

Decision of the Competition and Markets Authority

Conduct in the ophthalmology sector

Case CE/9784-13

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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 Consultant Eye Surgeons Partnership (CESP) Limited, an association of undertakings, has infringed the prohibition imposed by section 2(1) (the Chapter I prohibition) of the Competition Act 1998 (the Act) and Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).

1.2 This Decision is addressed to CESP Limited.

B. Background and summary of the CMA's formal investigation

1.3 On 26 May 2013, the Office of Fair Trading (OFT) received a complaint from [the complainant] expressing concerns that CESP LLPs, via CESP Limited's collective negotiation strategy, were agreeing prices and sharing price and non-price information between themselves rather than acting as independent bodies and competing with each other.

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

1.5 Following internal investigation and having established reasonable grounds for suspecting a breach of the Chapter I prohibition and Article 101(1) TFEU in relation to the infringements the CMA opened a formal investigation on 17 July 2014 under section 25 of the Act.

1.6 During the initial phase of the investigation the CMA conducted a without notice inspection at CESP Limited's premises under Section 27 of the Act and received responses to section 26 notices from CESP Limited, CESP LLPs and PMI providers. In addition the CMA held meetings with a number of PMI providers and interviewed the following witnesses: [CESP Ltd senior employee A], [CESP Ltd senior employee B], [CESP Ltd senior employee M], [CESP LLP employee 5a], [CESP senior board member 5a] and [CESP senior board member 34a].

1.7 In March 2015, the CMA held a State of Play meeting with CESP Limited. A second State of Play meeting with CESP Limited was held on 28 April 2015.

1.8 On 7 May 2015 CESP Limited approached the CMA expressing a genuine interest and willingness to enter into settlement discussions. The CMA entered into formal settlement discussions with CESP Limited on 14 May 2015. For the purpose of enabling CESP Limited to determine its position

regarding a possible settlement of this case, the CMA provided a draft Statement of Objections ('SO') to CESP Limited on 22 May 2015.

1.9 On 10 July 2015, CESP Limited entered into a settlement agreement with the CMA. It admitted that it had infringed the Chapter I prohibition and Article 101(1) TFEU and agreed to co-operate in expediting the process for concluding the investigation. The settlement letter signed by CESP Limited and the Terms of Settlement annexed to the settlement letter dated 10 July 2015 set out all the conditions of the agreement.¹

1.10 On 14 July 2015, the CMA issued an SO to CESP Limited.

1.11 For further details of the CMA's investigation please see Annex B.

C. Summary of the infringements

1.12 In light of the finding of facts (see Chapter 3), the CMA has concluded that CESP Limited has infringed the Chapter I prohibition and Article 101(1) TFEU. Specifically, the CMA has concluded that from September 2008 until present CESP Limited has formed and continues to form an association of undertakings. CESP Limited coordinated the CESP LLPs' commercial conduct as follows:

- From September 2008 until May 2015, CESP Limited coordinated the **trading** CESP LLPs' commercial conduct by negotiating and agreeing Inclusive Private Patient Package prices (IPPP prices) on their behalf with PMI providers and by facilitating the exchange of commercially sensitive information, including future pricing intentions, in that context. The facts relating to this infringement are outlined in paragraphs 3.174 – 3.257, 3.272 – 3.277 and 3.320–3.334 and the CMA's reasoning as to why this constitutes an infringement of the Chapter I prohibition and Article 101(1) TFEU in Chapter 4 *Legal Assessment*. This infringement is hereafter referred to as '**the IPPP infringement**'.
- From May 2012, CESP Limited coordinated the commercial conduct of **all** CESP LLPs' in response to [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants:
 - By recommending to all Consultants to delist from [PMI Provider 3] and, subsequently, not to be [PMI Provider 3] fee

¹ URN 3895, CESP Limited signed Settlement Letter and URN 3896, CESP Limited signed Terms of Settlement.

- assured consultants (re-iterated a number of times and in place until at least December 2013).
- By recommending to all Consultants that they bill [PMI Provider 3]-insured patients as an LLP for a (not centrally negotiated) IPPP and, subsequently, to charge [PMI Provider 3]-insured patients up-front the LLP's self-pay price (re-iterated a number of times and in place until at least November 2013).
- More generally, CESP Limited throughout the period from May 2012 to December 2013 formed a platform or '*conduit*' to exchange commercially sensitive information between CESP LLPs, as evidenced by the numerous exchanges of views, future intentions and information about CESP LLPs' market conduct in the context of [PMI Provider 3]'s initiatives and additional evidence showing CESP Limited's role in facilitating the exchange of information between LLPs and individual consultants.

The facts relating to these recommendations and exchanges of information are outlined in paragraphs 3.283 – 3.318 and the CMA's reasoning as to why this constitutes an infringement of the Chapter I prohibition and Article 101(1) TFEU are outlined in Chapter 4 *Legal Assessment*. These recommendations and exchanges of information are hereafter collectively referred to as '**the [PMI Provider 3] infringement**'.

- In October 2012, CESP Limited coordinated the CESP LLPs' commercial conduct by facilitating the exchange of commercially sensitive information between them about a proposal from [Facility 2] and [PMI Provider 3] and by recommending to the CESP LLPs to reject this proposal. The facts relating to this infringement are outlined in paragraphs 3.339 – 3.344 and the CMA's reasoning as to why this constitutes an infringement of the Chapter I prohibition and Article 101(1) TFEU are outlined in Chapter 4 *Legal Assessment*. This infringement is hereafter referred to as '**the [Facility 2] infringement**'.

1.13 The CMA proposes to find that the IPPP infringement, the [PMI Provider 3] infringement and the [Facility 2] infringement (hereafter together referred to as '**the infringements**') each forms a series of decisions by an association of undertakings.

1.14 The following considerations support this view:

- The CESP LLPs share a common interest in CESP Limited coordinating their commercial conduct and facilitating the exchange of commercially sensitive information between them.
- Employees of CESP Limited were empowered by the CESP LLPs to coordinate their market conduct. They also as a minimum received tacit approval to facilitate the exchange of commercially sensitive information.
- The coordination of the CESP LLPs' commercial conduct described above and in more detail in this Decision constituted the faithful reflection of CESP Limited's resolve to coordinate the conduct of the CESP LLPs, in accordance with the case-law.
- A number of CESP LLPs actually charge the agreed IPPP prices in practice and have implemented the recommendations regarding [PMI Provider 3]. They also participated actively in the exchange of commercially sensitive information facilitated by CESP Limited.

1.15 The CMA has concluded that these series of decisions by an association of undertakings each has the object of restricting competition in breach of the Chapter I prohibition and Article 101(1) TFEU.

1.16 The trading CESP LLPs empowered CESP Limited to negotiate and agree IPPP prices with PMI providers and detailed lists of proposed and agreed IPPP prices were circulated to all trading CESP LLPs (and on occasion to all CESP LLPs). This fixes the IPPP prices between the trading CESP LLPs. Furthermore, the circulation to the trading CESP LLPs of detailed IPPP prices lists enables each of them to predict with a reasonable degree of certainty what the pricing policy of the other trading CESP LLPs would be. These agreed IPPP prices apply to 12 PMI providers, representing about 60%² of the privately insured market, provided the procedures are covered by the IPPP agreements. When CESP Limited agrees an IPPP price with a PMI provider, this, moreover, fixes a minimum price that the trading CESP LLPs and their consultant members can charge that PMI provider, for at least cataract and YAG procedures, the two most common ophthalmic procedures. The agreements are binding on the PMI providers, but not on the trading CESP LLPs: trading CESP LLPs' consultants are free to charge a consultant fee acting as a sole trader that is higher than the consultant component of the IPPP price, with the security of being able, as a minimum, to charge the IPPP

² This does not include [PMI Provider 3], with whom CESP Limited was not able to conclude an IPPP agreement, although it attempted to (see below).

price. The IPPP prices ensure that any cost savings are not passed on through lower prices to PMI providers and, ultimately, consumers. For example, when an anaesthetist is not used, the anaesthetist component of the IPPP price is retained as additional profit by the consultant or the LLP. In areas where there is a lower local facility fee, the additional profit is again retained by the consultant or the LLP.

- 1.17 The efforts to agree an IPPP price with [PMI Provider 3], which are part of the IPPP infringement, meant that trading CESP LLPs exchanged commercially sensitive future pricing intentions, including by making reference to their local costs. These efforts and exchanges of information had as their object to ensure a price would be charged to [PMI Provider 3] that was acceptable to all. This had as a consequence that lower IPPP prices acceptable to some CESP LLPs were not accessible on the market.
- 1.18 The [PMI Provider 3] infringement was a direct response to [PMI Provider 3]'s initiatives to widen the pool of fee assured consultants and reduce the price for ophthalmic procedures. While [PMI Provider 3]'s initiatives were offered to individual consultants, CESP Limited facilitated discussions about them and issued agreed recommendations. These recommendations and exchanges of information were capable of removing the uncertainty between Consultants as regards the timing, extent and details of the response to these initiatives to be adopted by individual consultants and individual CESP LLPs. As they relate directly to a price offered by [PMI Provider 3] and to how to commercially deal with [PMI Provider 3] and [PMI Provider 3]-insured patients, they had as their object to restrict to an appreciable extent the freedom of conduct of the Consultants.³
- 1.19 CESP Limited also facilitated the exchange of future intentions between CESP LLPs and individual Consultants about a proposal for a package price agreement between [PMI Provider 3] and [Facility 2], for which [Facility 2] was seeking consultants, and recommended in three separate communications to reject this proposal. This, again, had the object of restricting to an appreciable extent the freedom of conduct of the Consultants.
- 1.20 The CMA finds that the objectives of the decisions outlined above were to increase revenues for CESP LLPs and their consultant members and to thwart downward pressure on prices exerted by PMI providers. For more information on how these decisions restrict competition see the sections

³ Refer to paragraph 3.284.

headed *Impact on Competition* in the Market Overview, and *Restriction of Competition* in the Legal Assessment.

- 1.21 Absent the coordination by CESP Limited, CESP Limited and individual consultants and/or the consultant groups (including LLPs) of which they form a part would have competed by making independent decisions in relation to their conduct in the sector. For more information see the section headed *Competition in the Market* in the Market Overview.
- 1.22 In 2014, CESP Limited had around 200 consultant members.⁴ According to the CESP Limited website it is the largest group of consultant eye surgeons in the UK.⁵
- 1.23 Prior to entering into settlement discussions with the CMA, CESP Limited made a number of claims to the CMA asserting that the joint setting of a price through the IPPP agreements falls outside the scope of the Chapter I prohibition and Article 101(1) TFEU or, alternatively, that it meets the criteria of section 9(1) of the Act and/or Article 101(3) TFEU. For more information see Chapter 4 *Legal Assessment, E. Exemption under Section 9 / Article 101(3)*.
- 1.24 The CMA concludes that the joint setting of a price through the IPPP does not fall outside the scope of the Chapter I prohibition or Article 101(1) TFEU, as it is not objectively necessary to enter a market that the CESP LLPs could not have entered individually or with a more limited number of parties than are effectively taking part in the cooperation through CESP Limited. Any assessment of efficiencies of jointly offering the trading CESP LLPs' services should, therefore, take place under Section 9 of the Act and/or Article 101(3) TFEU.
- 1.25 The burden of proof to demonstrate that a decision which infringes the Chapter I prohibition satisfies the four conditions in section 9(1) of the Act and/or Article 101(3) TFEU is on the undertaking or association of undertakings seeking to defend the decision.⁶ CESP Limited provided some limited qualitative evidence in support of its claims, but no quantitative

⁴ This is an estimate based on various sources. Based on Companies House annual returns for the CESP LLPs the CMA has counted 204 consultant partners of CESP LLPs in 2014 (190 in 2013, 198 in 2012 and 184 in 2011). There were also 144 consultant partners of Trading CESP LLPs in 2014 (144 in 2013, 151 in 2012 and 141 in 2011). This does not include LLP members who are not partners. The CESP website as at 1 June 2015 lists 204 members http://www.cesp.co.uk/who_we_are/around_the_uk/. The responses from CESP LLPs to the CMA section 26 requests list 189 consultant members. CESP Limited internal documents report that there were 245 (URN 0836) and 250 (URN 130) consultant members in 2013, although CESP Limited has clarified that these numbers are incorrect.

⁵ http://www.cesp.co.uk/who_we_are/history/.

⁶ Section 9(2) of the Act and Article 2 of Regulation 1/2003.

evidence. Based on the evidence no indications exist which may lead to individual exemption of one or more of the infringements.

2. GLOSSARY

Term	Definition
Benefit Maxima	A number of PMI Provider s, including, [PMI Provider 3], [PMI Provider 1], [PMI Provider 2] and [PMI Provider 6], have a fee schedule which sets out the maximum fee they will pay consultants per procedure.
[PMI Provider 3] infringement	<p>From May 2012, CESP Limited coordinated the commercial conduct of all CESP LLPs' in response to [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants:</p> <ul style="list-style-type: none"> • By recommending to all Consultants to delist from [PMI Provider 3] and, subsequently, not to be [PMI Provider 3] fee assured consultants (re-iterated a number of times and in place until at least December 2013). • By recommending to all Consultants that they bill [PMI Provider 3]-insured patients as an LLP for a (not centrally negotiated) IPPP and, subsequently, to charge [PMI Provider 3]-insured patients up-front the LLP's self-pay price (re-iterated a number of times and in place until at least November 2013). • More generally, CESP Limited throughout the period from May 2012 to December 2013 formed a platform or 'conduit' to exchange commercially sensitive information between CESP LLPs, as evidenced by the numerous exchanges of views, future intentions and information about CESP LLPs' market conduct in the context of [PMI Provider 3]'s initiatives and additional evidence showing CESP Limited's role in facilitating the exchange of information between LLPs and individual consultants
CESP Limited	Consultant Eye Surgeons Partnership Limited.
CESP LLPs	All the Consultant Eye Surgeon Partnerships Limited Liability Partnerships. CESP LLPs are undertakings organised on local and regional lines. All CESP LLPs have a seat on the board of CESP Limited. For a full explanation of CESP Limited and the CESP LLPs. See paragraphs 3.63 to 3.75

Codes	Procedure codes set by the Clinical Coding & Schedule Development Group, such as C7122 is the code for cataracts.
Consultant	A medically-trained doctor who has undertaken further specialist training and study in matters relating to the human eye.
Facility	A location where patients are treated, for example private hospitals, NHS hospitals Private Patient Units and day care clinics where patients are treated and discharged the same day.
Fee assured	A consultant who contracts with a PMI Provider and agrees to comply with a PMI Provider's agreed rates and not to levy shortfalls on patients (see below).
Infringements	The [PMI Provider 3] infringement, the IPPP infringement and the [Facility 2] infringement.
IPPP	Inclusive Private Patient Package A term used by CESP Limited and the CESP LLPs to refer to the package of ophthalmic procedures offered by CESP Limited and/or CESP LLPs to PMI Provider s and/or self-pay patients.
IPPP agreement	An agreement including a contract for the IPPP.
IPPP infringement	From September 2008 until May 2015, CESP Limited coordinated the trading CESP LLPs' commercial conduct by negotiating and agreeing Inclusive Private Patient Package prices (IPPP prices) on their behalf with PMI Providers and by facilitating the exchange of commercially sensitive information, including future pricing intentions, in that context.
IPPP price	The price of the IPPP.
Non-trading CESP LLPs	The remaining CESP LLPs which are not trading.
Package price	Refers to a bundled price for a procedure consisting of consultant fee, anaesthetist fee and facility fee. In some cases a package price also includes all associated investigations, tests and follow-up appointments.
PMI Provider	Refers to a private medical insurance Provider, including, but not limited to, [PMI Provider 2], [PMI Provider 1], [PMI Provider 3], and [PMI Provider 14].
Procedure	Ophthalmic procedures carried out by consultants. For a list of the top 30 most common procedures, see Annex C.

[Facility 2] infringement	In October 2012, CESP Limited coordinated the CESP LLPs' commercial conduct by facilitating the exchange of commercially sensitive information between them about a proposal from [Facility 2] and [PMI Provider 3] and by recommending to the CESP LLPs to reject this proposal.
Self-pay patient	A patient who pays for his/her private treatment out of his/her own funds.
Shortfall	The difference between the consultant fee and the benefit maxima when the consultant fee is higher. The difference, known as 'shortfall' is usually paid for by the patient.
Trading CESP LLPs	The CESP LLPs which are trading as set out in paragraph 3.67 below.

Key individuals

Name	Position
[CESP Ltd senior employee M]	[REDACTED]
[CESP senior board member 12a]	[REDACTED]
[CESP Ltd senior employee B]	[REDACTED]
[CESP senior board member 5a]	[REDACTED]
[CESP Ltd senior employee A]	[REDACTED]
[Consultant 13a]	[REDACTED]
[CESP senior board member 34a]	[REDACTED]
[CESP LLP employee 5a]	[REDACTED]
[CESP Ltd senior employee N]	[REDACTED]

3. THE FACTS

A. Market overview

Introduction

3.1 The purpose of this section is to set out the market context for privately funded ophthalmic services and a patient's journey from initial diagnosis to payment. It sets out:

- The privately funded ophthalmology market, including an explanation of ophthalmology and a definition of the relevant market, how the CMA would expect the market to operate and how consultants seek to compete for patients referral.
- The patient's pathway, in particular, the providers of ophthalmic services and a description of the different methods by which the consultant is reimbursed for procedures carried out on privately-insured patients and the cost control measures applied by PMI providers.

The ophthalmology market

What is ophthalmology?

3.2 This Decision is concerned with the provision of ophthalmic services to privately funded patients. Ophthalmology encompasses many different kinds of eye procedure including cataract surgery which is the most commonly performed procedure.⁷ Age-related cataract is one of the most common reasons for referral to ophthalmic services with over 300,000 cataract operations currently carried out by the NHS in the UK every year.⁸

3.3 A list of all ophthalmic services funded by PMI providers can be found in Annex C.

⁷ URN 2622, [PMI Provider 4] response to questions, Table 1: [PMI Provider 3] Top 30 ophthalmology codes, [3<] page 11. Royal College of Ophthalmologists ([RCO](https://www.rcophth.ac.uk/wp-content/uploads/2014/12/2010-SCI-069-Cataract-Surgery-Guidelines-2010-SEPTEMBER-2010.pdf)) Cataract Surgery Guidelines, page 6, <https://www.rcophth.ac.uk/wp-content/uploads/2014/12/2010-SCI-069-Cataract-Surgery-Guidelines-2010-SEPTEMBER-2010.pdf>.

⁸ NHS <http://www.nhs.uk/Conditions/Cataract-surgery/Pages/Introduction.aspx>.

Patient pathway

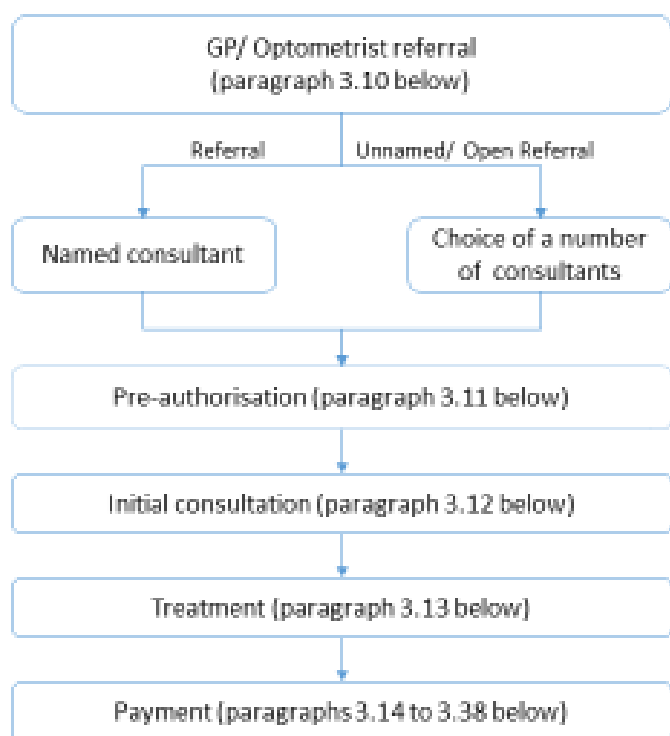
- 3.4 Set out below are the stages from initial diagnosis and referral to treatment which privately insured patients follow,⁹ which is also known as the 'patient pathway', either under a personal policy they have taken out themselves (approximately 18% of the privately funded market) or through an employer's corporate medical cover scheme (approximately 54% of the privately funded market).¹⁰ For the most common ophthalmic procedure, cataracts, patients are not likely to be on a corporate policy as they are likely to be retired and no longer working.¹¹

⁹ Patients who are not insured are able to access private ophthalmology services by paying for the services themselves. These are referred to as 'self-pay patients'. The Competition Commission's consultant survey found that, on average, self-pay customers accounted for 28% of the patients a consultant sees (72 % of private patients seen were insured).CESP Limited carried out a survey of around 40 ophthalmic consultants. Based on this survey, CESP Limited estimates the proportion of insured to self-pay patients to be 41.73% insured to 58.27% self-pay in ophthalmology. URN 3380, Note of telephone discussion with CESP Limited regarding settlement dated 18 June 2015. The CMA notes that CESP Limited was not able to provide the CMA with full details of this survey and it was unclear whether top up fees and shortfalls are categorised as self-pay or insured which may also have a bearing on these numbers (URN 3824, Letter from CESP Limited to the CMA re Questions of Clarification)

¹⁰ Approximately three times as many subscribers are part of corporate PMI schemes than those who pay themselves, as outlined in CMA, Private Healthcare Final Report, Appendix 2.1, paragraph 7.

¹¹ Age related cataracts commonly affects those aged 65 or over. <http://www.nhs.uk/conditions/Cataracts-age-related/Pages/Introduction.aspx> . URN 3524, Transcript of interview with [CESP LLP employee 5a], page 17, line 26 'I would say probably the average age is around about 70, 75.' URN 3568, Transcript of interview with [CESP senior board member 34a], page 31, line 25 - 26, 'The bulk of these, the average age of cataract surgery is 72, not many of them are corporate policy holders.'

Figure 3.1: patient pathway



Source: CMA.¹²

- 3.5 The patient pathway starts with a visit to a GP or an optometrist to assess the patient's condition. If the diagnosis is that the patient may have a condition that requires ophthalmic treatment, the patient is referred to a consultant ophthalmologist.

Consultant ophthalmologists

- 3.6 A consultant ophthalmologist (for the purposes of this Decision subsequently referred to as 'consultant') is a medically-trained doctor who has undertaken further specialist training and study in matters relating to the human eye. They examine, diagnose and treat diseases and injuries of the eye.¹³ In order to practice he/she is required to undergo specific training and be admitted to the UK specialist register.¹⁴

¹² See also [PMI Provider 2] pathway at URN 2297.

¹³ RCO, <https://www.rcophth.ac.uk/patients/frequently-asked-questions-faqs/>.

¹⁴ RCO, <https://www.rcophth.ac.uk/professional-resources/certificate-confirming-eligibility-for-specialist-registration/>.

3.7 Consultants who wish to provide privately insured ophthalmic services need to obtain PMI provider recognition.¹⁵ PMI providers have set criteria which consultants are required to meet which include:

- A substantive NHS consultant appointment or a past consultant appointment,
- General Medical Council specialist registration, and
- Medical indemnity insurance.¹⁶

3.8 In general, consultants approach the PMI providers for recognition. However, some PMI providers have attempted to actively sign up consultants (see paragraph 3.57 below). The CMA's private healthcare investigation found that the average percentage of fees paid to the top¹⁷ 20% of consultants covered 69% of the ophthalmology market over the period 2006 to 2011.¹⁸

Consultant ophthalmologist groups

3.9 A number of consultants have chosen to form and/or join consultant groups, usually in the form of Limited Liability Partnerships (LLPs). The CESP LLPs are such consultant groups, organised on regional and local lines.¹⁹ CESP Limited was formed in 2007 to provide membership services to CESP LLPs (see paragraphs 3.70 to 3.71 and 3.78 to 3.80 below).

Choice of consultant

3.10 If a privately insured patient requires further treatment, the GP or optometrist²⁰ will refer that patient to a consultant. When referring a patient to a consultant, a GP/optometrist can either refer a patient directly to a named consultant, who may practise locally,²¹ or make an unnamed

¹⁵ Note that consultants may still be able to provide services to self-pay patients.

¹⁶ URN 3217, Note of meeting with [PMI Provider 1], page 7, URN 3038, Note of meeting with [PMI Provider 3] page 11, URN 3331, Note of meeting with [PMI Provider 2], page 6.

¹⁷ Highest billing consultants out of the total percentage fees paid by PMI providers.

¹⁸ CMA, *Private Healthcare Market Investigation*, Appendix A7 (2)-2, Figure 2.

¹⁹ URN 0087, An introduction to CESP.

²⁰ [PMI Provider 1] explained it would only accept a referral from a GP. URN 3217, [PMI Provider 1] meeting note, page 9.

²¹ In the CMA's Private Healthcare Market Investigation's patient survey across a number of specialisms including ophthalmology, 50% of respondents said that their GP suggested a particular consultant, 20% said that the GP did not refer them to a named specialist consultant and 20% said that their GP had suggested two or more specialist consultants. CMA, *Private Healthcare Final Report*, page 2-11.

The average travel time to a hospital being attended was just over 30 minutes. However, around half of all patients said that they would travel further if the GP recommended that they did so or if it was the only way they could see the specialist consultant recommended. The proportion of those who felt their condition was severe or

referral²² where the referring GP/optometrist does not name the consultant but specifies the specialty or sub-specialty.²³ In addition to the GP/optometrist's recommendation, patients choose a consultant based on friends' recommendations or even a Google search.²⁴ The patient may also ask his/her PMI provider, which provides a choice of a limited number of consultants local to the patient.²⁵ The larger PMI providers may inform the patient that the consultant is not fee assured,²⁶ or limit the patient's choice to consultants who are fee assured and do not shortfall the patient.²⁷

- 3.11 Prior to confirming or making a choice of consultant, the patient will contact his or her PMI provider to pre-authorise treatment and inform the PMI provider of the consultant if already chosen. [PMI Provider 1] and [PMI Provider 3] told the CMA that at this stage, if the consultant is not fee assured, the PMI provider may advise the patient of this, so that the patient knows that he or she may be liable for extra charges.²⁸ Some PMI providers have in those circumstances offered an alternative consultant.²⁹

Initial Consultation

- 3.12 The patient's next step is to see a consultant for an initial consultation. The consultant may propose certain tests such as biometry or types of examination before coming to a firm diagnosis, or may recommend a

affected their life who would be willing to travel further was higher. CMA, Private Healthcare Final Report, page 2-11. However, some patients will be willing to travel further. See paragraph 3.47 below.

²² Also referred to as an open referral.

²³ The CMA understands that some corporate policies require the referral to be unnamed or open in which case the PMI provider will only provide cover if the treatment is carried out by a fee assured specialist consultant. URN 3217, [PMI Provider 1] meeting note, page 10.

²⁴ URN 3567, Transcript of interview with [CESP senior board member 5a], page 7, lines 2 – 6, that '*some will take the optometrist's recommendation, some will take friends' or neighbours' or acquaintances' recommendations. Occasionally patients have no idea who they want to see and they'll just do a Google search or, you know, look in the Yellow Pages. I would think that 80% of my patients come to me because they've heard of me.*', and URN 3568, Transcript of interview with [CESP senior board member 34a] page 8, lines 12 – 13 '*referral either comes from the optometrists with a side-step to the GP, or directly from the GP.*'

²⁵ URN 3331, Note of meeting with [PMI Provider 2], page 5 and page 7.

²⁶ 'Fee assured' refers to consultants across all specialisms who contract with PMI providers to charge within their fee schedules.

²⁷ URN 3331, Note of meeting with [PMI Provider 2], page 7. '*[PMI Provider 2] undertakes analysis on consultants which is regularly used to prioritise consultants. [PMI Provider 2] said that [PMI Provider 1] has a claims assessor database in place to rank consultants when a claim arises. The database considers amongst other things [X] See also URN 3217, Note of meeting with [PMI Provider 1], page 8. CMA, Private Healthcare Market Investigation Final Report, para 7.84. 'BUPA considered that open referral policies enabled it to constrain claims costs by directing its policyholders to fee assured consultants.'*

²⁸ URN 3217, Note of meeting with [PMI Provider 1], page 8. URN 3038, Note of meeting with [PMI Provider 3], page 8. See also URN 3331, Note of meeting with [PMI Provider 2], page 5. [PMI Provider 1] noted that shortfalls do not occur when a patient is on the [PMI Provider 2] cataract network (and the consultant is likely to be fee assured) but only occur where there is a named referral.

²⁹ URN 3038, Note of meeting with [PMI Provider 3], page 8 '*[PMI Provider employee 3a] stated that [PMI Provider 3] attempted to offer alternative supply to patients to help them avoid shortfalls*' URN 3217, Note of meeting with [PMI Provider 1], page 8. '*[PMI Provider 1] does warn patients that the cost will be higher with such consultants and offers an alternative*'

particular form of treatment, which typically in the case of cataract treatments would be a surgical procedure.

Treatment

- 3.13 The recommended treatment or procedure is carried out by the consultant at a facility, typically a private hospital or clinic, or a private bed or unit at an NHS hospital with a private patient unit.

Payment

- 3.14 Consultants charge for their services in a number of ways, the most important of which are:

- As a sole trader, where he/she is individually reimbursed by the PMI provider for his/her services or bills the patients directly and leaves it to the patient to recover this from the PMI provider. This is referred to as the 'traditional model' (see paragraphs 3.18 to 3.27 below).³⁰
- As a member of an LLP, billing the LLP's self-pay package prices to patients insured by certain PMI providers and leaving it to the patient to recover the fees from the PMI provider.³¹
- Under a facility provider's package deal, for which the consultant receives a per-procedure fee. This is referred to as the facility package price model (see paragraphs 3.29 to 3.31 below).
- As a member of an LLP, billing a PMI provider a package price negotiated and agreed between the individual LLP and the PMI provider (see paragraphs 3.32 to 3.33 below) or billing a PMI provider the consultant fee for consultations and/or procedures only.
- As a member of a trading CESP LLP that opts into CESP Limited's IPPP agreements with PMI providers, billing a PMI provider the CESP Limited IPPP price. This is referred to as the CESP IPPP model (see paragraphs 3.34 to 3.37 below).

³⁰ For example, URN 0485, [LLP 26] response to informal request for information dated 17 March 2014, page 3 'Individual partners of [LLP 26] are all able to enter into individual agreements with hospitals, self-pay patients or PMI companies. There are often situations when individual partners decide to work outside the LLP'.

URN 3567, Transcript of interview with [CESP senior board member 5a], page 8, lines 13 - 14. 'I still do a few operations at the [Facility 17] where we do bill as an individual surgeon'.

³¹ [LLP 5] is the only CESP LLP for which the CMA has seen this occur.

- Employed by a chain or clinic, such as [Facility 3], where the consultant can either have a full- or part-time employment contract (paragraph 3.38 below).

3.15 These billing mechanisms (apart from the employment contract with a chain or clinic) are not mutually exclusive. Self-employed sole trader consultants can be able to bill as individuals or as a member of an LLP depending on the contractual arrangements in place with PMI providers and patients and the LLP agreement.³² Whether a consultant member of a CESP LLP can charge a CESP package price depends on the local circumstances, such as whether the patient has expressed a preference for a facility and whether there is a facility contract in place with that facility (see paragraph 3.16).³³ If such a contract is not in place, the patient will be billed under the traditional model.

3.16 A consultant requires the use of a facility to provide ophthalmic services. Consultants, CESP LLPs or PMI providers (depending on the billing mechanism), contract with and pay the facility provider a fee for use of their facility ('facility fee').³⁴ In the case of CESP LLPs, which need agreement with a facility provider to charge a CESP Limited IPPP price to PMI providers, they are able to negotiate these contracts themselves, with assistance from CESP Limited, or CESP Limited can negotiate on their behalf.³⁵

³² CESP LLP responses to informal information requests, for example, URN 0485, [LLP 26] response to informal request for information dated 17 March 2014, page 3 *'Individual partners of [LLP 26] are all able to enter into individual agreements with hospitals, self-pay patients or PMI companies. There are often situations when individual partners decide to work outside the LLP'* URN 0497, [LLP 30] response to informal request for information dated 01 March 2014, page 3 *'in fact the majority of our partners put no work through the LLP'* See also URN 0468, [LLP 5] response to informal request for information dated 12 March 2014, page 2, URN 0473, [LLP 12] response to informal request for information dated 13 March 2014, page 2, URN 0480, [LLP 16] response to informal request for information dated 01 March 2014, page 3. This is confirmed in interviews, for example, Transcript of interview with [CESP senior board member 5a], page 8 - 9, 12 - 14 and Transcript of interview with [CESP senior board member 34a], page 9 - 10. URN 3824, Letter from [CESP senior board member 12a] to the CMA re Questions of Clarification *'there are only two LLPs where the consultant members put their entire Private Practice through the LLP, namely [LLP 5] and [LLP 38]. In all the others a proportion of the individuals Private Practice, both for insured and uninsured patients, is invoiced entirely outside of their CESP LLP and invoiced in their own name. In [LLP 12] we have just one consultant who invoices 100% of his practice through our LLP (the other consultants invoice a proportion of their practice, both insured and uninsured, individually outside of the LLP).'*

³³ In the CMA's Private Healthcare Market Investigation, the CMA found that a patient *'may have a choice of facility, as consultants usually have practicing rights at more than one hospital. However, in practice consultants tend to use one hospital as their main location, supplemented by one or two others'* (see CMA, *Private Healthcare Market Investigation*, paragraph 2.50). See also paragraph 3.10 above which sets out how patients choose a consultant.

³⁴ CESP LLP contracts with facility providers. See for example URN 0550, Agreement between [LLP 1] and [Facility 16] dated 30 June 2008. This was also confirmed in interview URN 3568, Transcript of interview with [CESP senior board member 34a], page 35.

³⁵ URN 0732, Introduction to the Consultant Eye Surgeons Partnership (CESP). This was confirmed in interview URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 111, lines 1 - 4. [CESP Ltd senior employee A] explained: *'I would go on behalf of the LLPs to explain the CESP model, explain that there's a group*

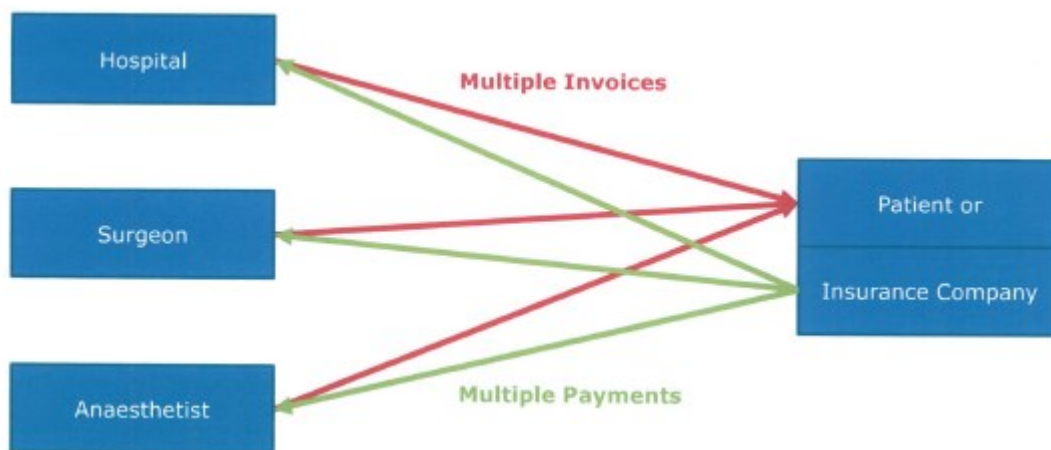
3.17 In the following section the CMA describes in more detail the various way in which billing/pricing may work in this market:

- a) The traditional model and a brief description of how fees have evolved over time,
- b) The package price models including facility providers, CESP LLPs and CESP Limited IPPP deals,
- c) Other chains and clinics.

The traditional model

3.18 In the traditional model³⁶ (shown in figure 3.2), the PMI provider reimburses the facility provider, the anaesthetist and the consultant separately.

Figure 3.2: The traditional model



Source: CESP slides.³⁷

3.19 Under the traditional model, the fee the consultant receives from the PMI provider depends on the agreement or terms of recognition that he/she has in place with each relevant PMI provider. Most PMI providers have benefit maxima in place, which determine the maximum fee a PMI provider will pay for a particular procedure. Normally, no negotiation takes place between the individual consultants and PMI providers.³⁸ [PMI Provider 2] informed

in their area that have formed and the only thing they don't have is a facility, and would the hospital be interested in us providing them a fee for the use of their facilities.

³⁶ This is referred to as the 'traditional model' as package pricing is a fairly recent model.

³⁷ URN 0087, An introduction to CESP, slide 5. Note that 'Surgeon' in these slides refers to the consultant.

³⁸ See paragraph 3.57 which sets out the limited circumstances in which some negotiation can take place.

the CMA that the benefit maxima³⁹ are calculated using a matrix-type approach which takes into account a range of factors.⁴⁰

- 3.20 Where the consultant charges in excess of the PMI provider's benefit maxima, the consultant will charge the patient an additional amount, known as a shortfall.

Historical context to PMI providers' fee schedules

- 3.21 Until the early 1980s, the British Medical Association ('BMA'), representing medical practitioners including consultants appeared to have accepted PMI providers reimbursement rates, including [PMI Provider 3]'s benefit maxima.⁴¹ Following a period when PMI providers did not increase these rates, the BMA published the BMA fee scale guidelines in 1989.
- 3.22 In 1994, a Monopolies and Markets Commission (MMC) report found that price competition amongst consultants was restricted by the BMA guidelines, as there was a tendency for consultants to charge the same level of fees.⁴² It concluded that the BMA Guidelines assisted consultants to effectively collude and command higher fees than they would otherwise enjoy if they set their prices individually. Consequently, in 1994, the MMC prohibited the BMA guidelines.

Evolution of fees under the traditional model

- 3.23 Since 1996, as a result of the introduction of phacoemulsification⁴³ cataract surgery can be performed under local anaesthetic, which has reduced the time taken to perform the procedure. A cataract operation now typically takes between 15 and 20 minutes (although it may take up to 45 minutes),⁴⁴ with very low risks of serious complications.⁴⁵ Prior to the introduction of phacoemulsification, cataract removal required a general anaesthetic and an overnight stay in a facility on an inpatient basis.

³⁹ The maximum fee under the fee schedule.

⁴⁰ URN 3331, [PMI Provider 2] meeting note, page 7. [PMI Provider 2] looked at a number of factors including [§<] and then rate the procedure and align to existing procedures to determine what a reasonable benefit maxima was. See also URN 2622, [PMI Provider 3] response to questions, paragraph 2.11 'The level of fee paid is related to the complexity classification of a procedure. There are 25 complexity ratings/classifications.'

⁴¹ Monopolies and Markets Commission (MMC). Private medical services: A report on agreements and practices relating to charges for the supply of private medical services by NHS consultants. 1994, page 31 and 169.

⁴² MMC. Private medical services: A report on agreements and practices relating to charges for the supply of private medical services by NHS consultants. 1994.

⁴³ URN 3567, Transcript of interview with [CESP senior board member 5a], page 6, line 7.

⁴⁴ RCO, Cataract Surgery Guidelines, September 2010, page 84 and NHS guidelines

<http://www.nhs.uk/Conditions/Cataract-surgery/Pages/Introduction.aspx>.

It is noted that [CESP senior board member 34a] said that 'And the actual amount of time it takes for the operation is probably similar now to when it was 10 or 15 years ago', URN 3568, Transcript of interview with [CESP senior board member 34a] Interview, page 6-7.

⁴⁵ <http://www.nhs.uk/Conditions/Cataract-surgery/Pages/Risks.aspx>.

Evidence from [LLP 5] confirms that a consultant can currently conduct two private cataract operations in an hour.⁴⁶

3.24 The majority of cataract procedures are carried out under local anaesthetic rather than general anaesthetic.⁴⁷ The local anaesthetic can be administered by the consultant, a nurse or an anaesthetist.⁴⁸ Some consultants still use anaesthetists for all procedures,⁴⁹ whereas others use anaesthetists in the minority of cases.⁵⁰

3.25 In light of these changes, [PMI Provider 3] told the CMA that the price it paid for ophthalmic procedures until 2010 appears high compared to what [PMI Provider 3] pays for other more complex procedures.⁵¹

Attempts to reduce consultant⁵² fees

3.26 PMI providers have taken steps to reduce the costs of ophthalmic procedures. For example, in 2005/6 Bupa designed an ophthalmic network in which providers were asked to quote a package price combining the facility and consultant fees. Bupa said it experienced '*significant pushback*'⁵³ in the creation of this network which resulted in:

- the scope of the network being confined to cataract procedures only,
- consultant fees not being included in the package price (and in any event only some providers offering package prices),⁵⁴ and

⁴⁶ URN 3224, Minutes of [LLP 5] Board meeting of 11 September 2013, page 3: '[CESP senior board member 5a] has recently been in talks with [redacted] regarding the theatre in [redacted]. They have offered [CESP senior board member 5a] theatre space at £[redacted]p/h i.e. £[redacted] per Phako', suggesting that two cataract operations ('phako') can be carried out in one hour.

⁴⁷ The RCO Cataract Surgery Guidelines state that 'With the advent of small incision techniques using phacoemulsification many surgeons find there is no longer a need for complete akinesia', page 37. The RCO guidelines reported that in 2009, only 1.4% of patients required sedation, page 39. The RCO and The College of Optometrists guidelines state that approximate 4 – 5% of patients require general anaesthesia, page 9. http://www.college-optometrists.org/filemanager/root/site_assets/guidance/Commissioning-Guide-Cataract-Surgery-Final-February-2015.pdf URN 3217, [PMI Provider 1] meeting note, page 6.

⁴⁸ The RCO guidelines reported that 'Ophthalmologists now administer anaesthesia for cataract surgery in the majority of cases in the UK' page 39.

⁴⁹ URN 3567, Transcript of interview with [CESP senior board member 5a], page 6, lines 12 - 21.

⁵⁰ URN 3568, Transcript of interview with [CESP senior board member 34a], page 6, lines 25 - 27, 'In terms of involvement, we tend to use anaesthetists less than we did in the past. Most surgeons now administer their own anaesthetic or just use drops.' page 37, lines 22 - 23 'I don't use an anaesthetist most of the time, some of my colleagues do.'

⁵¹ URN 3038, Note of meeting with [PMI Provider 3], page 7 – 8.

⁵² Reference to consultants in paragraphs 3.26 and 3.27 are to all consultants and not limited to ophthalmology.

⁵³ [redacted]

⁵⁴ This is consistent with the interview with [CESP Ltd senior employee B], who said that in 2008 the network only involved hospitals not consultants fees, page 49.

- the hospital group [Facility 5] withdrawing all of its ophthalmic services facilities from the network because only nine of its facilities had qualified through the competitive tender.

3.27 From 2008, the larger PMI providers brought in a number of schemes to reduce the fees that they pay to consultants (not limited to ophthalmic consultants) and encourage sign-up to and/or compliance with the PMI providers' fee schedule. For example:

- Incentivising consultants to agree to charge within the PMI provider's fee schedule in return for a bonus. From 2008 to 2010 if consultants agreed to charge within the relevant Bupa benefit maxima they would receive a [£] bonus at the end of the year.⁵⁵
- Recognition of new consultants contingent on them agreeing to charge in accordance with PMI provider's fee schedules. From 2008 onwards, AXA required all newly-recognised consultants to agree to charge only according to AXA's fee schedule and not to charge a shortfall.⁵⁶ Bupa ran a similar scheme from 2010,⁵⁷ and Aviva from 2013.⁵⁸
- Requiring all currently-recognised consultants to sign up to the fee schedule in return for being placed higher in a PMI provider's ranking and, therefore, more likely to receive unnamed referrals. For example, Bupa ran such a scheme from 2010.⁵⁹
- Referring patients to consultants whose fees are not significantly above their peers. For example, [PMI Provider 1] has a [£] list of consultants to whom it does not direct patients on receipt of an unnamed referral. These are the top [£] most expensive consultants.⁶⁰
- De-recognising consultants whose charges are significantly higher than other consultants. Since August 2011, Bupa carried out an evaluation programme as a result of which 27 consultants have been derecognised.⁶¹ Further, some existing contracted consultants who

⁵⁵ CMA, *Private Healthcare Market Investigation*, paragraph 7.74. [£]

⁵⁶ CMA, *Private Healthcare Market Investigation*, paragraph 7.70. [£]

⁵⁷ CMA, *Private Healthcare Market Investigation*, paragraph 7.74. Consultants are referred to as 'contract consultants'.

⁵⁸ CMA, *Private Healthcare Market Investigation*, paragraph 7.80.

⁵⁹ Consultants who signed up were referred to as 'premier partners'. CMA, *Private Healthcare Market Investigation*, para 7.75.

⁶⁰ URN 3217, Note of meeting with [PMI Provider 1], page 8.

⁶¹ CMA, *Private Healthcare Market Investigation*, paragraph 7.77.

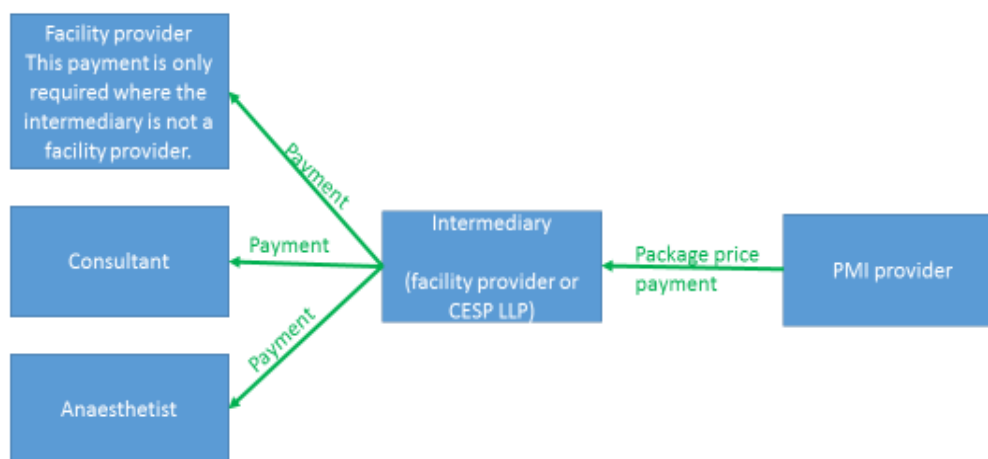
are not listed as fee assured, and, therefore, can charge higher prices, may be deterred from doing so out of fear of losing their contracted status.⁶²

- Reduction of the benefit maxima. Between 2011 and 2013, Bupa, AXA, and PruHealth also reviewed their benefit maxima for a number of procedures and made reductions.⁶³

The package price model

3.28 In the package price model (shown in figure 3.3 below), PMI providers pay an intermediary, which can either be a facility provider⁶⁴ or a CESP LLP for the full bundle of ophthalmic services, and the intermediary reimburses the consultant on each package sale.⁶⁵

Figure 3.3: the package price model



Source: CMA.

Facility provider package price

3.29 The negotiation for the total cost of the facility provider's package price takes place solely between the facility provider and the PMI provider, and the facility provider pays a single fee to the consultant.⁶⁶

⁶² CMA, *Private Healthcare Market Investigation*, paragraph 7.71.

⁶³ CMA, *Private Healthcare Market Investigation*, paragraphs 7.62, 7.65 and 7.66.

⁶⁴ In paragraph 2.36 of URN 2622, [PMI Provider 3] response to questions, [PMI Provider 3] states that it has agreed this type of package price with [Facility1], [Facility 2] and [Facility 3].

⁶⁵ A fee structure for the CESP package price for their consultant partnerships is outlined in URN 0087, An introduction to CESP, page 6. The fee structure that certain hospitals charged [PMI Provider 2] is outlined in URN 2908, [PMI Provider 2] response to the Section 26 Notice.

⁶⁶ URN 0371.2, [Facility 4] Cataracts proposal, page 6.

- 3.30 In 2012, [PMI Provider 3] and [Facility 2], a facility provider, introduced a cataract network with a single package price for procedures at [Facility 2] hospitals. Under this package price all consultants would become 'fee assured' with [PMI Provider 3] for cataract surgery carried out at a [Facility 2] facility.⁶⁷ The consultant would receive reimbursement for both the surgery (at the fee assured rate) and pre and post-operative consultations which was around £ [§<].⁶⁸
- 3.31 Another facility provider, [Facility 4], in 2012, developed a facility package price. Its cataract proposal sets out that it worked closely with consultants and PMI provider to ensure the consultants fee is acceptable to consultants.⁶⁹ The proposal sets out varying prices agreed with PMI provider and the reimbursement fees for consultants.⁷⁰

LLP package prices

- 3.32 Some consultant LLPs may have their own individually negotiated package agreement with a PMI provider. If such an agreement is in place, the LLP can only charge according to the package price fees that it has negotiated with a PMI provider at the locations listed in the agreement. The CMA understands that the prevalence of this is limited.
- 3.33 [LLP 15] has successfully agreed such a package price with [PMI Provider 3] and [PMI Provider 3] was interested in negotiating with [LLP 31] in the future.⁷¹ Other CESP LLPs have also attempted to negotiate with [PMI Provider 3], although they were not successful.⁷² The CMA understands that in these cases, negotiation takes place directly between the LLP and the PMI provider.

⁶⁷ URN 1180, Email from [CESP Ltd senior employee N] to consultant colleagues regarding the [Facility 2] – [PMI Provider 3] cataract network, page 4.

⁶⁸ URN 1180, Email from [CESP Ltd senior employee N] to consultant colleagues regarding the [Facility 2] – [PMI Provider 3] cataract network, page 5.

⁶⁹ URN 0371.2, [Facility 4] Cataracts proposal, page 6.

⁷⁰ The CMA notes that other facility groups, including [Facility 5] and [Facility1], also offer facility package prices.

⁷¹ See section entitled 'CESP LLPs' attempts to come to an IPPP agreement with [PMI Provider 3] below. URN 3038, Note of meeting with [PMI Provider 3], page 4. 'September 2014, [PMI Provider 3] signed an agreement with [LLP 15], which runs its own clinic [Facility 6]. The fee element of this clinic agreement includes [§<]. [LLP 15] is also part of [PMI Provider 3]'s Cataract Full Pathway, the fee element of which is fully inclusive i.e. all elements of the 'cataract pathway' are included in its pricing to [PMI Provider 3] (£ [§<]).' And '[PMI Provider 3] is interested in contracting with [LLP 31] on a package basis because it operates its own facility. [PMI Provider employee 3b] explained that the group has not as yet proposed a price to [PMI Provider 3]. However, it is expected that the group and [PMI Provider 3] would commence price negotiations in the future.'

⁷² See section entitled 'CESP LLPs' efforts to come to an agreement with [PMI Provider 3] below. URN 3038, Note of meeting with [PMI Provider 3], page 7 '[PMI Provider 3] has had discussions with individual LLPs - in the past year, for example, [PMI Provider 3] had been in touch with a CESP LLP in [§<].'

CESP Limited's IPPP

- 3.34 CESP Limited is a membership organisation of CESP LLPs, who have authorised CESP Limited to centrally negotiate and set IPPP prices with PMI providers. CESP Limited negotiates the price with a PMI provider⁷³, prior to and during the negotiations it generally seeks input from CESP LLP leads/key consultants before it offers an IPPP price to the PMI provider or confirms the agreement with the PMI provider. CESP LLPs discuss the proposed IPPPs by email and at CESP Limited board meetings to agree to a price.⁷⁴ If the IPPP price that a particular PMI provider is willing to pay is considered too low by some of the CESP LLPs, CESP Limited will generally not enter into an agreement with that PMI provider.⁷⁵
- 3.35 If an IPPP agreement is reached, CESP Limited circulates detailed IPPP price lists to all trading CESP LLPs. CESP LLPs then discuss the negotiated IPPP agreement within the LLP and decide at LLP level whether to sign up to it. CESP LLPs are able to opt in or opt out of agreements negotiated by CESP Limited.⁷⁶ When they decide to opt out, they are in no way bound by the IPPP agreement, although they will be aware of the prices charged by those CESP LLPs that have opted in.
- 3.36 In the case of a CESP Limited IPPP, the PMI provider pays the CESP LLP directly for the procedure and the individual LLP then reimburses the facility, individual consultant and the anaesthetist, if one is used. The LLP also pays a fixed fee to CESP Limited. It is up to each individual CESP LLPs how they divide the IPPP payment (the 'fee split') once the fixed components (facility fee, anaesthetist fee, if one is used, and CESP Limited fee) are paid.⁷⁷ Individual CESP LLPs may choose to allocate the remaining funds as a margin to the LLP or they can allocate it to a higher consultant's component. However, it is important to note that once the facility, anaesthetist (if used) and CESP Limited are paid, the remainder is fully at the consultant's disposal, either through the consultant's fee or through the LLP margin, subject to agreement between the members of the CESP LLP.

⁷³ See section 3.C the IPPP, headed '*negotiating and concluding IPPP agreements in practice*' starting at paragraph 3.171.

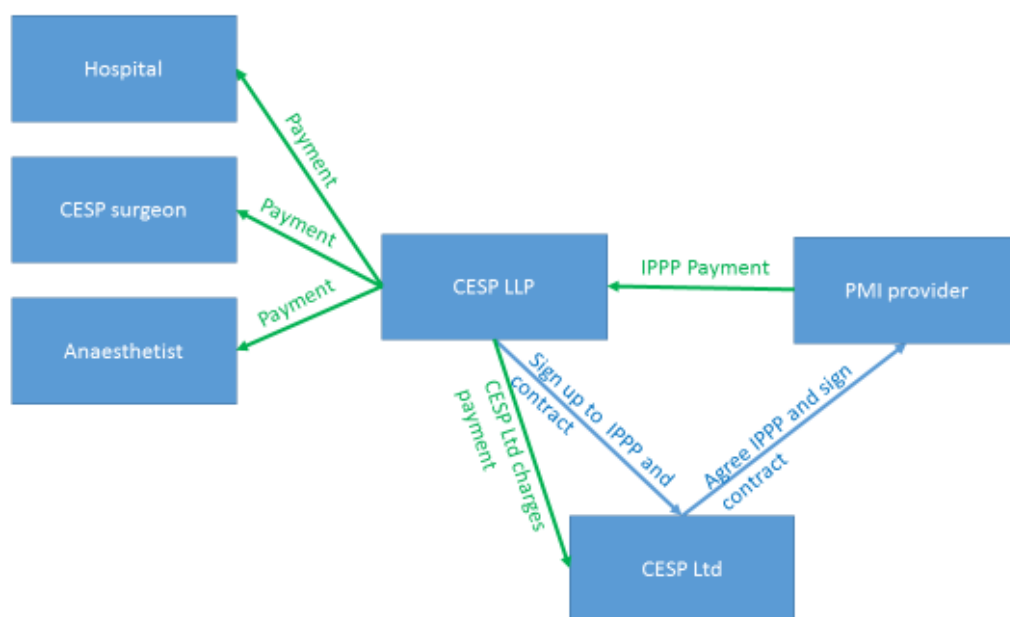
⁷⁴ See section headed '*How IPPP prices are calculated by CESP Limited and the input from CESP LLPs*', starting at paragraph 3.125. For example, URN 0291 shows an email sent to a cross section of CESP LLP Leads from CESP Limited, requesting confirmation of a deal between [PMI Provider 2] and CESP Limited.

⁷⁵ See paragraphs 3.323 – 3.325, which show that [PMI Provider 3] was in early 2013 willing to agree to an IPPP price of £[>], but some of the CESP LLPs considered this price too low and CESP Limited did not enter into an IPPP agreement with [PMI Provider 3].

⁷⁶ See section headed '*Non-binding nature of the IPPP*' starting at paragraph 3.134.

⁷⁷ See section headed '*Fee splits*' starting at paragraph 3.120.

Figure 3.4: CESP Limited IPPP model



Source: CMA based on evidence from CESP Limited⁷⁸

3.37 Consultant members of LLPs that have opted into a CESP Limited agreed IPPP who wish to use the IPPP can only charge according to the rates outlined in the agreement between CESP Limited and the PMI provider.⁷⁹ However, even if the LLP has opted into the IPPP there is no obligation on the consultant members to use the IPPP⁸⁰ and individual consultants are free to bill outside of this deal by working as a sole trader and in some cases charging shortfalls (the ‘traditional model’ outlined at paragraphs 3.18 to 3.20 above).⁸¹ [CESP senior board member 12a] explained to the CMA that whether or not a consultant chooses to use the CESP package price will depend on the local circumstances, such as whether there is a facility contract in place (see paragraph 3.16) if the patient has expressed a choice of facility. If such a contract is not in place, the patient will be billed under the traditional model.⁸² In other words, the fact that a consultant’s CESP LLP has opted in to an IPPP agreement does not restrict that consultant from working for the same PMI provider as a sole trader under the traditional model. The PMI provider is, however, bound by the IPPP

⁷⁸ Evidence as outlined in this SO, in particular, URN 0087, An introduction to CESP.

⁷⁹ For example, as outlined in URN 2618, [PMI Provider 1] contract with CESP Limited dated 2 December 2008, paragraph 3.2.

⁸⁰ URN 0426, email exchange between [CESP Ltd senior employee A], [CESP Ltd employee C] and [Consultant 16c] where [Consultant 16c] asks the CESP employees to confirm that the new [PMI Provider 1] deal does not prevent him from acting as a sole trader and shortfalling the patient.

⁸¹ See also paragraph 3.15. This may now be more restrictive, as suggested by URN 0426, [PMI Provider 1] may no longer allow consultant members to work as a sole trader at CESP contracted locations.

⁸² URN 3829, CESP Ltd initial response to CMA draft penalty statement.

agreement, so the consultant has the guarantee of being able to charge under that agreement, provided the operation is carried out at a facility covered by the IPPP agreement.

Chains and clinics

- 3.38 At [Facility 3], the consultant is paid according to their full or part-time employment contract.⁸³

Market Definition

- 3.39 When applying the Chapter I prohibition and Article 101 (1) TFEU, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement, concerted practice or decision by an association of undertakings under investigation had as its object or effect the appreciable prevention, restriction or distortion of competition.⁸⁴
- 3.40 As the CMA has concluded that the infringements comprise a series of decisions by an association of undertakings that have as their object the restriction of competition, as set out in Chapter 4, Legal Assessment of this Decision, no such obligation arises in this case.⁸⁵
- 3.41 Nonetheless, the CMA has formed a view of the relevant market⁸⁶ in order to calculate CESP Limited and its members' 'relevant turnover' in the market(s) affected by the infringements, for the purposes of establishing the level of the financial penalty that is imposed on CESP Limited.⁸⁷

Relevant product market

- 3.42 In this case, the focal product of the infringements is the supply of privately funded ophthalmic consultant services in the UK. The main questions for product market definition are the following:

⁸³ URN 3662, Screenshot from [Facility 3]'s website.

⁸⁴ 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.

⁸⁵ 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*'.

⁸⁶ 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.

⁸⁷ *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. See also Section 5 of this Decision.

- a) Whether NHS services are a substitute for privately-funded services; and
- b) Whether there are separate product markets for different types of ophthalmic procedures (such as cataract, YAG,⁸⁸ etc.).

3.43 Starting with privately-funded services as the CMA's focal product, it is unlikely that NHS services would be seen as a substitute to these services given the large difference in prices and waiting times,⁸⁹ and, in the case of privately-insured patients, given that, once a patient has decided to opt for private medical insurance, all or most of the costs of the private provision are covered by their PMI provider. There may be more scope for substitution between private and NHS supply in the case of self-pay patients as self-pay patients may be more likely to view NHS provision as an attractive alternative given that they have to pay for their private procedure.⁹⁰

3.44 As to the question of whether the market should be defined narrowly (at procedure level) or widely (as all ophthalmic services):

- a) With the possible exception of certain highly-specialist procedures that can only be undertaken at certain facilities and by certain consultants, all consultants will be able to undertake a range of procedures, and therefore it seems appropriate to define the market as covering all types of procedures given this scope for supply-side substitution.
- b) For some highly-specialist procedures, these may form separate product markets and may face differing levels of competitive constraint from equivalent NHS services, e.g., where a procedure is rare, complex or particularly risky, and so some patients may prefer to be treated in an NHS hospital.

⁸⁸ Yttrium aluminum garnet. A type of crystal used in a laser.

⁸⁹ For example, for cataracts waiting times may be much lower at private providers meaning that private patients may not see NHS provision as an attractive option. Waiting times for cataract surgery in the NHS in England are, on average, two months but the CMA understands this can be longer. See data for 'C71.2 Phacoemulsification of lens', Hospital Episode Statistics, Admitted Patient Care, England – 2013-14: <http://www.hscic.gov.uk/catalogue/PUB16719/hosp-epis-stat-admi-proc-2013-14-tab.xlsx>. URN 3846, Response to the draft Statement of Objections dated 18 June 2015. CESP Limited states that there is also additional waiting time for initial consultations of around 8 – 10 weeks.

⁹⁰ Some self-pay patients are likely to be from overseas and so would have different alternatives than NHS provision. However, any constraint that these additional options may provide is unlikely to be material and would not lead to a different product or geographic market definition. The CMA's *Private Healthcare Market Investigation* found that 3 per cent of revenues at private providers came from overseas patients, though this may be higher or lower in ophthalmology. See Figure 2.5 in the Final Report.

- 3.45 Therefore, it is likely that the relevant product market is the supply of privately funded ophthalmic services. Whether the product market is defined narrowly (by procedure) or more widely, and whether it is restricted to privately funded provision or includes public funded NHS provision, does not affect the CMA's overall assessment of the nature of restriction and harm to competition.

Relevant geographic market

- 3.46 Previous merger cases in healthcare services have concluded that the relevant geographic market is likely to be the local or regional.⁹¹ In the present case it is unlikely that the geographic market is wider than local or regional in scope, because PMI provider demand for ophthalmic services is derived from patient demand, and patients are likely to seek services in their local and/or regional area depending on their willingness to travel and the type of PMI cover they have.⁹² Having said this, the CMA does recognise that, as in many markets,⁹³ alongside local or regional competition, there are also elements of national competition, for example where PMI providers conclude national deals with private hospital groups with national prices that apply regardless of local competitive conditions. Even in these circumstances, however, differences in the competitive conditions across local markets may lead to some consultants refusing to sign up to contracts offered by PMI providers or facility providers. On balance, it is reasonable to conclude that geographic markets are likely to be local or regional, with some competitive interactions nevertheless taking place at the national level.
- 3.47 Some consultants have a wide reach of patients due to their reputation or other factors. [CESP senior board member 5a], [LLP 5] consultant explained that his patients come from *'Isles of Scilly, all over Wales, as far east as Swindon and Oxford and Chippenham, as far north as Worcestershire'*⁹⁴ [CESP senior board member 34a], [LLP 34], on the other

⁹¹ Competition Commission, *A report on the anticipated merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust*, 17 October 2013, page 57-61, concludes that markets are local with 17 to 22 minute drive time from each hospital using isochrones as the relevant market and this is tested against GP referrals.

⁹² As noted at paragraph 3.4

⁹³ For example, in many brick-and-mortar retail markets, the CMA observes some elements of the customer offer being set nationally, like advertised prices, and some locally, like staffing levels or opening hours, but often conclude that a market definition based on local markets is the appropriate approach to assessing competitive constraints.

⁹⁴ URN 3567, Transcript of interview with [CESP senior board member 5a], page 7, lines 11 - 12.

hand, explained that his patients come from a geographic radius of around 20 minutes from where he works and from a 5 – 10 mile radius.⁹⁵

- 3.48 In view of the above, it is reasonable to conclude that at its widest the relevant geographic market is the supply of ophthalmic services to PMI providers by region depending on the procedure or group of procedures, whilst noting that there are some national elements to competition.

Market structure

- 3.49 Estimates from various sources indicate that the number of NHS ophthalmic consultants practising in the UK is approximately 1,300.⁹⁶ The number of those consultants working in private practice is likely to be around 1,000.⁹⁷ [PMI Provider 1]⁹⁸ and [PMI Provider 3]⁹⁹ currently recognise around 1,000 consultants and [PMI Provider 2]¹⁰⁰ said it has around 700 consultants who offer cataract surgery. The CMA does not have precise figures for the numbers of these consultants who are active in the market. However, evidence suggests that a minority of those recognised perform the majority of the procedures and account for the majority of PMI providers' reimbursements.¹⁰¹
- 3.50 CESP Limited claimed in board minutes that membership of CESP in October 2013 was 66% of all consultants in the UK.¹⁰² However, CESP Limited later clarified that this was incorrect.¹⁰³ Based on a membership of around 200 consultants and a total of 1,000 recognised private practice consultants, the actual percentage measured against this total is likely to be

⁹⁵ URN 3568, Transcript of interview with [CESP senior board member 34a], page 9, lines 3 - 4.

⁹⁶ According to HSCIC, there were 1,077 consultant ophthalmologists in England in February 2015 (<http://www.hscic.gov.uk/searchcatalogue?productid=17948&topics=1%2fWorkforce%2fStaff+numbers&sort=Relevance&size=10&page=1#top>). According to ISD Scotland, there were 117 ophthalmologists in Scotland in March 2015 (<http://www.isdscotland.org/Health%2DTopics/Workforce/Medical%2Dand%2DDental/>). In addition, Specialist Info Statistics lists the number of ophthalmologists as 1,355.

http://www.specialistinfo.com/a_stats_view_spec.php

⁹⁷ Specialist Info Statistics lists the number of ophthalmologists operating in private practice as 930.

http://www.specialistinfo.com/a_stats_view_spec.php?t=5

⁹⁸ URN 3217, Note of meeting with [PMI Provider 1], page 3.

⁹⁹ As at 10 June 2015, [PMI Provider 3] recognised 1036 consultants. [3<]

¹⁰⁰ URN 2901, Meeting Note from Telephone Conference with [PMI Provider 2] dated 16 October 2014, page 2

¹⁰¹ Appendix 7.2, Figure 2. 'Our preliminary analysis showed that the average percentage of fees paid to the top 20 per cent of consultants by specialty ranged between 55 and 65 per cent except for radiology and ophthalmology where the range is 73 and 69 per cent respectively. This percentage may be explained by higher volumes and/or higher fees charged by such consultants.' and Figure 6 which shows the average number of consultants billing the three largest PMI providers in 2011. URN 3217, Note of meeting with [PMI Provider 1], page 4 '[PMI Provider employee 1b] explained that a minority of the 1,000 recognised consultants are likely to do the bulk of the work, with the rest spread out among the remainder. Also, not all of these consultants would be active, but [PMI Provider employee 1b] did not know what proportion this would be.'

CMA, *Private Healthcare Market Investigation*,

¹⁰² URN 0100, CESP Limited Board Slides, October 2013, page 28. This is based on an internal CESP document.

¹⁰³ URN 3829, CESP Ltd initial response to CMA draft penalty statement

closer to 20%. However, not all of the 1,000 consultants are active.¹⁰⁴ Therefore, the 20% is likely to be a conservative estimate of CESP consultants' share of the market. In some areas, there may be a higher concentration of consultants who are members of CESP Limited, a PMI provider suggested this was the case in [LLP 5].¹⁰⁵

Size of relevant market

3.51 The CMA does not have a precise figure for the size of the market in terms of turnover. The CMA has set out below two methods of calculating the size of the relevant market, first based on payments from PMI providers to consultants and secondly based on consultants' average income.¹⁰⁶

- **Payments from PMI providers to consultants.** In 2012, across all privately-funded medical services, there were four major PMI providers and 12 smaller PMI providers.¹⁰⁷ In 2011, just under £40 million was paid by the three largest PMI providers to consultants. However, this excludes smaller PMI providers and the self-pay segment and it also excludes any payments by insured patients out of their own funds due to shortfalls or where they have exceeded their outpatient benefit limits.¹⁰⁸ An estimate which includes smaller providers and the self-pay segment leads to a market size of around £119 million.¹⁰⁹

¹⁰⁴ For example, [PMI Provider 2] only recognises about 700 ophthalmologists. The CMA found in its Private Healthcare market investigation that the top 20% of consultant ophthalmologists are paid about 70% of the fees paid in the market.

¹⁰⁵ URN 3038, Note of meeting with [PMI Provider 3], page 4. '*the majority of consultants in [X] belong to a CESP LLP and that it was therefore difficult to find an alternative supply of ophthalmic services*'.

¹⁰⁶ The CMA notes that there could be other methods of calculating the relevant market which include an estimate for other elements of the package price, for example, facility fees and anaesthetist fees. However, it does not have the data to accurately calculate a reliable market size. Based on limited data, the CMA and CESP Limited suggest this would increase the size of the market to between £195 million - £234 million. The CMA considers that although this would increase the size of the market it would also increase the CESP LLPs' turnover figures and lead to the same market shares as both the LLP turnover and market turnover would increase in the same proportion. In addition, it is more robust to compare data for which the CMA has accurate figures for when assessing the impact on the market (see paragraph 4.105) below.

¹⁰⁷ CMA, *Private Healthcare Market Investigation*, Figure 3.15.

¹⁰⁸ The Competition Commission's survey across specialisms found that, on average, self-pay customers accounted for 28% of the patients a consultant sees (72% of private patients seen were insured). CESP Limited carried out a survey of around 40 ophthalmic consultants. Based on this survey, CESP Limited estimates the proportion of insured to self-pay patients to be 41.73% insured to 58.27% self-pay in ophthalmology. URN 3380, Note of telephone discussion with CESP Ltd regarding settlement dated 18 June 2015. The CMA notes that CESP Limited was not able to provide the CMA with full details of this survey and it was unclear whether top up fees and shortfalls are categorised as self-pay or insured which may also have a bearing on these numbers (URN 3824, Letter from [CESP senior board member 12a] to the CMA re Questions of Clarification)

¹⁰⁹ CMA, *Private Healthcare Investigation Final Report*, page (A7 (2)-1). The CMA notes that in 2012, these PMI providers (Bupa, Axa and Aviva) had 78% market share. Uplifting for other PMI providers adds another £11 million. Increasing in accordance with the 41.73% / 58.27% insured/self-pay proportion submitted by CESP Limited leads to £119 million.

- **Average consultant income.** According to research by Stanbridge Associates,¹¹⁰ consultants' private practice income was on average £117,000¹¹¹ in 2013 and £115,000 in 2012. With an estimated total number of consultants working in private practice of 1,000, this would lead to a market size of up to £117 million. The CMA understands that the consultants also carry out NHS WLI¹¹² work, although it is not clear whether this work is included in the £117,000. In 2014, 8.5% of work put through CESP LLPs was NHS WLI.¹¹³ Removing this from the calculation results in a market size of at least £107 million.¹¹⁴
- The CMA therefore estimates that the market size ranges between a lower bound figure of £107 million and an upper bound figure of £119 million.

Competition in the market

3.52 Customers drive competition where they are able to compare the price and quality of various suppliers in the market and where suppliers are incentivised to offer the best price and service combination they can in order to win customers. Therefore, suppliers setting prices and other elements of their service independently of each other when offering their services is crucial in delivering good outcomes in terms of price and quality in the market. Cooperation between consultants in consultant groups or even cooperation between consultant groups may lead to positive outcomes for PMI providers and, ultimately, patients. It is vital, however, that those benefits outweigh any negative effects on competition.

3.53 The CMA would expect consultants and consultant groups to compete for patient referrals in one or all of the following ways:

- Competition between individual consultants acting as sole traders,

¹¹⁰ The CMA notes that research by Stanbridge Associates was also used by the CMA in its Private Healthcare Report (paragraph 7.98 and Appendix 7.2).

¹¹¹ The CMA notes that CESP Limited informed the CMA that the average CESP consultant earns £ [] from private practice. The CMA has not been able to verify these figures but has reflected them when assessing the impact on the market (see paragraph 4.105 below).

¹¹² Waiting List Initiative patients.

¹¹³ URN 3830, CESP Turnovers 2011 – 2014.

¹¹⁴ This calculation is based on average consultant fee of £117,000 (URN 3831, Stanbridge Private Practitioner's incomes), multiplied by 1000 consultants less 8.5% (URN 3830, CESP Turnovers 2011 - 2014) the amount of NHS/ WLI work put through CESP LLPs in 2014.

- Competition between individual consultants acting as sole traders and consultant groups,
- Competition between consultant groups.

Competition between individual consultants acting as sole traders

3.54 In the absence of coordination through CESP Limited, including the package price, consultants acting as sole traders would have the following two options:

- individually decide whether to sign up to PMI provider agreements for reimbursement rates of consultant fees under the traditional model, which may include charging the patient a shortfall and/or
- individually decide whether to sign up to an intermediary's (such as a facility provider) package price.

3.55 The CMA would expect consultants to take their decisions independently from each other when deciding how to win business from PMI providers. This could take the form of accepting lower fees than other consultants in the area in return for PMI providers steering patients towards them, for example by recommending them to patients with unnamed referrals, or perhaps by offering better terms or service levels.

3.56 Second, the CMA would expect consultants to compete locally or regionally to attract patients, either directly marketing themselves to patients or by marketing themselves to referring GPs/optometrists. Consultants could compete on price (for example, making clear to patients that there would be no shortfall), as well as on other aspects of their offering, such as clinical quality, facility location or reputation and experience, thus creating better choice for patients who are then able to weigh cost against service.

3.57 Some consultants may have more market power than others in their particular area or sub-speciality due to serving a remote location or a specific specialism. Therefore, they may be able to negotiate a higher price with PMI providers.¹¹⁵

¹¹⁵ For example, [PMI Provider 1] stated that it would consider paying higher fees to a consultant if it was lacking a sub-speciality (such as eye cancer) in a particular area (see URN 3217, [PMI Provider 1] meeting note, page 8).

Competition between individual consultants acting as sole traders and consultant groups, as well as between consultant groups

- 3.58 Consultants may also form LLPs or similar groups. An example of a group of consultants working together in this way is the LLP of consultants at the [Facility 7] in [X].¹¹⁶ A CESP Limited newsletter from December 2013 suggests that the consultants of this LLP are [PMI Provider 3] fee assured consultants.¹¹⁷
- 3.59 If these groups form single undertakings for the purpose of competition law they can agree a group price, which may be the consultant fee or a package price that they offer to PMI providers and self-pay patients. These groups then compete with individual consultants who choose to act as sole traders and with other consultant groups. Another example of an LLP operating like this is [LLP 15], when it deals with [PMI Provider 3]. [LLP 15] owns its own facility, which allows it to offer [PMI Provider 3] a package price without involvement of CESP Limited.¹¹⁸
- 3.60 Many CESP LLPs do not appear to operate in this way. Firstly, the coordination through CESP Limited (discussed in Chapter 4, Legal Assessment, Section D below) means that competition between CESP LLPs and between individual consultant members of CESP LLPs is restricted.¹¹⁹ Second, most non-trading CESP LLPs have not formed undertakings for the purpose of competition law, in the sense that these are membership organisations only and do not engage in economic activity by offering good or services on a market (see paragraphs 3.66 to 3.67). Third, while most trading CESP LLPs form undertakings for the purpose of competition law, in most cases their consultant members retain their characterisation as undertakings as well, as they remain active as sole traders on the same market. As such, the CMA would expect the individual consultant members of the CESP LLPs to be capable of competing with each other.

¹¹⁶ [X]

¹¹⁷ URN 1219, CESP December 2013 update, page 4. '[Facility 7] – [PMI Provider 3] fee assured a threat...21 consultants, working as [PMI Provider 3] fee assured at £ [X] per cataract, or thereabouts'. [X].

¹¹⁸ URN 3038, [PMI Provider 3] meeting note, page 4. 'September 2014, [PMI Provider 3] signed an agreement with [LLP 15], which runs its own clinic ([Facility 6]). The fee element of this clinic agreement includes [X]. [LLP 15] is also part of [PMI Provider 3]'s Cataract Full Pathway, the fee element of which is fully inclusive i.e. all elements of the 'cataract pathway' are included in its pricing to [PMI Provider 3] (£ [X]).'

¹¹⁹ In addition, evidence shows that consultants are members of more than one CESP LLP. For example, URN 0836, shows that [Consultant 30a] is a member of three CESP LLPs, [LLP 1], [LLP 30] and [LLP 36]. This is also shown on the CESP website at: [X], [X] and [X]

Impact on competition

- 3.61 CESP Limited's coordination of the CESP LLPs' commercial conduct as set out in paragraph 1.12 restricts effective competition between consultants and between CESP LLPs. Chapter 4, Section D, Restriction of Competition sets out in more detail how each of the infringements restricts competition.

B. History, development and aims

The history and development of CESP Limited Liability Partnerships (LLPs) and CESP Limited

- 3.62 This section provides an introduction to CESP LLPs and CESP Limited, starting with a brief history of both their formation, their respective ownership structures and decision making processes. It then details the aims and objectives of CESP Limited in the UK ophthalmology market which are to:

- provide membership services to its LLP members;
- to increase its members' incomes and profitability through collective negotiations;
- provide a platform for the exchange of commercially sensitive information; and
- to expand its membership to protect its members' market position.

CESP LLPs

Formation

- 3.63 The first CESP LLP was established in [redacted] and was founded by consultant [redacted] in May 2003.¹²⁰ [redacted] idea for an ophthalmology partnership in [redacted] was based on a similar partnership set up by another consultant based in [redacted] who had established [redacted] a little earlier.¹²¹
- 3.64 From 2003 and prior to the incorporation of CESP Limited in late 2007, 20 LLPs were established throughout the UK.¹²² There are currently 37 CESP LLPs, [LLP 27] [redacted]. These CESP LLPs are established as limited liability

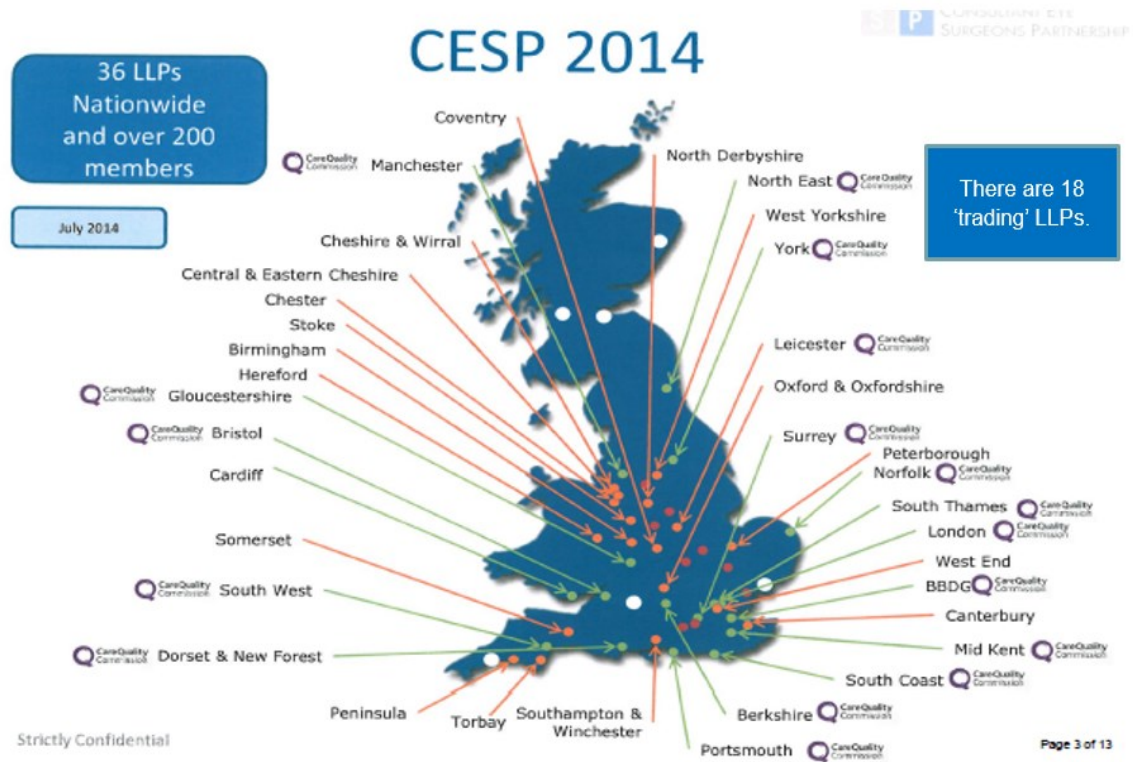
¹²⁰ Companies House, Certificate of incorporation.

¹²¹ [redacted]

¹²² Companies House data.

partnerships¹²³ on local and/or regional lines. The map below shows the extent of CESP LLPs UK coverage as of July 2014.

Figure 3.5: Map of CESP LLPs 2014



CESP Scotland joined in October 2014 so there are now 37 LLPs

Source: An introduction to CESP.¹²⁴

Autonomy of CESP LLPs and individual consultants

- 3.65 Under their respective partnerships, CESP LLPs and their consultant members can enter into agreements with third parties. This includes facility providers, PMI providers and intermediaries such as CESP Limited. In addition, unless this is excluded in the LLP agreement, individual members of CESP LLPs are able to enter into individual agreements with self-pay

¹²³ Each LLP must have a minimum of 2 partners (the minimum allowed for the incorporation of an LLP), with some LLPs having 16+ consultant members.

¹²⁴ URN 0087, presentation slides entitled 'An Introduction to CESP'

private patients and/or PMI providers.¹²⁵ Witnesses interviewed by the CMA also confirmed the autonomy of consultant members from their LLPs.¹²⁶

Trading and non-trading CESP LLPs

- 3.66 CESP Limited distinguishes between 'trading' and 'non-trading' CESP LLPs. The distinction is based on whether or not the CESP LLP can use CESP Limited's IPPP contracts with PMI providers. To do this, a CESP LLP must have access to a facility at which it can perform ophthalmic procedures, which usually requires an agreement with a local facility provider, as well as recognition from CQC. In addition, some trading LLPs also perform NHS work through their LLP.¹²⁷
- 3.67 There are currently 18 trading CESP LLPs¹²⁸ and 19 non-trading CESP LLPs. All the trading CESP LLPs have one or more agreements with facility providers in place, except [LLP 15] which operates its own facility.¹²⁹

Decision making

- 3.68 The CESP LLPs usually have a Board consisting of all partners to deal with strategic decisions and decisions of significant expenditure. Day-to-day decisions fall either to a sub-committee of around two or three partners or to the designated partner(s).¹³⁰
- 3.69 The regularity of CESP LLP Board meetings or LLP meetings more generally varies between CESP LLPs, and may be monthly or annually. For

¹²⁵ All LLPs that were sent informal requests for information have set out that their LLP agreement allows individual consultants to enter into such arrangements without needing any form of approval from the LLP: URN 0468, [LLP 5], URN 0473, [LLP 12], URN 0480, [LLP 16], URN 0485, [LLP 26], URN 0497, [LLP 30].

¹²⁶ [CESP senior board member 34a] said: '*...In many respects you were pretty autonomous and did things at a local level as you saw fit.*' URN 3568, Transcript of interview with [CESP senior board member 34a], page 13 line 7. When discussing with another witness, [CESP LLP employee 5a], the extent to which consultants could act as sole traders, the witness confirmed that '*they're fully entitled to obviously.*' URN 3524, Transcript of interview with [CESP LLP employee 5a] page 19 line 22. [CESP senior board member 5a] added: '*...the reason that the LLP in [LLP 5] exists was to gain some autonomy.*' URN 3567, Transcript of interview with [CESP senior board member 5a], page 26 line 15.

¹²⁷ URN 3830, CESP Turnovers 2011 - 2014, [LLP 1] [\geq] % of 2014 turnover, [LLP 18] [\geq] % of 2014 turnover, [LLP 26] [\geq] % of 2014 turnover, [LLP 38] [\geq] % of 2014 turnover.

¹²⁸ [LLP 1], [LLP 3], [LLP 5], [LLP 7], [LLP 12], [LLP 13], CESP [LLP 15], [LLP 16], [LLP 17], [LLP 18], [LLP 19], [LLP 21], [LLP 26], [LLP 29], [LLP 30], [LLP 31], [LLP 34], [LLP 38].

¹²⁹ URN 1075, [LLP 15] Submission, page 1, indicates they have their own facility.

¹³⁰ URN 0468, [LLP 5] response to informal information request - [LLP 5] '*All decisions relating to LLP pricing and significant expenditure require ratification of the Board*', URN 0473, [LLP 12] response to informal information request - [LLP 12] '*Any strategic decisions and decisions on significant items of expenditure, such as new or replacement equipment, require full Board approval*', URN 0480, [LLP 16] response to informal information request - [LLP 16] '*Day to day management decisions are made by the Management Sub-committee. All decisions relating to LLP pricing and significant expenditure (defined as over £ [\geq]) to third parties require ratification of the Board*'. URN 0485 [LLP 26] response to informal information request - [LLP 26] '*Day to day management decisions are made by the designated partners as appropriate. Decisions such as significant expenditure (defined as over £ [\geq]) or admission or expulsion of a member requires agreement of the Board as specified in the partnership agreement. Other decisions are taken by consensus at partnership meetings*'.

example [LLP 38] appears to hold monthly Board meetings¹³¹ whereas [LLP 30] appears to hold its Board meetings once a year.¹³²

CESP Limited

Formation and growth

3.70 CESP Limited was incorporated as a private limited company in 2007 (under the original name of Charco 15 Limited).¹³³ Its stated aim is to form a membership organisation for consultants, providing administrative and business support to all CESP LLPs across the country.¹³⁴ The support services which are available to those individual consultants or CESP LLPs include access to indemnity insurance at a reduced price, accountancy and assistance with billing and administration as well as negotiation of agreements with facility providers and PMI providers (see below at paragraph 3.79 for more details of the services CESP Limited provides to its members).

3.71 In 2014, CESP Limited had around 200 consultant members.¹³⁵ According to the CESP Limited website it is the largest group of consultant eye surgeons in the UK.¹³⁶

Ownership, decision making and structure

3.72 At the time of CESP Limited's incorporation, 22 CESP LLPs were already in existence.¹³⁷ CESP Limited is jointly owned by all the CESP LLPs.¹³⁸

3.73 The Chairman of every LLP (also known as an 'LLP lead') is represented on CESP Limited's Board. In addition, the Chairman of CESP Limited is always a member of the Board and in the past, when CESP Limited appointed a Chief Executive Officer (CEO), he was also a member of the

¹³¹ Minutes from Board meetings provided to the CMA by [LLP 38] indicate regular monthly Board meetings for a period of time during 2010. For example see URNs 2493 & 2494.

¹³² URN 1473.

¹³³ URN 0459, CESP Certificate of Incorporation of a Private Limited Company, October 2007.

¹³⁴ http://www.cesp.co.uk/who_we_are/history/.

¹³⁵ This is an estimate based on various sources. According to Companies House annual returns for the CESP LLPs there were 204 consultant partners of CESP LLPs in 2014 (190 in 2013, 198 in 2012 and 184 in 2011). 144 of these were partners of trading CESP LLPs in 2014 (144 in 2013, 151 in 2012 and 141 in 2011). This does not reflect LLP members who are not partners (often called 'associate members'). The CESP website as at 1 June 2015 lists 204 members http://www.cesp.co.uk/who_we_are/around_the_uk/. The responses from CESP LLPs to CMA section 26 requests list 189 consultant members. CESP Limited internal documents report that there were 245 (URN 0836) and 250 (URN 0130) consultant members in 2013 although CESP Limited has clarified that these numbers are overstatements.

¹³⁶ http://www.cesp.co.uk/who_we_are/history/.

¹³⁷ According to Companies House data 22 CESP LLPs were incorporated by April 2008.

¹³⁸ URN 0098, CESP [Facility1] meeting presentation dated 22 Aug 2013, page 4.

Board.¹³⁹ Each LLP representative on the Board is accountable to the members of his or her own local CESP LLP. The CEO and the other members of CESP Limited staff are accountable to all the Board members.

3.74 At the time CESP Limited had a CEO, the CEO was responsible for the day to day management of CESP Limited and for making executive decisions, in consultation with the Chairman of CESP Limited. Any significant decision is taken to the Board for discussion and requires approval by majority vote to enable ratification. None of the individual CESP LLPs, CESP Limited shareholders, or any other individuals have decisive influence over CESP Limited's decision making process.¹⁴⁰

3.75 [X] was the first CESP Limited Chairman until his resignation in 2010.¹⁴¹ [X] then became Chairman until January 2014 and [X] is the current Chairman.

Ownership of Newmedica

3.76 In September 2007, a company named Newmedica¹⁴² was incorporated and co- founded by [CESP senior board member 5a], [CESP Ltd senior employee M], [CESP LLP consultant 38c] and [Consultant 13a]. At that time Newmedica was a wholly owned subsidiary of CESP Limited.¹⁴³ Newmedica provides and sources NHS ophthalmic work for CESP LLPs or Newmedica itself.¹⁴⁴

3.77 In August 2009, CESP Limited sold a [X]% share in Newmedica.¹⁴⁵ The buyers were [CESP Ltd senior employee M], [CESP senior board member 5a], [Consultant 38c] and [Consultant 13a]. Over the following years CESP Limited reduced its stake in Newmedica. It currently retains a [minority] share in Newmedica and according to [CESP senior board member 12a] this share was valued at £[X] in 2011.¹⁴⁶

¹³⁹ Currently CESP Limited does not have a CEO.

¹⁴⁰ URN 0458, CESP Limited response to informal request for information dated 16 March 2014 page 2.

¹⁴¹ URN 2468, CESP Members: quarterly newsletter – Q1 2010 dated 8 April 2010.

¹⁴² Newmedica allowed CESP Limited to take on NHS work by allowing LLPs to avoid contact with NHS commissioning bodies by dealing with them directly (some LLPs are not geared up to do NHS work or not interested in bidding for it).

¹⁴³ URN 3329, Transcript of interview with [CESP Ltd senior employee M] page 8, line 9.

¹⁴⁴ URN 2555, Newmedica Rules of Engagement- 7 February 2009 Board Minutes page 9.

¹⁴⁵ URN 2602, CESP Board Minutes, September 2009 page 42.

¹⁴⁶ URN 2891, Email from Sue Aspinall to [CESP senior board member 12a] re CESP Ltd - Newmedica Share Price dated 23 October 2014 and URN 3411, Note of telephone conversation between CMA and [CESP senior board member 12a] dated 23 October 2014.

CESP Limited: Aims and Objectives

To provide membership services

3.78 CESP Limited operates as a membership organisation providing a number of services which are available to individual consultants or CESP LLPs who wish to use all or some of these services.¹⁴⁷

3.79 The main CESP Limited services include:

- Indemnity Insurance – CESP Limited has an arrangement with the Medical Defence Union. By buying as a group, individual consultants can save around 20 – 40% on their medical indemnity insurance costs.¹⁴⁸
- Care Quality Commission (CQC) – All trading CESP LLPs are required to be signed up to the CQC as they are providing a regulated service. CESP Limited provides registration support for the CQC.¹⁴⁹
- IPPP¹⁵⁰ – CESP Limited negotiates agreements with PMI providers to which CESP LLPs can opt in. These agreements provide CESP LLPs with the ability to bill patients a fixed IPPP price under package¹⁵¹ deals with PMI providers.¹⁵²
- The Virtual Practice Management Service (VPMS) – VPMS allows CESP LLPs to ‘*outsource the running of the invoicing and administrative aspects of [their] LLP*’¹⁵³ to a team at CESP Limited. In addition, the VPMS system undertakes all the payments to creditors, consultants and suppliers. In the case of paying consultants, the VPMS allows the payment of funds into LLPs’ bank accounts.¹⁵⁴ Currently, six CESP LLPs are signed up to VPMS: [LLP 3], [LLP 16], [LLP 30], [LLP 31], [LLP 34], [LLP 18].¹⁵⁵ CESP LLPs

¹⁴⁷ URN 0458, CESP Limited response to informal information request, answer 2 dated 16 March 2014

¹⁴⁸ URN 0113, The costs and benefits of MDU membership dated 14 January 2012

¹⁴⁹ URN 1168, Email from [CESP Ltd employee E] entitled Introduction to the Consultant Eye Surgeons Partnership and CQC Services dated 12 September 2012

¹⁵⁰ Inclusive Private Patient Package, see Glossary

¹⁵¹ The term ‘package’ refers to the packaging of biometry, surgeon’s fee, hospital fee, anaesthetist fee (if required) and follow up consultation (PMI dependent) in an all-inclusive price covering the entire care pathway of a particular procedure.

¹⁵² URN 0087, An introduction to CESP page 2.

¹⁵³ URN 0578, The Virtual Practice Management Service Leaflet

¹⁵⁴ URN 0578, The Virtual Practice Management Service Leaflet

¹⁵⁵ URN 0149, Spreadsheet containing list of trading LLPs.

who use VPMS need to be signed up to the IPPP programme and have a facility agreement in place.¹⁵⁶

- MedDbase¹⁵⁷ – CESP Limited provides its members with training and support to assist CESP LLPs to implement this software which is designed to ‘*allow for the smooth running of the LLP*’ and ‘*reduce stress on Practice Managers and Secretaries*’.¹⁵⁸
- Negotiating facility agreements – CESP LLPs require signed agreements with facility providers such as hospitals to carry out surgical procedures under the IPPP and to comply with the CQC.¹⁵⁹ CESP Limited claims that by negotiating as a group and providing volume it is more likely to secure the services of a facility than by CESP LLPs doing so independently.¹⁶⁰ CESP Limited estimates that it can negotiate down facility fees by [X] -[X]%.¹⁶¹
- Shared marketing – CESP Limited provides members with marketing services at a substantially lower cost than if CESP LLPs were to purchase these alone. Examples include bulk printing marketing leaflets, help with opportunistic marketing and NHS appointment card advertising.¹⁶²

3.80 In addition to the above, CESP Limited also provides, or has in the past provided, IT support to CESP LLPs¹⁶³ as well as an accountancy service, providing assistance with accounts preparation, filing and tax returns.¹⁶⁴

To increase members’ incomes and profitability through collective negotiations

3.81 CESP Limited sent materials by way of emails, Board slides, leaflets and newsletters to current and prospective CESP Limited members detailing its aim to increase members’ revenue and profitability by gaining control of the patient referral¹⁶⁵ process which it considered was being undermined by hospital groups and PMI providers.¹⁶⁶

¹⁵⁶ URN 1124, CESP members newsletter dated July 2010.

¹⁵⁷ MedDbase is the UK’s leading web based online medical software package for managing all aspects of practice management and clinical audit - from medical billing and medical coding to patient records, prescriptions, diaries, email, SMS, and invoicing.

¹⁵⁸ URN 0117, CESP Board Slides, dated October 2011, page 20.

¹⁵⁹ URN 0122, LLP Directors Meeting Minutes, dated May 2011, page 2.

¹⁶⁰ URN 1021, Email from [CESP Ltd senior employee N] to [Consultant 13a], dated 11 July 2013.

¹⁶¹ URN 2389, New Members Presentation dated 28 October 2012, page 40.

¹⁶² URN 2555, CESP Board Minutes 7 February 2009, page 8.

¹⁶³ URN 0959, [LLP 13] meeting minutes, 6 April 2011 page 2.

¹⁶⁴ URN 1127, CESP Members’ Newsletter December 2011 page 4.

¹⁶⁵ URN 0732, Introduction to the Consultant Eye Surgeons Partnership.

¹⁶⁶ URN 1021, Email from [CESP Ltd senior employee N] to [Consultant 13a], dated 11 July 2013, page 1.

- 3.82 An email¹⁶⁷ sent to CESP LLPs leads from [X] [CESP Ltd senior employee N] attaching CESP Limited's May 2011 Board minutes, sets out the benefits of CESP Limited to its members, describing it as a 'cooperative' to protect incomes:

'The financial benefits of using CESP are significant (imagine it is a cooperative protecting your market position/protecting income/generating savings through Group negotiated schemes), whether trading or not, and our contracts give us more power to negotiate locally and nationally for you and your colleagues, so thank you for your continued support.'

- 3.83 When asked about the aims of CESP Limited, [X] [CESP Ltd senior employee B] said that the aim was to *'form groups so that consultants could work better together ...could have more control and more discussion with the insurers directly as a group, as a single voice so to speak.'*¹⁶⁸ [CESP Ltd senior employee B] also said that *'...the aim of CESP was to discuss collectively fees with insurers.'*¹⁶⁹

- 3.84 A slide pack produced for the October 2011 CESP Limited Board Meeting,¹⁷⁰ contains a slide headed *'Work smarter, not harder'* and indicates two paths for consultants. A forecast of consultant's fees for the next four years showed fees under the first choice falling from £[X] to around £[X] but fees under the second choice rising to £ [X] (see below).

Figure 3.6: CESP Limited board meeting slide indicating the two options for consultants and a forecast of consultant's fees for the next four years

[X]

Source: CESP Limited Board meeting slides.¹⁷¹

- 3.85 When questioned about this and whether the aims of CESP Limited included increasing revenue, [CESP senior board member 34a] said:

*'It's one of the aims because if you are billing as a sole trader, for one very small part of the procedure fee, by taking control of the whole thing you are naturally increasing your revenue, and that's primarily what that is explaining.'*¹⁷²

¹⁶⁷ URN 1361, Email from [CESP Ltd senior employee N] to LLP leads, dated 20 May 2011.

¹⁶⁸ URN 3328, Transcript of interview with [CESP Ltd senior employee B] Transcript, page 8 lines 16-22

¹⁶⁹ URN 3328, Transcript of interview with [CESP Ltd senior employee B] Transcript, page 12 lines 16-17.

¹⁷⁰ URN 0114, CESP Board Slides October 2011.

¹⁷¹ URN 0114, CESP Board Slides October 2011 page 5

¹⁷² URN 3568, Transcript of interview with [CESP senior board member 34a], page 42 line 10

3.86 [CESP senior board member 34a] also said that CESP Limited's drive to increase revenue and profits for its members was down to [X] [CESP Ltd senior employee N]'s attempts to increase his own '*personal revenue package*' as this was linked to CESP Limited's revenue performance.¹⁷³

3.87 An email to CESP LLP leads from [CESP Ltd senior employee N] stated that the current membership status quo of CESP needed to be improved in order for consultants to increase their earning potential for cataracts procedures:

*'All 38 businesses should be trading fully through CESP. The current situation is far too piecemeal and doesn't provide you with the protection to ensure that you continue to earn £ [X] a cataract, rather than £ [X], which will happen if you don't continue to support us.'*¹⁷⁴

3.88 On 12 July 2012, [CESP Ltd employee E], an employee of CESP Limited, emailed at least one prospective consultant; the email reads:

'Up to [X] reduction in surgeon's fees

Either go down with this shipwreck, or grab hold of your lifeboat

CESP Limited – We can and will help you!'

'As you will be aware, there are changes afoot, particularly with respect to billing guidelines as outlined by the Private Medical Insurers, that are hugely detrimental to your practice and your future earning potential.

*Each partnership is owned and run by the local Consultants, using CESP Limited's model ,that is there to both maximise your income and optimising your business effectiveness.'*¹⁷⁵

3.89 On 30 August 2012, [CESP Ltd employee F], an employee of CESP Limited emailed prospective members about the benefits of joining, including having control over the referral process and increasing revenue:

'These insurer contracts are not only instrumental in protecting your position in the market and increasing your control over referral

¹⁷³ URN 3568, Transcript of interview with [CESP senior board member 34a] Interview, page 24 line 14.

¹⁷⁴ URN 1215, Email from [CESP Ltd senior employee N] to LLP Leads, 31 October 2013 page 1.

¹⁷⁵ URN 0731, Email from [CESP Ltd employee E] to LLP leads, dated 12 July 2012.

processes, but it also focuses on increasing your revenue per procedure, an average increase of [X]....

*CESP membership allows you to collaborate with your colleagues to protect each other whilst also increasing your income- both of which we believe are valuable tenets.*¹⁷⁶

- 3.90 In an attempt to encourage [Non CESP consultant A], a consultant from [Facility 7] to form a CESP LLP and join CESP Limited, an email from [CESP Ltd senior employee N], explains how collaborating rather than competing would be beneficial to [Non CESP consultant A]:

*'...going your own route will lead to increased costs, possibly lower rates than we can achieve, and we'll be in competition, not collaboration. We'll be played off again [sic] one another.'*¹⁷⁷

- 3.91 In a presentation delivered by CESP Limited to new members dated October 2012, a slide entitled '*Key benefits of CESP*' sets out the following:

'Control and increase your revenue

Control referral processes

Protects your position in the market

Strength and leverage as a collective

*Move your business to the most profitable and clinically effective hospitals*¹⁷⁸

- 3.92 When questioned about this document, [CESP Ltd senior employee M] explained that from 2005 to 2009 due to the changes made by PMI providers to the fees paid to consultants for certain ophthalmic procedures and the way PMI providers were taking control of the patient referral process, an '*adversarial relationship*'¹⁷⁹ had developed. [CESP Ltd senior employee M] explained that consultants were '*being pushed around*' by hospital managers.¹⁸⁰ In reference to control of the referral process, [CESP Ltd senior employee M] said that this was a '*fundamental issue in the medical market from a clinician's point of view*' and that there was '*value in*

¹⁷⁶ URN 0168, Email from [CESP Ltd employee F] to [CESP Ltd senior employee N] and [Non CESP consultant B] re CESP, dated 30 August 2012, page 1.

¹⁷⁷ URN 0183, Email from [CESP Ltd senior employee N] to [Non CESP consultant a], dated 29 September 2012 page 1.

¹⁷⁸ URN 2389, Membership to CESP, dated 28 October 2012, page 24.

¹⁷⁹ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 25 line 6

¹⁸⁰ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 24 line 16.

*working together, if you're trying to achieve some of these.*¹⁸¹ He said that there was a *'financial aspect as well'*:

*'They don't just do it just because they can control the clinical work that they do. There's also a remuneration that they get...'*¹⁸²

- 3.93 During the course of 2013 CESP Limited continued to promote its aims. [CESP Ltd senior employee N] sent an email to [LLP 13] dated 11 July 2013 entitled *'Protecting Your Private Practice- How to Make CESP Work for You'* in which he discussed how working together was financially more beneficial than working alone:

*'The premise behind CESP is that consultants working together are better able to secure their independence (and income) than consultants working alone. By continuing to work as individuals, consultants run the risk that control over how and where they practice, passes to third parties such as insurance companies and private hospital groups....We believe that the only way for consultants to retain control of how they choose to practice is to make a positive decision to work together...'*¹⁸³

- 3.94 In an email from [CESP Ltd employee G], an employee of CESP Limited, to a prospective new member dated 4 December 2013, [CESP Ltd employee G] forwards an email sent from a member of [LLP 31] because it gives a consultant's perspective on the financial benefits of CESP Limited:

*'Cesp has been critical to our success as a group in private practice. The billing mechanism and access to agreed contracts with private health insurers has greatly increased our profitability per procedure and protects Consultants from reduced fees imposed by insurers. The margin in the contracts, on top of the protected fees, means we have around a [X]% greater income than we would have had outside of CESP. For new Consultants that figure is probably more like [X]% greater income. If you are not in CESP, and running an IPPP, you need to realise that you are giving that money away at present.'*¹⁸⁴

¹⁸¹ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 23 line 8-17

¹⁸² URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 24 line 13.

¹⁸³ URN 1021, Email from [CESP Ltd senior employee N] to [Consultant 13a] re protecting your private practice, dated 11 July 2013, page 2.

¹⁸⁴ URN 0344, Email exchange between [CESP Ltd employee G] and [Consultant 32a] re A Consultants Perspective dated 06 December 2013, page 3.

- 3.95 On 10 December 2013, [CESP Ltd senior employee N] sent an email to a number of LLP leads in which CESP's strategy is discussed:

*'Our strategy is to try to protect your incomes at the highest sensible levels...'*¹⁸⁵

- 3.96 [CESP Ltd senior employee M] responded to this email on the same day:

*'[CESP Limited employee N] – this is most useful in terms of a vision statement. I am interpreting what you have written as an ambition to (1) maintain and raise private practice fees levels, (2) generate income and savings from each private patient episode, (3) generate income and savings from individual and group private practice.'*¹⁸⁶

- 3.97 The promotion of the benefits of using CESP Limited was not just limited to correspondence from CESP Limited. A number of CESP LLPs and their consultants also reflected CESP Limited's aims.

- 3.98 An email sent by [Consultant 34b], [LLP 34], to a number of individuals dated 5 July 2012, reads:

*'[LLP 34] was originally set up to unite against insurers who are trying to enforce managed care.'*¹⁸⁷

- 3.99 At a meeting of partners at [LLP 17] in May 2011, a new consultant explained why he wanted to establish a CESP partnership with other colleagues. He said that he wanted to *'help to maintain consultant control over private patient fees.'*¹⁸⁸

- 3.100 At the same [LLP 17] partners meeting, a prospective member explains that an incentive for joining the partnership was to protect himself *'from patients being redirected by insurers to other "cheaper" consultants (on account of their enforced acceptance of lower surgery fees by PMIs).'*¹⁸⁹

- 3.101 In an email from [Consultant 21a], [LLP 21], dated 30 January 2014 to a number of CESP LLPs, he says:

¹⁸⁵ URN 2277, Email from [CESP Ltd senior employee N] to a number of LLP Leads, dated 10 December 2013.

¹⁸⁶ URN 2276, Email response from [CESP Ltd senior employee M] to [CESP Ltd senior employee N], dated 10 December 2013.

¹⁸⁷ URN 2010, Email from [Consultant 34b] to a number of individuals including [Consultant 34c], dated 5 July 2012

¹⁸⁸ URN 1242, Minutes of meeting of CESP [LLP 17], dated 18 May 2011, page 2.

¹⁸⁹ URN 1242, Minutes of meeting of CESP [LLP 17], dated 18 May 2011 page 2.

*'It is our view that central CESP should act as a mutual support organisation to promote our common interests. E.g. to negotiate the best deal we can with the insurance companies, the hospitals and the professional indemnity organisations. It should also be the provider of services to its members such as the assistance and guidance necessary to meet CQC requirements.'*¹⁹⁰

3.102 In an email sent by [Consultant 14a], [LLP 14], to a number of CESP LLPs dated 27 February 2014, [Consultant 14a] says:

*'The whole purpose of CESP is to control our fees....Maintaining our fees - independently but within a group - is the only way to protect ourselves.'*¹⁹¹

3.103 When presented with this email at interview, [CESP Ltd senior employee A] responded:

*'I think this is unusual practice...It's one person's view really...And it's incorrect.'*¹⁹²

3.104 In response to [Consultant 14a] email, [CESP Ltd employee H] [§<], sent an email on 28 February 2014 and said:

*'CESP cannot condone any anticompetitive behaviour and should clarify that the company does not have a view on the commercial activities offered by [Facility 4] Hospital, the PMI industry or by individual consultants.'*¹⁹³

3.105 The CMA notes that the timing of [CESP Ltd employee H]'s email of 28 February 2014 follows just shortly after an informal information request was sent to CESP Limited by the OFT, on 20 February 2014.

To act as a conduit to facilitate the exchange of information

3.106 Documentary evidence in particular shows to indicate that in the period leading up to negotiations with [PMI Provider 3], CESP Limited acted as a

¹⁹⁰ URN 2392, Email from [Consultant 21a] to a number of LLPs, dated 30 January 2014.

¹⁹¹ URN 0840, Email from [Consultant 14a] to a number of LLPs, dated 27 February 2014, page 9.

¹⁹² URN 3327, Transcript of interview with [CESP Ltd senior employee A] Transcript, page 116 line 22 and page 117 line 1

¹⁹³ URN 1221, Email from [CESP Ltd employee H] to [Consultant 14a], copying other LLPs, dated 28 February 2014

conduit to facilitate commercially sensitive future intentions on how to treat [PMI Provider 3]-insured patients.¹⁹⁴

- 3.107 Further details of this can be found in Section D, *'Coordination of market conduct when attempts to agree an IPPP are unsuccessful'*.

To expand membership to protect market position

- 3.108 Since its formation in October 2007 CESP Limited has increased its membership by 18 LLPs to a total of 37 CESP LLPs. Documentary evidence obtained by the CMA indicates the importance of increasing membership to CESP Limited, in particular the importance of targeting areas in the UK where there is no CESP LLP presence. This targeting activity includes sending out introductory letters, leaflets and business cards to private practice consultants within those areas.¹⁹⁵

- 3.109 For example, in July 2012, [CESP Ltd senior employee N] sent an email to CESP LLP leads in which he urged CESP LLPs to encourage new members to join:

*'Please continue to encourage your new consultants and other colleagues to join CESP, as the more members we have, the better protected your position in the market place.'*¹⁹⁶

- 3.110 Another document shows CESP Limited aiming to have all UK private consultants operating through the CESP Limited model.¹⁹⁷

- 3.111 CESP Limited was also keen for newly qualified consultants to become members:

'Finally just to remind our current members that if they have any colleagues interested in joining CESP please persuade them to make the first step and contact us about membership. Furthermore it is particularly important to ensure newly qualified consultants are

¹⁹⁴ URN 0152, email from [CESP Ltd senior employee B] to [Consultant 3a] [LLP 3] when discussing if this LLP could approach [PMI Provider 3] directly: *'I can put you in touch with the [LLP 5] [S<], [CESP LLP employee 5b], who has been in unsuccessful discussions with [PMI Provider 3] for the past 12 months'*.

¹⁹⁵ URN 2268, CESP Winter update 2013, dated 12 December 2013.

¹⁹⁶ URN 1140, Email from [CESP Ltd senior employee N] to Others regarding CESP and Current Market, dated 29 July 2011, page 8.

¹⁹⁷ URN 2268, CESP Winter Update dated December 2013 from CESP Limited to CESP LLPs, page 2: *'With your help our aim is to get all UK private ophthalmologists working through CESP, so do keep thinking about new members.'*

*aware of CESP and that we sign them up, so please encourage them to join'*¹⁹⁸

3.112 One organisation raised concerns about the CESP model following an approach by CESP Limited to enter into an arrangement. A consultant ophthalmologist at [Facility 13] (a private medical clinic) emailed [CESP Ltd employee I] at CESP Limited in March 2013:

*'After detailed consideration we have concluded not to enter into a contractual agreement with CESP... The driving force for CESP has been explained to us as essentially to protect consultants' fees. We believe that this could lead to complaints of a cartel in the future and so affect adversely the reputation of [Facility 13].'*¹⁹⁹

C. The IPPP

Introduction

3.113 The purpose of this section is to set out the facts relating to the IPPP infringement. It sets out:

- what the CESP Limited IPPP is and how it works,
- how CESP Limited is empowered by the CESP LLPs to enter into IPPP agreements,
- how the CESP Limited IPPP maintains CESP LLPs' and their consultant members' prices above the level they would otherwise be,
- the exchanges of information and negotiations leading up to the IPPP agreements with PMI providers', and
- the claimed benefits of the CESP Limited IPPP.

What is the IPPP and how does it work

Introduction

3.114 The CESP Limited IPPP is a package, which it offers to PMI providers on behalf of CESP LLPs. If CESP Limited and a PMI provider reach an agreement, they enter into an IPPP agreement. The IPPP agreements are

¹⁹⁸ URN 2268, CESP Winter Update dated December 2013 from CESP Limited to CESP LLPs, page 2

¹⁹⁹ URN 0212, Email exchange between [CESP Ltd employee I] and [Facility Senior Manager 13a], dated 8 March 2013.

binding on the PMI provider, but not on the CESP LLPs. The CESP LLPs can opt-in or opt-out of the agreements, provided they have an agreement with a facility (see paragraphs 3.134 to 3.136 below) and are CQC registered (CESP LLPs who meet these criteria are known as 'trading CESP LLPs'). Even if a trading CESP LLP opts into a particular IPPP agreement, its individual consultant members can still treat patients insured by the relevant PMI provider under the traditional model (and therefore outside the IPPP agreement), by billing the patient or his/her PMI provider as a sole trader, which may include a shortfall (see paragraph 3.137 below).

- 3.115 The IPPP always includes a consultant, anaesthetist and facility fee and may include the initial consultation, biometry and a number of post-operative follow ups, depending on the relevant agreement.²⁰⁰ The facility fee itself will include fees for nurses and medical equipment and supplies.

²⁰¹

- 3.116 Once an IPPP has been agreed and is in place, CESP Limited circulates the IPPP price lists of all procedure codes covered by the agreement to the trading CESP LLPs.²⁰² A number of methods have been used for this circulation, including hard-copy rate books,²⁰³ email²⁰⁴ and loading the prices into the VPMS system.²⁰⁵ The price lists serve a number of purposes including assisting the LLP to invoice the PMI provider for a given procedure at the agreed rate and helping the CESP LLP calculate the incremental profit generated by contracting under the IPPP.²⁰⁶

- 3.117 If a patient is treated under the CESP Limited IPPP as set out in paragraph 3.36, the PMI provider pays the relevant CESP LLP the full IPPP price agreed in the agreement between CESP Limited and the PMI provider.²⁰⁷ The individual CESP LLP then reimburses the facility where the procedure

²⁰⁰ URN 3327, Transcript of interview with [CESP Ltd senior employee A] page 23 lines 1-10

²⁰¹ URN 3327, Transcript of interview with [CESP Ltd senior employee A] page 23 lines 1-10

²⁰² Such circulation was often limited to the LLP leads and/or practice managers, leaving it to the individual LLPs to decide whether or not to circulate the price lists to their consultant members.

²⁰³ [CESP Ltd senior employee B] explained that, [redacted], CESP LLP practice managers and CESP LLP leads were sent rate books which set out the package price covering 60-80 procedures. URN 3328, Transcript of interview with [CESP Ltd senior employee B], page 18 line 37. [CESP Ltd senior employee B] also explained that the information contained in these rate books was of a confidential nature and CESP LLPs were requested to treat these rate books accordingly URN 3328, Transcript of interview with [CESP Ltd senior employee B], page 35 lines 19-24.

²⁰⁴ URN 0437, Email from [CESP Ltd senior employee A] to LLP leads re [PMI Provider 1], 9 June 2014 page 4.

²⁰⁵ [CESP Ltd senior employee A] explained that for the six CESP LLPs that were signed up to VPMS, their billing was undertaken by CESP Limited, which would generate invoices on the LLPs behalf. URN 3327 Transcript of interview with [CESP Ltd senior employee A] Interview page 28-30.

²⁰⁶ URN 0047, CESP PMI Programme page 1

²⁰⁷ Thus, although CESP Limited negotiates and enters into the IPPP agreements on CESP LLPs' behalf, PMI providers pay the LLPs directly and payments do not flow through CESP Limited.

took place, the Consultant who carried out the procedure and the anaesthetist, if one is used. It is up to each individual CESP LLPs how they divide the IPPP payment (known as the 'fee split') once the fixed components of the IPPP have been paid.²⁰⁸ Fee splits are explained in more detail below in paragraph 3.120 to 3.124.

Agreement with facility providers

3.118 CESP LLPs require an agreement with facility providers in order to comply with the CQC's rules, which is necessary to be able to offer an IPPP.²⁰⁹ CESP Limited is of the view that by negotiating as a group and providing a greater volume of work, it is more likely to secure the services of a facility at a lower price than by CESP LLPs doing so independently,²¹⁰ estimating that it can negotiate facility fees down by [X] - [X]%.²¹¹

3.119 CESP LLPs are free to negotiate with facilities themselves or CESP Limited can do so on their behalf.²¹²

Fee splits

3.120 The IPPP price is made up of a number of separate components, the bulk of which is made up of the facility fee, the consultant's fee and the anaesthetist's fee. Other components can include fees for use of the VPMS software and a [X]%²¹³ fee of the IPPP price paid to CESP Limited. The fee splits are confidential and are not made available to the PMI providers.²¹⁴

3.121 CESP LLPs decide how they wish to split the IPPP price.²¹⁵ The way the CESP LLPs do this varies between them because of different preferences, but also because of different facility fees in the relevant CESP LLPs' local facility agreements. As the IPPP price is a fixed price, a lower (or higher)

²⁰⁸ URN 0047, CESP PMI programme. The fixed components of the IPPP price are the facility fee, the anaesthetist's fee and, up to 31 May 2014 a fee of [X]% to be paid to CESP Limited for the use of the IPPP. This fee was replaced by a fixed membership fee of [X]% of a CESP LLP's turnover on 1 June 2014. It is up to the individual CESP LLPs to decide how much of the residual amount is paid to the consultants directly (through the consultant's fee) and how much of this amount is retained as LLP margin (used to cover LLP costs and, if revenues exceed costs, LLP profit which can then be paid to consultant members).

²⁰⁹ URN 0122, LLP Directors Meeting Minutes, dated 14 May 2011, page 2.

²¹⁰ URN 1021, Email from [CESP Ltd senior employee N] to [Consultant 13a], dated 11 July 2013 page 2

²¹¹ URN 2389, New Members Presentation 28 October 2012 page 39

²¹² URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 12 line 2

²¹³ URN 0047, CESP PMI programme details the Pay as You Go fee to CESP Limited.

²¹⁴ URN 3328, Transcript of interview with [CESP Ltd senior employee B], page 50 lines 14-16: '*...you want the package price only that package price to be known to the insurer. You don't want all of the individual subs splits to be known*'.

²¹⁵ URN 0047, CESP PMI programme; and URN 3328 Transcript of interview with [CESP Ltd senior employee B], page 32 line 6 and page 61 line 27. See also page 61: '*the more favourable you know, the negotiations with the hospital, the more favourable ultimately the contribution that would hopefully be leftover at the end*'.

facility fee does not translate into a lower (or higher) IPPP price. Individual CESP LLPs may choose to allocate any 'excess' funds as a higher consultant fee or as a revenue for the LLP (known as the 'LLP margin').²¹⁶ The CMA understands that LLP margin can be used to invest in equipment and premises²¹⁷ or can be distributed to the LLPs partners.²¹⁸

3.122 CESP LLPs can forego the LLP margin in favour of netting a higher consultant's component. In such circumstances, the CMA has seen evidence of fee splits for certain CESP LLPs showing a loss where the component parts add up to more than the IPPP price.²¹⁹ However, the consultant's fee in particular can be varied, which would allow for such a CESP LLP to make a profit.

3.123 Where a procedure does not require the use of an anaesthetist, which the CMA understands is common,²²⁰ this does not lead to a lower IPPP price, as the IPPP price is fixed.²²¹ The fee set aside for the anaesthetist can then be allocated to the LLP margin or to the consultant's component of the package price, if no anaesthetist is used.²²² CESP Limited told the CMA that *'the majority currently, and all in 2013, of the PMIs allow in their terms and conditions a payment to be made to the surgeon for giving the anaesthetic if an anaesthetist was not present.'*²²³ Where this payment is

²¹⁶ URN 3328, Transcript of interview with [CESP Ltd senior employee B] page 61 line 1: *'the more favourable you know, the negotiations with the hospital, the more favourable ultimately the contribution that would hopefully be leftover at the end'*.

²¹⁷ URN 3829, CESP Ltd initial response to CMA draft penalty statement: *'[LLP 12] have invested over [£<] in equipment over approximately the past 5 years'*, URN 3567, Transcript of interview with [CESP senior board member 5a] page 24, lines 24 - 27 *'So I would suggest that there's an element of group practice equals efficiency and then if one generates a profit then what one does with it, by and large we use it to buy new equipment.'* URN 2491, [LLP 38] meeting note discussing the purchase or hire of equipment. URN 1674, 1682, 1685, 1686 [LLP 34] meeting notes discussing purchase of equipment and/or the option of purchasing premises. URN 3846, Response to the draft Statement of Objections.

²¹⁸ A number of CESP LLP meetings notes discuss profit share between LLP members. See for example, [LLP 1] URN 0557, [LLP 5] URNs 3254, 3289, 3290, CESP [LLP 17] URNs 1249 and 1250, [LLP 34], URNs 1674, 1678, 1680, 1687.

²¹⁹ URN 1491, [LLP 31] fee splits.

²²⁰ URN 3568, Transcript of with [CESP senior board member 34a], page 6 line 25

²²¹ See for example URN 0451 Email from [CESP Ltd employee C] to [CESP Ltd senior employee A] re [LLP 30] - New [PMI Provider 1] Agreement, dated 01 July 2014, page 1: *'Surgeon/Anaesthetist: £ [£<] ... If anaesthetist is used £ [£<] then surgeon gets £ [£<]. I know this isn't the best insurer deal ... but the only other option was not to have an [PMI Provider 1] deal. If a surgeon does not use an anaesthetist, which we are finding more and more common, then the surgeon can include the £ [£<], resulting in £ [£<].'*

²²² URN 3568, Transcript of interview with [CESP senior board member 34a], page 46 line 10; URN 1318, Minutes of [LLP 21] LLP meeting, dated 2 October 2012: *'At the moment the anaesthetic fee stays in the partnership is an anaesthetist is not used during phaco surgery. Current rate is £ [£<] for a l.a. It was agreed that if no anaesthetist is used then the surgeon be paid £ [£<] on top of their surgeon fee and the other £ [£<] back to the partnership'*.

²²³ URN 3829, CESP Ltd initial response to CMA draft penalty statement. See also URN 0742, Email from [CESP Ltd senior employee N] to consultant colleagues re [PMI Provider 3] policy on consultant administered anaesthesia.

available it is generally lower than the published benefit maxima for anaesthetists.²²⁴

- 3.124 The CMA has seen a number of fee splits which show how the components of the final IPPP price are allocated. In keeping with the fixed nature of the IPPP price, these fee splits show that LLPs with lower facility fees have higher consultant's fees and/or LLP margins (and vice versa). See Annex F for an example fee split set out by CESP Limited.

How IPPP prices are calculated by CESP Limited and the input from CESP LLPs

- 3.125 During the course of the relevant period a number of CESP Limited employees, in particular, [CESP Ltd senior employee M], [CESP Ltd senior employee N], [CESP Ltd employee J] and [CESP Ltd senior employee A], were involved in calculating the IPPP price, often seeking input from CESP LLPs before a final price was agreed.
- 3.126 [CESP Ltd senior employee M], who negotiated and agreed IPPP agreements in 2008 and 2009, explained that he calculated the IPPP price by starting with the consultant's fee which he took from one of the smaller PMI providers' reimbursement schedules [PMI Provider 6] and adding a 'percentage because they hadn't changed for some time.'²²⁵ [CESP Ltd senior employee M] explained that as a non-doctor he sought input from some Consultants on procedure time and the cost of consumables to aid him in arriving at a suitable figure.²²⁶
- 3.127 When [X] [CESP Ltd senior employee N] took over responsibility from [CESP Ltd senior employee M] for concluding IPPP agreements, [CESP Ltd senior employee N] with assistance from [CESP Ltd employee J] also used Consultants to sense check prices. For example, while negotiating a new IPPP agreement with [PMI Provider 1] in 2013, they sought input from a number of CESP LLPs including [LLP 5],²²⁷ [LLP 34],²²⁸ and [LLP 16].²²⁹

²²⁴ For example, The [PMI Provider 2] fee for a consultant administered anaesthesia (AC100) is £ [X], whereas an anaesthetist fee for a cataract procedures is £ [X]. The [PMI Provider 4] fee for a consultant administered anaesthesia (AC100) at £ [X], whereas an anaesthetist fee for a cataract procedures is £ [X].

²²⁵ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 51 line 27

²²⁶ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 54 line 10

²²⁷ URN 0247, Email from [CESP LLP employee 5a] to [CESP Ltd senior employee N], 12 July 2013.

²²⁸ URN 0330, Email exchange between [CESP Ltd senior employee N], [CESP Ltd employee J], [CESP Ltd employee H], [CESP Ltd employee I], [CESP senior board member 34a] and [Consultant 34b], 26 & 27 November 2013.

²²⁹ URN 0369, Email exchange between [Consultant 16a], [CESP Ltd employee J], [CESP senior board member 34a] and [CESP Ltd senior employee N], 3 January 2014.

- 3.128 [CESP Ltd senior employee N] also sought views from LLPs while attempting to negotiate an agreement with [PMI Provider 3].²³⁰ Throughout February 2013, various CESP LLP leads gave their views on what would be an acceptable IPPP price for [PMI Provider 3].
- 3.129 After [CESP Ltd senior employee A] was given delegated authority²³¹ to conclude IPPP agreements with [PMI Provider 1] and [PMI Provider 3], he calculated a proposed IPPP price for [PMI Provider 1] as follows: *‘So, I used historical data so the currently agreed prices and obviously did the best I can to work it ...obviously she [PMI Provider employee 1a], [PMI Provider 1] wanted a deal that was less than that’*.²³²
- 3.130 [CESP Ltd senior employee A], while attempting to negotiate an agreement with [PMI Provider 3], also sought input from CESP LLPs on what price would be agreeable.²³³
- 3.131 [CESP Ltd senior employee A] explained that he involved [CESP senior board member 12a], [X] of CESP Limited and a former consultant at [LLP 12], and a ‘mini’ Board of CESP LLP leads in the process of coming to an agreement with [PMI Provider 1].²³⁴ After obtaining approval from the ‘mini’ Board, in accordance with the decision making structure of CESP Limited, [CESP Ltd senior employee A] did not require further approval from the CESP LLPs not represented on the ‘mini’ Board.²³⁵
- 3.132 During his witness interview [CESP senior board member 5a] confirmed that the CESP LLPs were involved in formulating and sense checking IPPP prices.²³⁶
- 3.133 When asked about how he, as a representative of [LLP 34] was involved in formulating prices, [CESP senior board member 34a] explained to the CMA that he would be *‘feeding into HQ [CESP Limited] ballpark figures as to what level that you could comfortably afford in terms of what number’*.²³⁷ [CESP senior board member 34a] confirmed that the purpose of CESP Limited emailing CESP LLPs about prices was to get a view on whether the proposed price would be acceptable.²³⁸

²³⁰ URN 1013, Email from [CESP Ltd senior employee N] to a large number of LLP leads dated 5 February 2013.

²³¹ URN 0991, CESP Limited Board Meeting Minutes, 31 May 2014.

²³² URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 34 line 14.

²³³ URN 0446, Email exchange between [CESP Ltd senior employee A] and [Consultant 19a], 23 June 2014.

²³⁴ URN 3327, Transcript of interview with [CESP Ltd senior employee A] page 35 line 6 and page 37 line 14.

²³⁵ URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 42 line 1.

²³⁶ URN 3567, Transcript of interview with [CESP senior board member 5a], page 35 line 13.

²³⁷ URN 3568, Transcript of interview with [CESP senior board member 34a], page 43 line 18.

²³⁸ URN 3568, Transcript of interview with [CESP senior board member 34a], page 43 line 25-26.

Non-binding nature of the IPPP

3.134 As described above in paragraph 3.65, CESP LLPs can act independently of each other and do not require nor seek approval from any other body including CESP Limited when deciding whether or not to enter into CESP Limited's centrally negotiated IPPP agreements.

3.135 When an IPPP is agreed between CESP Limited and a PMI provider, the 18 trading CESP LLPs can either opt in or opt out of charging the IPPP price as they are not obliged to follow the IPPP agreements negotiated by CESP Limited on their behalf. Even if they opt in, Consultants can and do book patients outside these agreements (as "non-CESP" or "traditional private practice" patients) and are free to negotiate their own fees or shortfall patients.²³⁹ This was expressly confirmed by CESP Limited to a [LLP 16] consultant who asked if he was able to work outside the 2014 [PMI Provider 1] IPPP agreement as a sole trader.²⁴⁰ [CESP senior board member 12a] explained that whether or not a consultant chooses to use the CESP package price will depend on the local circumstances, such as, if the patient has expressed a preference for a facility and whether there is a facility contract in place (see paragraph 3.16).²⁴¹ If such a contract is not in place, the patient will be billed under the traditional model.²⁴²

3.136 A number of witnesses also confirmed to the CMA the non-binding nature of the IPPP agreements:

- [CESP Ltd senior employee A] said that CESP LLPs had the ability to charge what they wanted as it was not monitored by CESP Limited.²⁴³
- [CESP Ltd senior employee B] said '*...the agreements were agreed, but there was no obligation for the groups to use those agreements...we'd encourage them, you know, we felt that it was in their interest to do so, but there was no...there was no mandating of them to use them.*'²⁴⁴

²³⁹ URN 0485, [LLP 26] response to OFT information request, dated 17 March 2014, page 3: '*Individual partners of [LLP 26] are all able to enter into individual agreements with hospitals, self-pay patients or PMI companies. There are often situations when individual partners decide to work outside the LLP.*'

²⁴⁰ URN 0426, Email exchange between [CESP Ltd senior employee A] and [Consultant 16c] re [PMI Provider 1], dated 11 June 2014; URN 0427, Email from [CESP LLP employee 1a] to [CESP Ltd senior employee A] re [PMI Provider 1], dated 11 June 2014; and URN 0456, Email from [Consultant 16c] to [CESP Ltd employee C] re [PMI Provider 1] Agreement, 1 July 2014.

²⁴¹ In the CMA's Private Healthcare Market Investigation, the CMA found that a patient '*may have a choice of facility, as consultants usually have practicing rights at more than one hospital. However, in practice consultants tend to use one hospital as their main location, supplemented by one or two others.*' Paragraph 2.50. See also paragraph 3.10 above which sets out how patients choose a consultant.

²⁴² See paragraphs 3.18 to 3.20.

²⁴³ URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 54 line 24.

²⁴⁴ URN 3328, Transcript of interview with [CESP Ltd senior employee B] page 21 line 22-36.

- [CESP senior board member 5a] said ‘...I don’t think there’s any onus on us to toe the national line. We can opt in or opt out.’²⁴⁵

Implementation

- 3.137 If a trading CESP LLP chooses to opt in to a particular IPPP agreement, it can then bill the relevant PMI provider the IPPP price for procedures covered²⁴⁶ by the relevant agreement (although it is not obliged to do so even if it has opted in).
- 3.138 There is a significant difference between trading CESP LLPs as to how often they use the IPPP agreements. [CESP senior board member 5a] explained that due to regional cost variations some national IPPP agreements were likely to work for those CESP LLPs which incur lower local costs but would less likely work for those CESP LLPs which incur high local costs.²⁴⁷ The three trading LLPs with the highest turnovers used the IPPP agreements far more, and were successful at generating greater levels of income, than those trading CESP LLPs with lower turnover. These trading CESP LLPs were known as the ‘Millionaires Club’ and in 2011 consisted of [LLP 5], [LLP 34] and [LLP 13].²⁴⁸
- 3.139 Six CESP LLPs (one-third of the trading LLPs) charge the agreed IPPP price automatically through use of the VPMS system. At least three other trading LLPs have updated their billing systems to bring them into line with IPPP prices. For example:
- [LLP 15] stated ‘We use CESP (UK) fee schedule for insured patients whose procedures are allowed to be done by us at [LLP 15]’.²⁴⁹
 - Regarding the IPPP agreement with [PMI Provider 1], [CESP Ltd senior employee N] emailed [LLP 5] suggesting that ‘[i]t would be better if [LLP 5] continued to bill in line with the agreed prices for these codes.’ [CESP LLP employee 5a] [X] at [LLP 5]) confirmed that ‘[w]e apply the contract prices to all insurers (including [PMI Provider 1]) where those prices exist.’²⁵⁰ [CESP LLP employee 5a] confirmed that once an IPPP

²⁴⁵ URN 3567, Transcript of interview with [CESP senior board member 5a] page 54 line 9.

²⁴⁶ This differs between IPPP agreements. For example, the 2008 [PMI Provider 1] agreement (see paragraph 3.174 below) covered only two procedure codes, whereas the 2014 [PMI Provider 1] agreement (see paragraph 3.204 below) covered three procedure codes.

²⁴⁷ URN 3567, Transcript of interview with [CESP senior board member 5a], page 34 lines 4-10.

²⁴⁸ URN 0112, CESP Board Meeting Slides, 14 May 2011.

²⁴⁹ URN 1075, [LLP 15] submission to CMA, dated 28 July 2014.

²⁵⁰ URN 0247, Email exchange between [CESP Ltd senior employee N], [CESP LLP employee 5a] and [CESP senior board member 5a], dated 17 July 2013.

was in place, [LLP 5] would charge the price, and he said *‘even if it’s – even if it’s tough then, you know, we stick with it.’*²⁵¹

- Following the circulation of the 2014 [PMI Provider 1] price list [Consultant 13a] asks his Practice Manager at [LLP 13] to *‘revise the PP²⁵² pricing for Yags and Cataracts.’*²⁵³ [CESP LLP employee 13a] responds *‘we need to revise a lot of our packages, am currently working on a spreadsheet.’*²⁵⁴ The CMA interprets this email exchange as showing the CESP LLP’s decision to implement the newly agreed IPPP price in practice.

3.140 Therefore, the CMA understands that at least half of the trading CESP LLPs (nine out of 18) have implemented IPPP prices in practice.

Empowerment of CESP Limited to enter into agreements with PMI providers on the CESP LLPs’ behalf

Introduction

3.141 From its incorporation in 2008 it was recognised that negotiating and entering into IPPP agreements with PMI providers would be an important part of the services that CESP Limited would offer its members (see paragraph 3.144 below).

3.142 As indicated above, CESP Limited negotiated and entered into IPPP agreements on CESP LLPs’ behalf. From 2008 to present, a number of individual CESP Limited employees or officers have expressly been given authority to enter into such agreements. In addition, authority was given tacitly to other employees. These employees and officers of CESP Limited all reported to CESP Limited’s Chair, a consultant member, and ultimately to the Board of all CESP LLPs or, more recently, a sub-set thereof (known as the ‘mini’ Board see paragraphs 3.153 to 3.154 below).

3.143 The process of CESP LLPs opting into specific IPPP agreements was initially formal, with LLPs being required to enter into *‘back to back sub agreements with CESP Limited’*.²⁵⁵ As far as the CMA is aware, such sub agreements were only entered into by four CESP LLPs in relation to the 2008 [PMI Provider 1] agreement,²⁵⁶ and this formal process seems to

²⁵¹ URN 3524, Transcript of interview with [CESP LLP employee 5a], page 40 line 26-27.

²⁵² URN 3846, Response to the draft Statement of Objections. The CMA understands that ‘PP’ stands for private practice.

²⁵³ URN 1030, Email from [Consultant 13a] to [CESP LLP employee 13a], 14 June 2014.

²⁵⁴ URN 1030, Email from [CESP LLP employee 13a] to [Consultant 13a], 16 June 2014.

²⁵⁵ URN 2551, CESP Limited Board minutes of 13 September 2008.

²⁵⁶ URN 2618, 2008 [PMI Provider 1] agreement. It concerns [LLP 30], [LLP 1], [LLP 18] and [LLP 34].

have been abandoned subsequently, in favour of CESP LLPs simply indicating to CESP Limited if they wished to opt out.

PMI provider recognition and IPPP negotiation is a CESP Limited priority

3.144 Shortly after its incorporation, CESP Limited carried out a remit survey among CESP LLPs, which was presented to and discussed with the Board at CESP Limited's inaugural Board meeting and at subsequent Board meetings in the summer of 2008. The survey showed that CESP LLPs considered that the priority areas for CESP Limited should be insurance company recognition and IPPP,²⁵⁷ because the *'risk is that PMI companies will route patients around CESP LLPs to the long term detriment of the LLPs and their constituent partners.'*²⁵⁸

3.145 When asked why IPPP and insurer negotiation was important to the LLPs, [CESP Ltd senior employee M] said:

*'And this is in 2008, so if you take the context in - I think it was 2007 I guess - [PMI Provider 3] made their first attempt at cutting reimbursement levels for cataract surgery and so, you know, in that period that was at the top of people's minds. You know, if you think about their incomes, half of their income as individuals came from surgery, half from outpatients. Out of the half that came from surgery a third was probably self-paid, two thirds was insured and out of the two thirds that was insured, half of them, or 40% of it was [PMI Provider 3]. And so when they attempt to cut reimbursement levels, I guess people got quite worried so sort of not surprising given when this was done that that was at the top.'*²⁵⁹

3.146 He added that negotiating as a group made it easier to negotiate package prices with PMI providers.²⁶⁰ [CESP Ltd senior employee B] also said that historically individual consultants would have dealt with PMI providers directly and the aim of CESP Limited *'was to discuss collectively fees with insurers'*.²⁶¹

Delegated authority to [CESP Ltd senior employee M]

3.147 Following presentation of the remit survey, CESP Limited's Board passed three resolutions in September 2008, one of which was to authorise [CESP

²⁵⁷ URN 3355, CESP Limited Board Slides June 2008, page 12.

²⁵⁸ URN 0147, August 2008 Board meeting, page 10.

²⁵⁹ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 27, lines 12 to 25.

²⁶⁰ URN 3329, Transcript of interview with [CESP Ltd senior employee M] page 42 line 2

²⁶¹ URN 3328, Transcript of interview with [CESP Ltd senior employee B] page 12, line 16.

Ltd senior employee M] to enter into agreements with PMI providers on the CESP LLPs' behalf:

- *'The Board of CESP Limited approves the strategy to engage with insurance companies;*
- *The Board of CESP Limited gives [CESP Ltd senior employee M] authority to enter into central agreements with insurers; and*
- *The Board of CESP Limited requires that all LLPs wishing to participate in CESP Limited agreements with insurers will enter into back to back sub agreements with CESP Limited*²⁶²

3.148 [CESP Ltd senior employee M] explained to the CMA that prior to being given delegated authority, he was already conducting negotiations with PMI providers, but no agreements had yet been concluded. He added: *'...I assume that we got some deals which had been in principle agreed, in order to consummate the contracts I needed authority.'*²⁶³

3.149 [CESP Ltd senior employee M] confirmed that he reported to the Board during this period.²⁶⁴ [X] was CESP Limited's Chair at the time.

[CESP Ltd senior employee N] authorised to negotiate

3.150 In 2009 [CESP Ltd senior employee M] left CESP Limited²⁶⁵ and [CESP Ltd senior employee N] took over responsibility for negotiations with PMI providers. Around the same time, [X] succeeded [X] as Chair. Both [CESP Ltd senior employee N] and [CESP senior board member 34a] were later explicitly empowered to continue to negotiate agreements with PMI providers.²⁶⁶

3.151 During their time at CESP Limited, [CESP Ltd senior employee M] and [CESP Ltd senior employee N] were supported by various CESP Limited employees, including [CESP Ltd senior employee B], [CESP Ltd employee K], [CESP Ltd employee J] and [CESP Ltd employee H]. All were ultimately

²⁶² URN 2551, CESP Board Minutes September 2008.

²⁶³ URN 3329, Transcript of interview with [CESP Ltd senior employee M] page 50, line 20

²⁶⁴ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 9, line 7.

²⁶⁵ URN 3329, Transcript of interview with [CESP Ltd senior employee M] page 8, line 11. [CESP Ltd senior employee M] remained a shareholder in CESP Limited *'so apart from my shareholding I ceased to have any involvement with CESP'*. URN 3329 Transcript of interview with [CESP Ltd senior employee M], page 11, line 15.

²⁶⁶ URN 0108, CESP Board Slides, 11 May 2013: [CESP Ltd senior employee N] and [CESP senior board member 34a] *to negotiate a good a deal as possible with [PMI Provider 3] (cataract only) and bring it back to the Board.'* URN 0839, minutes of the 12 October 2013 board meeting state: *'ACTION – [CESP Ltd senior employee N] to continue price negotiations with [PMI Provider 2] for a 'cataract pathway' with clinical input from [CESP senior board member 34a].'*

accountable to a consultant Chair²⁶⁷ who was appointed by CESP LLPs and ultimately by CESP Limited's Board, on which all CESP LLPs had a seat.

3.152 Around December 2013 or January 2014 (the exact timing is not clear to the CMA) [CESP Ltd senior employee N] left CESP Limited.

New CESP Board structure and delegated authority to [CESP Ltd senior employee A]

3.153 In February 2014, a Board telephone conference call was held. It was decided that [X] would take over as Interim Chairman following [X] resignation.²⁶⁸ Additionally a new Board structure was proposed with the introduction of a 'mini-board' to operate on behalf of the Board in certain matters. The purpose of this 'mini' Board²⁶⁹ was to represent the interests of the 18 trading LLPs.²⁷⁰ It comprised of:

- [CESP senior board member 12a] of CESP [LLP 12],
- [CESP senior board member 5a]/ [Consultant 5b] of [LLP 5],
- [Consultant 13a] of [LLP 13],
- [Consultant 16c] of [LLP 16],
- [Consultant 21a] of [LLP 21],
- [Consultant 38a]/[Consultant 38b] of [LLP 38], and
- [Consultant 34b] of [LLP 34].

3.154 By May 2014 the new 'mini' Board was involved in decision making in relation to the 2014 national IPPP agreement with a number of PMI providers including [PMI Provider 1].²⁷¹ [CESP Ltd senior employee A] was given delegated authority to negotiate agreements with PMI providers, and in particular to negotiate the best deals with [PMI Provider 1] and [PMI Provider 3].²⁷²

²⁶⁷ During [CESP Ltd senior employee M]'s time the CESP Limited Chairman was [X]. [X] was the Chairman during the time [CESP Ltd senior employee N] was [X].

²⁶⁸ URN 0940, Minutes of 7 February 2014 Board Teleconference.

²⁶⁹ As referenced by [CESP Ltd senior employee A], URN 3327 Transcript of Interview with [CESP Ltd senior employee A], page 36 page 18

²⁷⁰ URN 3327, Transcript of Interview with [CESP Ltd senior employee A] page 37 line 1.

²⁷¹ URN 3327, Transcript of Interview with [CESP Ltd senior employee A], page 37 line 17.

²⁷² URN 0941, CESP Board Meeting, 31 May 2014.

How the IPPP maintains CESP LLPs' and their consultant members' prices above the level they would otherwise be

Introduction

3.155 From the start of the IPPP negotiations in late 2008 and early 2009, it was recognised by the CESP Limited Board that agreeing IPPP agreements with PMI providers would protect CESP LLP members' position in the market by giving them control over their fees and referrals, resulting in increased revenue and profit for CESP LLPs.

How the IPPP mechanism increases/maintains revenues

3.156 The IPPP mechanism raises the consultant's fee above the level that consultants would receive under PMI providers' benefit maxima. It also includes an allocation for CESP LLP margin. The figures at 3.7a and 3.7b below show how six different CESP LLPs²⁷³ have allocated the IPPP price between the component parts of the package (consultant fee, the LLP margin and the anaesthetist fee) and how this compares to the benefit maxima for [PMI Provider 4], [PMI Provider 1], [PMI Provider 2] and [PMI Provider 3] for both cataracts and YAG laser procedures.

Figure 3.7a: Consultant revenue for cataracts (C7122)

[X]

Source: Evidence gathered by the CMA and public sources.^{274, 275}

Figure 3.7b: Consultant revenue for YAG Laser (C7340)

[X]

Source: Evidence gathered by the CMA and public sources.^{276,277}

Evidence that the IPPP's purpose was to protect CESP LLPs and their members in the market

3.157 The CMA has obtained a significant number of Board minutes, slides, newsletters and emails which indicate that it was recognised by the CESP Limited Board that agreeing IPPP agreements with PMI providers would protect CESP LLP members' position in the market by giving them control

²⁷³ For cataracts, the CESP LLPs are: [LLP 16], [LLP 31], [LLP 3], [LLP 30], [LLP 18], [LLP 34] [LLP 16] rates. For YAG laser, the CMA only had evidence for three CESP LLPs: [LLP 31], [LLP 30], [LLP 34], [LLP 16] rates.

²⁷⁴ [X]

²⁷⁵ [X]

²⁷⁶ [X]

²⁷⁷ [X]

over their fees and referrals, resulting in increased prices, revenue and profit.

- 3.158 For example, the appendix to the February 2009 Board minutes²⁷⁸ entitled 'Access to CESP PMI contracts' states:

'CESP has negotiated a number of national contracts with PMI providers such that an LLP can provide services under the IPPP from any hospital that gives permission to package its charges. As well as delivering control of the whole episode of care, these contracts can produce significant incremental returns.

On average the PMI contracts CESP has negotiated produce a [X]% incremental profit on IPPP turnover.'

- 3.159 In December 2010, a CESP Limited newsletter sent to all CESP LLPs states *'from a recent analysis of the negotiated IPPP procedures, it is clear that the programme increases incremental income by approximately [X]% for cataract procedures, whilst other procedure increase income in excess of [X]%'.*²⁷⁹

- 3.160 The minutes of CESP Limited's Board meeting of May 2011 under the heading *'Financial benefits of CESP'* read, *'[CESP Ltd senior employee N] ran through examples of the benefits of the CESP model showing additional revenue and costs associated with CESP. This shows that all LLPs are significantly better off through CESP, and that their position is protected against changes in the market.'*²⁸⁰

- 3.161 The minutes of the subsequent CESP Board meeting of 1 October 2011 show that the minutes of the May 2011 Board meeting were approved.²⁸¹ This shows that the CESP Limited Board did not make any attempt to distance itself from what [CESP Ltd senior employee N] presented to them.

- 3.162 A slide (see below), presented to the Board members at the January 2013 Board meeting, on potential revenue without CESP Limited, shows that the consultant's component for cataract surgery would rise and then be maintained via the CESP Limited IPPP model but would fall significantly if

²⁷⁸ URN 2555, CESP Board Meeting Minutes 7 February 2009.

²⁷⁹ URN 1131, CESP Members' Newsletter, dated November 2010, page 1.

²⁸⁰ URN 0122, CESP Board Minutes, dated 14 May 2011.

²⁸¹ URN 0123, CESP Board Minutes, dated 1 October 2011.

consultants dealt with facility providers (the red line in the graph) or PMI providers such as [PMI Provider 3] (the green line in the graph) directly.²⁸²

Figure 3.8: Slide showing potential revenue with and without CESP Limited IPPP

[X]

Source: CESP Board meeting January 2013.²⁸³

- 3.163 A further slide presented to the January 2013 Board highlighted the need to maintain *'local control and increased revenue streams'*²⁸⁴ and another set out that consultants can *'SIMPLY INCREASE REVENUE THROUGH IPPP'*²⁸⁵ (capitalised in slide).
- 3.164 In October 2013, the Board meeting slides for that month set out CESP Limited's strategy, which includes *'Maintain pricing at current levels eg. £ [X] vs. £ [X] for cataracts'* and *'Insurer and hospital contracts to deliver maximum value to the consultants.'*²⁸⁶
- 3.165 CESP Limited also reiterated its aims to CESP LLPs by email. One email discusses how the CESP LLP can *'earn really good money'* and that the lack of transparency of the package price components *'mean that no one else is aware what you earn and that you take a chunk out of the insurer and facility fee, as well as protecting your surgeon fee.'*²⁸⁷
- 3.166 In a further email sent by [CESP Ltd senior employee N] dated 24 March 2013 to [Consultant 19a] [LLP 19], [CESP Ltd senior employee N] says: *'The value of CESP is almost completely at the LLP level (keeping surgeons fees very high, profit on IPP deals, sharing information, creating common systems...).'*²⁸⁸
- 3.167 A number of meeting minutes and emails also show that the CESP LLPs understood that the aim of CESP Limited to negotiate and conclude IPPP agreements was to increase revenue and profitability for both the surgeon and the CESP LLP itself, and to protect consultants from reduced fees.

²⁸² URN 0799, CESP Limited Board Meeting Slides, dated 12 January 2013, slide 17.

²⁸³ URN 0799, CESP Limited Board Meeting Slides, dated 12 January 2013, Slide 17.

²⁸⁴ URN 0799, CESP Limited Board Meeting Slides, dated 12 January 2013, Slide 18.

²⁸⁵ URN 0799, CESP Limited Board Meeting Slides, dated 12 January 2013, Slide 24.

²⁸⁶ URN 1442, CESP Limited Board Meeting Slides, dated 12 October 2013.

²⁸⁷ URN 0219, Email from [CESP senior board member 34a] to [Consultant 19a] re CESP members update, dated 24 March 2013, page 5.

²⁸⁸ URN 0219, Email from [CESP senior board member 34a] to [Consultant 19a] re CESP members update, dated 24 March 2013, page 2.

3.168 For example, an email from [Consultant 4a] sets out his recollection of a meeting in [redacted] on 3 July 2014 and in particular the earning potential of being a CESP member. It states:

‘... I made these points: 1. The gain is with the provider’s side of fees, in the sense that some of the provider’s fee, after paying hospital costs, is a CESP income, a significant part of which ultimately goes to the surgeon. This applies particularly to insured patients, for the health insurances that recognise CESP as a provider 2. I gave an example applicable to me (and [Consultant 4c]) with intravitreal injections. If we invoice via CESP we can earn approximately 4 times the amount payable by [PMI Provider 3] for an intravitreal injection, making CESP much more attractive than being a [PMI Provider 3] fee assured consultant. 3. I reiterated that [Consultant 4b] had a tangible realisation of CESP power as provider after invoicing £ [redacted]k for just two procedures, an amount of money he could not invoice for as a sole practitioners outside CESP.’²⁸⁹

3.169 Minutes of a meeting held at [LLP 13] on 22 November 2010 state *‘Partnership highly dependent on using insurance deals to improve partnership profits.’*²⁹⁰

3.170 Minutes of a meeting held at [LLP 1] on 27 February 2012 state *‘[Consultant 1a] also spoken [sic] about the potential profitability of using the contracts CESP has with the insurance companies to invoice for minor out-patient procedures. It was agreed that [CESP LLP employee 1a] would send all the partners an email with details for this.’*²⁹¹

Negotiating and concluding IPPP agreements in practice

Introduction

3.171 This section presents how the IPPP mechanism described above actually functioned in practice, with CESP Limited negotiating and concluding a number of IPPP agreements since 2008. The section starts with the conclusion of the first [PMI Provider 1] agreement in 2008, followed by a description of the failed attempt to renegotiate a deal in 2011 and then culminating in the second [PMI Provider 1] agreement in 2014.

²⁸⁹ URN 0598, Email from [Consultant 4a] to [Consultant 4b] re CESP meeting, dated 08 July 2014, page 2.

²⁹⁰ URN 0992, [LLP 13] Meeting minutes, dated 22 November 2010, page 2.

²⁹¹ URN 0556, [LLP 1] Partners Meeting, Dated 13 June 2011.

3.172 The section then provides a summary of the three [PMI Provider 2] IPPP agreements, starting in 2009, followed by the 2011 and then 2014 agreements.

3.173 Finally there is a summary of the negotiations to conclude IPPP prices with a number of smaller PMI provider such as [PMI Provider 5], [PMI Provider 4] and [PMI Provider 7], who are all charged significantly higher IPPP prices than [PMI Provider 1] and [PMI Provider 2].

[PMI Provider 1]

The 2008 [PMI Provider 1] agreement

3.174 The first IPPP agreement that CESP Limited entered into with [PMI Provider 1] ('the 2008 [PMI Provider 1] agreement')²⁹² was effective from 1 November 2008 and was initially for a year, after which it was automatically extended for an indefinite period (with a possibility for either party to terminate the agreement by giving three months' written notice). The agreement covered the two most common procedures: cataracts (codes C7100, C7110, C7122, C7123, C7124, C7125 and C7180), and Yag laser photo disruption of posterior capsule of lens procedures (code C7340, hereafter 'Yag').

3.175 The 2008 [PMI Provider 1] agreement initially only applied to four CESP LLPs,²⁹³ but a further 13 CESP LLPs acceded to the agreement in later years. As negotiations for a new agreement in 2011 were unsuccessful (see below), the 2008 [PMI Provider 1] agreement remained in force until the 2014 agreement entered into force.²⁹⁴

3.176 The CMA has obtained limited documentary evidence in relation to the 2008 agreement and whether it was used in practice by the 17 CESP LLPs who ultimately signed up to it. Evidence dating from 2013 confirms that [LLP 5] was charging [PMI Provider 1]-insured patients in accordance with the 2008 [PMI Provider 1] agreement.²⁹⁵ A number of CESP LLPs considered the IPPP prices in the 2008 [PMI Provider 1] agreement too

²⁹² URN 2618, Agreement between CESP Limited and [PMI Provider 1], November 2008.

²⁹³ [LLP 30], [LLP 1], [LLP 18] and [LLP 34].

²⁹⁴ See for example URN 0175 Email from [CESP Ltd senior employee N] (CESP Limited) to [Consultant 21b] [LLP 21] dated 12 September 2012, confirming a package price is in place for [PMI Provider 1] of £[<] in [LLP 16] and £[<] outside London (in line with the 2008 [PMI Provider 1] agreement). See also URN 2621 [PMI Provider 1] response to the CMA's Section 26 request, in which it confirmed that [LLP 17] acceded to the 2008 [PMI Provider 1] agreement in February 2012, at a package price of £[<], again in line with the 2008 [PMI Provider 1] agreement.

²⁹⁵ URN 0247, Email exchange between [CESP Ltd senior employee N], [CESP LLP employee 5a] and [CESP senior board member 5a], dated 17 July 2013, page 1.

low.²⁹⁶ Two CESP LLPs [LLP 5] and [LLP 34] indicated that the 2008 [PMI Provider 1] agreement represented a loss for them.²⁹⁷ [CESP senior board member 5a] explained to the CMA that the reference to a loss at [LLP 5] related to the lack of LLP margin and resulted from working to a consultant's fee of £ [X] and having to incur an anaesthetist fee at the local NHS hospital.²⁹⁸

3.177 The IPPP price in the 2008 [PMI Provider 1] agreement was not considered low by all CESP LLPs. For example:

- [Consultant 16b] [LLP 16] indicated: *'t]hat's very helpful [CESP Ltd senior employee A] thanks as I was under the impression (clearly wrong) that we could not do [PMI Provider 1] , this puts a rather better spin on things (for cataracts at least)...'*²⁹⁹
- Similarly, [Consultant 16a] (again [LLP 16]) said: *'the current CESP – deal is about right (I recall about £ [X] ...). Theres [sic] enough money to pay for an anaesthetist when necessary'*.³⁰⁰

The 2011 negotiations with [PMI Provider 1]

3.178 In November 2011, CESP Limited attempted to negotiate a new agreement between the two parties. However, this attempt failed on the basis that [PMI Provider 1] would not agree to CESP Limited's request for a [X]% price increase.³⁰¹

3.179 [CESP Ltd employee K] of CESP Limited subsequently sent an update about these discussions to the representatives of 20 CESP LLPs,³⁰² indicating that CESP Limited expected an increase in prices to *'be agreed*

²⁹⁶ In an email exchange between [Consultant 16c] [LLP 16] and [CESP Ltd employee I] (CESP Limited), [Consultant 16c] indicated: *'[t]he £ [X] IPPP for C7340 is quite low – i think we will be better off ignoring it, and treating [PMI Provider 1] like the other 2 insurers.'* See URN 0202.

²⁹⁷ URN 0205, email exchange between (amongst others) [CESP senior board member 5a] and [CESP senior board member 34a], 5 February 2013.

²⁹⁸ URN 3567, Transcript of interview with [CESP senior board member 5a], page 42 lines 16-27.

²⁹⁹ URN 0264, Email Exchanges between [Consultant 16b] [LLP 16] and [CESP Ltd senior employee A] (CESP Limited), dated 25 September 2013.

³⁰⁰ URN 1213, Email from [Consultant 16a] to [CESP Ltd senior employee N], [CESP senior board member 34a], [Consultant 16b] and [Consultant 16c], dated 16 October 2013. [X] stands for [PMI Provider 1].

³⁰¹ According to a summary of these discussions sent by CESP Limited to [PMI Provider 1], [PMI Provider 1] *'suggested that a review of prices would affect cataract network referral preference and no increases have been given to other providers.'* In addition, the summary reads *'CESP – will not be able to agree a fee across the board for [X] due to problems: 1) would be seen as price fixing 2) Consultants will not agree one price 3) [X]'*. See URN 0154, Email from [CESP Ltd senior employee N] to [CESP senior board member 34a] and others re [PMI Provider 1] Meeting Summary, 1 December 2011.

³⁰² It concerns representatives of [LLP 3], [LLP 31], [LLP 16], [LLP 17], [LLP 19], [LLP 18], [LLP 7], [LLP 12], [LLP 34], [LLP 10], [LLP 5], [LLP 6], [LLP 21], [LLP 38], [LLP 29], [LLP 13], [LLP 29], [LLP 22], [LLP 30] and [LLP 26].

shortly'.³⁰³ The email also states: *'We will agree these codes nationally for you so that [PMI Provider 1] cannot play you off against each other to gain the lowest possible fee.'* In relation to this email, and particularly what [CESP Ltd employee K] may have meant by *'play you off against each other'*, [CESP Ltd senior employee B] explained that by negotiating a national price centrally, CESP Limited could limit the PMI provider's ability to negotiate prices down, something that may not be possible if negotiations occurred on an individual CESP LLP basis.³⁰⁴

- 3.180 Despite discussions on a new agreement, a deal does not appear to have been agreed shortly after that email was sent.

The 2014 [PMI Provider 1] agreement

- 3.181 Towards the end of 2012, [PMI Provider 1] was concerned about CESP Limited consultants shortfalling its members and CESP consultants pricing outside the CESP Limited IPPP price.³⁰⁵ In a meeting with the CMA, [PMI Provider 1] explained that *'where [PMI Provider 1] has signed a contract and agreed a package price, it has a zero tolerance for consultants going above that price.'*³⁰⁶
- 3.182 During January and February 2013, CESP Limited and some of its members engaged in discussions about the level of IPPP prices charged to [PMI Provider 1]. In this period, CESP Limited presented to the CESP LLPs that *'[t]he break even point for an average LLP is approximately £ [redacted], which is similar to the price agreed with [PMI Provider 1]'*.³⁰⁷
- 3.183 Discussions to conclude a new IPPP agreement with [PMI Provider 1] continued through 2013, led by [CESP Ltd senior employee N] and [CESP Ltd employee J] from CESP Limited. However, according to [PMI Provider 1], consultant overcharging and shortfalling continued to be a cause for concern for [PMI Provider 1].³⁰⁸ During this period, CESP Limited sought significant feedback from individual CESP LLPs on the negotiations and their outcome, as set out below.

³⁰³ URN 1143, Email from [CESP Ltd employee K] to Others re [PMI Provider 1] & CESP Limited National Contracting Discussions Update, 07 December 2011, page 1.

³⁰⁴ URN 3328, Transcript of interview with [CESP Ltd senior employee B], page 43 lines 31-32

³⁰⁵ URN 0192, Email from [PMI Provider employee 1a] to [CESP Ltd employee K], 17 October 2012.

³⁰⁶ URN 3217, [PMI Provider 1] Meeting note, 3 February 2015.

³⁰⁷ URN 1690, PowerPoint slides for CESP Limited's board meeting, dated 12 January 2013. A table in the slides shows that with a hospital price of £ [redacted], an anaesthetist fee (if one is used) of £ [redacted], a surgeons fee of £ [redacted], a follow up fee of £ [redacted] and a fee paid to CESP Limited of £ [redacted] (that is, [redacted]% of the IPPP), an IPPP of £ [redacted] would not allow for an LLP margin owing to their sizeable facility fees and the choice for a higher surgeon's fee rather than LLP profit.

³⁰⁸ URN 2621, [PMI Provider 1] response to the CMA's Section 26 Notice.

- 3.184 [CESP Ltd senior employee N] initially sought input from [CESP LLP employee 5a] and [CESP senior board member 5a], [LLP 5]. In July 2013, [CESP LLP employee 5a] provided a list of the local prices [LLP 5] charged [PMI Provider 1] for the procedures which were not covered by the 2008 [PMI Provider 1] agreement. [CESP LLP employee 5a] explained that [LLP 5] charged in accordance with the 2008 [PMI Provider 1] agreement for the two agreed procedures and charged [PMI Provider 1] insured patients 'self-pay' IPPP prices for other procedures. However, [CESP LLP employee 5a] said that for those other procedures, [PMI Provider 1] only reimbursed its patients up to a certain amount, putting patients at risk of a shortfall.³⁰⁹ [CESP LLP employee 5a] explained to the CMA that [PMI Provider 1] had claimed at the time that prices for procedures outside cataracts and Yag had been agreed with [LLP 5]. [CESP LLP employee 5a] denied that any such agreement had been made and so [LLP 5] would '*submit a standard self pay price*' to patients.³¹⁰
- 3.185 In the same period, [CESP senior board member 5a] expressed concern to [CESP Ltd senior employee N] that constant shortfalling of patients was creating a '*bad feeling*' and was putting [LLP 5] in a '*difficult position*'. [CESP senior board member 5a] suggested the '*best route for our LLP would probably be to renege on the national agreement and charge [PMI Provider 1] the full self-pay rate via credit card- but this would not help with the national negotiation.*'³¹¹ In response, [CESP Ltd senior employee N] confirmed that '*[i]t would obviously be better if [LLP 5] continued to bill in line with the agreed prices for these codes*'. [CESP LLP employee 5a] replied to this saying '*[w]e apply the contract prices to all insurers (including [PMI Provider 1]) where those prices exist*'.³¹²
- 3.186 Towards the end of 2013, [PMI Provider 1] considered terminating the 2008 [PMI Provider 1] agreement, as it was '*not sure that we can continue to work together in the current format*'.³¹³ [PMI Provider 1] explained in an email to [CESP Ltd employee J] : '*If you add in the [X] on the Package Prices we have agreed with CESP, then the whole episode cost, in [sic] no longer competitive with our other providers and is around £ [X] - £ [X]*

³⁰⁹ URN 0247, Email from [CESP LLP employee 5a] to [CESP Ltd senior employee N], dated 12 July 2013, page 4.

³¹⁰ URN 3524, Transcript of interview with [CESP LLP employee 5a], page 35 line 11-12

³¹¹ URN 0247, Email exchange between [CESP Ltd senior employee N], [CESP LLP employee 5a] and [CESP senior board member 5a], dated 17 July 2013, page 1.

³¹² URN 0247, Email exchange between [CESP Ltd senior employee N], [CESP LLP employee 5a] and [CESP senior board member 5a], dated 17 July 2013, page 1.

³¹³ URN 0338, Email exchange between [CESP Ltd employee J] (CESP Limited) and [PMI Provider employee 1a] [PMI Provider 1], 26 November 2013.

*more expensive. We are not convinced that this provides best value for our members’.*³¹⁴

3.187 [CESP Ltd senior employee N] sought comments on this email from [Consultant 34b] and [CESP senior board member 34a] (both [LLP 34]) in November 2013.³¹⁵ In response, [CESP senior board member 34a] said *‘[w]e have a problem as both sides are picking and choosing, [PMI Provider 1] on one side and the consultants on the other, as you say cherry picking ... Our tariff netts [sic] a surgeon considerably more than if they see a patient elsewhere under the [PMI Provider 1] tariff. So we need to make this clear to the surgeons who are able to take patients up under our [PMI Provider 1] agreement’.*³¹⁶ [CESP senior board member 34a] explained to the CMA that some members of [LLP 34] were billing outside of the 2008 [PMI Provider 1] agreement as sole traders, as consultants are free to use the traditional type of billing.³¹⁷ Subsequently, [CESP Ltd employee J] forwarded part of [PMI Provider 1]’s email to representatives of [LLP 34], [LLP 16], [LLP 30], [LLP 21] and [LLP 22].³¹⁸ Among other things, [CESP Ltd employee J] asked them for their input on renegotiating new prices with [PMI Provider 1].

3.188 [Consultant 16a] [LLP 16] responded to this email in January 2014: *‘...trying to persuade my colleagues in [X] that invoicing thru [sic] CESP for phacos may be our solution – so obviously we need the [PMI Provider 1]³¹⁹ cataract package to still be in place. Losing it would significantly reduce the protection CESP offers us from the local hospitals.’*³²⁰

3.189 [CESP senior board member 34a] replied to [CESP Ltd employee J] email in the same period, copying in [Consultant 16a] and [CESP Ltd senior employee N]: *‘[g]ood stuff. At the end of the day all other factors will be*

³¹⁴ URN 0338, Email exchange between [CESP Ltd employee J] (CESP Limited) and [PMI Provider employee 1a] [PMI Provider 1], 26 November 2013.

³¹⁵ URN 0330, Email Exchange between [CESP Ltd senior employee N], [CESP Ltd employee J], [CESP Ltd employee H], [CESP Ltd employee I], [CESP senior board member 34a] and [Consultant 34b], re CESP and [PMI Provider 1] dated 26 and 27 November 2013.

³¹⁶ URN 0330, Email Exchange between [CESP Ltd senior employee N], [CESP Ltd employee J], [CESP Ltd employee H], [CESP Ltd employee I], [CESP senior board member 34a] and [Consultant 34b], re CESP and [PMI Provider 1] dated 26 and 27 November 2013, page 1.

³¹⁷ URN 3568, Transcript of interview with [CESP senior board member 34a], page 47 lines 22-26 and page 48 line 9-17.

³¹⁸ URN 0349, Email from [CESP Ltd employee J] to Others, dated 13 December 2013.

³¹⁹ The email mentions [X], which the CMA understands refers to [PMI Provider1], the full name of [PMI Provider 1] being ‘[PMI Provider 1]’.

³²⁰ URN 0366, Email from [Consultant 16a] to [CESP Ltd employee J], 2 January 2014.

secondary to price'.³²¹ When asked at his interview what these other factors were [CESP senior board member 34a] could not recall.³²²

3.190 The beginning of 2014 saw changes at CESP Limited with both [CESP Ltd employee J] and [CESP Ltd senior employee N] leaving the organisation. [CESP Ltd senior employee A] took over negotiations with [PMI Provider 1] in early 2014 and attempted to re-establish contact. However, [PMI Provider 1] was not satisfied that CESP Limited had put solutions forward to solve the issues that it had raised in November 2013.³²³ [CESP Ltd senior employee A] informed CESP Limited's Board of the difficulties in dealing with [PMI Provider 1] in April 2014.³²⁴

3.191 [PMI Provider 1] made it clear to CESP Limited that any new deal would have to be a *'fully inclusive package to include [X] which is competitive'*. [PMI Provider 1] also indicated that an inclusive package deal would not apply to facilities with which [PMI Provider 1] already had an agreement in place. At those facilities, CESP Limited would need to invoice for the consultant and anaesthetist fees separately.³²⁵

3.192 In June 2014, [PMI Provider 1] confirmed that it was willing to agree to *'the newly proposed terms set out below'*. [PMI Provider 1]'s email lists all trading CESP LLPs covered by the London and non-London rates and mentions an IPPP price of £ [X] for London and £ [X] for non-London. In contrast to the 2008 agreement, the 2014 IPPP price would include [X].³²⁶

3.193 [CESP Ltd senior employee A] shared this proposal with [CESP senior board member 12a], who subsequently shared it with the mini Board. [CESP Ltd senior employee A] stressed to [CESP senior board member 12a] that it was important that CESP Limited *'keep [PMI Provider 1] as an insurer'*. [CESP senior board member 12a] subsequently sent the [PMI Provider 1] proposal to the mini Board, outlining the London and non-London price and adding, *'[r]emember the [X]% CESP IPPP fee is now down to [X]% for those not using an anaesthetist it remains a pretty*

³²¹ URN 0369, Email Exchange between [Consultant 16a], [CESP Ltd employee J], [CESP Ltd senior employee N] and [CESP senior board member 34a], re CESP & [PMI Provider 1] dated 2 and 3 January 2014, page 1.

³²² URN 3568, Transcript of interview with [CESP senior board member 34a], page 49 line 2

³²³ URN 0410, Email from [PMI Provider employee 1a] to [CESP Ltd senior employee A], 9 May 2014.

³²⁴ URN 1224, Email from [CESP Ltd senior employee A] to Others re Direction of CESP Limited, dated 11 April 2014. As [CESP Ltd senior employee A] used Bcc, it is not clear who this email was sent to. However, it was submitted to the CMA by [LLP 16].

³²⁵ URN 0410, Email from [PMI Provider employee 1a] to [CESP Ltd senior employee A], 9 May 2014.

³²⁶ URN 0417, Email from [PMI Provider employee 1a] [PMI PROVIDER 1] to [CESP Ltd senior employee A] (CESP Limited) re [PMI Provider 1], dated 4 June 2014, page 2.

reasonable deal.' [CESP senior board member 12a] asked the addressees, '[a]re you "happy" with this? Any comments?'³²⁷

- 3.194 The only response on file is from [LLP 38]. Its consultants are able to use the IPPP at the [Facility 8], where the facility fee amounts to £ [X]. This leaves, according to a fee split provided by [CESP Ltd senior employee A],³²⁸ a consultant fee of £ [X] and a retained CESP LLP margin of £ [X]. [Consultant 38b], consultant at [LLP 38] commented: '*[t]he [Facility 8] is attractive for us on the money side*'.³²⁹
- 3.195 [CESP Ltd senior employee A] informed the leads of all trading and non-trading CESP LLPs except [LLP 20] and [LLP 23] (both non-trading) about the new [PMI Provider 1] agreement on 9 June 2014.³³⁰ The email shows the prices for London and non-London and explains which CESP LLPs these prices apply to.
- 3.196 On 12 June 2014, [CESP Ltd senior employee A] emailed the same group of individuals, stating that CESP Limited also agreed new prices with [PMI Provider 1] for Yag operations (C7340): £ [X] outside London and £ [X] in London.³³¹
- 3.197 The leads of the trading CESP LLPs were subsequently sent 'fee splits' for the [PMI Provider 1] agreed codes.³³²
- 3.198 Some CESP LLPs welcomed the new prices^{333, 334, 335}, while others had questions about the new agreement³³⁶ and some indicated that the prices were too low. [CESP LLP employee 1a], practice manager of [LLP 1], indicated in an email to [CESP Ltd senior employee A]:

³²⁷ URN 0419, Email from [CESP senior board member 12a] dated 6 June 2014. The addressees are [Consultant 16c] and [Consultant 16b] ([LLP 16]), [CESP senior board member 5a] and [Consultant 5b] [LLP 5]

³²⁸ URN 0419, Email from [CESP Ltd senior employee A] to [CESP LLP employee 38a] [LLP 38] re CESP – [PMI Provider 1] New Contract dated 9 June 2014, page 1.

³²⁹ URN 2530, Email from [Consultant 38b] to [CESP LLP employee 38a] and [Consultant 38a] (all [LLP 38])

³³⁰ URN 0437, Email from [CESP Ltd senior employee A] to LLP leads re [PMI Provider 1] dated 9 June 2014, page 4.

³³¹ URN 0432, Email from [CESP Ltd senior employee A] re [PMI Provider 1] dated 12 June 2014, page 1.

³³² See for example URN 0456, Email exchange between [CESP Ltd employee C] and [Consultant 16c], dated 11 July 2014.

³³³ URN 0447, Email from [Consultant 4b] to [CESP Ltd senior employee A] re Standing Order Instructions, dated 9 June 2014, page 4.

³³⁴ URN 0422, Email from [Consultant 15a] to [CESP Ltd senior employee A] re [PMI Provider 1], dated 9 June 2014, page 1.

³³⁵ URN 0424, Email from [Consultant 5c] to [CESP Ltd senior employee A] re [PMI Provider 1] dated 10 June 2014, page 1. Note that [LLP 28] is not a 'trading LLP', so it is not able to charge the [PMI Provider 1] price currently.

³³⁶ URN 0423, Email from [Consultant 34b] to [CESP Ltd senior employee A] dated 9 June 2014, page 1 [CESP Ltd senior employee A] responded: '*[t]he [LLP 16] package is active at [Facility 9], if that's what you mean*' at page 2).

*'This is going to be a bit of a problem for us because by the time we pay Consultants, nurses etc we will have no profit at all ... Presumably this is not like [PMI Provider 2] i.e. the Consultants could still invoice as individuals?'*³³⁷

3.199 On 12 June 2014, [CESP LLP employee 5a], practice manager at [LLP 5] requested further details from [CESP Ltd senior employee A] to see whether he could make the CESP Limited prices workable as they were lower than [LLP 5]'s self-pay prices.³³⁸

3.200 [CESP Ltd senior employee A]' responded on 13 June 2014:

'[CESP senior board member 12a] emailed or called all of the Board members to stress the importance of the [PMI Provider 1] deal with CESP. The [PMI Provider 1] package has always been lean, however for the foreseeable future of CESP it is vital that CESP have agreements with the majority of the insured market ...

... [PMI Provider 1] informed me that they were fed up of CESP consultants short-falling patients at hospitals where they already have agreements (e.g. [Facility 14]) ... [PMI Provider 1] requested that we submit a competitive package price (including consultation) for cataract by the end of May otherwise all LLPs would be removed as approved providers.

*In areas such as [X] where you have a local lock out of consultants, yes financially this deal is not as lucrative as if you inform the patient that the price will be X amount up front and it's then their issue for what they can recoup from their insurance cover. However actions like this would result in the entire [PMI Provider 1] deal being removed, not just in [X].'*³³⁹

3.201 When asked during his witness interview what he meant by 'local lockout' [CESP Ltd senior employee A] explained that the majority of consultants in that area are members of [LLP 5].³⁴⁰ When asked why [LLP 5] agreed to a price which it felt was too low, [CESP Ltd senior employee A] said: *'... every price isn't going to be ... received well by all of the LLPs, and obviously in certain places around the country they may have wanted more than that.'* *'... That's one insurance deal out of everything that CESP*

³³⁷ URN 0427, Email from [CESP LLP employee 1a] to [CESP Ltd senior employee A] re [PMI Provider 1] dated 11 June 2014, page 1. It is not clear if [CESP Ltd senior employee A] replied to this email.

³³⁸ URN 0436, Email from [CESP Ltd senior employee A] to [CESP LLP employee 5a], 12 June 2014.

³³⁹ URN 0436, Email from [CESP Ltd senior employee A] to [CESP LLP employee 5a], 13 June 2014.

³⁴⁰ URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 93 line 17.

*provides ... [M]y understanding is that that's just one small cog of everything. And those seven people ... that are in the mini board ... [w]hich include people from [LLP 5], understand obviously the other benefits that we have and the work that our office provides.'*³⁴¹

3.202 On 1 July 2014, [X] [LLP 30],³⁴² forwarded an email entitled '[LLP 16] – New [PMI Provider 1] Agreement' to [CESP Ltd employee C] (CESP Limited) (the forwarded email is not included), which [CESP Ltd employee C] forwarded to [CESP Ltd senior employee A] (CESP Limited) on the same day. [X] [LLP 30], email reads³⁴³

'Do you really mean for the yag code the initial consultation and a follow up are included or is this an error. We will be doing the yag for nothing.

The cataract fee is very tight financially in [LLP 16], and we would be doing the cataract for about £ [X] if we don't use an anaesthetist and £ [X] if we do I cant [sic] see many of us doing this.

With the C7982 what happens with combined procedures which are very common in this group?

I have changed the fees a little, but will need to know some answers to the above to know whether to take it to the partners.'

3.203 [CESP Ltd senior employee A] replied to [X] [LLP 30] email on the same date:

Please see my comments by procedure below;

C7340 (YAG) – The old deal was £ [X] for procedure ... The new package deal is £ [X] for procedure ... and [X] . The issue here is that you pay such a high hospital fee of £ [X] for this procedure is too high.

C7122 (Cataract) – Old deal £ [X] for procedure ... The new package deal is £ [X] for procedure ... and now to include initial consultation. See splits below;

Package: £ [X]

³⁴¹ URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 100 line 20

³⁴² [Consultant 30a] is the 'lead' for [LLP 30], but is also a member of [LLP 1] and [LLP 36].

³⁴³ URN 0450, Email from [CESP Ltd employee C] to [CESP Ltd senior employee A] re [LLP 30] - New [PMI Provider 1] Agreement, dated 01 July 2014, page 1.

Hospital: £ [X]

CESP [X] %: £ [X]

VPMS: £ [X]

Surgeon/Anaesthetist: £ [X] ... If anaesthetist is used £ [X] then surgeon gets £ [X].

I know this isn't the best insurer deal ... but the only other option was not to have an [PMI Provider 1] deal. If a surgeon does not use an anaesthetist, which we are finding more and more common, then the surgeon can include the £ [X], resulting in £ [X].

C7982 [Vitrectomy]... - Did not have a CESP deal previously. If this procedure is performed in a combination, agreed which is common, you would bill for 100% of the C7982 £ [X] and a % of the second procedure ... totalling £ [X].³⁴⁴

3.204 The 2014 [PMI Provider 1] agreement came into effect in June 2014, covering three procedures: Cataracts, Yag and Vitrectomy.³⁴⁵ The agreement applied to seventeen LLPs.³⁴⁶

3.205 Minutes from the [LLP 5] management meeting in November 2014 indicate that [LLP 5] chose to opt out of the 2014 [PMI Provider 1] agreement.³⁴⁷ This was confirmed by [CESP LLP employee 5a].³⁴⁸

3.206 [LLP 5] was subsequently derecognised by [PMI Provider 1] in December 2014.³⁴⁹ In February 2015, [LLP 5] confirmed that it was willing to re-join the 2014 [PMI Provider 1] agreement but only on the condition that procedures could be carried out at [LLP 5] [Facility 10], with which it had negotiated a lower facility fee.³⁵⁰

³⁴⁴ URN 0451, Email from [CESP Ltd senior employee A] to [Consultant 30a], 1 July 2014.

³⁴⁵ Cataract codes of £ [X] in London and £ [X] outside London, for code C7982 (Vitrectomy) of £ [X] in London and £ [X] outside London and for code C7340 (Yags) of £ [X] in London and £ [X] outside London.

³⁴⁶ It concerns the following LLPs: [LLP 3], [LLP 1], [LLP 5], [LLP 12], [LLP 13], [LLP 15], [LLP 16], [LLP 17], [LLP 18], [LLP 19], [LLP 21], [LLP 26], [LLP 29], [LLP 30], [LLP 31], [LLP 34] and [LLP 38].

³⁴⁷ URN 3289, [LLP 5] Management Meeting minutes, 19 November 2014.

³⁴⁸ URN 3524, Transcript of interview with [CESP LLP employee 5a], page 46 line 24

³⁴⁹ URN 3217, [PMI Provider 1] Meeting note, 3 February 2015.

³⁵⁰ URN 3567, Transcript of interview with [CESP senior board member 5a], page 48 line 1-3.

[PMI Provider 2]

2009 [PMI Provider 2] agreement

3.207 CESP Limited and [PMI Provider 2] entered into an IPPP agreement effective from 1 May 2009 ('the 2009 [PMI Provider 2] agreement').³⁵¹ The agreement was initially for a period of one year, after which each party could terminate it by giving 90 days' written notice. The CMA has obtained limited documentary evidence in relation to the 2009 [PMI Provider 2] agreement but understands that it provided for an IPPP price for cataracts of £[>] in London and outside London.³⁵²

2011 [PMI Provider 2] agreement

3.208 In 2011, CESP Limited and [PMI Provider 2] concluded a second IPPP agreement.³⁵³ On CESP Limited's side, these negotiations were carried out by [CESP Ltd senior employee N] and [CESP Ltd senior employee B]. A three year agreement was entered into on 1 January 2011 ('the 2011 [PMI Provider 2] agreement')³⁵⁴ and provided for an IPPP price for cataracts of £ [>] in London and £ [>] outside of London. The IPPP covered [>]. Sixteen trading CESP LLPs were covered by the 2011 [PMI Provider 2] agreement.³⁵⁵

3.209 On 13 April 2011, [CESP Ltd senior employee B] emailed a number of CESP LLP leads³⁵⁶ about the 2011 [PMI Provider 2] agreement, explaining that it would run for [>] years with an option to extend and that practice managers should be given the new prices so they could invoice immediately. [CESP Ltd senior employee B] stated that one set of price lists had been issued per LLP and also stressed the confidential nature of them.³⁵⁷ [CESP Ltd senior employee B] left CESP Limited during the course of 2011, handing over the agreement negotiating responsibilities to

³⁵¹ URN 2609, Agreement between [PMI Provider 2] and CESP Limited dated 1 May 2009. Prior to the 2009 [PMI Provider 2] agreement, CESP Limited and [PMI Provider 2] first entered into two separate confidentiality agreements.

³⁵² URN 2609, Agreement between [PMI Provider 2] and CESP Limited dated 1 May 2009.

³⁵³ URN 0153.1, [LLP 5] Meeting Slides, dated 30 March 2011, page 16: '*[PMI Provider 2] – contract agreement in final stages / agreed in principle (3 years)*'.

³⁵⁴ URN 2610, Agreement between [PMI Provider 2] and CESP Limited dated 1 January 2011.

³⁵⁵ It concerns [LLP 1], [LLP 16], [LLP 30] and [LLP 34] (London prices) and [LLP 5], [LLP 7], [LLP 10], [LLP 12], [LLP 13], [LLP 19], [LLP 21], [LLP 28], [LLP 29], [LLP 31], [LLP 32] and [LLP 38] (non-London prices).

³⁵⁶ It concerns [Consultant 1a] [LLP 1], [CESP senior board member 5a] [LLP 5], [Consultant 7a] [LLP 7], [CESP senior board member 12a] (CESP [LLP 12]), [Consultant 13a] [LLP 13], [Consultant 16c] [LLP 16], [Consultant 19b] and [Consultant 19a] (both [LLP 19]), [Consultant 21c] ([LLP 21]), [Consultant 29a] and [Consultant 29b] ([LLP 29]), [Consultant 30a] [LLP 30], [CESP senior board member 34a] [LLP 34], and [Consultant 38a] [LLP 38].

³⁵⁷ URN 2517, Email from [CESP Ltd senior employee B] to LLP Leads, dated 13 April 2011.

[CESP Ltd senior employee N] along with whoever was allocated to assist him.³⁵⁸

3.210 The new [PMI Provider 2] prices were discussed at the partners meeting of [LLP 34] in April 2011, the minutes of which note:³⁵⁹

'[CESP senior board member 34a] presented the new [PMI Provider 2] price list and discussed procedures that could be invoiced through the CESP package and identified how the partnership could benefit from using the [PMI Provider 2] packages for procedures not currently being used. [CESP LLP employee 29a] explained in further detail the advantages of using the CESP IPPP. It was suggested and agreed that following the implementation of more contracts with hospital facilities the partners should review the surgeon fees.'

3.211 During the course of 2012, [PMI Provider 2] carried out a study into how fees were set. Regarding this study, [CESP Ltd employee E] (CESP Limited) sent an email (copying in [CESP Ltd senior employee N]) to an undisclosed group of 'CESP colleagues and Practice Managers' in September 2012, indicating that:³⁶⁰

'...several of you have reported this to us due to concerns that they may be following in the footsteps of other insurers. I have spoken with [PMI Provider 2] ..., and would like to assure CESP consultants that there is no immediate plan from [PMI Provider 2] to reduce the fees for these procedures. Furthermore, the CESP negotiated PMI deal with [PMI Provider 2] will still stand, so LLP's can bill at the scheduled rates for IPPP procedures'.

2014 [PMI Provider 2] agreement

3.212 During the course of 2013 and 2014, [PMI Provider 2] and CESP Limited conducted negotiations and ultimately concluded a new agreement which would cover the '*[PMI Provider 2] cataract pathway*', as well as a large number of other codes ('the 2014 [PMI Provider 2] agreement').³⁶¹

³⁵⁸ URN 3328, Transcript of interview with [CESP Ltd senior employee B], page 49 line 6

³⁵⁹ URN 1673, Board Meeting Minutes, dated 20 Apr 2011, page 2 para 3.

³⁶⁰ URN 0177, Email from [CESP Ltd employee E] CESP LLPs dated 11 September 2012.

³⁶¹ URN 2611, Agreement between CESP Limited and [PMI Provider 2] April 2014. The pathway '*is inclusive of Surgeons Fees, hospital fees including Anaesthetist and nurse assessment, initial consultation and biometry and all necessary follow up appointments including provision of post operative drops. One single bill will be provided for the whole pathway.*'

3.213 [CESP Ltd senior employee N] and [CESP senior board member 34a] attended a meeting at [PMI Provider 2]'s offices in July 2013.³⁶² Following this, CESP Limited and [PMI Provider 2] engaged in discussions to agree an IPPP price in September and October of that year.³⁶³ [CESP Ltd senior employee N] indicated in an email that he would require an uplift for London and proposed IPPP prices of £ [X] and £ [X] (non-London and London) for cataracts.³⁶⁴ In response to this proposal, [PMI Provider 2] offered a counter offer of £ [X], with the expectation that all [X] was included in the pathway. [PMI Provider 2] indicated that even at this level, the package price would be 'above the majority'.³⁶⁵

3.214 In October 2013 [CESP Ltd senior employee N] sought input from LLPs on the proposed price, including [LLP 34], [LLP 5] and [LLP 31], saying in his email that he was '*...very nervous about [PMI Provider 2] using this as a way of reducing what they pay us, as there is no commitment for them to provide us with any more patients....would appreciate your thoughts on pricing*'.³⁶⁶

3.215 [CESP senior board member 34a] from [LLP 34] responded on the same day:

*'[i]f it's less than our current total then we are not interested. We can offer them synergy savings as we are a single organisation with reduced infrastructure costs on both side [sic] but we aren't going down the prisoners' dilemma route with them.'*³⁶⁷

3.216 When asked by the CMA what he meant by the term '*prisoners dilemma*' [CESP senior board member 34a] said:

³⁶² URN 0248, Email from [CESP Ltd employee L] to [CESP Ltd senior employee N] and [CESP senior board member 34a] dated 18 July 2013.

³⁶³ URN 0259, Email from [CESP Ltd employee L] to [CESP Ltd senior employee N] re [PMI Provider 2] Cataracts Network, dated 13 September 2013, indicating that [PMI Provider 2] was '*now at the pricing and implementation of our Cataract Network development and are keen to move forward with CESP as a key supplier.*' According to the email, a meeting between CESP Limited and [PMI Provider 2] was organised for the week after.

³⁶⁴ The package price offered included [X]. See URN 0270, Email from [CESP Ltd employee L] to [CESP Ltd senior employee N] re London Pricing Differentia, dated 08 October 2013.

³⁶⁵ URN 0270, Email from [CESP Ltd employee L] to [CESP Ltd senior employee N] re London Pricing Differentia, dated 08 October 2013.

³⁶⁶ URN 0611, Email exchange between [CESP Ltd senior employee N] and [CESP senior board member 34a], [Consultant 31a], [Consultant 29a], [CESP senior board member 5a] and [Consultant 26a], dated 11 October 2013.

³⁶⁷ URN 0612, Email from [CESP senior board member 34a] to [CESP Ltd senior employee N], dated 11 October 2013. [CESP Ltd senior employee N] replied to all on the same date: '*[t]hanks and agreed, [w]ill wait for comments back from other [sic] before I reply to [PMI Provider 2]*' (URN 0613).

*“Yeah, I mean if you look at the surgeon’s fee, part of the IPPP contract, the way that these things were being constructed was going to drive down the service fee side of things. Once you had a mutually agreed contract with them, then it was much easier to see where the service fees would go. It’s the fact that once the insurance companies and the hospitals come up with a contract, and the surgeon is very much being dictated to by the hospital or the insurance company, then those fees are going to go down, and that’s virtually impossible to sell to everyone else in the organisation. They just wouldn’t use it’.*³⁶⁸

3.217 [PMI Provider 2]’s proposal was discussed at CESP Limited’s October 2013 Board meeting where it was noted that, *‘CESP members currently perform less than 5% of the [PMI Provider 2] cataracts. The pathway model could potentially be applied to other procedures.’* As an action point the Board agreed: *‘[CESP Ltd senior employee N] to continue price negotiations with [PMI Provider 2] for a ‘cataract pathway’ with clinical input from [CESP senior board member 34a]’.*³⁶⁹

3.218 Towards the end of October 2013, CESP Limited and [PMI Provider 2] remained at deadlock in relation to agreeing an IPPP price, with CESP Limited considering the price too low and [PMI Provider 2] considering the price *‘well in excess of the market’*.³⁷⁰ However, in November 2013, [CESP Ltd senior employee N] sent an email to *‘a cross section of LLP Leads / key cataract surgeons’*,³⁷¹ in which CESP Limited *‘recommend that the [PMI Provider 2] proposal is accepted’*. The email sets out the key elements of the proposal, including an IPPP price of £ [X] outside London and £ [X] in London. [CESP Ltd senior employee N] stated: *‘This would be on the basis that if you are a CESP surgeon, you have to take this deal (no cherry picking).’* [CESP Ltd senior employee N] also said: *‘[i]n light of the pressures from [PMI Provider 3] and [PMI Provider 1] on price we believe*

³⁶⁸ URN 3568, Transcript of interview with [CESP senior board member 34a], page 50 lines 9-14, when asked about what he understood from the *‘prisoners’ dilemma’* email [CESP senior board member 5a] could not recall URN 3567, Transcript of interview with [CESP senior board member 5a] page 52, line 14 but then in response to whether it meant *‘agreeing to lower rates they will end up being paid less, but for doing more work’*, he responded with, *‘Right. Well, yes, there’s an element of truth in that.’* URN 3567, Transcript of interview with [CESP senior board member 5a] page 52 line 22.

³⁶⁹ URN 0100, CESP Board Slides, October 2013.

³⁷⁰ URN 0284, Email exchange between [CESP Ltd employee L] and [CESP Ltd senior employee N] re [PMI Provider 2] & CESP Networks Partnerships for Cataracts, dated 18 Oct 2013.

³⁷¹ It concerns the representatives of nine LLPs: [CESP senior board member 34a] [LLP 34] [X], [Consultant 38a] [LLP 38], [Consultant 16c] and [Consultant 16b] (both [LLP 16]), [Consultant 36a] and [Consultant 36b] (both [LLP 36]), [Consultant 30a] and [Consultant 30b] (both [LLP 30]), [Consultant 17a] [LLP 17], [Consultant 5b] and [CESP senior board member 5a] (both [LLP 5]), [Consultant 19a] [LLP 19], [Consultant 34b] [LLP 34] and [Consultant 21d] [LLP 21].

that this is a fair proposal that continues to protect the overall revenue of CESP members.’ [CESP Ltd senior employee N] requested that the recipients let him know their thoughts.³⁷² [CESP senior board member 34a] replied to all addressees of the above email, saying *‘this is very commercially sensitive information and under no circumstances should it be disclosed to any third party other than yourselves’*.³⁷³

3.219 A number of consultants responded to [CESP Ltd senior employee N]’s and/or [CESP senior board member 34a]’s email. The responses show that the proposal was positively received by CESP LLP representatives. For example:

- [CESP senior board member 34a] replied to [CESP Ltd senior employee N]: *‘[g]ood for me’*.³⁷⁴
- [Consultant 34b] replied to [CESP senior board member 34a] and [CESP Ltd senior employee N]: *‘[t]his is great’*.³⁷⁵
- [Consultant 38a] [LLP 38] forwarded the emails described above. It is unclear who the recipients of this forwarded email are. [Consultant 38a] states: *‘Happy if I accept this?’* [Consultant 38b] (also [LLP 38]) replied to [Consultant 38a]: *‘You bet ... Happy for us to discuss [sic] – but definitely yes – I never expected to see it’*. [Consultant 38a] subsequently forwarded this email to [CESP Ltd senior employee N], saying *‘A yes from [LLP 38]’*.³⁷⁶
- [Consultant 36b] [LLP 36] responded to [CESP Ltd senior employee N], saying: *‘many thanks and I agree to recommending acceptance of this proposal’*.³⁷⁷
- [Consultant 16a] [LLP 16]: *‘[t]he [PMI Provider 2] deal is just right!’*³⁷⁸

³⁷² URN 0291, Email from [CESP Ltd senior employee N] to [CESP senior board member 34a] & Others re [PMI Provider 2] Cataract Pricing dated 4 Nov 2013, page 1.

³⁷³ URN 0297, Email from [Consultant 38a] to [CESP Ltd senior employee N] re [PMI Provider 2] Cataract Pricing, dated 4 Nov 2013, page 2.

³⁷⁴ URN 0293, Email from [CESP senior board member 34a] to [CESP Ltd senior employee N] re [PMI Provider 2] Cataract Pricing, dated 4 Nov 2013, page 1.

³⁷⁵ URN 0298, Email from [Consultant 34b] to [CESP senior board member 34a] & [CESP Ltd senior employee N] re [PMI Provider 2] Cataract Pricing, dated 4 Nov 2013, page 1.

³⁷⁶ URN 0297, Email from [Consultant 38a] to [CESP Ltd senior employee N] re [PMI Provider 2] Cataract Pricing, dated 4 Nov 2013.

³⁷⁷ URN 0299, Email from [Consultant 36b] to [CESP Ltd senior employee N] re [PMI Provider 2] Cataract Pricing, dated 4 Nov 2013, page 1.

³⁷⁸ URN 0348, Email from [Consultant 16a] to [CESP Ltd senior employee N] re [PMI Provider 3], dated 12 Dec 2013, page 1. N.B., this email is not directly in response to [CESP Ltd senior employee N]’s/ [CESP senior board member 34a]’s email, but is included as it refers to [PMI Provider 2].

- 3.220 Other positive respondents to [CESP Ltd senior employee N]’s email include [Consultant 30b] of [LLP 30]. On 4 November 2013, [Consultant 30b] [LLP 30] responded to [CESP Ltd senior employee N]: *‘[d]o you think we should be seen to support any form of closed referral system? The prices offered are reasonable’*. [CESP Ltd senior employee N] responded: *‘[w]hilst I take your point, I think as long as price is fair and sensible which it is, then it’s ok’*. To which [Consultant 30b] replied: *‘[w]e then cannot criticise our colleagues who have opted in to the closed [PMI Provider 3] system or argue against closed referral systems and lack of [PMI Provider 8]. I am uneasy about this. It is very hypocritical of us. Are we saying if the price is right stuff [PMI Provider 8]? Food for thought.’* In turn, [CESP Ltd senior employee N] responded *‘it’s naturally a trade off, we have historically taken the stance that you mention, but I think a combination of factors mean that we should continue to reconsider our insurer strategies and tactics overall and each in turn ... We are using our market power to negotiate ...’* To which [Consultant 30b] replied: *‘Thanks [CESP Ltd senior employee N] it does make commercial sense and I look forward to treating [PMI Provider 2] patients’*.³⁷⁹
- 3.221 On 4 December 2013, [CESP Ltd employee J] sent an email to a number of CESP LLP leads³⁸⁰ indicating for [PMI Provider 2], among other things, *‘Cataract Pathway pricing now agreed with changes to our original proposal – will move forward with new process from February ... Existing agreement expires end of year – meeting 19th Dec to review all other procedures.’*³⁸¹ This is confirmed in a CESP Limited winter update, dated 12 December 2013, which states for [PMI Provider 2]: *‘[c]omplete cataract pathway agreed, from consultation to follow up for package prices of £ [X] and £ [X], nationally and in London, which I believe are excellent in the context of [PMI Provider 3] / [PMI Provider 1]’*.³⁸²
- 3.222 By early 2014, with [CESP Ltd senior employee N] and [CESP Ltd employee J] having left CESP Limited, [CESP Ltd employee H] temporarily took over the role as contact for CESP Limited in relation to the 2014 [PMI Provider 2] agreement. She sent an email to [Consultant 16a], [LLP 16], attaching an extract from the draft agreement with [PMI Provider 2]. In the email, sent on 5 March 2014, she states *‘Please do not share this*

³⁷⁹ URN 0296, Email from [Consultant 30b] to [CESP Ltd senior employee N] re [PMI Provider 2] Cataract Pricing, dated 4 Nov 2013, page 1.

³⁸⁰ [CESP senior board member 34a] (CESP Limited and [LLP 34]), [Consultant 34b] [LLP 34], [Consultant 26a] [LLP 26], [Consultant 37a] [LLP 37], [Consultant 30b] [LLP 30], [Consultant 38a] [LLP 38], [Consultant 16a] [LLP 16], [Consultant 5b] and [CESP senior board member 5a] (both [LLP 5]), and [Consultant 13a] [LLP 13]

³⁸¹ URN 0334, Email from [CESP Ltd employee J] to LLP Leads including [CESP senior board member 5a], [CESP senior board member 34a] and [Consultant 26a], 4 December 2013.

³⁸² URN 1219, CESP Update, December 2013.

confidential figure- especially as contract is not signed yet – Looking to go live 2nd April 2014 and mentions a cataract package price of £ [X] outside London and £ [X] inside London. [Consultant 16a] replied to this email on 6 and 10 March 2014, asking a number of follow up questions.³⁸³

3.223 On 8 March 2014, [CESP Ltd employee H] sent an email to [Consultant 34b], [LLP 34] LLP, saying *‘[w]e have now received the draft contract from [PMI Provider 2] for the Cataract Pathway. The attached may be useful. We look forward to your thoughts on this’*.³⁸⁴ Attached to the email is an overview, which shows a ‘CESP IPPP Package Price with [PMI Provider 2]’ of £ [X] (the existing London IPPP price) and an ‘Example of New Pathway’ of £ [X]. It also shows examples of fee-splits for both IPPP prices. [Consultant 34b] responded on 10 March 2014: *‘I’m confused by the “new pathway” – what pathway is this? The [PMI Provider 2] pathway looks fine! Bring it on.’*³⁸⁵

3.224 During the remainder of March 2014 [CESP Ltd employee H] sent [PMI Provider 2] a spreadsheet of codes with nationwide and London fees.³⁸⁶ She indicated to [PMI Provider 2] that CESP Limited was *‘happy to go live with the Pilot on the 2nd April and get the contract signed ASAP.’*³⁸⁷

3.225 On 27 March 2014, [CESP Ltd employee C] sent an email to as a minimum [LLP 16], copying [CESP Ltd employee H] and [CESP Ltd senior employee A], saying:

‘...CESP Limited and [PMI Provider 2] have been negotiating a new cataract pathway and I am pleased to announce that from the 2nd April 2014 a new package price of £ [X] for cataract surgery will commence...

*...This is an exciting development for CESP and should result in more referrals from [PMI Provider 2].’*³⁸⁸

3.226 On the same day [CESP Ltd employee C] also sent the same email to a number of other CESP LLPs, including [LLP 13], [LLP 38], [LLP 5] and [LLP 17] save that the package price mentioned in this email is £[X].³⁸⁹

³⁸³ URN 0384, Email exchange between [CESP Ltd employee H] to [Consultant 16a], 5 March 2014.

³⁸⁴ URN 2303, Email from [CESP Ltd employee H] to [Consultant 34b], dated 8 March 2014.

³⁸⁵ URN 2302, Email exchange between [CESP Ltd employee H] and [Consultant 34b], dated 8-11 March 2014.

³⁸⁶ URN 0386, Email from [CESP Ltd employee H] to [CESP Limited employee L], 21 March 2014.

³⁸⁷ URN 0390, Email from [CESP Ltd employee H] to [CESP Limited employee L], 27 March 2014.

³⁸⁸ URN 1222, Email from [CESP Ltd employee C] to [LLP 16], dated 27 March 2014.

³⁸⁹ URN 1024, Email from [CESP Ltd employee C] to a number of LLPs, dated 27 March 2014.

3.227 [Consultant 34b] [LLP 34] responded to this email on the same date³⁹⁰:
'[e]xcellent work! Who has this email been sent to in [LLP 34]? I guess only consultants that work at contracted hospitals? Also, are we allowed to use NHS facilities? What is the agreed surgeon fee for this? If patient does not need surgery do we charge initial?' [CESP Ltd employee C] responded on 28 March 2014: *'... the email has been sent to all the trading LLP leads. I will be informing the [LLP 34] secretaries in due course of the procedures we need them to follow ... With regard to the surgeons fee, this needs to be decided by the LLP. In the case of [LLP 34], the hospital fee is at present £ [X] for the [Facility 9]'*.³⁹¹

3.228 During the first week of April 2014 [CESP Ltd employee C] sent a number of separate but nearly identical emails to various LLPs³⁹² about CESP Limited having reached an agreement with [PMI Provider 2]. In these emails [CESP Ltd employee C] explains that the outside of London IPPP price is £ [X] for cataract surgery, commencing 2 April 2014. [CESP Ltd employee C] also sent separate but virtually identical emails to at least [LLP 30],³⁹³ [LLP 1]³⁹⁴ and [LLP 16]³⁹⁵. The emails are as above, but mention the London package price of £ [X].

3.229 [CESP senior board member 34a] responded to [CESP Ltd employee C]'s email on 1 April 2014, saying *'[g]reat news. Well done'*.³⁹⁶

3.230 The new [PMI Provider 2] agreement was discussed at [LLP 34] LLP's partners meeting of 24 April 2014, the minutes of which read:

'[PMI Provider 2] Contract is now up and running. [LLP 34] has decided to allocate patients that come through this pathway, to LLP members based on a rota system to ensure equality. CESP has already put this method in place. Cataracts can only be performed at [Facility 9], [Facility 11], [Facility 12] and [Facility 1] – places where there are CESP contracts in place.

*CESP provided a fee split example for the [PMI Provider 2] cataract pathway. Figures will vary slightly depending on hospital used.
CESP also provided the [PMI Provider 2] cataract pathway flowchart*

³⁹⁰ URN 2292, Email exchange between [CESP Ltd employee C] and [Consultant 34b], dated 27 March 2014.

³⁹¹ URN 2292, Email exchange between [CESP Ltd employee C] and [Consultant 34b], dated 27 March 2014.

³⁹² [LLP 3]- URN 0391, [LLP 30] - URN 0392, [LLP 26]-URN 0394, CESP [LLP 18]-URN 0393, [LLP 19] –URN 0400, [LLP 7] URN 0403, CESP [LLP 13] URN 0399, LLP 38 –URN 0402.

³⁹³ URN 0396, Email from [CESP Ltd employee C] to [LLP 30], 1 April 2014.

³⁹⁴ URN 0406, Email from [CESP Ltd employee C] to [LLP 1], 1 April 2014.

³⁹⁵ URN 0395, Email from [CESP Ltd employee C] to [LLP 16], 1 April 2014

³⁹⁶ URN 2290, Email from [CESP senior board member 34a] to [CESP Ltd employee C], dated 1 April 2014.

to illustrate each stage of the pathway. [PMI Provider 2] will refer all unnamed cataracts to CESP preferentially. Patients will be distributed to all consultants that can operate at a CESP hospital – [CESP senior board member 34a], [Consultant 34d], [Consultant 34b], [Consultant 34e]. There will be a log maintained of who operates on these patients.’³⁹⁷

3.231 On 8 May 2014, [CESP Ltd employee L] sent an updated CESP/ [PMI Provider 2] optical and refractive services agreement to [CESP Ltd senior employee A] and [CESP Ltd employee H].³⁹⁸ The agreement mentions the London IPPP price of £ [X] and the non-London IPPP price of £ [X] for [PMI Provider 2] pathway cataracts. It also contains IPPP prices for a large number of other procedures. It covers 18 CESP LLPs.³⁹⁹ [CESP Ltd senior employee A] confirmed that all 18 CESP LLPs can charge these IPPP prices.⁴⁰⁰

3.232 When asked by the CMA how the agreement was functioning, [CESP Ltd senior employee A] said:

‘... It’s working well. I’ve had meetings with [PMI Provider 2] ... It seems to be a very new process that’s taken a bit of getting used to on both sides ...[I]n terms of prices, again, there may have been certain LLPs that weren’t happy at the pricing. It all depends on how they work out their fees in terms of surgeons’ fee, how much they pay a hospital. So again, whatever price you agree for any procedure’s not going to suit all of our LLPs.’⁴⁰¹

3.233 [CESP Ltd senior employee A] also explained how the agreement worked in practice:

[X]⁴⁰²

3.234 Minutes from the [LLP 5] Management Meeting from November 2014 indicate that [LLP 5] partners chose to opt out of the 2014 [PMI Provider 2] agreement.⁴⁰³ This was confirmed by [CESP LLP employee 5a], who

³⁹⁷ URN 2354, [LLP 34] Partners Meeting, 24 April 2014.

³⁹⁸ URN 0415, Email from [CESP Ltd employee L] to [CESP Ltd senior employee A] and [CESP Ltd employee H], 8 May 2014.

³⁹⁹ [LLP 3], [LLP 1], [LLP 5], [LLP 7], [LLP 12], [LLP 13], [LLP 15], [LLP 16], [LLP 17], [LLP 18], [LLP 19], [LLP 21], [LLP 26], [LLP 29], [LLP 30], [LLP 31], [LLP 34] and LLP 38.

⁴⁰⁰ URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 49 line 4

⁴⁰¹ URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 69 line 10-23

⁴⁰² URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 70 line 7-21

⁴⁰³ URN 3289, [LLP 5] Management Meeting minutes, 19 November 2014.

explained that [LLP 5] would continue to treat [PMI Provider 2] patients but would charge them the prices which remained from the 2011 agreement.⁴⁰⁴

Small PMI providers

3.235 Between 2009 and 2014 CESP Limited entered into IPPP arrangements with a number of smaller PMI providers with combined market shares of approximately 12 per cent.⁴⁰⁵ These arrangements are not always reflected in formal agreements but are sometimes based on emails confirming acceptance of CESP Limited suggested rates.

3.236 [CESP Ltd senior employee B] explained that the approach CESP Limited took with the smaller PMI providers was broadly the same as the larger ones.⁴⁰⁶ The package price was agreed by [X], [CESP Ltd senior employee M], and [CESP senior board member 5a]. [CESP Ltd senior employee M] explained to the CMA that his approach was to seek recognition from a cross section of PMI providers, *'with [PMI Provider 3] and [PMI Provider 1] at the top and goes down to I guess [PMI Provider 4] and [PMI Provider 6] at the bottom.'*⁴⁰⁷ In some cases, smaller PMI providers did not have their own legal agreements so asked CESP Limited to send a template.⁴⁰⁸

3.237 The CMA has summarised the available information for the smaller PMI providers below which shows that fixed IPPP prices were agreed. It appears that the small PMIs' limited market share and negotiating strength highlighted their position as price takers. This is reflected in the higher IPPP prices agreed with CESP Limited compared to those agreed with the larger PMI providers ([PMI Provider 1] and [PMI Provider 2]). Pricing information obtained by the CMA^{409,410} from 2011 and 2014 show agreed prices for cataracts ranging from £ [X] to £ [X], which means that on occasion the price a small PMI provider paid was higher than the self-pay price a non-insured patient would pay.

2009

3.238 The minutes for the 1 April 2009 CESP Limited Board meeting state that agreements for IPPP prices were signed or agreed with [PMI Provider 5],

⁴⁰⁴ URN 3524, Transcript of interview with [CESP LLP employee 5a] page 47 line 12-15

⁴⁰⁵ Laing's Healthcare Market Review 2011

⁴⁰⁶ URN 3328, Transcript of interview with [CESP Ltd senior employee B], page 55 line 36

⁴⁰⁷ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 52 line 25

⁴⁰⁸ URN 3328, Transcript of interview with [CESP Ltd senior employee B] interview, page 56 line 6-7.

⁴⁰⁹ URN 2514, PMI Pricing Handbook 2011. The prices on the list are non-London prices.

⁴¹⁰ URN 2572, PMI Pricing Handbook London 2014 & URN 2573, PMI Pricing Handbook National 2014.

[PMI Provider 10], [PMI Provider 4] and [PMI Provider 6], and that negotiations were ongoing with [PMI Provider 15] and the remaining smaller PMIs.⁴¹¹ [PMI Provider 5], [PMI Provider 10], [PMI Provider 4] and [PMI Provider 6] all feature on the 2011 price list, which is the oldest price list seen by the CMA and which sets out the prices agreed.

3.239 On 7 May 2009, [CESP Ltd senior employee B] sent emails to [PMI Provider employee 8a] [PMI Provider 8]⁴¹² and [PMI Provider employee 9a] [PMI Provider 9],⁴¹³ referring to telephone conversations [CESP Ltd senior employee B] had with these individuals and indicating '*[h]appy to hear that the pricing schedule has been accepted by your company ... would you please be so kind as to reply to this email with the words 'ACCEPTED' ... so that we have something on file here at our office*'. The email contains a price list, showing an IPPP price for cataracts of £ [X] outside London and of £ [X] in London. There is no reply from [PMI Provider 8] on file, but the insurer features on the 2011 price list, suggesting that [PMI Provider 8] had accepted the prices.⁴¹⁴ [PMI Provider 9] replied on 7 May 2009, confirming receipt and indicating no formal agreement would be needed, as [PMI Provider 9] had '*limited use of your services*'.⁴¹⁵

3.240 On the same date, [CESP Ltd senior employee B] sent a similar email to [PMI Provider employee 10a] [PMI Provider 10].⁴¹⁶ The email contains a price list which shows IPPP prices for cataracts of £ [X] outside London and of £ [X] in London. [PMI Provider employee 10a] replied with '*ACCEPTED*' on 12 May 2009.

3.241 In an email exchange dated 23 June 2009, [CESP Ltd senior employee B] agreed pricing with [PMI Provider 11]. The email shows an IPPP price for cataracts of £ [X].⁴¹⁷

3.242 A draft agreement between CESP Limited and [PMI Provider 4] was according to a handwritten note on the draft '*sent to [PMI Provider employee 4a]*' (an employee of [PMI Provider 4]) on 8 June 2009.⁴¹⁸ The agreement lists IPPP prices of £ [X] outside London and £ [X] in London. An email exchange between [CESP Ltd senior employee B] and [PMI Provider employee 4b] confirms there was a conversation between CESP

⁴¹¹ URN 2557, CESP Board Minutes 1 April 2009.

⁴¹² URN 0005, Email from [CESP Ltd senior employee B] to [PMI Provider employee 8a], 7 May 2009.

⁴¹³ URN 0073, Email from [CESP Ltd senior employee B] to [PMI Provider employee 9a], 7 May 2009.

⁴¹⁴ URN 2570, and 2571, PMI provider ratebooks 2011.

⁴¹⁵ URN 0073, Emails between [CESP Ltd senior employee B] and [PMI Provider 9], 7 May 2009

⁴¹⁶ URN 0023, Email from [CESP Ltd senior employee B] to [PMI Provider employee 10a], 7 May 2009.

⁴¹⁷ URN 0068, Email from [PMI Provider employee 11a] to [CESP Ltd senior employee B], 23 June 2009.

⁴¹⁸ URN 0019, Agreement between CESP Limited and [PMI Provider 4], June 2009.

Limited and [PMI Provider 4] on 13 November 2009, at which [PMI Provider employee 4a] requested CESP Limited to amend the agreement so that it included CESP LLP names and facility locations.⁴¹⁹ [CESP Ltd senior employee B] confirmed on 16 November 2009, indicating the action points and stating which CESP LLPs (15 in total) were ‘active’ at that time⁴²⁰ and which CESP LLPs would become active in the next three to six months. On 18 November 2009, [CESP Ltd senior employee B] updated a number of CESP LLPs about the CESP Limited/ [PMI Provider 4] agreement.⁴²¹ [PMI Provider 4] also features on the 2011 price list.

- 3.243 On 6 August 2009, [PMI Provider 12] accepted the ‘*Terms and Conditions for Arrangements between [CESP] and [PMI Provider 12]*’ in writing.⁴²² The document does not contain pricing information, but [PMI Provider 12] features on the 2011 price list, suggesting that [PMI Provider 12] had agreed IPPP prices with CESP Limited.

2010

- 3.244 On 13 July 2010, [PMI Provider employee 13a] [PMI Provider 13] emailed [CESP Ltd senior employee B], indicating that [CESP Ltd senior employee B] had ‘*emailed my manager [PMI Provider employee 13b] last year with your 2009-2010 Tariff rates*’ and requesting CESP Limited’s tariff rates for 2010-2011. [CESP Ltd senior employee B] replied on 16 July 2010, confirming that CESP Limited had decided not to change its IPPP prices for that year.⁴²³ This confirms that an IPPP price was in place with [PMI Provider 13] from 2009. [PMI Provider 13] features on the 2011 price list.

2011

- 3.245 On 10 May 2011, CESP Limited sent nearly identical letters to (as a minimum) [PMI Provider 4]⁴²⁴ and [PMI Provider 12].⁴²⁵ The letters indicate that CESP Limited unilaterally applied a ‘*small increase*’ to the package price charged to these PMI provider on request of the CESP LLPs. It is not clear whether the same letter has been sent to any other PMI providers.

⁴¹⁹ URN 0018, Email from [CESP Ltd senior employee B] to [PMI Provider employee 4a], 16 November 2009.

⁴²⁰ It concerns [LLP 1], [LLP 5], [LLP 7], [LLP 12], [LLP 13], [LLP 16], [LLP 18], [LLP 19], [LLP 21], [LLP 28], [LLP 29], [LLP 30], [LLP 32], [LLP 34] and [LLP 38].

⁴²¹ URN 0021, A handwritten note states that the addressees are the ‘*LLPs that have signed up to PMI programme + [admin and practice managers]*’.

⁴²² URN 0084, Letter from [PMI Provider employee 12a] to [CESP Ltd senior employee B], 6 August 2009.

⁴²³ URN 0071, Email from [CESP Ltd senior employee B] to [PMI Provider employee 13a] 16 July 2010.

⁴²⁴ URN 0076, Letter from [CESP Ltd senior employee B] to [PMI Provider employee 4a] 10 May 2011.

⁴²⁵ URN 0024, Letter from [CESP Ltd senior employee B] to [PMI Provider employee 12b] 10 May 2011. The file also contains terms and conditions for a CESP / [PMI Provider 12] contract, to commence on 1 June 2011, which were only signed on CESP Limited’s behalf (URN 0025).

The CMA notes that the 2011 price list dates from June 2011, so may have been circulated to CESP LLPs following this increase.

- 3.246 On 17 June 2011, [PMI Provider 6] sent to [CESP Ltd senior employee B] *'a signed agreement that will need to be counter signed by CESP'*.⁴²⁶ [CESP Ltd senior employee B] forwarded this to [CESP Ltd senior employee N] on 21 June 2011 and subsequently to [CESP Ltd employee K] on 3 November 2011.
- 3.247 On 22 November 2011, [PMI Provider employee 4b] [PMI Provider 4] sent an email to [CESP Ltd employee F] (CESP Limited) introducing herself as the new contact and requesting an up-to-date tariff list from CESP Limited. [CESP Ltd senior employee B] replied on 8 December 2011, referring to *'the communication that was sent out back in May/June relating to our new tariff'*,⁴²⁷ as well as sending a new list of CESP LLPs.
- 3.248 There was an exchange of mark-ups on a draft agreement and price list between CESP Limited and [PMI Provider 11] in late 2011,⁴²⁸ but it is unclear whether this led to the completion of a final agreement, or whether the IPPP price mentioned on the 2011 price list remained in place. [CESP Ltd senior employee B] informed [CESP Ltd employee K] of this on 12 December 2011, asking them to review changes made in the agreement by [PMI Provider 11] and mentioning *'[t]he volumes are not massive with [PMI Provider 11] and we've not had any problems in terms of them paying IPPP'*.⁴²⁹
- 3.249 The December 2011 CESP Members' Newsletter states under 'insurer update': *'[PMI Provider 4]/ [PMI Provider 5]. [PMI Provider 4] have bought [PMI Provider 5]. No change in agreement or IPPP until further notice.'*⁴³⁰

2012

- 3.250 The PowerPoint presentation for CESP Limited's board meeting of 14 January 2012 mentions an *'uplift in June'* as an *'ongoing plan'* for [PMI Provider 6] and *'small insurers'*.⁴³¹

⁴²⁶ URN 0007, Email from [PMI Provider employee 6a] to [CESP Ltd senior employee B], 17 June 2011.

⁴²⁷ URN 0075, Email from [CESP Ltd senior employee B] to [PMI Provider employee 4b], 8 December 2011.

⁴²⁸ URN 0035, Agreement between CESP Limited and [PMI Provider 11], 1 June 2011.

⁴²⁹ URN 0049, Email from [CESP Ltd senior employee B] to [CESP Ltd employee K], 12 December 2011.

⁴³⁰ URN 0682, CESP Newsletter December 2011.

⁴³¹ URN 0695, CESP Limited Board Meeting, January 2012, page 30.

3.251 On 28 March 2012, [PMI Provider 11] sent a letter to CESP Limited attaching '*a signed copy of the legal contract*'.⁴³² The agreement itself was not attached.

3.252 On 25 May 2012, [CESP Ltd employee I] of CESP Limited emailed [CESP LLP employee 5a], [LLP 5], saying '*[t]he small insurer prices are due to be updated in the next couple of months, and our aim will be to increase them in line with RPI. Whether any or all of them will agree to this is another matter. We are not proposing to amend the prices for the large insurers at this time, although I may revisit them later in the year, once our negotiations with [PMI Provider 14] have been completed.*'⁴³³

2013

3.253 On 26 June 2013, [CESP Ltd employee H] (CESP Limited) emailed [CESP LLP employee 5a] [LLP 5] about [PMI Provider 4], indicating: '*I've attached the tariff that is loaded on MedDBase which you can use. Also, in the past year, [LLP 5] have billed [PMI Provider 4] some £ [§<] including a lot of package price procedures.*'⁴³⁴

3.254 [CESP Ltd employee J] updated [CESP Ltd senior employee N] and a number of CESP LLPs⁴³⁵ that the [PMI Provider 4] agreement was up for renewal and that a meeting had been arranged for 9 December 2013. As for [PMI Provider 7] the email indicated that CESP Limited was finalising an agreement based on the same prices as 2012/13.⁴³⁶

2014

3.255 On 23 June 2014, [CESP Ltd senior employee A] emailed a large number of CESP LLPs,⁴³⁷ indicating that '*[r]ecently I have been contacted by some of our members regarding a letter consultants have received from [PMI Provider 4]. The letter confirms a new fee scale the insurance company would expect surgeons to invoice. I can confirm that this new fee scale has no effect on the IPPP CESP agreement with [PMI Provider 4].*'⁴³⁸ On 7 August 2014, [CESP Ltd senior employee A] confirmed this again to [CESP senior board member 12a], saying that [PMI Provider 4] '*informed me that*

⁴³² URN 0082, Letter from [PMI Provider employee 11b] to [CESP Ltd employee K], 28 March 2012.

⁴³³ URN 0620, Email from [CESP Ltd employee I] to [CESP LLP employee 5a], 25 May 2012.

⁴³⁴ URN 0235, Email from [CESP Ltd employee H] to [CESP LLP employee 5a], 26 June 2013.

⁴³⁵ It concerns the following LLPs: [LLP 34], [LLP 26], [LLP 30], [LLP 5], [LLP 13], [LLP 16], [LLP 38] and [LLP 37].

⁴³⁶ URN 0616, Email from [CESP Ltd employee J] to [CESP Ltd senior employee N], [CESP senior board member 34a], [Consultant 34b], [Consultant 26a] and [Consultant 37a], 4 December 2013.

⁴³⁷ The email appears to have been sent to all 38 LLPs.

⁴³⁸ URN 0443, Email from [CESP Ltd senior employee A] to LLP Leads, 23 June 2014.

there would be no change to our package prices. This may trigger a review of procedure pricing from the [PMI Provider 4]. This is the same as what [PMI Provider 7] indicated a week or so ago'.⁴³⁹

3.256 On 28 July 2014, [CESP LLP employee 21a], [X] at [LLP 21] sent an email to [CESP Ltd senior employee A], asking '*I was just trying to invoice for a C2650 ... for [PMI Provider 7] and it has come as £ [X] for this? Can I just check that this correct [sic] as [PMI Provider 3] only pay £ [X]*'. [CESP Ltd senior employee A] replied on 29 July 2014, copying a line from [PMI Provider 7]'s package prices, showing for C2650 a price of £ [X]⁴⁴⁰

3.257 In July 2014 there is an exchange of emails between [CESP Ltd senior employee A] and [PMI Provider 7].⁴⁴¹ [PMI Provider 7] asks that CESP Limited aligns its tariff for C7122 with [Facility1]'s to £ [X] and subsequently to £ [X]. [CESP Ltd senior employee A] responded, indicating '*[y]ou are looking to reduce C7122 from £ [X] to £ [X] across the nation. In line with inflation we were looking at moving up to £ [X]. Taking into account that it is now a single national deal including London £ [X] (including standard lens.) would work, please let me know if you would like me to escalate to the members of the board.*' [PMI Provider 7] responded by accepting the offer of £ [X].

Claimed benefits of the IPPP

3.258 CESP Limited claimed that the CESP Limited IPPP provides benefits for both the PMI provider and the patient.⁴⁴² These claimed benefits were also raised in the interviews the CMA carried out.

Benefits to PMI providers

3.259 During the course of the investigation and before it admitted the infringement, CESP Limited claimed that the CESP Limited IPPP allowed CESP LLPs to offer a bundled package price to PMI providers⁴⁴³ which CESP LLPs would not be able to do without a single price across all CESP

⁴³⁹ URN 2580, Email from [CESP Ltd senior employee A] to [CESP senior board member 12a], 7 August 2014.

⁴⁴⁰ URN 2587, Email from [CESP Ltd senior employee A] to [CESP LLP employee 21a], 29 July 2014. CESP Limited has clarified to the CMA that the £ [X] mentioned is the surgeon's fee only, whereas the £ [X] figure is the package price.

⁴⁴¹ URN 0453, Email exchange between [CESP Ltd senior employee A] and [PMI Provider employee 13c], 8 July 2014.

⁴⁴² URN 3350, CESP Limited note for the CMA.

⁴⁴³ URN 3329, Transcript of interview with [CESP Ltd senior employee M] page 16 line 14-16: '*here's a cataract operation, it costs this much, there's one invoice, one bill and we will figure everything else out underneath.*'

LLPs *'as the cost of negotiating individual prices with each LLP would make the arrangements uneconomic'*.⁴⁴⁴

3.260 CESP Limited claimed that this allowed the PMI provider to *'benefit from national coverage without the need for individual negotiations with each LLP'*.⁴⁴⁵ The PMI providers the CMA spoke to indicated ensuring national coverage as a PMI provider was important. [PMI Provider 2] explained that as it operates nationally, PMI cover must be available to all customers.⁴⁴⁶ However, this does not suggest that CESP Limited needs to offer national coverage in order to be able to negotiate agreements with PMI providers. [PMI Provider 1], [P<] initially only entered into an agreement with CESP limited that covered four trading CESP LLPs.⁴⁴⁷ Other providers, such as private hospital groups, chains such as [Facility1] and [Facility 3] and NHS trusts do not offer national coverage as they do not have a facility and/or consultant in every location.

3.261 CESP Limited also claimed that the IPPP provides administrative benefits to the PMI provider. The PMI provider receives one invoice covering the covering the whole treatment pathway (rather than separate invoices for the consultant, anaesthetist, facility and any other services). CESP Limited claim this *'significantly reduces administrative costs for the insurer'*.⁴⁴⁸ [CESP Ltd senior employee M] explained that for a single procedure, for example, a cataract operation *'there might be seven or eight transactions. So there'd be an outpatient transaction and there'd be a pre-operative transaction and then a surgical transaction, then the follow-up, then the anaesthetist and a consultant and so for a single episode of care, so from a patient's point of view, I'm going for an operation, when you look underneath that there were six, seven, eight different transactions, all with their own admin processes, invoicing and billing and this that and the other'*.⁴⁴⁹

3.262 One PMI provider, [PMI Provider 2], acknowledged that the CESP model provided administration benefits,⁴⁵⁰ however, it did not see justification for

⁴⁴⁴ URN 3350, CESP Limited, Note for the CMA dated 31 March 2015.

⁴⁴⁵ URN 3350, CESP Limited, Note for the CMA dated 31 March 2015. However, it is noted that some LLPs appear to have been able to contract individually with PMI providers, which undermines the necessity of offering a central IPPP. For example, CESP [LLP 15] has been successful in negotiations with [PMI Provider 3] as it runs a facility. See paragraphs 3.335

⁴⁴⁶ URN 2901, [PMI Provider 2] telephone meeting note, 16 October 2014. See also URN 3038, Note of meeting with [PMI Provider 3], 14 January 2015

⁴⁴⁷ URN 2618, [PMI Provider 1] contract with CESP 2008.

⁴⁴⁸ URN 3350, CESP Limited, Note for the CMA dated 31 March 2015.

⁴⁴⁹ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 15 line 219

⁴⁵⁰ URN 2901, [PMI Provider 2] telephone meeting note, 16 October 2014. *'CESP offered a bundled package with different makeup and nebulous breakdown but still administratively simpler than traditional method.'*

the coordination of prices through CESP as this *'results in less transparent prices for services and prices that are higher than they would otherwise be.'*⁴⁵¹

Reducing the risk of shortfalling

3.263 CESP Limited has said that a single IPPP price provides certainty over the total costs of the procedure and reduces the risk of shortfalling for the PMI provider and patient.⁴⁵² In witness interviews, witnesses explained that the CESP IPPP model allows consultants a greater control over the process which enabled them to provide certainty for the patient over the total cost for the procedure preventing the need to have discussions with patients regarding the cost and whether that patient would face a shortfall.⁴⁵³

3.264 [CESP Ltd senior employee B] explained this was important to PMI providers:

*'one of the main concerns for the insurers was that the potential for shortfalls so that patients would get upset, they would get a lot of calls in terms of dealing with shortfalls and therefore one of the benefits was that, you know, that aspect or the issue of shortfalls would go away as a result of having an agreement between the parties and I suppose for the end consumer, the patient, they would have a guarantee that their treatment would be dealt with and paid in full by their insurer and they wouldn't have any shortfalls or money potentially to be paid directly by them.'*⁴⁵⁴

3.265 Although the IPPP provides certainty over the price of a procedure and reduces the risk of shortfalling, this risk would also be reduced where consultants accept fee assured status and/or agree to bill in accordance with the PMI providers' benefit maxima.⁴⁵⁵

⁴⁵¹ URN 2606.1, [PMI Provider 2] section 26 response.

⁴⁵² URN 3350, CESP Limited note for the CMA.

⁴⁵³ URN 3567, Transcript of interview with [CESP senior board member 5a] page 11 line 4-11 *'Because prior to the LLP, patients who wanted private treatment would go to a sole trader, the sole trader would effectively offer an operation and they would probably know what the sole trader's surgical fee was but I had not known what anaesthetists charge, I had no idea what the hospital charged, I had no idea how many follow-up appointments they might need. So a patient would effectively sign up to an operation with no insights into what the total thing was going to cost and I didn't know and I was providing the surgical service.'* URN 3568, Transcript of interview with [CESP senior board member 34a], page 28 line 25 *'There were benefits for both sides, and certainly benefits for patients of this. If it was all clear and above board, there wasn't all this short-falling of patients, there wasn't all this rigmarole of where patients were being referred to. It was all done in the open, and explicit between everybody, then it was certainly better for all concerned in terms of the patients.'*

⁴⁵⁴ URN 3328, Transcript of interview with [CESP Ltd senior employee B], page 13 line 1-19

⁴⁵⁵ [PMI Provider 2] explained that where its members use the [PMI Provider 2] network pathway there are no shortfalls. URN 3331, [PMI Provider 2] meeting note, page 5.

Negotiating better rates with facility providers

3.266 The evidence suggests that CESP Limited may be able to use its market power to negotiate better rates from facility providers. CESP Limited estimates it can negotiate down facility fees down by [x] - [x]%.⁴⁵⁶

3.267 [CESP Ltd senior employee M] explained that *'if you're able to take all of that activity, the being referred to doctors and take it to the private hospitals in a town and the NHS hospital in a town, you could negotiate the rates for those hospital fees in a way that you couldn't as an individual doctor.'*⁴⁵⁷

3.268 While the IPPP may allow CESP to negotiate better rates with facility providers (see paragraph 3.118), the fee splits (Annex F) show these costs savings are not passed on to the PMI provider and ultimately the patient.⁴⁵⁸ The CMA understands that LLP margin can be used to invest in equipment and premises⁴⁵⁹ or can be distributed to the LLPs partners.⁴⁶⁰ PMI providers can also independently negotiate package prices with facility providers.

D. Coordination of market conduct when attempts to agree an IPPP are unsuccessful [PMI Provider 3]

3.269 CESP Limited has throughout from its incorporation to present been unable to reach a centrally negotiated IPPP agreement with [PMI Provider 3]. However, from its incorporation, CESP Limited and its members considered it important to reach an IPPP agreement with [PMI Provider 3],⁴⁶¹ and in

⁴⁵⁶ URN 2389, New Members Presentation 28 October 2012.

⁴⁵⁷ URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 16 line 8-11. See also URN 3567, Transcript of interview with [CESP senior board member 5a] page 24 line 8-15. *'Well it is certainly true that if one runs an IPPP and is efficient about it, one can cut out marginal costs. So if for example prior to 2003 the whole package price for an operation was x and then you take control of the entire package price and you use fewer secretaries or you negotiate down hospital overheads or you find cheaper premises that with sensible business minded cost cutting you can make a business margin by being efficient and that has always been part of why I did this.'*⁴⁵⁷

⁴⁵⁸ See paragraphs 3.121 to 3.124

⁴⁵⁹ URN 3829, CESP Ltd initial response to CMA draft penalty statement [LLP 12] have invested over [x] in equipment over approximately the past 5 years, URN 3567, Transcript of interview with [CESP senior board member 5a] page 24, lines 24 - 27 *'So I would suggest that there's an element of group practice equals efficiency and then if one generates a profit then what one does with it, by and large we use it to buy new equipment.'* URN 2491, [LLP 38] meeting note discussing the purchase or hire of equipment. URN 1674, 1682, 1685, 1686 [LLP 34] meeting notes discussing purchase of equipment and/or the option of purchasing premises. URN 3846, Response to the draft Statement of Objections.

⁴⁶⁰ A number of CESP LLP meetings notes discuss profit share between LLP members. See for example, [LLP 1] URN 0557, [LLP 5] URNs 3254, 3289, 3290, [LLP 17] URNs 1249 and 1250, [LLP 34], URNs 1674, 1678, 1680, 1687.

⁴⁶¹ See, among other documents: URN 0123, Minutes of the CESP Limited board meeting on 1 October 2011, page 2 *'large insurers ([PMI Provider 3], etc) will be signed up in due course but ... it may be a while before we have sufficient strength'*; URN 0105, PowerPoint slides for CESP Limited board meeting of 14 January 2012, page 15, which shows as one of its *'ongoing plans'* to *'restart discussions'* with [PMI Provider 3]; URN 0988, Minutes of the CESP Limited board meeting on 12 January 2013, page 2, *'[CESP Ltd senior employee N] has met with [PMI Provider 3] and will continue negotiations'*. URN 1013, Email from [CESP Ltd senior employee N]

doing so fix the price charged by LLPs to [PMI Provider 3], given its high market share and *'from a credibility point of view'*.⁴⁶²

3.270 Until at least September 2014,⁴⁶³ CESP Limited has attempted to agree an IPPP with [PMI Provider 3] and coordinated discussions between the CESP LLPs about acceptable IPPP prices. [CESP Ltd senior employee M],⁴⁶⁴ [CESP Ltd senior employee N],⁴⁶⁵ [CESP senior board member 34a]⁴⁶⁶ and [CESP Ltd senior employee A]⁴⁶⁷ were all explicitly empowered by the CESP LLPs to negotiate with [PMI Provider 3]. The CMA finds that CESP Limited's attempts to agree an IPPP with [PMI Provider 3], outlined in more detail at paragraphs 3.272 – 3.277 and 3.320 – 3.334, form part of the IPPP infringement.

3.271 In addition, from May 2012 until at least December 2013, CESP Limited coordinated all CESP LLPs' commercial response to [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants. In response to these initiatives, CESP Limited recommended a joint response for CESP LLPs, which was implemented by a number of CESP LLPs and/or by consultant members of CESP LLPs when acting as sole traders, and operated as a platform for the exchange of future commercial intentions about these initiatives. The CMA finds that the recommended joint response to [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants, outlined in more detail at paragraphs 3.283 – 3.318, form the [PMI Provider 3] infringement.

to LLP leads dated 5 February 2013, page 1 *'we have tentatively restarted discussions with [PMI Provider 3]'*; URN 0271.1, Minutes of CESP Limited board meeting of 11 May 2013, page 2, *'[CESP Ltd senior employee N] and [CESP senior board member 34a] to negotiate as good a deal as possible with [PMI Provider 3] (cataract only) and bring it back to the board'*; URN 2488, Email from [CESP Ltd employee J] to a number of LLP leads dated 4 December 2013, page 1, *'[PMI Provider 3] ... Need to get agreement on this'*; and URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 87, lines 17 – 18.

⁴⁶² URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 66, line 6. See also, more generally, URN 3568, Transcript of interview with [CESP senior board member 34a], page 73, lines 26 – 27 and page 74, line 1. *'It was more about your professional reputation. [PMI Provider 3] have this veneer of being, you know, respected and everything else'*.

⁴⁶³ URN 3327, [CESP Ltd senior employee A] Interview Transcript page 44, lines 22 – 24, page 45, lines 3 – 4, and page 107, lines 25 – 26.

⁴⁶⁴ See section headed *'Empowerment of CESP Limited to enter into agreements with PMI providers on the CESP LLPs' behalf'* above; and URN 2557, Minutes of CESP Limited's board meeting of 1 April 2009.

⁴⁶⁵ URN 0271.1, Minutes of CESP Limited board meeting of 11 May 2013: *'[CESP Ltd senior employee N] and [CESP senior board member 34a] to negotiate as good a deal as possible with [PMI Provider 3] (cataract only) and bring it back to the board'*.

⁴⁶⁶ Ibidem.

⁴⁶⁷ URN 0991, Minutes of CESP Limited Board meeting of 31 May 2014, which show [CESP Ltd senior employee A] was given authority to *'negotiate best deals'* with [PMI Provider 1] and [PMI Provider 3].

September 2008 – May 2012: CESP Limited's efforts to reach agreement with [PMI Provider 3]

Introduction

3.272 In the September 2008 to May 2012 period, CESP Limited attempted to reach an IPPP agreement with [PMI Provider 3], similar to the IPPP agreements with other PMI providers, as discussed in Section 3. C. the IPPP, *'Negotiating and concluding IPPP agreements in practice'*, above. The key difference was that CESP Limited was unsuccessful at reaching an IPPP agreement with [PMI Provider 3].

CESP Limited efforts to come to an agreement with [PMI Provider 3]

3.273 In the 2008-2012 period, [PMI Provider 3] issued calls for tender for its cataract network. At a CESP Limited Board meeting in April 2009, the CESP LLP leads discussed how they should respond to these calls for tender. The CESP LLP leads decided not to tender for [PMI Provider 3] work, as charging [PMI Provider 3] through an IPPP was preferred.⁴⁶⁸

3.274 The initial attempts to come to an IPPP agreement, carried out by [CESP Ltd senior employee M],⁴⁶⁹ focused on cataracts. For non-cataract work, CESP Limited piloted negotiations for [LLP 5], the lead of which was, [CESP senior board member 5a], [§<].⁴⁷⁰ The expectation for non-cataract work was that any pilot-agreement with [LLP 5] would be rolled out to *'all CESP LLPs with delivery capacity'*.⁴⁷¹ It proved difficult for [CESP Ltd senior employee M] and [CESP senior board member 5a] to come to an agreement with [PMI Provider 3], which was considered to be *'very aggressive about price'* and potentially having *'a principle [sic] objection to dealing with CESP'*.⁴⁷²

3.275 When [CESP Ltd senior employee N] took over from [CESP Ltd senior employee M] in 2009, he continued negotiations with [PMI Provider 3].⁴⁷³ In

⁴⁶⁸ URN 2557, CESP Limited board meeting 1 April 2009: *'On [PMI Provider 3] cataract network, the four generic options were discussed. Board recognized it was preferable to contract under the IPPP and LLPs that value control of their practices could inform their hospitals that they are willing to work in this way with [PMI Provider 3].'*

⁴⁶⁹ URN 2557, Minutes of CESP Limited's board meeting of 1 April 2009 (*'[CESP Ltd senior employee M] to contact [PMI Provider 3] with a national offer, and feedback response to LLP leads'*).

⁴⁷⁰ URN 3567, Transcript of interview with [CESP senior board member 5a], page 57 lines 15 – 27, and page 58, lines 1 - 7. [CESP LLP employee 5b], [LLP 5] [§<] may also have been involved in these negotiations, but [CESP senior board member 5a] could not recall the exact arrangements.

⁴⁷¹ URN 0147, PowerPoint pack for CESP Limited board meeting of 6 August 2008, page 21.

⁴⁷² URN 3329, Transcript of interview with [CESP Ltd senior employee M], page 65, line 23.

⁴⁷³ URN 3228, Transcript of interview with [CESP Ltd senior employee B], page 18, lines 9 - 10. [CESP Ltd senior employee N]'s role in this period can also be inferred from his role in negotiations with other PMI providers (see Section 3. C. The IPPP, *'Negotiating and concluding IPPP agreements in practice'*, above) and from later confirmation of his role in negotiations: URN 0988, Minutes of the CESP Limited board meeting on 12 January

the period from 2009 until early 2012, CESP Limited again did not succeed at coming to an agreed IPPP with [PMI Provider 3].⁴⁷⁴ Reasons given in board meetings were that CESP Limited needed '*sufficient strength*' to enter into an agreement with [PMI Provider 3]⁴⁷⁵ and that the '*number of consultants*' might be a barrier to contracting.⁴⁷⁶ In addition, the prices that [PMI Provider 3] would, according to CESP Limited, be willing to agree to were '*about 20% below currently negotiated prices with [PMI Provider 1]*'.⁴⁷⁷ [PMI Provider 3] also required more transparency than other PMI providers, which had an impact on CESP Limited's ability to negotiate an additional margin.⁴⁷⁸

3.276 CESP Limited did not succeed in reaching agreement with [PMI Provider 3] in the period from 2008 until early 2012 and indeed at any time during the relevant period, either by itself or through [LLP 5].⁴⁷⁹

3.277 By no later than March 2011, CESP did, however, have '*some guidance on [PMI Provider 3] for all LLPs as we do not contract with [PMI Provider 3] at CESP LLP (HQ) level*'.⁴⁸⁰ There was a discussion and '*recommendation on how to manage the relationships with [PMI Provider 3]*'.⁴⁸¹ This guidance did not amount to pricing recommendations. According to [CESP Ltd senior employee B], '*[i]t was more a case of if you want to approach [PMI Provider 3] you need to know that they will contract only on a transparent basis you know that kind of guidance*'.⁴⁸² Later, in May 2012, CESP Limited

2013: '[CESP Ltd senior employee N] has met with [PMI Provider 3] and will continue negotiations'. URN 1013, Email from [CESP Ltd senior employee N] to LLP leads dated 5 February 2013: '*we have tentatively restarted discussions with [PMI Provider 3]*'; URN 0271.1, Minutes of CESP Limited board meeting of 11 May 2013: '*[CESP Ltd senior employee N] and [CESP senior board member 34a] to negotiate as good a deal as possible with [PMI Provider 3] (cataract only) and bring it back to the board*'.

⁴⁷⁴ See for example URN 0651, [LLP 5] Minutes of meeting held on 22 February 2010, '*[PMI Provider 3] – [CESP LLP employee 5b], [X] reported that we are at a complete impasse*'; URN 0120, Minutes of the CESP Limited Board meeting on 14 January 2011, under item 4; URN 0123, LLP Directors meeting on 1 October 2011, '*...large insurers ([PMI Provider 3], etc) will be signed up in due course but that it may be a while before we have sufficient strength*'; and URN 0105, PowerPoint slides for CESP Limited board meeting of 14 January 2012, page 15.

⁴⁷⁵ URN 0123, Minutes of the CESP Limited board meeting on 1 October 2011.

⁴⁷⁶ URN 0105, PowerPoint slides for CESP Limited board meeting of 14 January 2012, page 15.

⁴⁷⁷ URN 0152, Email from [CESP Ltd senior employee B] to [Consultant 3a] [LLP 3] of 24 February 2010. See also URN 3328, Transcript of interview with [CESP Ltd senior employee B], page 52, lines 3 - 22, where [CESP Ltd senior employee B] confirmed the view that a package price for [PMI Provider 3] would be around 20% below the IPPP agreed with [PMI Provider 1].

⁴⁷⁸ URN 0152, Email from [CESP Ltd senior employee B] to [Consultant 3a] [LLP 3] of 24 February 2010 '*whilst [PMI Provider 3] will allow packages, these packages have to be broken down on the invoices indicating exactly what is surgeon's anaesthetist's and hospital fee, so there is no room for admin margin*'.

⁴⁷⁹ URN 0650, See also URN 0152, Email from [CESP Ltd senior employee B] to [Consultant 3a] [LLP 3] of 24 February 2010: '*I can put you in touch with the [LLP 5] [X], [CESP LLP employee 5b], who has been in unsuccessful discussions with [PMI Provider 3] for the past 12 months*'.

⁴⁸⁰ URN 0995, Email from [CESP Ltd senior employee B] to [CESP LLP employee 13a] [LLP 13] dated 3 March 2011.

⁴⁸¹ URN 0995, Email from [CESP Ltd senior employee B] to [CESP LLP employee 13a] [LLP 13] dated 3 March 2011.

⁴⁸² URN 3328, Transcript of interview with [CESP Ltd senior employee B], page 54, lines 20 - 22.

presented to its members a number of ways to ‘*maximise your earnings*’ when dealing with [PMI Provider 3], setting out recommended prices or price ranges for a number of services.⁴⁸³

CESP LLPs’ efforts to come to an agreement with [PMI Provider 3]

3.278 CESP LLPs were also explicitly ‘*free to engage with [PMI Provider 3] directly*’ and were encouraged to ‘*make [an] independent decision with respect to how to proceed*’⁴⁸⁴ absent a national IPPP agreement between CESP Limited and [PMI Provider 3].

3.279 In 2011, [LLP 38] and [LLP 13] individually considered contracting with [PMI Provider 3] on a package price basis.⁴⁸⁵ It is not clear from the evidence seen by the CMA whether these LLPs actually contacted [PMI Provider 3]. In any event, this did not lead to agreements with [PMI Provider 3] between 2008 and 2012.

Individual CESP consultants carrying out work for [PMI Provider 3]

3.280 Individual consultants who were members of CESP LLPs were free to continue to provide services to [PMI Provider 3] insured patients in this period. Whether they did or did not was at their discretion, as were the pricing terms, namely whether they would accept [PMI Provider 3]’s benefit maxima of £[<], or whether they would charge [PMI Provider 3]-insured patients in excess of that price, thereby seeking payment of a shortfall from the patients.

3.281 On one occasion, when a new member joined [LLP 13], the LLP members agreed to advise the new member not to join the ‘*[PMI Provider 3]*’

⁴⁸³ URN 0106, PowerPoint presentation for CESP Limited’s Board meeting of 12 May 2012, page 14.

⁴⁸⁴ URN 2557, CESP Limited board meeting 1 April 2009. The members present at the board meeting were [Consultant 1a], [LLP 1], [Consultant 5b] [LLP 5], [Consultant 7a] [LLP 7], [Consultant 9a] [LLP 9], [CESP senior board member 12a] [LLP 12], [Consultant 13a] [LLP 13], [CESP Ltd senior employee M] (Limited), [CESP senior board member 5a], [Consultant 19a] [LLP 19], [Consultant 21c] [LLP 21], [Consultant 22a] [LLP 22], [Consultant 28a] [LLP 28], [CESP senior board member 34a] [LLP 34], [Consultant 35a] [LLP 35], [Consultant 30a] [LLP 30]. See also email from [CESP Ltd senior employee B] to [Consultant 3a] of 24 February 2010 (URN 0152).

⁴⁸⁵ URN 2501, Minutes of [LLP 38] meeting dated 20 Sep 2011, page 2, which shows that [LLP 38] was considering contacting [PMI Provider 3] to set up a package price; and URN 0998, Email from [Consultant 13a] to [Consultant 13b] and others re CESP news dated 01 Dec 2011, URN 0993, Minutes of [LLP 13] meeting on 13 December 2011, and URN 0968, [LLP 13] Medical Advisory Committee meeting minutes dated 14 Dec 2011 which show an intention at [LLP 13] to approach [PMI Provider 3].

*partnership*⁴⁸⁶ while the LLP attempted to arrange negotiations with [PMI Provider 3].⁴⁸⁷

Conclusion September 2008 – May 2012 period

3.282 CESP Limited attempted to reach an IPPP agreement with [PMI Provider 3], similar to the IPPP agreements with other PMI providers as outlined in Section 3. C. the IPPP, '*Negotiating and concluding IPPP agreements in practice*', above, albeit it was not successful in concluding an IPPP agreement with [PMI Provider 3]. In this period the downward pressure on reimbursement rates from PMI providers including [PMI Provider 3] was mainly directed at new consultants (that is, NHS consultants seeking PMI provider recognition for the first time). There is a significant shift in reaction and coordination from around May 2012, when [PMI Provider 3] cut reimbursement rates for **all** consultants, new and established, as outlined below.

From May 2012 to at least December 2013: Coordination of market conduct and exchange of information relating to [PMI Provider 3] initiatives

[PMI Provider 3] lowers its benefit maxima

3.283 CESP Limited's contractual situation with [PMI Provider 3] had not changed by the May 2012 board meeting. Around that time, [PMI Provider 3] lowered its benefit maxima for consultants and facilities across specialisms for a number of procedures, including cataracts.⁴⁸⁸

3.284 There was widespread industry discussion about [PMI Provider 3]'s actions at the time.⁴⁸⁹ The CMA has not analysed the content of these discussions to consider whether these were also in breach of competition law, although it notes that one organisation FIPO, made consultants aware that the decision whether to accept the decrease in benefit maxima was for the individual consultant. Its newsletter of November 2014 states '*Bear in mind*

⁴⁸⁶ This may refer to the 'consultant partnership' referred to by [PMI Provider 3] in its meeting with the CMA on 14 January 2015, page 10 (URN 3038), although [PMI Provider 3] indicated that it operated this scheme until 2010, while the matter discussed in this paragraph dates from December 2011.

⁴⁸⁷ URN 0993, Minutes of [LLP 13] meetings on 13 and 14 December 2011: '*[LLP 5] have had some negotiations regarding fixed price packages and [Consultant 13a] will try to arrange the same for [LLP 13]. [Consultant 13c] will be advised not to join the [PMI Provider 3] partnership in the meantime*'.

⁴⁸⁸ URN 2438, Email from [CESP Ltd senior employee N] to LLP leads dated 30 May 2012: '*[i]n recent weeks, [PMI Provider 3] have re-categorised cataracts, effectively halving the payment going forward to approx. £[redacted]*'. See also URN 2622, [PMI Provider 3] response to questions, paragraphs 2.12-2.18. URN 0643, Email from [CESP Ltd senior employee N] dated 29 March 2012.

⁴⁸⁹ URNs 3847 to 3849, FIPO newsletters May 2012, January 2014, and November 2014. URN 3846, Response to the draft Statement of Objections. CESP Limited have also informed the CMA that there was '*extensive discussion concerning [PMI Provider 3] on the www.doctorsnet.org website forum, although this website is only accessible to GMC members*'.

*that If you are discussing all the implications of these matters with your local colleagues that the final decision about your course of action must be yours alone.*⁴⁹⁰

3.285 CESP Limited functioned as a ‘conduit for conversations’ between consultants affected by the decrease in benefit maxima⁴⁹¹ and issued agreed recommendations to the CESP LLPs about how to treat [PMI Provider 3] and its patients. These recommendations together form the [PMI Provider 3] infringement. The facts relating to the [PMI Provider 3] infringement are discussed in more detail below.

Agreed response by CESP LLPs and their consultant members to [PMI Provider 3] initiatives

3.286 The [PMI Provider 3] benefit maxima reduction was discussed at the CESP Limited May 2012 board meeting, as evidenced by the meeting minutes.⁴⁹² Subsequently, CESP Limited organised a conference call for the LLP leads on 28 May 2012.⁴⁹³ After the call took place, [CESP Ltd senior employee N] of CESP Limited (via [CESP Ltd employee E]) sent a summary of the discussion to the LLP leads, which reads (in part) as follows:

‘... What has happened?

... in short:

- *[PMI Provider 3] (and [PMI Provider 1]) have launched Open Referral process (initially in Corporates (1m out of 3m customers), but will roll out to the rest of their client book soon (SME/ Individuals)) ...*

⁴⁹⁰ URN 3849, FIPO newsletter November 2014.

⁴⁹¹ URN 3567, Transcript of interview with [CESP senior board member 5a], page 69, lines 7 – 8. For examples of CESP Limited functioning as a conduit or platform for conversations, see URN 2438, Email from [CESP Ltd senior employee N] to LLP leads dated 30 May 2012, which confirms that CESP Limited organised a conference call about [PMI Provider 3]’s reduction in benefit maxima; URN 1198, Email from [CESP LLP employee 1a] dated 8 February 2013, forwarded to the LLP leads by [CESP Ltd senior employee N] on the same date, which shows (i) that CESP Limited organised an LLP practice managers’ meeting, at which billing [PMI Provider 3]-insured patients was discussed; and (ii) that CESP Limited gathered the experience from an individual LLP with billing a [PMI Provider 3]-insured patient and then circulated this to other LLPs; URN 1575, Email from [CESP senior board member 5a] to [CESP Ltd senior employee N] re FW dated 02 Oct 2012 and URN 0185, Email exchange between [Consultant 36b], [CESP Ltd senior employee N], [CESP senior board member 5a], [Consultant 31a] and others, dated 26 September and 2 and 3 October 2012, which shows [Consultant 36b] ([LLP 36]) asking [CESP Ltd senior employee N] about experience with billing [PMI Provider 3]-insured patients and [CESP Ltd senior employee N] forwarding this request to [CESP senior board member 5a] [LLP 5] and [Consultant 31a] [LLP 31], who both reply to all with their specific local experience of charging [PMI Provider 3]-insured patients.

⁴⁹² URN 0126, Minutes of CESP Limited’s Board meeting of 12 May 2012: ‘a large part of the discussion centred around [PMI Provider 3], and the reduction of the surgeons fees for a number of procedures’.

⁴⁹³ URN 1151, Email from [CESP Ltd senior employee N] to LLP leads dated 23 May 2012.

- *If you don't sign up to [PMI Provider 3]'s new consultant terms (incl. price), you get NO work*
- *In recent weeks, [PMI Provider 3] have re-categorised cataracts, effectively halving the payment going forward to approx. £[<]*
- *They have reduced young anaesthetists fees to approx. £[<] (from £[<] previously) – they have been using new consultants to undermine their more experienced colleagues*
- *Was happy to tick along and add new members in order to prepare for battle down the line, but regrettably [PMI Provider 3] have now taken this decision out of our hands through the above*
- *Lastly, if we don't act, then all other insurers will follow suit as [PMI Provider 3] will have proven model*
- *This is happening to ALL consultants, and we need to stand up for our relationship with patient*

As I'm sure you can appreciate, there's really not a huge amount to lose.

[PMI Provider 3] has 40% share of PPI, PPI comprises roughly half our members work, so 20% at a rapidly declining rate (probably 15% on across all LLPs). All other insurers are watching and will follow suit.

What did we agree?

- *Agreed that we would recommend to all consultants in all LLPs that they delist from themselves [sic] [PMI Provider 3], once they have discussed this with their partners*
- *Agreed we would bill [PMI Provider 3] as IPPP, incl. surgeons and anaesthetists fee (as the latter have just been negotiated down to approx. £[<] from now on from £[<], so they are not happy either and will now need local ally.*
- *Prices to be determined by LLP for all procedures*
- *Invoice as CESP LLP not as individuals*

- *Key is for each LLP to enact the above, and contact new / young consultants, so that they realise implications of Open Referrals and working for £[X] per cataract – it completely undermines everyone’s private practice and domino effect enacts race to bottom in terms of price (and quality)!’⁴⁹⁴*

3.287 [CESP senior board member 34a], [X], responded to [CESP Ltd employee E] saying ‘*the email [CESP Ltd employee E] sent out summarising our teleconference is great. However it contains a lot of [sic] confidential information. Please use this to help spread the message to your colleagues but please don’t forward it. We all remember how this sort of thing got a bit out of hand before.*’⁴⁹⁵ [CESP senior board member 34a] confirmed in his witness interview that the points outlined under ‘*[w]hat did we agree*’ were an accurate reflection of what was agreed during the teleconference and added that ‘*tempers were running pretty high at this stage*’ following [PMI Provider 3]’s decision to lower its benefit maxima for cataracts.⁴⁹⁶

3.288 The three key forms of coordination (which are interlinked) can be distilled from the May 2012 email and the subsequent implementation of the recommendations in practice (discussed below): (i) the recommendation by CESP Limited to all Consultants to delist from [PMI Provider 3] and (following implementation in practice) not to be ‘fee assured’ consultants;⁴⁹⁷ (ii) the recommendation to bill [PMI Provider 3]-insured patients as an LLP for a (not centrally negotiated) IPPP and (following implementation in practice) to charge [PMI Provider 3]-insured patients up-front the LLP’s self-pay price, rather than to charge [PMI Provider 3] in accordance with its benefit maxima, and (iii) more generally, CESP Limited throughout this period formed a platform or ‘*conduit*’ to exchange information between CESP LLPs, as evidenced by the numerous exchanges of views, intentions and information about recommendations (i) and (ii) and additional evidence showing CESP Limited’s role in facilitating the exchange of information between LLPs and individual consultants. These three forms of coordination are discussed in more detail below.

⁴⁹⁴ URN 2438, Email from [CESP Ltd senior employee N] to LLP leads dated 30 May 2012 (the May 2012 email).

⁴⁹⁵ URN 1959, Email from [CESP senior board member 34a] to [CESP Ltd employee E] dated 31 May 2012.

⁴⁹⁶ URN 3568, Transcript of interview with [CESP senior board member 34a], page 60, lines 22 to 25.

⁴⁹⁷ To de-list means not to deal with [PMI Provider 3] at all (URN 3568, Transcript of interview with [CESP senior board member 34a], page 62, lines 5- 7), whereas not being ‘fee assured’ means that a consultant deals with [PMI Provider 3] (and continues to be [PMI Provider 3]-recognised), but not as a fee assured consultant, charging instead the consultant’s own fee (which may mean a shortfall for the patient).

(i) Recommendation by CESP Limited to all Consultants to delist from [PMI Provider 3] and subsequently not to be 'fee assured' consultants

- 3.289 The May 2012 email mentions under 'What did we agree' a recommendation 'to all consultants in all LLPs that they delist from ... [PMI Provider 3], once they have discussed this with their partners'.⁴⁹⁸ A number of Consultants were at the time of the May 2012 email recognised by [PMI Provider 3], which meant that [PMI Provider 3]-insured patients could obtain authorisation from [PMI Provider 3] to seek treatment from these consultants. To de-list would mean that an individual consultant would no longer be [PMI Provider 3] recognised, which may have the consequence that the patient would not receive authorisation from [PMI Provider 3] for reimbursement of treatment by that consultant.
- 3.290 By the summer of 2013, this recommendation changed and became a recommendation to Consultants not to be [PMI Provider 3] fee assured consultants. The recommendation not to be [PMI Provider 3] fee assured overlaps in part with the recommendation, discussed below, to charge [PMI Provider 3]-insured patients an IPPP or the 'self-pay price' (as discussed below under the second recommendation), as it is not possible for a consultant to charge an IPPP or 'self-pay price' (both of which result in a higher consultant fee than the [PMI Provider 3] benefit maxima) and be a fee assured consultant at the same time.
- 3.291 The recommendation to delist from [PMI Provider 3] and (later) not to be a [PMI Provider 3] fee assured consultant was in place from May 2012 until at least December 2013,⁴⁹⁹ and reiterated a number of times during this period.⁵⁰⁰ These recommendations were implemented by various LLPs as outlined below. In addition, all examples outlined in paragraphs 3.292 to 3.297 of CESP LLPs implementing the recommendation to charge [PMI Provider 3]-insured patients an IPPP or 'self-pay price' are also evidence of

⁴⁹⁸ URN 2438, Email from [CESP Ltd senior employee N] to LLP leads dated 30 May 2012.

⁴⁹⁹ URN 1219, CESP Winter update 2013, dated 12 December 2013 ('please hold firm and consider very strongly your status and whether to be fee assured, which generally we advise against').

⁵⁰⁰ See for example, URN 0791, Email from [CESP Ltd senior employee N] to CESP LLPs dated 23 November 2012: 'I suggest that you remain firm and avoid negotiating with them and suggest they contact me for a national contract'. The specific examples of recommending not to be fee assured include: URN 1206, Email from [CESP Ltd senior employee N] to LLP leads dated 3 July 2013 ('[u]nfortunately 33 CESP members are still [PMI Provider 3] fee assured consultants ... when we need it to be zero' and '[m]ay we suggest that you urgently review this fee assured situation and encourage other consultants to follow suit'); URN 0839, Minutes of CESP Limited Board meeting of 12 October 2013 ('General agreement that CESP members need to present a 'united front' and de register from [PMI Provider 3]', although '[v]arious issues with the mandatory de-registering all CESP members were voiced'. As action point, the minutes mention 'working group to form to fact find and agree appropriate course of action to reduce [PMI Provider 3] fee assured procedures within CESP').

implementation of the recommendation not to be fee assured (but not necessarily of the original recommendation to 'de-list').

- 3.292 [Consultant 31a], LLP lead at [LLP 31] indicated in an email to [CESP Ltd senior employee N], [CESP senior board member 5a] [LLP 5], [Consultant 36b] [LLP 36], [Consultant 30a] and [Consultant 30c] (both [LLP 30]) in October 2012: '*[n]o one is accepting any of [PMI Provider 3]'s new fee schedule in [X] (or to my knowledge, anywhere in the [X])*'.⁵⁰¹
- 3.293 Regarding [LLP 34], the LLP lead, [Consultant 34b], indicated to his colleagues in July 2012: '*I believe that there is a consensus of opinion within CESP we either not perform [PMI Provider 3] cataracts or charge the patient 'up-front' the self-pay price and ask the patient to reclaim the fee from [PMI Provider 3]*'.⁵⁰² On the specific agreed approach of recommending '*to all consultants in all LLPs that they delist from ... [PMI Provider 3]*', [CESP senior board member 34a] said, '*I didn't de-list. I think there was the odd person who did it, but they went back on them quite quickly afterwards*'.⁵⁰³ [LLP 34] internal agreement to charge [PMI Provider 3] a price in excess of the [PMI Provider 3] benefit maxima (paragraph 3.305) shows that, as a minimum, the LLP for which [CESP senior board member 34a] was the lead and its members implemented the recommendation not to be fee assured.
- 3.294 An email from [Consultant 13a], the LLP lead of [LLP 13], in January 2013, reads '*[PMI Provider 3] causing plenty of trouble – I see [X] is still "fee assured". Is he doing a sneaky deal on [PMI Provider 3] cataracts at [X]*',⁵⁰⁴ suggesting that most of the LLP members are not fee assured and that being fee assured was frowned upon. In addition, when [CESP Ltd senior employee M] and [Consultant 13a] communicated about whether [Consultant 5d], a consultant at [LLP 5], could undertake private work from the [Facility 15] in [X], [Consultant 13a] indicated '*[s]ince the cataract equipment is owned by CESP he will have to operate on our terms and I think he will have to reject [PMI Provider 3] altogether*'.⁵⁰⁵
- 3.295 The [LLP 38] meeting minutes of June 2013 state: '*at present we continue to not deal with [PMI Provider 3] and accept that new patients are being directed away from us*'.⁵⁰⁶

⁵⁰¹ URN 0185, Email from [Consultant 31a] dated 2 October 2012.

⁵⁰² URN 1966, Email from [Consultant 34b] [LLP 34], dated 5 July 2012.

⁵⁰³ URN 3568, Transcript of interview with [CESP senior board member 34a], page 61, lines 7 - 9.

⁵⁰⁴ URN 1006, Email from [Consultant 13a] dated 11 January 2013.

⁵⁰⁵ URN 1012, Email from [Consultant 13a] dated 3 February 2013.

⁵⁰⁶ URN 2507, [LLP 38] minutes of LLP meeting on 6 June 2013.

- 3.296 The minutes of [LLP 5]'s meeting of September 2013 read: '*[CESP senior board member 5a] highlighted to Partners [that [Consultant 5d]⁵⁰⁷ will not see [PMI Provider 3] patients at the new reduced [PMI Provider 3] fee*'.⁵⁰⁸ This shows that [Consultant 5d], who was a new associate member of [LLP 5] at that time, complied with the recommendation not to be fee assured. [CESP senior board member 5a] indicated to the CMA about [PMI Provider 3]-insured patients who wish to be treated by a [LLP 5] consultant: '*[y]ou could argue that they've parked their [PMI Provider 3] insurance and chosen to be self-pay patients*' and '*we've not chosen to refuse to see these patients but we have chosen to say that if you come here you must accept that your insurance company doesn't cover your bill*'.⁵⁰⁹ Later he added '*As you know, people now have referral centres which direct patients towards providers who are fee assured. And ultimately, we are not*'.⁵¹⁰
- 3.297 [Consultant 30d], a consultant at [LLP 30], sent an email to CESP Limited in November 2013, indicating that he '*might have to break rank and accept [PMI Provider 3]'s phaco fees soon*'.⁵¹¹ This indicates that this consultant was at that moment in time not accepting [PMI Provider 3]'s benefit maxima for cataracts, and it suggests that his reasons for doing so was to comply with CESP Limited's recommendation.

(ii) Recommendation to bill [PMI Provider 3]-insured patients as an LLP for an IPPP including surgeon's and anaesthetist's fee and (later) to charge [PMI Provider 3]-insured patients up-front the LLP's self-pay price

- 3.298 The agreed May 2012 recommendation (as set out in the May 2012 email) to CESP LLPs was to '*bill [PMI Provider 3] as IPPP, incl. surgeons and anaesthetists fee*'. As CESP Limited and [PMI Provider 3] had not agreed an IPPP, this would be an IPPP at LLP level. Therefore, the extent to which each CESP LLP was able to charge [PMI Provider 3] insured patients an IPPP depended in particular on whether the local facility had an agreement with [PMI Provider 3] relating to the facility fee for a cataract procedure.⁵¹² If such an agreement existed, the CESP LLP would be unable to charge an

⁵⁰⁷ [Consultant 5d] is a consultant active in the [X] area. He became an associate of [LLP 5] (URN 3229, Minutes of [LLP 5] Management/MAC meeting of 27 February 2013, URN 3230, 3231, and 3233 [Consultant 5d] is currently mentioned on CESP Limited's website as a consultant member of [LLP 5], but [CESP LLP employee 5a] confirmed to the CMA that he has recently resigned (URN 3524, [CESP LLP employee 5a] Interview Transcript, page 7, lines 24 - 25.)

⁵⁰⁸ URN 3324, Minutes of [LLP 5] meeting of 11 September 2013.

⁵⁰⁹ URN 3567, Transcript of interview with [CESP senior board member 5a], page 61, lines 6-7 and lines 13-15.

⁵¹⁰ URN 3567, Transcript of interview with [CESP senior board member 5a] Interview, page 67, lines 2-4.

⁵¹¹ URN 0327, Email from [Consultant 30d] dated 27 November 2013.

⁵¹² As far as the CMA is aware, only [LLP 5] was (and still is) able to charge [PMI Provider 3]-insured patients a package price that includes the hospital component, which it charges on behalf of the [Facility 14].

IPPP price (including facility fee), as it would not be able to bill on the facility's behalf.

- 3.299 The recommendation from CESP Limited shifted away from a focus on IPPP by October 2012. Instead, the approach of charging [PMI Provider 3]-insured patients the consultant fee 'up front' and at a level higher than [PMI Provider 3]'s benefit maxima was described as the '*default national position*'.⁵¹³ CESP Limited has indicated to the CMA that 'up front billing' was only carried out by a minority of trading LLPs, but it has not substantiated this with contemporaneous evidence. The CMA finds that at least a non-trivial number of CESP LLPs adopted the practice.⁵¹⁴
- 3.300 Around the same time, CESP Limited communicated 'billing guidelines' for billing [PMI Provider 3]-insured patients to its members, which confirm that patients would receive an invoice before surgery and that surgery would only take place after the patient had paid. It would then be for the patient to claim reimbursement from [PMI Provider 3] (which may leave the patient with a shortfall in many cases).⁵¹⁵
- 3.301 From December 2012 onwards,⁵¹⁶ the recommendation to charge [PMI Provider 3]-insured patients up-front and at a higher price than the benefit maxima was made more specific. It became a recommendation to charge [PMI Provider 3]-insured patients up-front the specific CESP LLP's self-pay consultant fee, which was usually higher than [PMI Provider 3]'s benefit maxima.⁵¹⁷
- 3.302 The recommendations about billing [PMI Provider 3] and [PMI Provider 3]-insured patients (first billing the CESP LLP's IPPP and subsequently the 'self-pay' consultant fee) were in place from May 2012 until at least November 2013,⁵¹⁸ were reiterated at various times during this period,⁵¹⁹ and were implemented by a number of LLPs as outlined below.

⁵¹³ The phrase 'default national position' is from an email from [CESP Ltd senior employee N], URN 0186, Email from [CESP Ltd senior employee N] dated 3 October 2012.

⁵¹⁴ See paragraphs 3.292 to 3.297

⁵¹⁵ URN 0102, PowerPoint presentation for CESP Limited Board meeting of 6 October 2012, page 3.

⁵¹⁶ URN 1190, CESP December update, dated 18 December 2012: '*... to re-iterate you should be treating [PMI Provider 3] (and any other non CESP contracted insurer) patients as Self Pay and it is the insurers [sic] issue*'.

⁵¹⁷ The self-pay price varies between LLPs. It usually only covers the consultant's component and it tends to be [PMI Provider 3] [£<] (around £[£<]) or higher (see the examples given in tables 3.1, 3.2 and 3.3 [LLP 5] is an exception in the period at issue (May 2012-December 2013), as it charged (and continues to charge) [PMI Provider 3]-insured patients its self-pay IPPP of (currently) £[£<]).

⁵¹⁸ URN 0317, Email from [CESP Ltd employee J] dated 22 November 2013, asking internally whether it has been suggested to [LLP 15] to charge [PMI Provider 3] a self-pay price.

⁵¹⁹ See for example, URN 1190, Email from [CESP Ltd senior employee N] dated 18 December 2012 '*to re-iterate you should be treating [PMI Provider 3] (and any other non CESP contracted insurer) as Self Pay and it is the insurers issue*'; URN 1007, Email from [CESP Ltd senior employee N] dated 22 January 2013 '*you should be*

3.303 [CESP LLP employee 5a], [§<] at [LLP 5], confirmed to the CMA when asked about the May 2012 email '*all of that was what we were already doing*'.⁵²⁰ Both [CESP LLP employee 5a] and [CESP senior board member 5a] confirmed that [LLP 5] charges [PMI Provider 3]-insured patients the local 'self-pay IPPP' of £ [§<].⁵²¹ The important distinction with the approaches of some other LLPs is that [LLP 5] did not invoice [PMI Provider 3], but only dealt with the patient: the patient receives a bill for the LLP's self-pay price and if the patient wants [PMI Provider 3] to reimburse that bill, this is a matter between patient and [PMI Provider 3]. This model of 'up-front billing' was subsequently adopted by a number of other LLPs and was described by [CESP Ltd senior employee N] as the '*default national position*'⁵²², albeit for billing the consultant fee and not an IPPP.⁵²³

3.304 [LLP 5]'s practice of charging [PMI Provider 3]-insured patients up-front the self-pay IPPP is confirmed in a number of invoices, set out in the table below. The amounts allocated to the consultant and the LLP are **significantly higher** than [PMI Provider 3]'s benefit maxima.

Table 3.1: [LLP 5] invoices to [PMI Provider 3]-insured patients, March-December 2013

Code	Invoice date and URN	Self-pay IPPP invoiced	Consultant fee + LLP margin	[PMI Provider 3] benefit maxima (consultant fee)
C7982+C7122	28 March 2013 (URN 3312)	£[§<]	£[§<]	£[§<]
C7122	16 May 2013 (URN 3320)	£[§<] ⁵²⁴	£[§<]	£[§<]
C7982	23 May 2013 (URN 3319)	£[§<]	£[§<]	£[§<]
C7982+C7122	25 September 2013 (URN 3324)	£[§<]	£[§<]	£[§<]
C3113	18 November 2013 (URN 3307)	£[§<]	£[§<]	£[§<]
C7982	18 November 2013	£[§<]	£[§<]	£[§<]
C7520	(URN 3313)	£ [§<] ⁵²⁵	£[§<]	£[§<]
C5432	9 December 2013 (URN 3308)	£[§<]	£[§<]	£[§<] ⁵²⁶

charging Self Pay prices to [PMI Provider 3] and [PMI Provider 14], where practicable and possible'; URN 0821, CESP March 2013 update ('*we need to retain a firm line and treat all non-contracted insured patients as Self Pay*').

⁵²⁰ URN 3524, Transcript of interview with [CESP LLP employee 5a], page 51, lines 12-21.

⁵²¹ URN 0667, [LLP 5] price list; URN 3524, [CESP LLP employee 5a] Interview Transcript, page 53, lines 24-27; and URN 3567, Transcript of interview with [CESP senior board member 5a], page 61, lines 3, 6, and 13-15. See also URN 3307 – 3326 [PMI Provider 3] Invoices.

⁵²² The phrase 'default national position' is a reference to an email from [CESP Ltd senior employee N]. URN 0186, Email from [CESP Ltd senior employee N] dated 3 October 2012. CESP Limited has indicated to the CMA that 'up front billing' was only carried out by a minority of trading LLPs, but it has not substantiated this with contemporaneous evidence. The CMA considers that at least a non-trivial of CESP LLPs adopted the practice.

⁵²³ This is partly a result of [PMI Provider 3]'s preference for separate agreements with the service providers in the ophthalmology pathway (the traditional model).

⁵²⁴ Operation carried out at [Facility 17], which '*never acknowledged the LLP*' (URN 3567, Transcript of interview with [CESP senior board member 5a], page 8, lines 14 - 15, which means that [LLP 5] cannot charge a patient an IPPP including the facility fee. As a result, the IPPP of £[§<] is lower than the self-pay IPPP of £ [§<].

⁵²⁵ This price is lower than [LLP 5]'s self-pay IPPP, likely as a result of the procedure being carried out at the same time as the C7982 procedure, which was invoiced at the full self-pay IPPP.

⁵²⁶ According to the patient's letter to [PMI Provider 3], this was also the amount that [PMI Provider 3] had authorised prior to the procedure.

3.305 For [LLP 34], [CESP senior board member 34a] indicated that *'it was talked about but it never actually happened.'*⁵²⁷ As a result, the CESP consultants in [LLP 34] agreed to bill [PMI Provider 3]-insured patients as an LLP, but for a proposed price of £ [X] - £ [X] (including topical (that is, local instead of general) anaesthetic),⁵²⁸ which was only the consultant's component and not a full IPPP. The [LLP 34] consultants also agreed to charge [PMI Provider 3]-insured patients *'directly up front'*.⁵²⁹ [CESP senior board member 34a] indicated in his witness interview that this approach to billing was not in place for long.⁵³⁰ However, minutes of a [LLP 34] meeting of February 2013 reflect that it was still in place at that time.⁵³¹

3.306 At [LLP 13], the consultant members agreed at an 11 June 2012 meeting that *'the consultants will accept the lowering of payments from [PMI Provider 3] but that the patient will receive a bill for the shortfall. It was also agreed that all [PMI Provider 3] patients must pay up front for their surgery'*.⁵³² [LLP 13] billed [PMI Provider 3]-insured patients the consultant fee only, which was £ [X] in February 2013,⁵³³ and a number of invoices to [PMI Provider 3]-insured patients was significantly higher. An email from [LLP 13] practice manager confirms that patients were billed directly and told to *'battle it out'* with [PMI Provider 3].⁵³⁴ This approach was still in place at least as recently as April 2014.⁵³⁵ The following table of invoices confirms that [LLP 13] consistently invoiced [PMI Provider 3]-insured patients a price that was significantly in excess of [PMI Provider 3]'s benefit maxima of £[X], or indeed the original [PMI Provider 3] benefit maxima of £[X]. On one occasion, the [LLP 13] lead [Consultant 13a], charged a [PMI Provider 3]-insured patient an IPPP.

⁵²⁷ URN 3568, Transcript of interview with [CESP senior board member 34a], page 61, lines 18 – 19 and 20 – 21. The reason given was *'we couldn't get any of the hospitals to agree to it, because the hospitals were in breach of their signed agreements with [PMI Provider 3]'*.

⁵²⁸ URN 3568, Transcript of interview with [CESP senior board member 34a], page 68, lines 11 – 19, page 69, lines 17 – 27 and page 70, lines 1 – 6; URN 1683, Minutes of [LLP 34] meeting of 21 August 2012.

⁵²⁹ URN 1683, Minutes of [LLP 34] meeting of 21 August 2012.

⁵³⁰ URN 3568, [CESP senior board member 34a] interview, page 73, lines 13 – 14.

⁵³¹ URN 1685, Minutes of [LLP 34] meeting of 7 February 2013, which mentions under the heading '[PMI Provider 3]': *'all were reminded of importance to bill patients in advance the surgeons fee or refer work elsewhere'*.

⁵³² URN 0994, Minutes of [LLP 13] meeting of 11 June 2012.

⁵³³ URN 1016, Email from [CESP LLP employee 13a] dated 8 February 2013. Note that an increase to £ [X] was discussed as well in January 2013: URN 1006, Email from [Consultant 13a] dated 9 January 2013.

⁵³⁴ URN 1016, Email from [CESP LLP employee 13a] dated 8 February 2013.

⁵³⁵ URN 0408, Email from [Consultant 13a] dated 14 April 2014: *'practice managers mightbe [sic] able to give you figures of just how much shortfall [sic] cash we are passing on to [PMI Provider 3]'s patients - the numbers must be huge and might encourage them to come to their senses'*.

Table 3.2: [LLP 13] invoices to [PMI Provider 3]-insured patients, May-November 2013

Code	Invoice date and URN	Self-pay consultant fee or IPPP invoiced	[PMI Provider 3] benefit maxima (consultant fee)
C7122	3 May 2013 (URN 3309)	£[§<]	£[§<]
C7920	31 October 2013 (URN 3311)	£[§<]	£[§<]
C7122	28 October 2013 (URN 3322)	£[§<]	£[§<]
C7122	19 November 2013 (URN 3314)	£[§<]	£[§<]
C7122	20 November 2013 (URN 3325)	£[§<]	£[§<]

3.307 The consultants of [LLP 29] sent a letter to [PMI Provider 3] in August 2012, which was copied to a number of leads of other CESP LLPs.⁵³⁶ In the letter, the LLP explains that [PMI Provider 3]-insured patients will from that moment on be warned that the cost of their treatment may not be fully covered by [PMI Provider 3]. Charges would be presented directly to the patient and not to [PMI Provider 3] and [PMI Provider 3]-insured patients would be billed through the LLP's central billing system. The letter also states that there has been no discussion or agreement between the members of the LLP about actual charges to patients and that the letter is *'not part of any attempt to negotiate or fix charges'*.

3.308 [LLP 31] charged [PMI Provider 3]-insured patients up front (by card) for surgical fees and consultations/investigations, following the schedule agreed between CESP Limited and [PMI Provider 12], which was in excess of *'old [PMI Provider 3] rates'*.⁵³⁷

3.309 [LLP 38] asked [PMI Provider 3]-insured patients to pay in cash or by card.⁵³⁸ As of January 2013, it made all of its [PMI Provider 3]-insured patients explicitly aware of this.⁵³⁹ [LLP 38] also billed [PMI Provider 3]-insured patients as an LLP, rather than as individual consultants. It *'always submit[ted] invoices for the same fees regardless of who the consultant is'*.⁵⁴⁰ This is confirmed by the invoiced outlined in the table below, which also shows that the consultant members of [LLP 38] charged [PMI Provider

⁵³⁶ URN 0749, Email from [Consultant 29a] dated 1 August 2012.

⁵³⁷ URN 0185, Email from [Consultant 31a] dated 2 October 2012. See also undated discussion paper URN 1505.

⁵³⁸ URN 2505, [LLP 38] meeting minutes of 11 October 2012, page 2 (bottom). See also URN 3310, Invoice from [LLP 38] [§<] dated 31 July 2013; and URN 3317, Invoice from [LLP 38] [§<] dated 6 August 2013, which confirm the patient paid by card, prior to the operation.

⁵³⁹ URN 2506, [LLP 38] meeting minutes of 17 January 2013, page 2 (bottom).

⁵⁴⁰ URN 1562, Email from [CESP LLP employee 38a] dated 1 November 2012.

3]-insured patients significantly in excess of [PMI Provider 3]'s benefit maxima.

Table 3.3: [LLP 38] invoices to [PMI Provider 3]-insured patients, July-August 2013

Code	Invoice date and URN	Self-pay consultant fee invoiced	[PMI Provider 3] benefit maxima (consultant fee)
C7122	31 July 2013 (URN 3310)	£[§<]	£[§<]
C7122	6 August 2013 (URN 3317)	£[§<]	£[§<]

3.310 The [§<] [LLP 1] also confirmed in an email in February 2013 that at an LLP practice managers meeting organised by CESP Limited it had been *'recommended that we treat [PMI Provider 3] patients as self-paying, send the patient a receipt and let them fight it out with [PMI Provider 3] as to whether they will pay the full amount. I sent an email to that effect back in November I think.'*⁵⁴¹ According to the email, [PMI Provider 3] had on one occasion paid the amount in full after the patient had continued to complain. The email ends with *'[t]hank you to CESP HQ for the suggestion!'*

3.311 The CMA has received a number of additional invoices to [PMI Provider 3]-insured patients. The major difference with the invoices presented in the tables above is that the following invoices are from consultants who are members of a CESP LLP, but who bill [PMI Provider 3] or a [PMI Provider 3]-insured patient as a sole trader. It follows from these invoices that some of these consultants did and some of them did not charge [PMI Provider 3]-insured patients in excess of [PMI Provider 3]'s benefit maxima.

Table 3.4: Other CESP LLP member invoices to [PMI Provider 3]-insured patients, July-October 2013

LLP / Consultant	Code	Invoice date and URN	Self-pay consultant fee invoiced	[PMI Provider 3] benefit maxima (consultant fee)
[LLP 16] / [Consultant 16c]	C7122	23 October 2013 (URN 3321)	£[§<]	£[§<]
[LLP 17] / [Consultant 17a]	C2910	11 July 2013 (URN 3315)	£[§<]	£[§<]
[LLP 25] / [Consultant 25a]	C7122	9 September 2013 (URN 3316)	£[§<]	£[§<] ⁵⁴²
[LLP 15] / [Consultant 15b]	C3180	22 October 2013 (URN 3318)	£[§<]	£[§<]

⁵⁴¹ URN 1198, Email from [CESP LLP employee 1a] dated 8 February 2013, forwarded to the LLP leads by [CESP Ltd senior employee N] on the same date.

⁵⁴² The invoice shows that [Consultant 25a] is a [PMI Provider 3] consultant partner, so it may be that the fee invoiced is in accordance with what was agreed between [PMI Provider 3] and the consultant.

(iii) *CESP Limited as a conduit for conversations between CESP LLPs about the [PMI Provider 3] initiatives*

3.312 As shown by the paragraphs above, CESP Limited functioned as a ‘conduit for conversations’ or ‘forum’ for CESP LLPs to discuss [PMI Provider 3]’s reduction in fees⁵⁴³ and other matters relating to their commercial conduct towards [PMI Provider 3].⁵⁴⁴ The following paragraphs outline additional evidence showing CESP’s role in facilitating the exchange of information between LLPs and individual consultants. The evidence available to the CMA shows that CESP Limited performed this role throughout the period of May 2012 until at least April 2014.⁵⁴⁵

3.313 CESP Limited facilitated an exchange of information between [LLP 36], [LLP 5] and [LLP 31].⁵⁴⁶

- [Consultant 36b] [LLP 36] in an email to [CESP Ltd senior employee N]: *‘Would you have any helpful data that would confirm [PMI Provider 3] patients being remunerated at CESP rather than [PMI Provider 3] prices in [X] as the powers that be at [Facility 7] were contesting this point ie that CESP wasnt [sic] effective in halting the downward trend in remuneration.’*
- [CESP Ltd senior employee N] in an email to [CESP senior board member 5a] [LLP 5] and [Consultant 31a] [LLP 31]: *‘Hello chaps ... please could you let me know latest on [PMI Provider 3] incl. pricing as some of the [Facility 7] consultants are cynical of what we claim.’*
- [CESP senior board member 5a] [LLP 5] in an email to all: *‘In [LLP 5] we bill all [PMI Provider 3] patients the full IPPP cost as per self-pay patients. The patient pays in full and we give them a receipt. I believe that in many cases [PMI Provider 3] are reimbursing our patients in full.’*

⁵⁴³ URN 3567, Transcript of interview with [CESP senior board member 5a], page 69, lines 7 – 8 and URN 3568, Interview transcript [CESP senior board member 34a], page 19, lines 1 – 21, page 59, lines 2 - 9. The characterisation of the CESP organisation as a conduit or platform for the exchange of information does not follow only from [CESP senior board member 5a] witness testimony, but also from the other evidence outlined in this section.

⁵⁴⁴ See the evidence outlined above in relation to recommendations (i) and (ii). See also for example URN 1173, Email from [CESP Ltd senior employee N] dated 26 September 2012, collating and circulating a number of responses from various CESP consultants to [PMI Provider 3]’s initiatives.

⁵⁴⁵ URN 0408, Email from [Consultant 13a] dated 14 April 2014.

⁵⁴⁶ URN 1575, Email exchange dated 2 October 2012, first between [Consultant 36b] and [CESP Ltd senior employee N] and others at CESP Limited, then also including [CESP senior board member 5a] and [Consultant 31a].

- [Consultant 31a] [LLP 31] in response to a separate email exchange between the same consultants:⁵⁴⁷ *'[CESP senior board member 5a] is correct. We charge [PMI Provider 3] patients up front (by card) for surgical fees and consultations/ investigations at CESP rates (above [§<]). Locally we are using the CESP [PMI Provider 12] schedule for [PMI Provider 3] patients ... No one is accepting any of [PMI Provider 3]'s new fee schedule in [§<] ...'*

Witness views on significance and purpose of the recommendations and information exchange relating to [PMI Provider 3]

3.314 Both [CESP senior board member 5a] and [CESP senior board member 34a] discounted the significance of the May 2012 email and the subsequent communications outlined above in their witness interviews. During a State of Play meeting⁵⁴⁸ between CESP Limited and the CMA, [§<] similarly suggested the correspondence relating to [PMI Provider 3] emanated from 'a few hotheads' and were not representative of the CESP Limited organisation as a whole.⁵⁴⁹

3.315 According to [CESP senior board member 5a], the May 2012 email was *'just a consensus of the views expressed by a smallish number of individuals on a given evening at a certain point in time, whether people acted upon that, I don't know'*.⁵⁵⁰ About the exchange of views with [Consultant 36b] [LLP 36], [Consultant 31a] [LLP 31] and [CESP Ltd senior employee N] (CESP Limited), [CESP senior board member 5a] said it was *'probably pub gossip'*.⁵⁵¹ In addition, he indicated that *'there's a very subtle difference between some sort of national, coordinated campaign of instructing people how to act, on the one hand, conspiracy, if you like. Versus, it's just a bunch of individuals who are all up in arms at having their fees cut by [§<] per cent who have spontaneously decided that they don't particularly want to work in that direction. I would argue that it was primarily the latter and that it wasn't some sort of CESP orchestrated bid to say no to [PMI Provider 3]'*.⁵⁵² More generally, [CESP senior board member 5a] claimed that *'I don't know what goes on nationally. So, I don't know beyond*

⁵⁴⁷ URN 0185, Email exchange dated 26 September and 2 and 3 October 2012, first between [Consultant 36b] and [CESP Ltd senior employee N]. [CESP Ltd senior employee N] responds copying [Consultant 31a] and [CESP senior board member 5a], and includes in this email the email from [CESP senior board member 5a] mentioned above (URN 1575).

⁵⁴⁸ URN 3569, Transcript of State of Play meeting page 77 line 20 &- page 78 line 24.

⁵⁴⁹ The CMA notes that [CESP senior board member 12a]' remarks were not made in relation to a specific piece of correspondence, but rather in general terms.

⁵⁵⁰ URN 3567, Transcript of interview with [CESP senior board member 5a], page 63, lines 5 - 6.

⁵⁵¹ URN 3567, Transcript of interview with [CESP senior board member 5a], page 66, line 19. See also pages 69 -70.

⁵⁵² URN 3567, Transcript of interview with [CESP senior board member 5a], page 68, lines 8 - 13.

*[LLP 5] what other eye doctors and other LLPs are doing with [PMI Provider 3] patients’.*⁵⁵³

3.316 Similarly, [CESP senior board member 34a] said about the May 2012 email that *‘there was discussions of lots of different ways of how to deal with this. Very little of it actually got off the ground. Nothing really ever happened of it, because people didn’t do anything that was recommended or talked about’.*⁵⁵⁴ He indicated about another email from September 2012⁵⁵⁵ that *‘this is the time when everybody was sabre-rattling and getting very stressed’.*⁵⁵⁶

3.317 [CESP senior board member 12a] indicated that *‘there are bound to be a few in that group who really get very worked up about certain things, one of which, admittedly, is the way [PMI Provider 3] behaved whenever all that kicked off ... And what does concern me is that a few hot-heads, if you like, bring down the organisation where the whole organisation itself is trying to be cooperative, helpful, patient friendly, as I say, and I think the evidence will show that pricing has reduced or at the very least there is more included in that price.’* Later he added *‘there’s not a boycott. The issue, to get down to the nitty-gritty, is that [PMI Provider 3] decided that they would pay £[<] to a consultant for a cataract operation, end of, right? And as I alluded to earlier, the majority of ophthalmologists feel that that is just an inappropriately low fee for that procedure and all the rest of it, and as an individual, what can you do?’*⁵⁵⁷

Conclusion: May 2012 – December 2013 coordination

3.318 These views are not supported by the contemporaneous documentary evidence from the May 2012 – December 2013 period, outlined above. In particular, the CMA concludes from the contemporaneous documentary evidence outlined above that:

- There was a recommendation to all Consultant members, first, to delist from [PMI Provider 3] and, later, not to be a [PMI Provider 3] fee assured consultant, which was in place from May 2012 until at least December 2013, and reiterated a number of times during this

⁵⁵³ URN 3567, Transcript of interview with [CESP senior board member 5a], page 61, lines 22 - 23.

⁵⁵⁴ URN 3568, Transcript of interview with [CESP senior board member 34a], page 61, lines 5 - 8.

⁵⁵⁵ URN 0170, Email exchange between [Consultant 30c], [CESP senior board member 34a] and others, dated 10 September 2012.

⁵⁵⁶ URN 3568, Transcript of interview with [CESP senior board member 34a], page 71, lines 19 - 20.

⁵⁵⁷ URN 3569, Transcript of State of Play meeting, page 78, lines 18 – 21, and 24 - 26, page 79, lines 1-4, and page 80, lines 14 - 21.

period. This recommendation was implemented to a certain degree by at least six CESP LLPs (see paragraphs 3.289 to 3.297 above)

- There was a recommendation to all Consultant members to charge [PMI Provider 3]-insured patients an IPPP or a consultant's component in excess of [PMI Provider 3]'s benefit maxima and to charge this fee 'up front', which was in place from May 2012 until at least November 2013. This recommendation was implemented to a certain degree by at least eight LLPs (see paragraphs 3.298 to 3.311 above)
- CESP Limited formed a platform for the exchange of information about [PMI Provider 3]'s initiatives in general and about how to bill [PMI Provider 3]-insured patients in particular from May 2012 until December 2013. This conduct involved all CESP LLPs as they all received all or some of the information (see paragraphs 3.312 to 3.313 above).

3.319 In addition, the contemporaneous documentary evidence and witness evidence suggest that the recommendations and information exchange in this period were not only based on a desire to protect the doctor/patient relationship⁵⁵⁸ by frustrating attempts to introduce open referral policies. The recommendations and information exchange were also based on the aim to thwart the downward pressure on prices that [PMI Provider 3]'s initiatives had and/or to increase revenue. For example:

- The May 2012 email states '*Key is for each LLP to enact the above, and contact new / young consultants, so that they realise implications of Open Referrals and working for £[X] per cataract – it completely undermines everyone's private practice and domino effect enacts race to bottom in terms of price (and quality)!*'⁵⁵⁹
- In July 2012, CESP Limited sent an email to CESP LLP leads, indicating (among other things) '*there are changes afoot, particularly with respect to billing guidelines as outlined by the Private Medical Insurers that are hugely detrimental to your practice and your future earning potential*'.⁵⁶⁰

⁵⁵⁸ URN 0731, Email from [CESP Ltd senior employee N] dated 12 July 2012: '*we need to stand up for our relationship with the patient, and to defend and justify the hard work that we put into providing excellent private patient care*'.

⁵⁵⁹ URN 2438, Email from [CESP Ltd employee E] dated 30 May 2012.

⁵⁶⁰ URN 0731, Email from [CESP Ltd employee E] dated 12 July 2012.

- [Consultant 36b] sent a message for prospective consultant members of [LLP 36] to [CESP Ltd employee F] (CESP Limited) and [Consultant 36a]⁵⁶¹ in September 2012, which reads '*[PMI Provider 3] has initiated an aggressive unilateral campaign to drive down doctor remuneration and take control of the private health insurance market. With other insurers likely to follow suit if [PMI Provider 3] are successful, remuneration to Consultants will be reduced by upto [sic] [X] % for key procedures (cataract, intravitreal injection etc) ie we will be expected to work for cost price*'.⁵⁶²
- In July 2013, [CESP Ltd senior employee N] indicated in an email to CESP LLP leads, '*[i]f surgeons continue to sign up to [PMI Provider 3]'s fee assured rates, then it is the opinion of CESP that you will be working for significantly under your value, and will lose control of your practice*'.⁵⁶³
- [CESP senior board member 5a] indicated in his witness interview: '*Granted. Granted. Yes. We're effectively generating more income charging it. It is self evident. The self-pay and IPPP is higher than the maxima [PMI Provider 3] are paying*'.⁵⁶⁴

From November 2012 to at least September 2014: Renewed efforts to come to an agreement with [PMI Provider 3], exchange of pricing information

Introduction

- 3.320 From November 2012 until at least September 2014, CESP Limited again held discussions with [PMI Provider 3] about an IPPP agreement, while the recommendations discussed above remained in place until at least December 2013. Thus, CESP Limited again fulfilled a role vis-à-vis [PMI Provider 3] similar to its role when coordinating and agreeing package prices with other PMI providers. However, CESP Limited remained unsuccessful at reaching an IPPP agreement with [PMI Provider 3].
- 3.321 The exchanges of pricing information and intentions from November 2012 until at least June 2014 are significantly more detailed than in the period up to May 2012. Moreover, the exchanges show that some LLPs are willing to accept an IPPP with [PMI Provider 3] of as low as £ [X], whereas others, with higher local costs, want prices to be in excess of £ [X]. This

⁵⁶¹ A consultant at [Facility 7] who ultimately decided not to join CESP.

⁵⁶² URN 0181, Email from [Consultant 36b] dated 14 September 2012.

⁵⁶³ URN 0242, Email from [CESP Ltd senior employee N] dated 3 July 2013.

⁵⁶⁴ URN 3567, Transcript of interview with [CESP senior board member 5a], page 65, lines 25 - 27

demonstrates that coordination through CESP Limited's IPPP does not allow the passing on of lower local costs to PMI providers through lower package prices.

CESP Limited efforts to come to an agreement with [PMI Provider 3]

3.322 [CESP Ltd senior employee N] re-opened discussions with [PMI Provider 3] about a potential IPPP agreement between CESP Limited and [PMI Provider 3] in November 2012. However, he indicated to a small group of LLP leads *'I don't expect we'll achieve a sensible price'*.⁵⁶⁵ According to a presentation prepared for CESP Limited's board meeting of 12 January 2013, [PMI Provider 3] offered a package price of £ [X].⁵⁶⁶ In early February 2013, [CESP Ltd senior employee N] sought views from LLPs about the *'ballpark we believe sensible'*, which included a cataract package price for [PMI Provider 3] of £ [X] and a YAG package price of £ [X].⁵⁶⁷ Throughout February 2013, various LLP leads gave their views on what would be an acceptable package price for [PMI Provider 3].

3.323 These responses show a mixed picture:

- [Consultant 36b], [LLP 36]⁵⁶⁸ *'if [PMI Provider 3] are offering £ [X] for Yag Laser and £ [X] for focal laser to retina as package prices I think this would be acceptable to [LLP 36] as we would like be able to maintain (or even increase our fee), pay the [Facility 13]⁵⁶⁹ and pay the LLP',*
- [Consultant 26a], [LLP 26]⁵⁷⁰ *'We would be very keen to take [PMI Provider 3] patients on the rate I think you are suggesting, especially with rumours of lower rates being agreed at a nearby competitor.*
- [Consultant 30a], [LLP 16]⁵⁷¹ *'In LLP 16 we make a small loss with some insurers whilst charging old [PMI Provider 3] rates for surgical fees, it would be useful to avoid this with [PMI Provider 3]...agreeing to less means possibly deciding on a reduced surgeons fee. Our hospital costs are relatively high.'*

⁵⁶⁵ URN 1187, Email from [CESP Ltd senior employee N] dated 19 November 2012. See also URN 0791, Email from [CESP Ltd senior employee N] dated 23 November 2012.

⁵⁶⁶ URN 0799, PowerPoint presentation for CESP Limited Board meeting of 12 January 2013, slide 9.

⁵⁶⁷ URN 1013, Email from [CESP Ltd senior employee N] to a large number of LLP leads dated 5 February 2013.

⁵⁶⁸ URN 0203, Email from [Consultant 36b] to [CESP Ltd senior employee N] dated 5 February 2013.

⁵⁶⁹ Likely to refer to [Facility 13], a hospital.

⁵⁷⁰ URN 0204, Email from [Consultant 26a] to [CESP Ltd senior employee N] dated 5 February 2013.

⁵⁷¹ URN 2101, Email from [Consultant 30a] dated 5 February 2013 to all addressees of [CESP Ltd senior employee N]'s original email.

- [CESP senior board member 5a], [LLP 5]⁵⁷² *'[LLP 5] is in the same boat. We have high costs and make a loss on [PMI Provider 1] work currently and anxious to avoid this for [PMI Provider 3] too.'*
- [CESP senior board member 34a], [LLP 34]⁵⁷³ *'same for [LLP 34]'*
- [Consultant 29a], [LLP 29]⁵⁷⁴ *'We at the various [X] could manage quite well with these proposed prices but if this is the starting point for negotiations we would not want to see the prices beaten down by much. However, I think it would be wonderful to restore some harmony with [PMI Provider 3] and we will have to accept some concessions'.*

3.324 [CESP Ltd senior employee N] responded to all on 6 February 2013⁵⁷⁵ noting that he would add intravitreal procedures to the discussions with [PMI Provider 3], with a proposed consultant's fee of £[X]. The responses to the intravitreals prices were positive:

- [Consultant 7a] [LLP 7]⁵⁷⁶ (6 February 2013) *'Proposed fees for all listed seem reasonable including intravits'*
- [Consultant 13a] [LLP 13]⁵⁷⁷ (7 February 2013) *'£ [X] for IV injection is reasonable. I agree about follow up and injection on the same day. You can also add into the mix their daft idea about not agreeing to OCT scans done by our surgeons during follow up but wanting them to go to our trust unit for the tests. Time for some joined up thinking from them and we might stop complaining.'*

3.325 On 14 February 2013,⁵⁷⁸ [CESP Ltd senior employee N] emailed LLP leads with initial feedback from [PMI Provider 3] *'which isn't promising as they have stipulated that they don't want to move from their offer of £ [X] package price for a cataract ...'* He added: *'I doubt that that we will get to a meaningful outcome, so don't hold your breath, unless you accept lower surgeons fees'*. This prompted the following responses from consultants:

⁵⁷² URN 2100, Email from [CESP senior board member 5a] dated 5 February 2013 to all addressees of [CESP Ltd senior employee N]'s original email.

⁵⁷³ URN 0205, Email from [CESP senior board member 34a] dated 5 February 2013 to all addressees of [CESP Ltd senior employee N]'s original email.

⁵⁷⁴ URN 0205, Email from [Consultant 29a] dated 6 February 2013 to all addressees of [CESP Ltd senior employee N]'s original email.

⁵⁷⁵ URN 0205, Email from [CESP Ltd senior employee N] dated 6 February 2013.

⁵⁷⁶ URN 0205, Email from [Consultant 7a] to [CESP Ltd senior employee N] dated 6 February 2013.

⁵⁷⁷ URN 0815, Email from [Consultant 13a] dated 7 February 2013 to all addressees of [CESP Ltd senior employee N]'s original email.

⁵⁷⁸ URN 0207, Email from [CESP Ltd senior employee N] dated 14 February 2013.

- [Consultant 14a] [LLP 14]: *'War! They'll regret it in the end'*⁵⁷⁹
- [Consultant 34b] [LLP 34]: *'Any idea how much [PMI Provider 3] hospitals charge for their facility fee at this cataract price? Then we could work out surgery and consultation fees. Personally £ [X] sounds great - £ [X] for surgery, £ [X] new patient, £ [X] hospital fee, free 1st follow-up. No anaesthetist. CESP £ [X]. VPMS [X], LLP £ [X] Presently I'm still turning them away'*⁵⁸⁰
- [Consultant 5b] [LLP 5] *'I think we should tell [PMI Provider employee 3c] that if [PMI Provider 3] wishes to continue treating patients that need surgery; (Quote from a patient) "like punters who can be shunted off to the local high street by a call centre, where they will be seen by somebody who has 'been on a course', where they can pick up a tattoo and KFC at the same time", then fine, but CESP will continue to provide the opposite kind of experience with pre, intra and postop time with a Consultant Surgeon... private patients tend to prefer the latter and until [PMI Provider 3] realises this then their market share will continue to contract'*⁵⁸¹

3.326 CESP Limited had a Board meeting on 11 May 2013. The hand out for this meeting included proposed package prices for [PMI Provider 3], showing the LLP margins for four levels of package prices (£ [X], £ [X], £ [X] and £ [X]) and set out that the breakeven price for average CESP LLPs is £ [X] when charging a consultants fee of £ [X].⁵⁸² The minutes for this meeting indicate that *'[t]here was a discussion that to close the [PMI Provider 3] deal CESP may need to consider £ [X] to match [Facility1]'*⁵⁸³

3.327 CESP Limited and [PMI Provider 3] met in June 2013,⁵⁸⁴ and that [PMI Provider 3] had by this time lowered its package price expectation for cataracts to £ [X],⁵⁸⁵ whereas CESP Limited's offer at the end of June was £[X].⁵⁸⁶

3.328 In October 2013, [Consultant 16a] [LLP 16] offered to help CESP Limited with the [PMI Provider 3] negotiations. He indicated *'I suggest we anticipate a minimum of £ [X] for the phaco which with 1 pre-op (about £ [X] - [X])*

⁵⁷⁹ URN 0207, Email from [Consultant 14a] dated 14 February 2013.

⁵⁸⁰ URN 0208, Email from [Consultant 34b] dated 14 February 2013.

⁵⁸¹ URN 0209, Email from [Consultant 5b] dated 16 February 2013.

⁵⁸² URN 1523, PowerPoint presentation for CESP Limited Board meeting of 11 May 2013, page 20.

⁵⁸³ URN 0271.1, Minutes of CESP Limited Board meeting of 11 May 2013.

⁵⁸⁴ URN 0603, Email from [CESP Ltd senior employee N] to [CESP senior board member 5a] dated 26 June 2013.

⁵⁸⁵ URN 0241, Email from [CESP Ltd senior employee N] dated 3 July 2013.

⁵⁸⁶ URN 0258, Email from [CESP Ltd senior employee N] dated 29 June 2013.

and one post op visit (about £ [X] - [X]) comes to about £ [X] ... to repeat: £ [X] should be the bare minimum for every case even when we have an anaesthetist'.⁵⁸⁷

3.329 On 25 November 2013, a meeting was held between [CESP Ltd employee J], [CESP Ltd senior employee N] (CESP Limited), [Consultant 34b] ([LLP 34]), [Consultant 37a] [LLP 37], [Consultant 26a] [LLP 26] and [CESP senior board member 34a] [LLP 34] to discuss [PMI Provider 3] (among other things).⁵⁸⁸ [CESP Ltd employee J] summarised the meeting in an email, which indicates that CESP Limited's 'fall-back position' was £ [X] outside London and £ [X] in London at this time. [Consultant 34b] responded that it was important to ensure that [PMI Provider 3]-insured patients could be seen at *'our hospitals, including NHS. Our local private hospital charges £ [X] for a case, so would not be viable'*.⁵⁸⁹

3.330 On 4 December 2013, [CESP Ltd employee J] emailed [CESP Ltd senior employee N], [CESP senior board member 34a], [Consultant 34b], [LLP 34], [Consultant 26a], [LLP 26] and [Consultant 37a], [LLP 37]. He copied in [Consultant 30b], [LLP 30], [Consultant 38a], [LLP 38], [Consultant 16a], [LLP 16], [Consultant 5b], [LLP 5], [CESP senior board member 5a], [LLP 5], and [Consultant 13a], [LLP 13]. In this email he sets out the position with [PMI Provider 3] which was the same as his summary of the 25 November 2013 meeting, including the fall-back position of £[X]. [Consultant 16a] [LLP 16] responded saying: *'I dont [sic] think £ [X] is adequate let alone the sums you mention'*.⁵⁹⁰ This email was forwarded by [Consultant 38a] to the consultant members of [LLP 38]. [Consultant 38b], a CESP consultant in [X] responded, saying, among other things, *'if we get £ [X] from [PMI Provider 3] to include the consultation I would buy it'*.⁵⁹¹

3.331 On 5 December 2013, [CESP Ltd employee J] emailed [Consultant 26a] CESP, [LLP 26], and [Consultant 34b], [LLP 34] stating that CESP Limited intended to offer a package price for cataracts to [PMI Provider 3] in the amount of £ [X] (London) and £ [X] (outside London).⁵⁹² He also attached a list of proposed prices for other ophthalmic procedures.⁵⁹³

⁵⁸⁷ URN 0276, Email from [Consultant 16a] dated 16 October 2013.

⁵⁸⁸ URN 0331, Email from [CESP Ltd employee J] dated 27 November 2013 and response from [CESP Ltd senior employee N] dated 29 November 2013.

⁵⁸⁹ URN 0331, Email from [Consultant 34b] dated 30 November 2013.

⁵⁹⁰ URN 2488, Email from [Consultant 16a] dated 4 December 2013.

⁵⁹¹ URN 2542, Email from [Consultant 38b] dated 5 December 2013.

⁵⁹² URN 0337, Email from [CESP Ltd employee J] dated 5 December 2013.

⁵⁹³ URN 0337.1, CESP Limited [PMI Provider 3] price list for other ophthalmology procedures than cataracts.

- 3.332 The CESP Limited PowerPoint board slides for the board meeting on 31 May 2014 note that there were no current negotiations with [PMI Provider 3] and the last contact was in 2013 where £[X] was the proposed package price. The accompanying meeting minutes note that [CESP Ltd senior employee A] was to *'negotiate best deals'* with [PMI Provider 1] and [PMI Provider 3].⁵⁹⁴ [CESP Ltd senior employee A] said that not having a deal with [PMI Provider 3] and [PMI Provider 1] would be *'very detrimental to CESP Limited'* as it would mean that CESP Limited would not have much coverage of the PMI market.⁵⁹⁵
- 3.333 On 22 June 2014, [Consultant 19a] emailed [CESP Ltd employee H] asking if there was any chance of a [PMI Provider 3] deal in the next six months. [CESP Ltd senior employee A] responded stating that he was meeting [PMI Provider 3] in July and was hoping to confirm a figure and then let the board decide. He asked *'what are your thoughts in [X]? And what price would you be happy with?'* [Consultant 19a] responded that *'£ [X] (not including consultations) would be the lowest'*.⁵⁹⁶ [CESP Ltd senior employee A] said he will *'log'* the price and discuss with the mini board.⁵⁹⁷ [Consultant 19a] replied that *'I have heard verbally that to be competitive with [Facility 4] we need to charge £ [X] not including outpatient consultations, or £ [X] including consultations. Otherwise a deal seems unlikely'*.⁵⁹⁸
- 3.334 [CESP Ltd senior employee A] confirmed that in September 2014, CESP Limited did not have an agreement with [PMI Provider 3], but that CESP Limited's efforts to agree an IPPP agreement were ongoing. [CESP Ltd senior employee A] had attended a meeting with [PMI Provider employee 3c] of [PMI Provider 3] in summer 2014 and the next step was for him to contact [PMI Provider 3], which had not yet happened in September 2014.⁵⁹⁹ [PMI Provider 3] confirmed to the CMA in February 2015 that it had not entered into an agreement with CESP Limited at that time. CESP Limited confirmed the same to the CMA in March 2015.⁶⁰⁰

⁵⁹⁴ URN 0991, Minutes of CESP Limited mini-board meeting dated 31 May 2014.

⁵⁹⁵ URN 3327, Transcript of interview with [CESP Ltd senior employee A], page 87, lines 16 - 24.

⁵⁹⁶ URN 0445, Email from [Consultant 19a] to [CESP Ltd senior employee A] re [PMI Provider 3] dated 23 June 2014

⁵⁹⁷ URN 0446, Email from [CESP Ltd senior employee A] to [Consultant 19a] dated 24 June 2014

⁵⁹⁸ URN 0455, Email from [Consultant 19a] to [CESP Ltd senior employee A] re [PMI Provider 3] dated 10 July 2014

⁵⁹⁹ URN 3327, Transcript of interview with [CESP Ltd senior employee A] page 17, lines 24 – 27, page 44, line 22 to page 46, line 6. The exact date of the meeting with [PMI Provider 3] is not known, but was in any event after 17 July 2014, as [CESP Ltd senior employee A] indicated it took place *'after [the CMA] first visited'* (Transcript of interview with [CESP Ltd senior employee A] page 45, line 3).

⁶⁰⁰ URN 3569, Transcript of State of Play meeting, page 31, lines 1 - 3.

CESP LLPs' attempts to come to an IPPP agreement with [PMI Provider 3]

3.335 In November 2013, [LLP 15] asked CESP Limited to *'update us on the progress of your negotiations esp with [PMI Provider 3] - if you do not make any progress by end of November - I am sure you will appreciate why we would want to negotiate directly with them - though it is not our preference'*. [LLP 15] owns its own CQC registered facility, which makes it *'different from most of the CESP organisations'*.⁶⁰¹ In January 2014, [LLP 15] indicated again to CESP Limited that it wished to deal directly with [PMI Provider 3]. As the LLP has its own facility, it *'can maintain surgeon's fee within the current [PMI Provider 3] price offer'*.⁶⁰² Subsequently, the LLP registered with [PMI Provider 3] and offered it a package price for cataracts of £ [X].⁶⁰³ In September 2014, [PMI Provider 3] signed an agreement with [LLP 15] for a price for cataracts of £ [X].⁶⁰⁴

3.336 On 23 June 2014, [Consultant 4a] emailed [CESP Ltd senior employee A] stating that [PMI Provider 3] is negotiating with [LLP 4].⁶⁰⁵

Conclusion: November 2012 – September 2014

3.337 The CMA concludes that from November 2012 until at least September 2014, CESP Limited attempted to reach an IPPP agreement with [PMI Provider 3], similar to the IPPP agreements with other PMI providers as outlined in Chapter 3 Section C IPPP, above and Annex E, albeit it was not successful in concluding an IPPP agreement with [PMI Provider 3].

3.338 In doing so, CESP Limited facilitated the exchange of commercially sensitive future intentions on acceptable IPPP prices and acceptable consultant fees thereof between trading CESP LLPs between November 2012 and June 2014.

E. Facilitation of the exchange of information about a proposal from [PMI Provider 3] and [Facility 2]

3.339 In October 2012, CESP Limited also provided a platform for the exchange of views about a proposal from [PMI Provider 3] and [Facility 2], a hospital group, regarding a package price between [PMI Provider 3] and [Facility 2],

⁶⁰¹ URN 0310, Email from [Consultant 15a] dated 19 November 2013.

⁶⁰² URN 0367, Email from [Consultant 15a] dated 3 January 2014.

⁶⁰³ URN 1081, Email from [Consultant 15a] dated 24 January 2014, and attached price list.

⁶⁰⁴ URN 3038, Note of meeting with [PMI Provider 3], *September 2014, [PMI Provider 3] signed an agreement with [LLP 15], which runs its own clinic [Facility 6]. The fee element of this clinic agreement includes [X] which is fully inclusive i.e. all elements of the 'cataract pathway' are included in its pricing to [PMI Provider 3] (£ [X]).'*

⁶⁰⁵ URN 0444, Email from Consultant 4a to [CESP Ltd senior employee A] meeting dated 23 June 2014

under which [PMI Provider 3] would ‘cede control of the [consultant] to [Facility 2]’ and the consultant would be fee assured.⁶⁰⁶

3.340 [Non CESP consultant C], a consultant in [X], informed CESP Limited about a proposal from [PMI Provider 3] and [Facility 2] hospital group to consultants. CESP Limited forwarded the details of the proposal to its members on 15 October 2012, saying ‘you should reject this proposal for all the above reasons’ and ‘[i]f you’d like to get in touch, please do so and we’ll try to guide you through these minefields’. The details of the proposal include the package price agreed between [PMI Provider 3] and [Facility 2] (£ [X]), the consultant component (£ [X]) and the anaesthetist component (£ [X], to go to consultant if no anaesthetist is used). In addition, [Facility 2] and [PMI Provider 3] proposed that ‘the clinical governance associated with the specialist will become [Facility 2]’s responsibility ... Consequently surgeons providing the service for [Facility 2] could be a mix of employed and overseas docs’.

3.341 A number of consultants responded individually to [CESP Ltd senior employee N] about this email on the same date, and [CESP Ltd senior employee N] collated these responses in another email sent to CESP Limited’s members on 17 October 2012. The responses from the consultants read, in part, as follows:⁶⁰⁷

- a. [Consultant 17b], [LLP 17]: ‘Thanks [CESP Ltd senior employee N], This is a very worrying and strange comment that should be put out to all consultants from your piece below: [citing [CESP Ltd senior employee N]’s email] ... **Consequently surgeons providing the service for [Facility 2] could be a mix of employed and overseas docs** [emphasis in original email]. This is clearly a model that should be resisted. How can we influence [Facility 2] organisation to stop this. No body [sic] wants overseas doctors in our private hospitals. Maybe stopping all cases going to [Facility 2] for any condition?’
- b. [Consultant 28b], [LLP 28]: ‘... [PMI Provider 3] are just being daft. If they cut out the middle man, and gave [Facility 2]’s [X] cut to the surgeon, [PMI Provider 3] would be no worse off. They would have no aggro, and their membership numbers would be buoyant and reputations solid’.
- c. [Consultant 17b], [LLP 17] again: ‘Don’t bet on it [Consultant 28b]. Most [Facility 2]’s do little opthalmics and this would be a reasonable

⁶⁰⁶ URN 0776, Emails from [CESP Ltd senior employee N] dated 15 and 17 October 2012.

⁶⁰⁷ All responses are included in URN 0776, Emails from [CESP Ltd senior employee N] dated 15 and 17 October 2012.

business decision. The problem here is that I know there will be consultants who will do this ... I don't think patients will be happy as they are signed up to [PMI Provider 3] for consultants not South Africans!

3.342 In [CESP Ltd senior employee N]'s email collating these responses, he repeated that the deal is '*clearly ... not in your interests at all on any level*'.⁶⁰⁸

3.343 On 29 October 2012, [CESP Ltd senior employee N] re-iterated to Consultant members: '*[j]ust a reminder on our position, which remains that you do not agree to this deal in any form as it's all about directional control from [PMI Provider 3] and the [Facility 2] [sic]*'.⁶⁰⁹

3.344 The CMA concludes that in October 2012, CESP Limited facilitated the exchange of information between CESP LLPs about a proposal from [PMI Provider 3] and [Facility 2] regarding the provision by [Facility 2] to [PMI Provider 3] of packaged ophthalmic services. Prior to and following these exchanges of information, CESP Limited recommended to CESP LLPs⁶¹⁰ not to accept the proposal from [PMI Provider 3] and [Facility 2].

⁶⁰⁸ URN 0776, Emails from [CESP Ltd senior employee N] dated 15 and 17 October 2012.

⁶⁰⁹ URN 1565, Email from [CESP Ltd senior employee N] dated 29 October 2012.

⁶¹⁰ It is not clear exactly which CESP LLPs received the emails that form the evidence of the [Facility 2] infringement, because [CESP Ltd senior employee N] used Bcc when sending the emails. As a minimum, all or some of the emails were sent to [Consultant 17b] [LLP 17], [Consultant 26b] [LLP 26], [Consultant 28b] [LLP 28], [Consultant 31a] [LLP 31] and [Consultant 6a] [LLP 6].

4. LEGAL ASSESSMENT

A. Introduction

- 4.1 This Chapter sets out the CMA's conclusions of its legal assessment of CESP Limited's conduct in light of the evidence set out at Chapter 3 above.⁶¹¹ 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, legislation and guidance, is set out at Annex A (Legal Framework). The CMA recommends that, in the first reading of this Decision, Annex A is read before this Chapter.
- 4.2 The CMA has assessed the evidence in this case by reference to the requisite standard of proof as described in paragraphs A.83 to A.85 Annex A. The evidence set out in this Decision is sufficient to discharge the burden of proof in respect of the CMA's conclusions.

B. Undertakings and associations of undertakings

- 4.3 The Chapter I prohibition and Article 101(1) TFEU⁶¹² apply to agreements and concerted practices between 'undertakings', as well as to decisions by 'associations of undertakings'.⁶¹³
- 4.4 For the purposes of the Act and the TFEU, an undertaking is any entity engaged in economic activity, regardless of its legal status or the way in which it is financed.⁶¹⁴ An association of undertakings is any body formed to represent the interests of its members in commercial matters.⁶¹⁵

Individual consultants

- 4.5 This section considers which persons or entities form 'undertakings' for the purpose of applying the Chapter I prohibition at the level of individual consultants. Consultants active in the privately funded healthcare market offer their services as sole traders, that is to say, they are not in the employment of an organisation.⁶¹⁶ They offer services to patients, who either pay for these

⁶¹¹ 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.

⁶¹² For the purpose of brevity and in this chapter, references to the Chapter I prohibition should be read as including Article 101(1) TFEU, unless specifically indicated otherwise.

⁶¹³ See Annex A, paragraph A.11

⁶¹⁴ See Annex A, paragraph A.12

⁶¹⁵ See Annex A, paragraph A.20

⁶¹⁶ An exception is the [Facility 3] model, in which ophthalmologists are employed by [Facility 3]. None of the CESP ophthalmologists is employed by [Facility 3].

services themselves (self-pay), or have private medical insurance, in which case the services are paid for (wholly or partly) by PMI providers. Thus, individual consultants engage in an economic activity and are undertakings for the purpose of the Chapter I prohibition.

CESP LLPs

- 4.6 When individual consultants form an LLP, they create a new entity, which can in turn also form an undertaking, provided that it engages in economic activity.
- 4.7 Where the LLP itself does not offer goods or services on a given market, but acts only as a membership organisation, assisting the individual members for example with renting premises, pooling administrative resource and ensuring there is cover when members are on leave, the LLP does not engage in an economic activity. It does not, therefore, in itself constitute an undertaking, but rather operates as an association of undertakings, the undertakings being the individual consultants.
- 4.8 If, on the other hand, LLPs themselves offer goods or services on a given market, they engage in an economic activity and, therefore, form undertakings for the purpose of the Chapter I prohibition. Whether individual consultants then retain their characterisation as separate undertakings or together with the LLP form one single undertaking depends on the extent to which (including in respect to which commercial functions) they cede decision making power to the LLP they joined. Where the individual consultant no longer enjoys real autonomy in determining his/her course of action in the market, but carries out the instructions issued to him/her by the LLP's decision making body,⁶¹⁷ the consultant and the LLP form a single economic unit and, thus, one single undertaking for the purpose of the Chapter I prohibition.⁶¹⁸ Where, on the other hand, individual consultants retain autonomy in determining their course of action in the market (or a segment thereof), they remain undertakings separate from the LLP. The situation at each individual LLP will depend on the economic, organisational and legal links that exist between the LLP and its members, which may vary from case to case and cannot therefore be set out in an exhaustive list.⁶¹⁹

⁶¹⁷ This can include the LLP's Board or a committee of partners, but may also concern the entire partnership.

⁶¹⁸ Case C-73/95 P *Viho v Commission* [1996] ECR I-5457, paragraph 16. See also the judgment of the Competition Appeal Tribunal in *AXA Healthcare Limited v Competition and Markets Authority* [2015] CAT 5, paragraph 36: 'where individual professionals operate through a genuine partnership structure with full sharing of profits and losses, the question of unlawful common price-setting by professionals does not arise, because the partnership is regarded as a single economic entity for competition law purposes',

⁶¹⁹ See, by analogy, Case C-172/12 P *El du Pont de Nemours and Company v Commission*, not yet reported, paragraph 43, and the case law there cited.

- 4.9 In this case only the 18 trading LLPs can charge the IPPPs agreed between CESP Limited and PMI providers. In order to charge the IPPPs, the individual consultants are required to bill through the CESP LLPs, which therefore offer goods/services in the relevant market(s). In addition, the LLP may retain what is known as the ‘LLP margin’. The LLP margin represents revenue for the LLP and, if it is larger than the LLP’s relevant costs, this results in profit at the LLP level. When charging package prices, the CESP LLPs not only offer the services of their consultant members to patients and PMI providers, they also commit to ensuring the patient can be seen at a facility and, if necessary, that an anaesthetist is present. These are obligations on the LLP, not on the individual consultant.⁶²⁰
- 4.10 Taking these circumstances in the round, each of the 18 trading LLPs forms a separate undertaking. However, whether they are separate undertakings or associations of undertakings (as is likely the case for the non-trading LLPs if they do not engage in an economic activity), this is consistent with the CMA’s conclusion, discussed below, that CESP Limited is an association of undertakings for the purpose of the Chapter I prohibition.⁶²¹ Whether the individual consultants who are members of the trading LLPs form single economic units with their LLPs or not similarly does not alter the CMA’s conclusions.

CESP Limited

- 4.11 From as early as 2008, CESP Limited operated as a membership organisation for consultants providing a number of services which are available for individual consultants and/or LLPs.⁶²² It offers the services set out at paragraph 3.79, one of which is the opportunity to participate in the IPPP agreements agreed between CESP Limited and PMI providers.
- 4.12 The CMA finds that, CESP Limited constitutes an association of undertakings for the following reasons.
- 4.13 First, CESP Limited’s members are separate undertakings or associations of undertakings (see above).
- 4.14 Secondly, CESP Limited acts in the interest of those members. It describes itself as a membership organisation which provides a number of services to its

⁶²⁰ This follows from the fact that it is the LLP that has a hospital agreement in place and it is at the level of the LLP that fee splits (the fees paid to the hospital, the ophthalmologist and the surgeon) are agreed.

⁶²¹ Joined cases T-217/03 and T-245/03 *FNCBV and Others v Commission* [2006] ECR II-4987, paragraph 49: ‘the concept of an association of undertakings must be understood as being capable of applying to associations which themselves consist of associations of undertakings’.

⁶²² URN 0458, CESP Limited response to informal information request.

members. Those services are not limited to the agreeing of IPPP prices with PMI providers, but include joint purchasing of indemnity insurance, assistance with obtaining CQC registration, billing through VPMS, training and support to use the MedDbase system, negotiating facility agreements and shared marketing.

- 4.15 Thirdly, Board structure, whereby each member has a representative on the Board,⁶²³ ensures that all members have a say in important decisions relating to CESP Limited. Despite the fact that some LLPs have a larger shareholding, this does not entitle them to a stronger vote at Board level. Although recently a ‘mini-board’ consisting of seven or eight CESP LLP leads was formed, this was pursuant to a decision in which all members could have a say and not the result of those seven or eight LLPs having a stronger vote within the association’s decision making bodies.
- 4.16 Fourthly, although CESP Limited has other shareholders than the 18 trading CESP LLPs whose commercial conduct it coordinates with **agreed** IPPP prices (namely the non-trading CESP LLPs and [CESP senior board member 5a] and [CESP Ltd senior employee M]), the interests of those other shareholders do not conflict with those of the 18 trading LLPs.⁶²⁴
- 4.17 Finally, the CMA concludes that CESP Limited does not form one single undertaking with one or more LLPs or with individual consultants. As a result of the corporate governance put in place, none of the 37 LLPs has decisive influence over CESP Limited, nor do any of the individual consultants. In turn, CESP Limited also does not have decisive influence over any of the 37 LLPs or over any individual consultants. As a result, CESP Limited does not form one single economic unit and therefore a single undertaking for the purposes of the Chapter I prohibition with one or more of the CESP LLPs or with any of the individual consultants.
- 4.18 The CMA does not accept that the potential infringements discussed in this Decision can be avoided by ‘*a minimal change in structure*’, that is to say, by establishing ‘*one single LLP covering the whole of the UK*’.⁶²⁵ The merging of 37 separate LLPs with significantly differing structures and functions would not amount to ‘*a minimal change in structure*’. Moreover, such a change in structure would likely constitute a relevant merger situation, which could be assessed by the CMA under the Enterprise Act 2002. Finally, any cartel activity between professionals would fall outside the scope of the Chapter I

⁶²³ URN 0458, CESP Limited response to the CMA’s informal information request, page 2, point 3.b.

⁶²⁴ Case T-111/08 *MasterCard v Commission*, paragraph 258.

⁶²⁵ URN 3350, CESP Limited submission to the CMA dated 31 March 2015, paragraphs 2.2 and 2.3.

prohibition from the moment they have formed one single undertaking. That does not mean that such activity should be treated any differently up to the moment such a single undertaking was formed.

Conclusion: undertakings and associations of undertakings

4.19 The CMA concludes that CESP Limited forms an association of undertakings for the purpose of the Chapter I prohibition.

C. The infringements are each a series of decisions by an association of undertakings

Introduction

4.20 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, which are calculated to produce the results which this provision aims to suppress.⁶²⁶

4.21 Where an association of undertakings is found to exist, its decisions and recommendations which constitute the faithful reflection of the association's resolve to coordinate the commercial conduct of its members fall within the scope of the Chapter I prohibition.⁶²⁷

4.22 From September 2008 until May 2015, CESP Limited coordinated the **trading** CESP LLPs' commercial conduct by negotiating and agreeing IPPPs on its trading members' behalf with certain PMI providers and by facilitating the exchange of commercially sensitive information, including future pricing intentions, about the IPPPs between trading CESP LLPs (**the IPPP infringement**).

4.23 Secondly, from May 2012, CESP Limited coordinated the commercial conduct of **all** CESP LLPs in response to [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants by:

- Recommending to all Consultants to delist from [PMI Provider 3] and, subsequently, not to be [PMI Provider 3] fee assured consultants (re-iterated a number of times and in place until at least December 2013).

⁶²⁶ Case C-382/12 P *MasterCard*, not yet reported, paragraph 62.

⁶²⁷ Paragraph A.30 of Annex A.

- Recommending to all Consultants that they bill [PMI Provider 3]-insured patients as an LLP for a (not centrally negotiated) IPPP and, subsequently, to charge [PMI Provider 3]-insured patients up-front the LLP's self-pay price (re-iterated a number of times and in place until at least November 2013).
- More generally, CESP Limited throughout this period of May 2012 – December 2013 formed a platform or '*conduit*' to exchange information between CESP LLPs, as evidenced by the numerous exchanges of views, intentions and information about the above recommendations and additional evidence showing CESP Limited's role in facilitating the exchange of information between LLPs and individual consultants.

(together the [PMI Provider 3] infringement).

- 4.24 Finally, CESP Limited facilitated the exchange of information between CESP LLPs about a proposal from [PMI Provider 3] and [Facility 2] regarding the provision by [Facility 2] to [PMI Provider 3] of packaged ophthalmic services. Prior to and following these exchanges of information, CESP Limited recommended to CESP LLPs not to accept the proposal from [PMI Provider 3] and [Facility 2] **(the [Facility 2] infringement)**.
- 4.25 The infringements each constitute a series of decisions by an association of undertakings to continuously coordinate the CESP LLPs' commercial conduct, with the object of restricting competition in breach of the Chapter I prohibition. The CESP LLPs and/or their consultant members by authorising and/or expressly or tacitly empowering CESP Limited to coordinate their commercial conduct in these ways, intended and/or agreed to coordinate their conduct by means of these series of decisions. Their collective interests coincide with the interests taken into account when CESP Limited adopted these decisions.

Characterisation as a series of decisions by an association of undertakings

- 4.26 The following (non-cumulative) considerations support the characterisation of each of the infringements as a series of decisions by an association of undertakings which form a single and continuous restriction of competition, in line with the case-law set out in Annex A, paragraphs A.42 to A.51:
- a) The CESP LLPs share a common interest in CESP Limited coordinating their commercial conduct and facilitating the exchange of information between them (paragraphs 4.27 to 4.31 below)

- b) Employees of CESP Limited were empowered by the CESP LLPs to coordinate their commercial conduct through the IPPP infringement. They also as a minimum received tacit approval to issue the recommendations and facilitate the exchanges of commercially sensitive information between CESP LLPs that form the [PMI Provider 3] infringement and the [Facility 2] infringement (paragraphs 4.32 to 4.33 below)
- c) The coordination of commercial conduct of the CESP LLPs through the IPPP infringement, the recommendations regarding [PMI Provider 3]'s initiatives and regarding the proposal from [PMI Provider 3] and [Facility 2] and the facilitation of the exchanges of commercially sensitive information constituted the faithful reflection of CESP Limited's resolve to coordinate the conduct of the CESP LLPs. The fact that such measures are non-binding is immaterial to this conclusion (paragraph 4.34 to 4.65 below)
- d) CESP LLPs actually charge the IPPP prices in practice and have actually implemented the recommended commercial response to [PMI Provider 3]'s initiatives (paragraphs 4.66 to 4.67 below). They also participated actively in the exchanges of commercially sensitive information that form part of all three infringements.

Common interest

- 4.27 The CESP LLPs have a common interest in CESP Limited coordinating their commercial conduct through the IPPP prices and with regards to [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants, and in CESP Limited facilitating the exchange of commercially sensitive information.
- 4.28 First, the **trading** LLPs have a common interest in CESP Limited negotiating, recommending and agreeing IPPP prices on their behalf, which would increase their revenue, thwart downward pressure on prices and stabilise their margins. In the CMA's view, it follows from the existence of these IPPP prices and the LLPs' involvement in the setting of these IPPP prices that the trading LLPs have a common interest in the IPPP prices. There would be no reason to opt-in to the IPPP prices if they were not beneficial to the LLPs. In addition, the following evidence clearly shows this common interest:
 - a) The IPPP secures that revenue streams within the packaged ophthalmic pathway that are not part of a consultant's income under the traditional model have been allocated to consultants

and/or their CESP LLPs as a higher consultant fee and/or LLP margin. This is the case for the anaesthetist component of the IPPP price when no anaesthetist is used and where the facility fee is at such a level that it allows for LLP margin.⁶²⁸

- b) As early as June 2008, CESP LLPs considered negotiating and agreeing IPPP agreements a priority for CESP Limited.⁶²⁹ [CESP Ltd senior employee M] indicated this may have been a result of downward pressure on prices from [PMI Provider 3].⁶³⁰
- c) CESP Limited on a number of occasions projected profit or revenue increases for LLPs as a result of the use of IPPPs.⁶³¹ The benefits of the IPPPs for increasing profits or maintaining fees were recognised by individual CESP LLPs.⁶³²
- d) The CESP LLPs also have a common interest in the amount of the IPPP prices, showing a strong preference for higher prices.⁶³³
- e) The CESP LLPs had a common interest in thwarting downward pricing pressure by PMI providers, which they sought to avoid through the IPPP.⁶³⁴

⁶²⁸ See Section 3.C the IPPP of the Decision, headed 'Fee splits' starting at paragraph 3.120

⁶²⁹ See paragraph 3.145 and URN 3355, CESP Limited Board Slides June 2008, page 12.

⁶³⁰ URN 3329, [CESP Ltd senior employee M] Interview Transcript, page 27: '*... so when [PMI Provider 3] attempt to cut reimbursement levels, I guess people got quite worried so sort of not surprising when this was done that [IPPP and insurer recognition] was at the top*'.

⁶³¹ See Chapter 3.Section B, History, development and aims, section headed '*to increase members incomes and profitability through collective negotiations*' starting at paragraph 3.81, URN 2555, CESP Limited Board meeting minutes dated February 2009; URN 1048, CESP Board meeting PowerPoint presentation, 14 January 2012; URN 0732, Introductory leaflet entitled 'An introduction to CESP'.

⁶³² URN 0992, [LLP 13] meeting notes dated 22 November 2010: '*Insurance deals ... Partnership highly dependent on using insurance deals to improve partnership profits*'; and URN 0840, Email from [Consultant 14a] ([LLP 14]): '*The whole purpose of CESP is to control our fees....Maintaining our fees - independently but within a group - is the only way to protect ourselves*'; URN 0555, [LLP 1] Meeting minutes dated 13 June 2011.

⁶³³ URN 0612, Email from [CESP senior board member 34a] dated 11 October 2013 about a new contract with [PMI Provider 2]: '*[i]f it's less than our current total then we are not interested*'. URN 0330, Email exchange between CESP Limited and members of [LLP 34], dated 26 and 27 November 2013: '*Our tariff netts [sic] a surgeon considerably more than if they see a patient elsewhere under the [PMI Provider 1] tariff*'; URN 0369, email exchange between [Consultant 16a], [CESP Ltd employee J], [CESP Ltd senior employee N] and [CESP senior board member 34a], dated 2 and 3 January 2014: '*[g]ood stuff. At the end of the day all other factors will be secondary to price*'; URN 3327, [CESP Ltd senior employee A] interview, page 93: '*... every price isn't going to be ... received well by all of the LLPs, and obviously in certain places around the country they may have wanted more than that*', showing that the LLPs had an interest in higher package prices.

⁶³⁴ URN 1969, Email from CESP Limited dated 12 July 2012: '*Up to [X] reduction in surgeon's fees. Either go down with this shipwreck, or grab hold of your lifeboat CESP Ltd*'. URN 0612, Email from [CESP senior board member 34a] dated 11 October 2013 about a new contract with [PMI Provider 2]: '*[i]f it's less than our current total then we are not interested ... we aren't going down the prisoners dilemma route with them*'. URN 2433, Article by [CESP senior board member 34a] et al, entitled 'Private Practice, Insurance Companies and the Prisoners' Dilemma', which shows a concern of the authors (including also for example [CESP senior board member 5a] and [Consultant 14a]) that PMI providers would drive the reimbursement for consultants down.

- 4.29 Secondly, **all** CESP LLPs had a common interest in thwarting the downward pressure⁶³⁵ on consultant fees following in particular [PMI Provider 3]'s lowering of its benefit maxima and [PMI Provider 3]'s initiatives to increase the pool of fee-assured consultants. When [PMI Provider 3] lowered its benefit maxima in the course of 2012, CESP Limited organised a conference call to discuss the members' conduct vis-à-vis [PMI Provider 3], at which the CESP LLPs agreed on two recommendations.
- 4.30 Finally, the CESP LLPs have a common interest in CESP Limited facilitating the exchange of commercially sensitive information about the above and about other commercial matters. For example, in the period leading up to and during negotiations with PMI providers, CESP Limited facilitated exchanges between CESP LLPs regarding the future prices that would be acceptable to them, ensuring that IPPP prices were set at a level that was in the CESP LLPs' common interest.⁶³⁶ [CESP senior board member 34a] indicated in relation to conversations between CESP LLPs through CESP Limited about [PMI Provider 3] that *'Ophthalmology and medicine in general has no forum for discussing these terms and conditions for private practice. Our College won't allow us to do it through their charter. The MDU and BMA won't allow it ... It was felt as though trying to organise a contract through CESP might be a way around this.'*⁶³⁷ CESP Limited also functioned as a *'conduit for conversations'* between LLPs,⁶³⁸ gathering, collating and circulating information passed to it by individual consultants or LLPs. As such, it provided a platform to LLPs to exchange commercially sensitive future intentions on how to treat [PMI Provider 3] and [PMI Provider 3]-insured patients.⁶³⁹
- 4.31 The value of CESP Limited to the LLPs was summed up by [CESP senior board member 34a] in an email as *'almost completely at the LLP level (keeping surgeons fees very high, profit on IPP [sic] deals, sharing information, creating common systems ...).'*⁶⁴⁰ This comment from a consultant member who was also the Chair of CESP Limited at that time,

⁶³⁵ The downward pressure that [PMI Provider 3] would have is visualised by CESP Limited in the slide reproduced at Figure 3.8, which shows how the consultant component falls if consultants sign up to [PMI Provider 3], but increases and then stays stable if they charge under the CESP Limited IPPP prices.

⁶³⁶ See Section 3C IPPP paragraphs 3.126 to 3.133 URN 0103, CESP board meeting hand-out of 12 January 2013, which states that [PMI Provider 3] was offering a £[><] package price. It asks the attendees: *'Do we accept? £ [><]k.'* URN 1013, Email from [CESP Ltd senior employee N] to a number of LLP leads, requesting *'honest/candid feedback on where we are trying to aim for'.*

⁶³⁷ URN 3568, [CESP senior board member 34a] Interview Transcript, page 76.

⁶³⁸ URN 3567, [CESP senior board member 5a] Interview Transcript, page 91 (comment made in relation to [PMI Provider 3]).

⁶³⁹ See Chapter 3 sections D and E. Also URN 0152, email from [CESP Ltd senior employee B] to Consultant 3a [LLP 3] when discussing if this LLP could approach [PMI Provider 3] directly: *'I can put you in touch with the [LLP 5] [><], [CESP LLP employee 5b], who has been in unsuccessful discussions with [PMI Provider 3] for the past 12 months'.*

⁶⁴⁰ URN 0219, Email from [CESP senior board member 34a] to [Consultant 19a] dated 24 March 2013.

confirms that the LLPs had a common interest in the coordination and facilitation that CESP Limited provided, as detailed above.

Empowerment of CESP employees

- 4.32 In a board resolution the CESP LLPs explicitly and formally gave delegated authority to [CESP Ltd senior employee M] to negotiate and enter into IPPP contracts with PMI providers.⁶⁴¹ This practice was subsequently continued by [CESP Ltd senior employee N]⁶⁴² and [CESP Ltd senior employee A].⁶⁴³ All of these members of staff were also explicitly empowered to negotiate with [PMI Provider 3].⁶⁴⁴ [CESP Ltd senior employee M], [CESP Ltd senior employee N] and [CESP Ltd senior employee A] were supported by various CESP Limited employees, including [CESP Ltd senior employee B], [CESP Ltd employee J] and [CESP Ltd employee H]. The CESP Limited members of staff were supervised by a consultant chairman who was appointed by the CESP LLPs and ultimately by CESP Limited's Board, on which all CESP LLPs had a seat. Thereby, the CESP LLPs empowered CESP Limited to continuously coordinate their pricing by offering national deals to PMI providers.
- 4.33 Such formal empowerment did not take place with respect to the specific functions of coordination of CESP LLPs' response to [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants and their response to the proposal from [Facility 2] and [PMI Provider 3], or with respect to facilitation of the exchange of commercially sensitive information about these matters. However, the CMA finds that CESP Limited's staff could not have organised this coordination and the facilitation of exchange of information without at least the express or tacit approval of its members:⁶⁴⁵

⁶⁴¹ See Chapter 3 section C paragraphs 3.147 - 3.149.

⁶⁴² See Chapter 3 section C paragraphs 3.150– 3.152. On occasion, formal authorisation is given to [CESP Ltd senior employee N] as well: the minutes of the 12 October 2013 board meeting (URN 1693) state about [PMI Provider 2]: *'ACTION – [CESP Ltd senior employee N] to continue price negotiations with [PMI Provider 2] for a 'cataract pathway' with clinical input from [CESP senior board member 34a].'*

⁶⁴³ See Chapter 3 section C paragraphs 3.153 – 3.154 [CESP Ltd senior employee A] negotiated on the CESP LLPs behalf and then required the 'mini board's' consent to enter into an agreement with [PMI Provider 1]. [CESP Ltd senior employee A] was given authority to *'negotiate best deals'* with [PMI Provider 1] and [PMI Provider 3] at a Board meeting of 31 May 2014 (URN 0991, Minutes of CESP Limited Board meeting of 31 May 2014).

⁶⁴⁴ This occurred not only by giving [CESP Ltd senior employee M] delegated authority on 13 September 2008, but also specifically at CESP Limited's board meeting on 1 April 2009, where it was agreed that *'[CESP Ltd senior employee M] [would] contact [PMI Provider 3] with a national offer, and feedback response to LLP leads'* (URN 2557); at CESP Limited's board meeting on 11 May 2013, when the board resolved: *'[CESP Ltd senior employee N] and [CESP senior board member 34a] to negotiate as good a deal as possible with [PMI Provider 3] (cataract only) and bring it back to the board'* (URN 0226.1); and at CESP Limited's board meeting on 31 May 2014, when the board resolved that [CESP Ltd senior employee A] was to *'negotiate best deals with [PMI Provider 1] and [PMI Provider 3]'* (URN 0991).

⁶⁴⁵ See, in the same vein, Case T-136/94 *Eurofer* [1999] ECR II-266, paragraph 113, upheld in Case C-179/99 *Eurofer* [2003] ECR I-10740, paragraphs 27 and 28.

- a) The two recommendations relating to [PMI Provider 3], outlined in paragraph 4.23 above, were made by CESP Limited after a conference call with the CESP LLP leads⁶⁴⁶, and the recommendations reflected an 'agreed' position. [CESP senior board member 34a], at the time Chair of CESP Limited, confirmed that the summary containing the recommendations was 'great'.⁶⁴⁷
- b) The coordination of CESP LLPs' response to [PMI Provider 3]'s lowering of its benefit maxima and [PMI Provider 3]'s initiatives to increase the pool of fee-assured consultants and facilitation of the exchange of commercially sensitive information were carried out for a significant period of time and with active participation from the Consultant members.
- c) None of the individual consultants or CESP LLPs at any point in time publicly distanced themselves from the coordination by CESP Limited of CESP LLPs' response to [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants and their response to the proposal from [Facility 2] and [PMI Provider 3]. They also did not publicly distance themselves from CESP Limited's facilitation of the exchange of commercially sensitive information, or from any actual exchanges of information.
- d) The members of staff involved reported to a consultant Chairman. Two former Chairmen of CESP Limited were actively involved in the coordination by CESP Limited of CESP LLPs' response to [PMI Provider 3]'s lowering of its benefit maxima and [PMI Provider 3]'s initiatives to increase the pool of fee-assured consultants and facilitation of the exchange of commercially sensitive information.⁶⁴⁸

Faithful reflection of CESP Limited's resolve to coordinate the conduct of the trading CESP LLPs

4.34 A measure⁶⁴⁹ constitutes a decision by an association of undertakings if it *'constitutes the faithful reflection of the association's resolve to coordinate the*

⁶⁴⁶ URN 2438, May 2012 email.

⁶⁴⁷ URN 1959, [CESP senior board member 34a] response to May 2012 email.

⁶⁴⁸ URN 3568, Transcript of interview page 20 lines 15 to 17, page 61 line 11 to page 62 lines 20. URN 3567, Transcript of interview [CESP senior board member 5a] page 18 line 10 to 12, page 63 lines 2 to 23, page 68 line 6 to page 69 line 17

⁶⁴⁹ This can include, for example, the constitution or rules of an association of undertakings, or its recommendations or other activities (see paragraph A.42 of Annex A).

conduct of its members'.⁶⁵⁰ Below, the CMA sets out why the infringements constitute the faithful reflection of CESP Limited's resolve to coordinate the conduct of its members.

(i) The IPPP infringement

- 4.35 When CESP Limited agrees an IPPP with a PMI provider, it creates price lists for all procedure codes on which it has reached agreement and circulates these price lists to trading CESP LLPs.⁶⁵¹ The trading CESP LLPs can then choose to opt-in or opt-out. As such, CESP Limited fixes the price that trading CESP LLPs that opt-in charge to PMI providers. It also enables each CESP LLP that receives the price lists to predict with a reasonable degree of certainty what the pricing policy of the other trading CESP LLPs would be.⁶⁵² For this to form a decision by an association of undertakings, the trading LLPs do not need to unanimously approve or agree on all aspects of the decision. It is sufficient that a decision is taken by the competent body within CESP Limited,⁶⁵³ namely the Board or whomever the Board has explicitly or implicitly given authority to enter into agreements with PMI providers.
- 4.36 As set out above, the CMA has established that the trading CESP LLPs had a common interest in the decisions fixing the IPPP prices. As such, the IPPP prices disclose an intention of the trading CESP LLPs to coordinate their conduct on the market through CESP Limited.⁶⁵⁴
- 4.37 Undertakings cannot avoid the Chapter I prohibition by the fact that they coordinate their conduct on the market through a body or a joint structure or that they entrust such coordination to an independent body.⁶⁵⁵
- 4.38 Although the decision to fix the IPPP at a certain level is not binding on all trading CESP LLPs (they can choose to opt-in or opt-out), CESP Limited indicated on a number of occasions,⁶⁵⁶ to the CESP LLPs that it was important to join the IPPPs and actually charge these prices, showing a desire

⁶⁵⁰ Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, paragraph 32.

⁶⁵¹ Such circulation took place, first, by sending hard-copy handbooks and, later, by email (see Chapter 3 Section C paragraph 3.116).

⁶⁵² See, in the same vein, Commission decision of 5 June 1996 in Case 34.983 *Fenex* (OJ L 181/21), paragraphs 48-51.

⁶⁵³ Commission decision of 19 December 2007 in Case 34.579 *MasterCard*, paragraph 384, and the case-law cited there.

⁶⁵⁴ See, in the same vein, Opinion of Advocate General Mengozzi in Case C-382/12 P *MasterCard*, paragraph 43.

⁶⁵⁵ Opinion of Advocate General Leger in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, point 62.

⁶⁵⁶ URN 0247, Email exchange between [CESP Ltd senior employee N], [CESP LLP employee 5a] and [CESP senior board member 5a], dated 17 July 2013; URN 0154, Email from [CESP Ltd senior employee N] to 'a cross section of LLP Leads / key cataract surgeons' dated November 2013, URN 0330 and URN 2251, Email exchange between [CESP Ltd senior employee N], [CESP Ltd employee J], [CESP Ltd employee H], [CESP Ltd employee I], [CESP senior board member 34a] and [Consultant 34b], dated 26 and 27 November 2013.

to coordinate its members' conduct on prices.⁶⁵⁷ Non-binding recommendations by associations of undertakings can constitute decisions by an association of undertakings.⁶⁵⁸ It is sufficient to point out that a number of the trading CESP LLPs have implemented the IPPPs and that the IPPP enables each CESP LLP that receives the price lists to predict with a reasonable degree of certainty what the pricing policy of the other trading CESP LLPs would be.

- 4.39 CESP Limited's efforts to negotiate and agree an IPPP price with [PMI Provider 3] (paragraphs 3.272 – 3.277 and 3.320 – 3.334) may not have led to an IPPP agreement, but these efforts nevertheless formed attempts to fix a price for [PMI Provider 3] as well.
- 4.40 As such, the negotiation, agreement and circulation of IPPPs to trading CESP LLPs constituted the faithful reflection of CESP Limited's resolve to coordinate the trading CESP LLPs' commercial conduct on the market for ophthalmic services. The CMA concludes that the Board decision to authorise CESP Limited to negotiate and fix IPPP prices on the CESP LLPs' behalf,⁶⁵⁹ each reiteration thereof, and each subsequently agreed IPPP price amounts to a decision by an association of undertakings within the meaning of the Chapter I prohibition. The CMA also concludes that CESP Limited's efforts to negotiate and agree an IPPP price with [PMI Provider 3] constitutes such a decision by an association of undertakings.
- 4.41 This is confirmed by the varying degrees of input that trading CESP LLPs have had on IPPPs proposed to and agreed with PMI providers by CESP Limited from 2008 until May 2015:
- a) [CESP Ltd senior employee M] indicated that he used [PMI Provider 6]'s (a PMI provider) published fee schedule and took clinical input and input on the individual components of the IPPP price from Consultant members before proposing prices to individual PMI providers.⁶⁶⁰

⁶⁵⁷ See, similarly, Commission decision of 5 June 1996 in Case 34.983 *Fenex* (OJ L 181/21), paragraph 54.

⁶⁵⁸ See for example Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405 and *Belgian Architects*. (see Annex A paragraphs A.21.1 and A.60.3.

⁶⁵⁹ As evidenced by the delegated authority given to [CESP Ltd senior employee M] in September 2008.

⁶⁶⁰ See Chapter 3 section C paragraph 3.126, URN 3329 [CESP Ltd senior employee M] interview, pages 54-57.

- b) [CESP Ltd senior employee N] and employees who reported to him also on multiple occasions sought input from LLP representatives about proposed IPPP prices to be offered to PMI providers.⁶⁶¹
- c) When [CESP Ltd senior employee A] took over responsibility for negotiating the IPPP agreements in 2014, the CESP LLPs had set up a 'mini-board' of LLP representatives and, through [CESP senior board member 12a], they were asked for input on and agreement on the proposed IPPP prices. [CESP Ltd senior employee A] also sought feedback on [PMI Provider 3] prices from at least one LLP.⁶⁶²
- d) When [PMI Provider 3] offered an IPPP price of £[>] to CESP Limited, certain trading CESP LLPs with higher local costs requested CESP Limited not to accept this price, even though other trading CESP LLPs were willing to accept it.⁶⁶³

4.42 The above, again, reveals a resolve to continuously coordinate the pricing conduct of the CESP LLPs in the market with IPPP prices that were in line with the trading CESP LLPs' interests, as voiced to CESP Limited through comments on proposed and agreed prices. Indeed, when CESP Limited was in a position to enter into an agreement with [PMI Provider 3], it did not do so because some CESP LLPs considered the price should be higher. Thus, the IPPP prices were intended to be, and were, the faithful reflection of CESP Limited's resolve to coordinate the commercial conduct of the CESP LLPs in the market. This also shows that the IPPP prices were more than unsubstantiated recommendations and in fact followed quite closely what CESP LLPs expected to charge in the market, showing the CESP LLPs' common interest in the prices.

4.43 Finally, as discussed below, the purpose of the IPPP prices is to coordinate prices centrally, so that the PMI providers do not '*play [the CESP LLPs] off against each other to gain the lowest possible fee*'.⁶⁶⁴ This, again, reflects CESP Limited's resolve to coordinate the conduct of its members.

⁶⁶¹ See Chapter 3 section C paragraphs 3.127 to 3.128. Also see for example URN 0611, email from [CESP Ltd senior employee N] dated 11 October 2013 to [CESP senior board member 34a] [>] [LLP 34]), [Consultant 31a] [LLP 31], [Consultant 29a] [LLP 29], [Consultant 26a] [LLP 26] and [CESP senior board member 5a] [LLP 5] about negotiations with [PMI Provider 2];

⁶⁶² URN 0455, email exchange between [CESP Ltd senior employee A] and [Consultant 19a] [LLP 19] dated June 2014.

⁶⁶³ See paragraphs 3.321 – 3.325 above.

⁶⁶⁴ URN 1143, Email from [CESP Ltd employee K] to a number of representatives of CESP LLPs, dated 7 December 2011.

- 4.44 For completeness, the CMA adds that it does not characterise the conduct outlined above as a joint selling agreement between LLPs.⁶⁶⁵ It is relevant that CESP Limited has wider functions than just the joint selling of the trading CESP LLPs' services under an IPPP to PMI providers. It also carries out the functions more generally associated with membership organisations as outlined in Section 3.B, History, development and aims, paragraphs 3.78 to 3.80. Moreover, it coordinated all CESP LLPs' commercial conduct in response to [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants (see paragraphs 4.51 to 4.59 below) and it facilitated the exchange of commercially sensitive future intentions relating to topics unrelated to the joint sales of the trading LLPs' services under an IPPP to PMI providers (see paragraphs 4.60 to 4.65 below). Any existing joint sales agreement was necessarily adopted within the context of the activities of CESP Limited as an association of undertakings.⁶⁶⁶ Furthermore, CESP Limited had a far more central role in the coordination of the CESP LLPs' commercial conduct than would normally be required for a joint venture set up for the joint sales of the trading LLPs' services under an IPPP.
- 4.45 Collusion can be characterised by the CMA alternatively as an agreement, a concerted practice or a decision by an association of undertakings.⁶⁶⁷ In this case, while there may be characteristics of a joint selling agreement between CESP LLPs, the CMA characterises the IPPP infringement as a series of decisions by an association of undertakings. Where the case-law and guidance on joint selling agreements provides relevant context (such as for the determination of the object of the series of decisions and for the analysis of potential efficiencies arguments), the CMA has had regard to such case-law and guidance for the joint sales element of the conduct at issue.
- 4.46 The CMA finds that CESP Limited cannot be viewed as an agent of the CESP LLPs. The above considerations on why the IPPP infringement forms a series of decisions by an association of undertakings apply *mutatis mutandis*. In addition, even if CESP Limited qualified as an 'agent' for the purpose of competition law, the infringements relate to the coordination of the CESP LLPs' commercial conduct on the market, not to any agency agreements between CESP Limited and one or more CESP LLPs acting as the principal (if

⁶⁶⁵ The concept of joint selling agreements, which can be considered to form part of the category of commercialisation agreements, is discussed in section 6 of the European Commission's Guidelines on the applicability of Article 101(1) of the TFEU to horizontal co-operation agreements.

⁶⁶⁶ See, by analogy, Case T-136/94 *Eurofer* ECR II-266, paragraph 117.

⁶⁶⁷ See, for example, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, paragraph 697, and, more recently, judgment of 5 December 2013 in Case C-449/11 P *Solvay Solexis v Commission*.

such agreements exist). Even if such agency agreements exist in this case, they would to fall within the Chapter I prohibition and Article 101(1) TFEU, since they are likely to facilitate collusion between the CESP LLPs (as evidenced by the collusion in response to [PMI Provider 3]’s lowering of its benefit maxima and [PMI Provider 3]’s initiatives to increase the pool of fee-assured consultants and by the facilitation of the exchange of commercially sensitive information about the proposal from [PMI Provider 3] and [Facility 2]).⁶⁶⁸

- 4.47 The CMA concludes from the above that the IPPP infringement forms a series of decisions by an association of undertakings.
- 4.48 In addition, CESP Limited facilitated the exchange of commercially sensitive information, including future pricing intentions, about IPPP prices. Examples are listed in paragraphs 3.184, 3.187 – 3.189, 3.193 - 3.198, 3.218 – 3.226; and 3.328 – 3.331.
- 4.49 Many CESP LLPs participated actively in these exchanges of information. The facilitation of the exchange of commercially sensitive information can be described as a decision by an association of undertakings without necessarily being binding on the members concerned, at least to the extent to which the members concerned by the decision comply with it. That is the case when the undertakings participate in the exchanges of information on a continuous basis and, without raising any objections, received the information circulated by CESP Limited.⁶⁶⁹
- 4.50 The CMA finds that CESP Limited’s facilitation of the exchange of commercially sensitive information regarding IPPP prices also forms a decision by an association of undertakings, in line with the case-law on this subject, and is part of the series of decisions by an association of undertakings that constitutes the IPPP infringement.

(ii) The [PMI Provider 3] infringement

- 4.51 When [PMI Provider 3] introduced initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants, CESP Limited recommended (i) to all Consultants to delist from [PMI Provider 3] and (later) not to be fee assured consultants, and (ii) to all CESP LLPs to bill [PMI Provider 3] patients as an LLP for a (not centrally negotiated) IPPP including consultant’s and anaesthetist’s fee and (later) to charge [PMI Provider 3]

⁶⁶⁸ European Commission’s Guidelines on vertical restraints, [2010] OJ C 130/1, paragraph 20.

⁶⁶⁹ Case T-136/94 *Eurofer* [1999] ECR II-266, paragraph 116.

patients up-front the LLP's self-pay price, rather than to charge [PMI Provider 3] in accordance with its benefit maxima.

- 4.52 CESP Limited also throughout the period from May 2012 to December 2013 formed a platform or '*conduit*' to exchange commercially sensitive information between CESP LLPs, as evidenced by the numerous exchanges of views, future intentions and information about CESP LLPs' market conduct in the context of [PMI Provider 3]'s initiatives and additional evidence showing CESP Limited's role in facilitating the exchange of information between LLPs and individual consultants.
- 4.53 The recommendations from CESP Limited were made to all CESP LLPs and related to commercial matters such as which price to charge [PMI Provider 3] and [PMI Provider 3] insured patients, how to bill [PMI Provider 3] and [PMI Provider 3]-insured patients and how to respond to [PMI Provider 3]'s commercial initiative of introducing a fee assured structure. As such, they constitute the faithful reflection of CESP Limited's resolve to coordinate the commercial conduct of all CESP LLPs vis-à-vis [PMI Provider 3]. These recommendations fall squarely within the existing case law which considers recommendations by associations of undertakings.⁶⁷⁰
- 4.54 Although the recommendations were not binding on the members, they were re-iterated several times and CESP LLPs were encouraged to abide by the recommendations.⁶⁷¹ A number of CESP LLPs have confirmed that they complied with one or more of these recommendations.⁶⁷² Thus, they are characterised as a decision by an association of undertakings.
- 4.55 These recommendations changed over time following practical difficulties of implementation (for example the change from de-listing from [PMI Provider 3] to not being fee assured and the change from charging [PMI Provider 3]-insured patients the LLP's IPPP price to charging [PMI Provider 3] patients up-front the LLP's self-pay price) (For further information see paragraph 3.301). This, again, reveals a resolve to continuously coordinate the commercial conduct of the CESP LLPs in the market with recommendations that were in line with the CESP LLPs' interests, as made aware to CESP Limited by the actual implementation in practice of the recommendations. Similarly to the IPPPs, this shows that the recommendations regarding [PMI

⁶⁷⁰ See for example Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405 and *Belgian Architects*. See Annex A paragraphs A.21.1 & A.60.3

⁶⁷¹ See for example URN 1190, CESP December update dated 18 December 2012, '*[t]hese are your patients and you, not [PMI Provider 3] should maintain both the patient and commercial relationship, so to re-iterate you should be treating [PMI Provider 3] (and any other non CESP contracted insurer) patients as Self Pay and it is the insurers [sic] issue*'.

⁶⁷² See Chapter 3 section D paragraphs 3.292 - 3.297

Provider 3] were intended to be the faithful expression of CESP Limited's resolve to coordinate the commercial conduct of the CESP LLPs in the market.

- 4.56 As for CESP Limited's role as a platform or '*conduit*' to exchange commercially sensitive information between CESP LLPs, including future intentions and information about CESP LLPs' market conduct in the context of [PMI Provider 3]'s initiatives, the CMA notes that where an association gathers, compiles and circulates such information, the association's employees are authorised or received express or tacit approval from its members, and the members which participated in the exchange of information are affiliated to the association, this forms a decision by an association of undertakings.⁶⁷³
- 4.57 The CMA finds that CESP Limited facilitated the exchange of commercially sensitive future intentions between LLPs by gathering, collating and circulating information about [PMI Provider 3]'s initiatives to reduce the price for ophthalmic procedures and increase the pool of fee-assured consultants.⁶⁷⁴
- 4.58 Many CESP LLPs participated actively in these exchanges of information. The facilitation of the exchange of commercially sensitive information may be described as a decision by an association of undertakings without necessarily being binding on the members concerned, at least to the extent to which the members concerned by the decision comply with it. That is the case when the undertakings participate in the exchanges of information on a continuous basis and, without raising any objections, received the information circulated by CESP Limited.⁶⁷⁵
- 4.59 The CMA finds that CESP Limited's facilitation of the exchange of commercially sensitive information regarding [PMI Provider 3]'s initiatives also forms a decision by an association of undertakings, in line with the case-law on this subject, and is part of the series of decisions by an association of undertakings that constitutes the [PMI Provider 3] infringement.

(iii) The [Facility 2] infringement

- 4.60 In October 2012, CESP Limited coordinated the CESP LLPs' commercial conduct by facilitating the exchange of commercially sensitive information

⁶⁷³ Case C-179/99 P *Eurofer* [2003] ECR I-10740, paragraph 27.

⁶⁷⁴ See Chapter 3 section D paragraphs 3.285 – 3.318

⁶⁷⁵ Case T-136/94 *Eurofer* [1999] ECR II-266, paragraph 116.

between them about a proposal from [Facility 2] and [PMI Provider 3] and by recommending to the CESP LLPs to reject this proposal.⁶⁷⁶

- 4.61 The recommendation from CESP Limited to reject the proposal was related to commercial matters such as the price included in the proposal and the proposed change of making [Facility 2] responsible for the clinical governance associated with the consultant, which would make it possible for [Facility 2] to work with employed and overseas surgeons. The recommendation was reiterated at least three times. As such, the recommendation to reject the proposal constitutes the faithful reflection of CESP Limited's resolve to coordinate the commercial conduct of all CESP LLPs. This recommendation also falls squarely within the existing case law which considers recommendations by associations of undertakings.⁶⁷⁷ The recommendation should be characterised as a decision by an association of undertakings.
- 4.62 As for the facilitation of the exchange of commercially sensitive information about the proposal from [PMI Provider 3] and [Facility 2], the CMA notes that where an association gathers, compiles and circulates such information, the association's employees are authorised or received express or tacit approval from its members, and the members which participated in the exchange of information are affiliated to the association, this forms a decision by an association of undertakings.⁶⁷⁸
- 4.63 The CMA finds that CESP Limited facilitated the exchange of commercially sensitive future intentions between LLPs about the proposal from [Facility 2] and [PMI Provider 3], as outlined in paragraphs 3.339 – 3.344.
- 4.64 Many CESP LLPs participated actively in these exchanges of information. The facilitation of the exchange of commercially sensitive information may be described as a decision by an association of undertakings without necessarily being binding on the members concerned, at least to the extent to which the members concerned by the decision comply with it. That is the case when the undertakings participate in the exchanges of information on a continuous basis and, without raising any objections, received the information circulated by CESP Limited.⁶⁷⁹
- 4.65 The CMA finds that CESP Limited's facilitation of the exchange of commercially sensitive information relating to the proposal from [PMI Provider

⁶⁷⁶ See paragraphs 3.339 – 3.344 above.

⁶⁷⁷ See for example Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405 and *Belgian Architects*. See Annex A paragraphs A.21.1 & A.60.3.

⁶⁷⁸ Case C-179/99 P *Eurofer* [2003] ECR I-10740, paragraph 27.

⁶⁷⁹ Case T-136/94 *Eurofer* [1999] ECR II-266, paragraph 116.

3] and [Facility 2] also forms a decision by an association of undertakings, in line with the case-law on this subject and is part of the series of decisions by an association of undertakings that constitutes the [Facility 2] infringement.

Implementation

- 4.66 It is not necessary for the CMA to prove that the majority of trading LLPs actually charge the agreed IPPP prices to PMI providers.⁶⁸⁰ In practice, six CESP LLPs,⁶⁸¹ or one third of all trading CESP LLPs, a significant proportion, do so automatically, when they use the VPMS system which without further work by the LLP being necessary enters the package prices into bills sent to PMI providers,⁶⁸² whereas as a minimum three other trading CESP LLPs⁶⁸³ actively update their own billing systems.⁶⁸⁴ In any event, it can be assumed that those LLPs and their consultant members who do not follow the IPPP price are (at the very least) influenced by their knowledge of that price when setting their own prices, because it enables them to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be.⁶⁸⁵
- 4.67 A number of CESP LLPs also confirmed that they complied with the recommendations relating to [PMI Provider 3].⁶⁸⁶

Conclusion: the decisions and their duration

- 4.68 The CMA concludes from the above that CESP Limited resolved to coordinate its trading members' commercial conduct from September 2008 until May 2015 by the IPPP infringement, which related to the **trading** CESP LLPs, from May 2012 until December 2013 by the [PMI Provider 3] infringement, which

⁶⁸⁰ Case 8/72 *Vereeniging van Cementhandelaren* [1972] ECR 977, paragraph 21. See also Commission decision of 5 June 1996 in Case 34.983 *Fenex*, in which only one of the 23 Fenex members questioned by the Commission acknowledged having applied the recommended tariffs (paragraph 72).

⁶⁸¹ [LLP 3], [LLP 16], [LLP 30], [LLP 31], [LLP 34], [LLP 18] (see URN 1048, CESP Limited Board Meeting Agenda Handout, 14 January 2012).

⁶⁸² See URN 3327 Transcript of [CESP Ltd senior employee A] interview, pages 28-30

⁶⁸³ For example [LLP 13], [LLP 38] and [LLP 5]. See for an example of [LLP 13] implementing the new [PMI Provider 1] price: URN 1030, Email exchange between [Consultant 13a] (LLP lead) and [CESP LLP employee 13a] [3<] dated 16 June 2014. See also as an example of [LLP 38] seeking clarification of how to bill under the new [PMI Provider 1] agreement: URN 2584, Email exchange between [CESP LLP employee 38a] and [CESP Ltd senior employee A] dated 11 August 2014. See URN 3524, Transcript of [CESP LLP employee 5a] Interview, page 40, lines 20-23 and 25-27, where [CESP LLP employee 5a] confirms [LLP 5] applies the centrally negotiated IPPP price where the LLP has opted in to that price.

⁶⁸⁴ See Chapter 3 section C paragraph 3.139.

⁶⁸⁵ Case 8/72 *Vereeniging van Cementhandelaren* [1972] ECR 977, paragraph 21; and Commission decision of 5 June 1996 in Case 34.983 *Fenex*, paragraph 73.

⁶⁸⁶ See Chapter 3 section D paragraphs 3.292-3.297.

related to **all** CESP LLPs, and during October 2012 by the [Facility 2] infringement.

4.69 The CMA concludes that the IPPP infringement forms a series of decisions by an association of undertakings. These decisions were:

- a) the Board decision to authorise CESP Limited to negotiate and fix IPPP prices on the CESP LLPs' behalf,⁶⁸⁷
- b) each reiteration thereof,
- c) each subsequent agreement between CESP Limited and PMI providers. The table at Annex E provides an overview of all such agreements, their duration and the CESP LLPs to which they apply.
- d) the various attempts to negotiate and agree an IPPP with [PMI Provider 3], and
- e) the facilitation of the exchanges of commercially sensitive future intentions regarding the above.

4.70 The CMA concludes that the [PMI Provider 3] infringement forms a series of decisions by an association of undertakings. These decisions were:

- a) The recommendation by CESP Limited to all Consultants to delist from [PMI Provider 3] and subsequently not to be fee assured consultants (May 2012 until at least December 2013),
- b) The recommendation by CESP Limited to all Consultants to bill [PMI Provider 3] patients as an LLP for a not centrally negotiated IPPP including consultant's and anaesthetist's fee and subsequently to charge [PMI Provider 3] patients up-front the LLP's self-pay consultant fee, rather than to charge [PMI Provider 3] in accordance with its benefit maxima (May 2012 until at least November 2013), and
- c) The facilitation of the exchange of commercially sensitive future intentions regarding the above during the same periods.

4.71 The CMA concludes that the [Facility 2] infringement constitutes a series of decisions by an association of undertakings. These decisions were:

⁶⁸⁷ As evidenced by the delegated authority given to [CESP Ltd senior employee M] in September 2008.

- a) The recommendation to reject the proposal from [PMI Provider 3] and [Facility 2], and
- b) The facilitation of the exchange of commercially sensitive information relating to the proposal from [PMI Provider 3] and [Facility 2].

D. Restriction of competition

Introduction

- 4.72 Having concluded that the infringements form a series of decisions by an association of undertakings, the CMA finds that this coordination has the object of restricting competition, as it is by its very nature harmful to the proper functioning of normal competition in the market.
- 4.73 In order to determine whether the series of decisions by an association of undertaking reveal a sufficient degree of harm to competition that they may be considered a restriction of competition ‘by object’, regard must be had to the content of their provisions, their objectives and the economic and legal context of which they form a part. The economic and legal context has been set out in detail in Section 3. A, Market Overview. In particular, it is important to note that the CMA concludes that absent coordination through CESP Limited, CESP Limited and individual consultants and/or the consultant groups (including LLPs) of which they form a part would have competed by making independent decisions in relation to their conduct in the sector (see Chapter 3 *Competition in the market*).

The contents of the decision’s provisions

The IPPP infringement

- 4.74 From September 2008 onwards, CESP Limited has shown a continuous resolve to coordinate the CESP LLPs’ commercial conduct through the use of the IPPP. With various degrees of input from the CESP LLPs, CESP Limited negotiated, recommended and agreed IPPP agreements with PMI providers on the trading CESP LLPs’ behalf, which set a price for a number of ophthalmic procedures. Before and after agreeing the IPPP, proposed and agreed price lists were circulated to the CESP LLPs, including on occasion to non-trading CESP LLPs.⁶⁸⁸ When IPPP agreement was reached, a trading CESP LLP could opt in and charge the IPPP prices to PMI providers for

⁶⁸⁸ URN 0437, Email from [CESP Ltd senior employee A] to LLP leads re [PMI Provider 1] dated 9 June 2014, page 4.

operations carried out on insured patients by its consultant members, after the ‘fee splits’ were agreed by the relevant trading CESP LLP. CESP Limited actively encouraged the CESP LLPs to join the IPPPs and actually charge these prices (see paragraph 4.38).

- 4.75 As such, the recommended and agreed IPPP prices constitute, as a minimum, non-binding recommended current and future prices for services that CESP LLPs and individual consultants offer in competition absent the agreed IPPP price. The circulation to the trading CESP LLPs of recommended price lists enables each of them to predict with a reasonable degree of certainty what the pricing policy of the other trading CESP LLPs would be. In general, when a membership organisation such as CESP Limited circulates recommended prices to its members, such circulation is liable to prompt CESP Limited’s members to align their prices, or at least provide a price benchmark that influences their price setting, irrespective of their cost prices.⁶⁸⁹ The CMA finds that these non-binding recommended prices in themselves have the object of coordinating the pricing behaviour of the trading CESP LLPs members and, as such, form restrictions by object.
- 4.76 The **agreed** IPPP prices, which apply to 12 PMI providers, representing 60% of the privately insured market, actually go further in their impact on competition than being mere recommendations. They fix a minimum price that the trading CESP LLPs and their consultant members can charge these 12 PMI providers when they treat one of their patients at a facility and for a procedure covered by the agreement (‘a covered procedure’). The ability to use the IPPP price as a minimum price related to at least cataracts and Yag laser⁶⁹⁰ but had the potential to affect more covered procedures as the CESP circulated rate book lists the prices for all covered procedures.⁶⁹¹ As the IPPP agreement is not binding on the CESP LLPs and their consultant members, but the PMI providers are contractually bound to pay the IPPP price, it sets a price floor for these covered procedures: the trading CESP LLPs’ consultant members are free to charge a consultant fee under the traditional model that is higher than the IPPP’s consultant fee, and they have no incentive to charge a lower consultant fee under the traditional model, as the higher price has already been agreed with the PMI provider, so cutting prices would not lead to an increase in volumes.
- 4.77 An individual consultant member of a trading CESP LLP who wishes to perform a covered procedure does not have to reach further agreement with

⁶⁸⁹ Commission decision of 5 June 1996 in Case 34.983 *Fenex* (OJ L 181/21), paragraph 73.

⁶⁹⁰ URN 3881, Note of settlement meeting with CESP Limited

⁶⁹¹ See for example, URNs 2570 to 2573

the PMI provider to be able to charge the agreed IPPP price, as the consultant is already entitled to do so under the IPPP agreement between CESP Limited and the relevant PMI provider. As such, the agreed IPPP prices also prevent PMI providers from seeking lower prices from individual LLPs and/or individual consultants, which reinforces the functioning of the IPPP prices as a minimum price.

- 4.78 This is recognised by [CESP Ltd senior employee N] in an email to [Consultant 19c] [LLP 19], dated March 2013: *'CESP has not seen any revenue from keeping your market rates artificially high for years by not agreeing to settle for a few hundred pounds a cataract ... we appreciate that the minute one insurer has managed to take the floor out of the market, the others will follow, so it's important we try to prevent that'*.⁶⁹² Reference is also made to an email from [CESP Ltd employee K] dated 7 December 2011, in which she indicated that codes will be negotiated nationally for the CESP LLPs, to ensure that [PMI Provider 1] does not *'play [the CESP LLPs] off against each other to gain the lowest possible fee'*.⁶⁹³
- 4.79 The agreed IPPP prices ultimately operate in the interests of the individual consultants,⁶⁹⁴ who significantly reduce competition between themselves locally and nationally, and as a result of charging an IPPP price are able to (i) keep the consultant's component of the IPPP price at an artificial level that is not the result of vigorous competition between individual CESP LLPs or individual consultants; (ii) ensure that where no anaesthetist is used, this is not deducted from the price. Instead, the anaesthetist's component of the IPPP is either retained as CESP LLP revenue or added to the consultant's fee; and (iii) divide between themselves any CESP LLP margin that is left after the CESP LLP's costs are covered. The CMA understands that LLP margin can be used to invest in equipment and premises⁶⁹⁵ or can be distributed to the LLPs partners.⁶⁹⁶ This is a result of the actual make-up of the IPPP, which

⁶⁹² URN 0219, Email from [CESP Ltd senior employee N] to [Consultant 19c] dated 22 March 2013.

⁶⁹³ URN 1143, Email from [CESP Ltd employee K] to a number of representatives of CESP LLPs, dated 7 December 2011.

⁶⁹⁴ See, by analogy, Joined cases T-217/03 and T-245/03 *FNCBV and Others v Commission* [2006] ECR II-4987, paragraph 50: *'the [various associations/unions of farmers] concluded the disputed agreements in the interest and on behalf of, not their direct members, which are actually farmers' federations or unions, but the farmers who are the basic members of the latter.'*

⁶⁹⁵ URN 3829, CESP Ltd initial response to CMA draft penalty statement [LLP 12] have invested over [£] in equipment over approximately the past 5 years, URN 3567, Transcript of interview with [CESP senior board member 5a] page 24, lines 24 - 27 *'So I would suggest that there's an element of group practice equals efficiency and then if one generates a profit then what one does with it, by and large we use it to buy new equipment.'* URN 2491, [LLP 38] meeting note discussing the purchase or hire of equipment. URN 1674, 1682, 1685, 1686 [LLP 34] meeting notes discussing purchase of equipment and/or the option of purchasing premises. URN 3846, Response to the draft Statement of Objections.

⁶⁹⁶ A number of CESP LLP meetings notes discuss profit share between LLP members. See for example, [LLP 1] URN 0557, [LLP 5] URNs 3254, 3289, 3290, CESP [LLP 17] URNs 1249 and 1250, [LLP 34], URNs 1674, 1678, 1680, 1687

has secured that revenue streams within the packaged ophthalmic pathway that are normally outside of an consultant's income have been allocated to consultants and/or their CESP LLPs.

- 4.80 As such, the IPPP allows them to yield a rent from PMI providers which they could not obtain under competitive circumstances, under which, for instance, the savings of not using an anaesthetist would be passed on through a lower IPPP.⁶⁹⁷ The CMA finds that this is an inherent part of the decisions relating to the IPPP, and it shows its object of artificially increasing revenues at the individual consultants' level.
- 4.81 In addition, CESP Limited also coordinated the **trading** LLPs' commercial conduct by attempting to negotiate and agree an IPPP with [PMI Provider 3].
- 4.82 As the paragraphs 3.320 – 3.334 show, CESP Limited and various individual CESP LLPs regularly exchanged views about which prices would be acceptable and about [PMI Provider 3]'s pricing expectations. As such, CESP Limited facilitated the exchange of individualised future pricing intentions between CESP LLPs, including by making reference to their local costs.⁶⁹⁸ Although the connection between the IPPPs they sought to charge [PMI Provider 3] and consumer prices is indirect,⁶⁹⁹ the Chapter I prohibition is not limited to decisions by an association of undertakings which only relate to prices paid by end users.⁷⁰⁰
- 4.83 Whereas some CESP LLPs were willing to accept the price offered by [PMI Provider 3], CESP Limited did not enter into an IPPP agreement with [PMI Provider 3], because other CESP LLPs did not consider the price acceptable. The CMA finds that these efforts and exchanges of information relating to an IPPP price for [PMI Provider 3] had as their object to ensure that a price would be charged to [PMI Provider 3] that was acceptable to all the CESP LLPs. As a result, lower prices acceptable for some CESP LLPs were not accessible on the market. Only when [LLP 15], which has its own facility and can, therefore, pass on this efficiency through a lower IPPP, decided to individually approach [PMI Provider 3] (after having informed CESP Limited of this intention) was its lower IPPP price available to [PMI Provider 3].

⁶⁹⁷ See, in the same vein, Commission decision of 19 December 2007 in Case 34.579 *MasterCard*, paragraph 385.

⁶⁹⁸ See paragraphs 3.323 – 3.330

⁶⁹⁹ If [PMI Provider 3] and CESP Limited had agreed an IPPP, it would be charged to [PMI Provider 3] and not to [PMI Provider 3]-insured patients. The indirect connection to consumer prices follows from the relationship between the prices that a PMI provider faces and the premiums payable by consumers to the PMI provider.

⁷⁰⁰ Case C-286/13 P *Dole v Commission*, not yet reported, paragraph 123.

The [PMI Provider 3] infringement

- 4.84 CESP Limited did not manage to come to an IPPP agreement with [PMI Provider 3]. Nevertheless, it coordinated the CESP LLPs' commercial conduct vis-à-vis [PMI Provider 3], when [PMI Provider 3] introduced initiatives to introduce open referrals, widen the pool of fee-assured consultants and lower its benefit maxima.
- 4.85 CESP Limited recommended to all Consultants, first, to delist from [PMI Provider 3] and subsequently not to be fee assured consultants; and secondly, that they bill [PMI Provider 3] for an IPPP and subsequently to charge [PMI Provider 3] patients up-front the LLP's self-pay consultant fee, rather than to charge [PMI Provider 3] in accordance with [PMI Provider 3]'s benefit maxima. The following exchanges of information in which the recommendations were re-iterated,⁷⁰¹ individual CESP LLPs informed CESP Limited about their experiences in applying the recommended conduct⁷⁰² and CESP Limited circulated such information to its members,⁷⁰³ are both a continuation of these recommendations and a further exchange of commercially sensitive future intentions.
- 4.86 These recommendations and exchanges of information were a direct response to [PMI Provider 3]'s initiatives to introduce open referrals, widen the pool of fee assured consultants and lower its benefit maxima. [PMI Provider 3] offered these initiatives to individual consultants, but Consultants discussed them in a conference call facilitated by CESP Limited where they agreed on the recommendations.⁷⁰⁴ Thus, the recommendations and exchanges of information are capable of removing the uncertainty between Consultants as regards the timing, extent and details of the response to these initiatives to be adopted by individual consultants and individual CESP LLPs who are competitors. As the recommendations and exchanges of information directly relate to whether or not to accept a price offer from [PMI Provider 3], they have the object of restricting competition between CESP LLPs and their consultant members.⁷⁰⁵ Moreover, the recommendation to charge [PMI

⁷⁰¹ See Chapter 3 section D paragraphs 3.291, 3.299 – 3.302.

⁷⁰² See Chapter 3, section D, paragraphs 3.292 – 3.297, 3.306, 3.310 and, 3.313.

⁷⁰³ See Chapter 3, section D, paragraph 3.286 and 3.299 - 3.301.

⁷⁰⁴ See the May 2012 Email and [CESP senior board member 34a]'s response (URN 1959).

⁷⁰⁵ See for example Case C-286/13 P *Dole v Commission*, not yet reported, paragraph 122. See also European Commission's Guidelines on Horizontal Cooperation Agreements, paragraph 68, following which information exchanges on current conduct that reveals intentions on future behaviour, such as the information exchanged by certain CESP LLPs, through CESP Limited, on how they bill [PMI Provider 3] and [PMI Provider 3]-insured patients, has the object of restricting competition.

Provider 3] patients up-front the LLP's self-pay price has a direct impact on patients, as this price is charged to the patient, not to [PMI Provider 3].

- 4.87 In this respect, it is not relevant that the recommendations and exchanges of information do not specify a price (although they do specify a price that is deemed too low, namely [PMI Provider 3]'s proposed price). First, they relate directly to a price offer made by [PMI Provider 3]. By discussing whether other Consultants would accept [PMI Provider 3]'s lower benefit maxima and [PMI Provider 3]'s offer of becoming a fee assured consultant and by subsequently sharing experience as to how this operated in practice, Consultants removed uncertainty between themselves as to the whether and how they would deal with [PMI Provider 3]. Second, the recommendations and exchanges of information relating to [PMI Provider 3] all relate to how to commercially deal with [PMI Provider 3] and [PMI Provider 3]-insured patients. Thus, the CMA concludes that they had as their object to restrict to an appreciable extent the freedom of conduct of the Consultants⁷⁰⁶ when it came to how to charge [PMI Provider 3] and [PMI Provider 3]-insured patients.
- 4.88 Prior to entering into settlement discussions with the CMA, CESP Limited indicated that its overriding concern was to ensure that [PMI Provider 3]-insured patients could still have access to treatment, despite [PMI Provider 3] lowering its benefit maxima.⁷⁰⁷ In the CMA's view, this does not objectively justify the recommendations, as each CESP LLP and each consultant acting as a sole trader outside the CESP LLP must determine independently the policy which he/she intends to adopt on the market.⁷⁰⁸ This was confirmed by the BMA to its members in as early as 2010, when [PMI Provider 3] first changed its consultant recognition process: *'agreeing to the Terms as part of the new consultant recognition process is a commercial matter between the consultant and [PMI Provider 3]'*. It also advised *'that members consider the implications of signing up to the Terms and to decide individually whether they are prepared to agree face-to-face consultation fees and accept the fee levels outlined in [PMI Provider 3]'s Benefit Maxima'*.⁷⁰⁹ Therefore, it ought to have been clear to CESP Limited, the CESP LLPs and the individual consultant members that they should not discuss such commercially sensitive matters between themselves as competitors.

⁷⁰⁶ See, in the same vein, Joined Cases T-39/92 and T-40/92 *Groupeement des Cartes Bancaires and Europay v Commission* [1994] ECR II-54, paragraph 86.

⁷⁰⁷ 3350, CESP Limited submission to the CMA dated 31 March 2015.

⁷⁰⁸ Case C-286/13 *Dole Food Company Inc*, not yet reported, paragraph 119.

⁷⁰⁹ See [http://bma.org.uk/practical-support-at-work/private-practice/\[PMI Provider 3\]-consultant-recognition](http://bma.org.uk/practical-support-at-work/private-practice/[PMI Provider 3]-consultant-recognition).

The [Facility 2] infringement

- 4.89 Finally, CESP Limited recommended to CESP LLPs to reject the proposal from [PMI Provider 3] and [Facility 2] and facilitated the exchange of information between CESP LLPs and individual Consultants about this proposal.
- 4.90 When [PMI Provider 3] and [Facility 2] reached a package price agreement and proposed this to consultants, CESP Limited circulated the details of the proposal – only made to individual consultants – to its members with a clear recommendation to reject it. A number of consultants responded individually to this communication and CESP Limited collated these responses in one email and sent them to CESP Limited’s members, repeating that the deal was *‘clearly ... not in your interests at all on any level’*⁷¹⁰ and in a later email: *‘[j]ust a reminder on our position, which remains that you do not agree to this deal in any form as it’s all about directional control from [PMI Provider 3] and the [Facility 2]’*.⁷¹¹
- 4.91 This recommendation to reject the proposal and the related facilitation of exchanges of information were a direct response to a proposal which included a package price of £ [X] and a consultant component of £ [X]. Moreover, the proposal introduced making [Facility 2] responsible for the clinical governance associated with the consultant, which would make it possible for [Facility 2] to work with employed and overseas surgeons. This change, which may lead to an increase in overseas surgeons, faced significant resistance from at least one consultant member.⁷¹²
- 4.92 [Facility 2] offered these initiatives to individual consultants, but CESP Limited facilitated the exchange of information between Consultants and recommended to Consultants to reject the proposal. Thus, the recommendation and exchanges of information are capable of removing the uncertainty between Consultants as regards the timing, extent and details of the response to the proposal to be adopted by individual consultants and individual CESP LLPs. As the recommendations and exchanges of information directly relate – among other things – to whether or not to accept a price offer from [Facility 2], they have the object of restricting competition between CESP LLPs and their consultant members.⁷¹³

⁷¹⁰ URN 0776, Emails from [CESP Ltd senior employee N] dated 15 and 17 October 2012.

⁷¹¹ URN 1565, Email from [CESP Ltd senior employee N] dated 29 October 2012.

⁷¹² URN 0776, Emails from [Consultant 17b] ([LLP 17]) dated 15 October 2012.

⁷¹³ See for example Case C-286/13 P *Dole v Commission*, not yet reported, paragraph 122. See also European Commission’s Guidelines on Horizontal Cooperation Agreements, paragraph 68, following which information exchanges on current conduct that reveals intentions on future behaviour, such as the information exchanged by

- 4.93 In this respect, it is not relevant that the recommendation and exchanges of information do not specify a price. First, they relate directly to a price offer made by [Facility 2]. By discussing this offer and by CESP Limited recommending to reject the proposal, uncertainty between Consultants as to whether they would accept the proposal was reduced. Thus, the CMA concludes that they had as their object to restrict to an appreciable extent the freedom of conduct of the Consultants⁷¹⁴ when it came to how to respond to the proposal.

The decision's objectives

- 4.94 A finding that the series of decisions by an association of undertakings which form the infringements have the object of restricting competition is further supported by the aims of the decisions setting the IPPPs and recommending pricing conduct vis-à-vis [PMI Provider 3] as outlined in the section discussing the purposes of CESP Limited. See paragraphs 3.78 to 3.112 above. The [Facility 2] infringement should be seen within the context of these aims and purposes.
- 4.95 In addition, the IPPP infringement has the objective of thwarting downward pressure on prices exerted by PMI providers,⁷¹⁵ as does the [PMI Provider 3] infringement. The CMA finds that the object of the recommendations in response to [PMI Provider 3]'s initiatives was to thwart the downward pressure on prices which was a result of these initiatives and to ensure individual consultant members of CESP LLPs did not sign up to [PMI Provider 3] as fee assured consultants, thereby accepting the lower [PMI Provider 3] benefit maxima.

The economic and legal context of which the decision forms part

- 4.96 The economic and legal context of this case is set out in detail in Chapter 3 Section A, Market Overview. In particular, the CMA expects that absent coordination by CESP Limited, CESP Limited and individual consultants and/or the consultant groups (including LLPs) of which they form a part would have competed by making independent decisions in relation to their commercial conduct in the sector.

certain CESP LLPs, through CESP Limited, on how they bill [PMI Provider 3] and [PMI Provider 3]-insured patients, has the object of restricting competition.

⁷¹⁴ See, in the same vein, Joined Cases T-39/92 and T-40/92 *Groupeement des Cartes Bancaires and Europay v Commission* [1994] ECR II-54, paragraph 86

⁷¹⁵ See paragraph 4.28(e) and the evidence cited there.

- 4.97 As set out above, the CMA finds that the series of decisions by an association of undertakings that form the infringements had the object of restricting, preventing or removing such competition.
- 4.98 In the round, and given the economic and legal context of this case, the infringements restrict competition by object.

CESP Limited's claims that the fixing of IPPP prices does not have the object of restricting competition

- 4.99 Prior to entering into settlement discussions with the CMA, CESP Limited submitted that there are many cases where the joint setting of prices has not been considered to amount to a restriction of competition by object. It cites the examples of the *MasterCard* and *Cartes Bancaires* cases and states that these cases involved the joint setting of fees but were not considered 'object restrictions'.⁷¹⁶
- 4.100 For completeness, the CMA notes that the facts of the *MasterCard* case differ significantly from the facts of the present case. CESP Limited negotiates and sets IPPP prices which are then circulated to the trading CESP LLPs. The IPPP prices are intended to increase revenues for CESP LLPs and/or to thwart downward pressure on consultant fees. Their aim is, therefore, to restrict pricing competition between trading CESP LLPs and their consultant members. Moreover, it should be noted that in *MasterCard*, the Commission stated that '*given that it can be clearly established that the MasterCard MIF has the effect of appreciably restricting and distorting competition ... it is not necessary to reach a definite conclusion as to whether the MasterCard MIF is a restriction by object within the meaning of Article [101 TFEU]*'.⁷¹⁷ Therefore, the Commission actually left open whether the MasterCard multilateral fallback interchange fees which apply in the EEA ('MIF') could form a restriction by object.
- 4.101 In *Cartes Bancaires*, the Commission took issue with measures introduced by Groupement des Cartes Bancaires, an association of undertakings, including (i) a formula aimed to encourage members that are issuers more than acquirers to expand their acquisition activities and to take account financially of the efforts of members whose acquisition activity is considerable in relation to their issuing activity; (ii) a reform of the membership fee for the association comprising, in addition to a fixed sum, a fee per active CB card issued in the three years following membership and, where appropriate, a supplementary

⁷¹⁶ URN 3350, CESP Limited submission to the CMA dated 31 March 2015, paragraphs 3.9 and 3.10.

⁷¹⁷ Commission decision of 19 December 2007 in case 34.579 *MasterCard* C(2007) 6474 final, paragraph 407.

membership fee applicable to members that triple the number of CB cards in stock in the course or at the end of their sixth year of membership compared with their number of CB cards in stock at the end of their third year of membership; and (iii) a mechanism consisting in a fee per CB card issued, applicable to members that were inactive or not very active before the date of entry into force of the new pricing measures. According to the Commission, those measures had an anti-competitive object, evident from the actual formulas envisaged for those measures. That object ran counter to the objectives declared to the Commission by the association in 2002.⁷¹⁸

4.102 It suffices to say that the facts of the *Cartes Bancaires* case differ significantly from those of the present case. *Cartes Bancaires* does not relate to the collective negotiation and setting of prices by competitors, as is the case for the IPPP infringement.

E. Appreciability

4.103 In line with the legal principles set out at Annex A, paragraphs A.65 to A.68, the CMA has concluded that the infringements appreciably prevented, restricted or distorted competition in the market(s) for the supply of privately funded ophthalmology services in the UK.

4.104 As set out in Chapter 4, section D above, the CMA has concluded that the object of the infringements was to prevent, restrict or distort competition. In line with established case law and given the fact that the CMA finds that Article 101(1) TFEU applies in this case,⁷¹⁹ the CMA therefore has concluded that the infringements constitute **by their nature** an appreciable restriction of competition in the market(s) for the supply of privately funded ophthalmology services in the UK.⁷²⁰

4.105 **In the alternative**, the CMA also finds that the infringements had an appreciable potential effect on competition in the markets for the supply of privately funded ophthalmology services in the UK. This conclusion is based on the fact that:

- a. the infringements constituted, in essence, an horizontal arrangement between competitors,

⁷¹⁸ Case C-67/13 P *Groupeement des Cartes Bancaires*, not yet reported, paragraphs 3-9. The CJ set aside the judgment of the GC which had upheld the Commission decision. According to the CJ's judgment, the measures at issue did not have the object of restricting competition. The case has been referred back to the GC to assess the Commission's decision insofar as it concerns the anti-competitive effects of the measures.

⁷¹⁹ See Section F, below.

⁷²⁰ See Annex A, paragraph A.68.

- b. the **trading** CESP LLPs had an aggregate turnover of around £ [§<] million in 2013/2014.⁷²¹ The individual consultant members of the trading LLPs⁷²² had an aggregate private practice turnover of no lower than £ [§<] million in 2014.⁷²³ It is appropriate to compare this to the total market size of £107 million (see paragraph 3.51) and not a larger market which also includes anaesthetists' and facility fees, as both numbers only contain payments to surgeons. On the basis of this total market size, the trading CESP LLPs would represent a lower bound estimated national market share of more than 10%.
- c. the [PMI Provider 3] infringement related to **all** CESP LLPs. The aggregate market share of all CESP LLPs on the national market is in excess of that of the trading CESP LLPs. The consultant members of all CESP LLPs⁷²⁴ had a turnover of no lower than £ [§<] million.⁷²⁵ On the basis of the total market size of £107 million, the CESP LLPs would represent a lower bound estimated national market share of more than 10%.

4.106 As is explained in further detail at paragraph A.67, and **in the alternative**, the CMA considers that a decision by an association of undertakings that coordinates the commercial conduct of 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 infringements exceeds that 10% threshold.

4.107 In light of the foregoing, the CMA finds that the infringements appreciably prevented, restricted or distorted competition in, the market(s) for the supply of privately funded ophthalmology services in the UK.

F. Application of Article 101(1) TFEU: Effect on trade between EU member states

Introduction

4.108 As set out in Annex A, at paragraphs A.69 to A.72, Article 101(1) TFEU applies where an agreement, concerted practice or decision by an association

⁷²¹ CESP LLP financial accounts

⁷²² Based on Companies House data showing 144 consultant partners in 2014.

⁷²³ Based on average CESP consultant income of £87,000 in 2015 (URN 3881). The CMA notes that evidence from Stanbridge Associates shows that average consultant private practice income is £117,000. URN 3831.

⁷²⁴ Based on Companies House data showing 198 consultant partners.

⁷²⁵ Based on average CESP consultant income of £[§<] (URN 3881). The CMA notes that evidence from Stanbridge Associates shows that average consultant private practice income is £117,000. URN 3831.

of undertakings has the potential to affect trade between EU Member States to an appreciable extent.

4.109 The CMA finds that in the present case the infringements give rise to an effect on trade between EU Member States to an appreciable extent. The CMA is therefore under a duty to apply Article 101(1) TFEU to the infringements.

Assessment

The effect on trade concept

4.110 For the purposes of assessing whether the infringements give rise to an appreciable effect on trade between EU Member States, the CMA has had regard to the approach set out in the European Commission's published guidelines on the effect on trade concept ('the Effect on Trade Guidelines').⁷²⁶

4.111 According to the Effect on Trade Guidelines, the assessment of whether a decision by an association of undertakings is capable of affecting trade between EU Member States requires that three concepts are addressed:

- The concept of '*trade between Member States*',
- The notion of '*may affect*', and
- The concept of '*appreciability*'.

4.112 Below, the CMA sets out its assessment of how the infringements may affect trade to an appreciable extent, by reference to the concepts set out in the Effect on Trade Guidelines.

The concept of trade between Member States

4.113 The concept of trade includes but is not limited to traditional exchanges of goods and services across borders. It is a wider concept, covering all cross-border economic activity, including establishment. This interpretation is consistent with the fundamental objective of the TFEU to promote free movement of goods, services, persons and capital.

⁷²⁶ See Annex A, paragraph A.71.

4.114 According to settled case-law, the concept of trade also encompasses cases where decisions by an association of undertakings affect the competitive structure of the market.⁷²⁷

4.115 The application of the effect on trade criterion is independent of the definition of relevant geographic markets. Trade between Member States may be affected also in cases where the relevant market is national or sub-national, such as in the present case.⁷²⁸

The notion of ‘may affect’

4.116 The notion ‘may affect’ implies that it must be possible with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the decision by an association of undertakings may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. There is no requirement to calculate the actual volume of trade between EU Member States affected by the series of a decision by an association of undertakings.⁷²⁹

4.117 Medical tourism is an emerging global industry.⁷³⁰ In the UK, there has been a substantial increase in the number of UK residents travelling abroad to access medical treatment in the period 2001-2010.⁷³¹ By 2010, over 60,000 UK patients travelled abroad to access medical treatment. UK residents commonly travel to other EU Member States, with France being the most visited country over the course of the decade covered by the research.⁷³² The CMA has no reason to believe the number of UK residents seeking treatments abroad has dropped since 2010.

4.118 In the region of 52,000 international patients travelled to the UK for medical procedures (independent sector and NHS private services) in 2010. Data over the decade also confirms that while growing, the overall numbers of patients travelling into the UK to access medical services is rising at a much slower rate than UK residents travelling out for care. Major source countries for

⁷²⁷ See for example Joined cases T-24/93 and others *Compagnie maritime belge* [1996] ECR II-1201, paragraph 203; and Joined cases 6/73 and 7/73 *Commercial Solvents* [1974] ECR I-223, paragraph 23.

⁷²⁸ Effect on Trade Guidelines, paragraph 22.

⁷²⁹ Effect on Trade Guidelines, paragraph 27.

⁷³⁰ The industry is discussed in detail in Lunt N, Smith R, Exworthy M, Green S T, Horsfall D, Mannion R, ‘Medical Tourism: Treatments, Markets and Health System Implications: A Scoping Review’.

⁷³¹ Hanefeld J, Horsfall D, Lunt N, Smith R (2013) ‘Medical Tourism: A Cost or Benefit to the NHS?’ PLoS ONE 8(10). The data used in this article are the International Passenger Survey, conducted by the UK Office of National Statistics (ONS), interviews with patients carried out by the authors, and freedom-of-information requests submitted to 28 NHS Foundation Trust hospitals.

⁷³² *Ibidem*.

patients coming into the UK include EU Member States such as Spain, Greece, Cyprus, France and Ireland.⁷³³

- 4.119 There is no specific data available to the CMA on patient inflow and outflow when it concerns ophthalmic services. However, ‘eye surgery’ is mentioned in the OECD commissioned scoping review by Lunt *et al.* as one of the procedures for which patients seek treatment abroad.⁷³⁴ An online search shows that a number of providers of these services based in different Member States offer these services to foreign patients, for example in EU Member States such as Germany, Spain, Hungary and the Czech Republic. Websites such as www.treatmentabroad.com allow consumers to compare, among other procedures, the cost of a cataract operation in a number of countries.
- 4.120 Focusing on PMI providers, the UK has seen entry from a number of providers which are based in other EU Member States. For example, AXA is a French insurer and Allianz a German one. In turn, UK-based PMI providers have entered markets in other Member States as well, with Aviva having a healthcare presence in Ireland for example.⁷³⁵
- 4.121 The CMA is not aware of individual consultants or companies offering ophthalmic services entering the UK market from other EU Member States.⁷³⁶ However, the entry on the market of Optical Express with its model of employing consultants, rather than working with sole traders, shows that companies operating in other EU Member States and new entrants could enter the market in a similar way. Optical Express has, itself, entered the market in Ireland, where it offers ophthalmic services,⁷³⁷ and in France, Germany, the Netherlands and Croatia, albeit not yet with ophthalmic services.
- 4.122 The CMA concludes from the above that both patients and PMI providers, the only customers of the CESP LLPs and their consultant members, engage or may engage in cross-border trade. In addition, at least one other provider of packaged ophthalmic services, Optical Express, has entered markets in other Member States. The CMA discusses below to what extent the infringements are capable of having an effect on such cross-border trade.

⁷³³ *Ibidem*.

⁷³⁴ Lunt *et al.* ‘Medical Tourism: Treatments, Markets and Health System Implications: A Scoping Review’, paragraph 24.

⁷³⁵ The CMA notes that the concept of ‘trade’ is a wide concept, covering all cross-border economic activity including establishment (Effect on Trade Guidelines, paragraph 19 and the case-law cited there).

⁷³⁶ Although the CMA considers it possible for individual consultants from other EU Member States to enter the UK market following registration with the General Medical Council, the CMA is careful not to draw conclusions from this possibility in the absence of actual evidence of entry.

⁷³⁷ See <http://www.opticalexpress.ie/>.

- 4.123 The CMA notes that it is sufficient for Article 101(1) TFEU to apply that the infringements are ‘capable’ of having an effect on trade between Member States. Article 101(1) TFEU applies to categories of decisions by an association of undertakings that are capable of having cross-border effects, irrespective of whether a particular decision actually has such effects.⁷³⁸
- 4.124 The CMA finds that the infringements are capable of leading to a change in the number of UK patients seeking ophthalmic treatment abroad and to the number of EU patients seeking such treatment in the UK.
- 4.125 The IPPP contracts cover a substantial part of the UK. They have as their object the restriction of price competition between trading CESP LLPs and their consultant members in the UK. One of the CMA’s objections against the IPPP prices is that they may set a price floor for some consultant members, who are able to charge the IPPP price, but will charge a higher price and shortfall the patient where possible. A shortfall inevitably raises costs for the patient. If those patients are able to obtain the same surgery at a lower cost in a different Member State,⁷³⁹ the number of patients seeking treatment abroad may increase. As such, the IPPP infringement is capable of having an effect on trade between Member States.⁷⁴⁰
- 4.126 A similar analysis applies to the [PMI Provider 3] infringement. It was recommended to the CESP LLPs and their consultant members not to accept [PMI Provider 3]’s fee-assured offering, but instead to charge [PMI Provider 3]-insured patients self-pay prices. The CMA has presented a number of examples of implementation of the recommendations regarding [PMI Provider 3], including of prices charged being well in excess of [PMI Provider 3]’s benefit maxima. While the invoices presented in Chapter 3 section D (Tables 3.1 to 3.4) are examples of patients who underwent surgery at higher prices regardless of the shortfall they faced, it cannot be excluded that other patients decided not to accept the shortfall rates charged by CESP LLPs and their consultant members. If those patients were able to obtain the same surgery at a lower cost in a different Member State, the number of patients seeking treatment abroad may increase. As such, the recommendations relating to [PMI Provider 3] were capable of having an effect on trade between Member States.

⁷³⁸ Effect on Trade Guidelines, paragraphs 26 and 27.

⁷³⁹ The CMA’s limited research into prices abroad suggests that, indeed, prices for private patients are lower in at least the Netherlands, Germany and the Czech Republic.

⁷⁴⁰ The CMA notes that the term ‘pattern of trade’ is neutral. It is not a condition that trade be restricted or reduced. Patterns of trade can also be affected when a decision by an association of undertakings causes an increase in trade (Effect on Trade Guidelines, paragraph 34).

4.127 In addition, the CMA notes that it is possible for providers of ophthalmic services active in other Member States to enter the UK market, for example by adopting a model similar to [Facility 3] (see paragraph 4.121) or similar to the proposal from [Facility 2] and [PMI Provider 3], which expressly indicated that *'surgeons providing the service for [Facility 2] could be a mix of employed and overseas docs'*.⁷⁴¹ The potential pricing effects of the series of decisions of undertakings outlined above may mean that those potential entrants can undercut prevailing prices or that an existing provider such as [Facility 2] can undercut prices by employing surgeons from other Member States. On the other hand, the fact that a relatively large number of UK consultants is linked to CESP Limited may mean that it is more difficult for an entrant that is relying on working with consultants as sole traders to enter the market. The effects on cross-border trade may therefore be both positive and negative. As the term 'pattern of trade' is neutral and merely requires an effect on trade, not that trade is restricted or reduced, the CMA finds that the infringements were capable of having an effect on trade between Member States.

4.128 Finally, the infringements cover a substantial part of the territory of the UK. The EU Courts have held in a number of cases that *'an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about'*.⁷⁴² This is a further reason to conclude that the series of decisions by an association of undertakings are capable of having an effect on trade between Member States.

The concept of appreciability

4.129 Decisions by an association of undertakings fall outside the scope of application of Article 101(1) TFEU when they affect the market only insignificantly having regard to the weak position of the undertakings concerned. Appreciability can be appraised in particular by reference to the position and the importance of the relevant undertakings on the market.⁷⁴³ The Commission quantifies in the Effect on Trade Guidelines, with the help of the combination of a 5% market share threshold and a EUR 40 million turnover threshold, which agreements, decisions and concerted practices are in principle not capable of appreciably affecting trade between Member

⁷⁴¹ URN 1565, Email from [CESP Ltd senior employee N] dated 15 October 2012.

⁷⁴² See for a case dealing specifically with a decision by an association of undertakings: Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 95. See also the Effect on Trade Guidelines, paragraph 78.

⁷⁴³ Effect on Trade Guidelines, paragraph 44.

States.⁷⁴⁴ CESP Limited and its members fail this test, as the CESP LLPs' market shares in local markets are all highly likely to be in excess of 5%, as is their aggregate national market share (see paragraph 4.105 above).

4.130 In addition to the market share and turnover quantification, the Effect on Trade Guidelines indicate that '*agreements between small and medium-sized undertakings (SMEs) ... are normally not capable of affecting trade between Member States*'. However, this is on the basis that '*the activities of SMEs are normally local or at most regional in nature*'.⁷⁴⁵ Even if each individual CESP LLP were to be considered an SME, the infringements sought to coordinate the CESP LLPs' commercial conduct at a national level: the purpose of the LLPs' coordination through CESP Limited was to act together to set a national price and to coordinate a national response to [PMI Provider 3]'s initiatives and the [Facility 2] and [PMI Provider 3] proposal. Indeed, it was considered important for CESP Limited to negotiate nationally for the CESP LLPs, to ensure that PMI providers did not '*play [them] off against each other to gain the lowest possible fee*'.⁷⁴⁶ The CESP LLPs have through CESP Limited created a membership organisation that represents them and that allows for the coordination of pricing and other commercial conduct at a national level.

4.131 As such, and given the CMA's considerations on cross-border trade in ophthalmic services and how the infringements may affect that cross-border trade, the CMA finds that the infringements may affect trade between Member States. Therefore, the CMA will apply Article 101(1) TFEU in this case.

G. Effect on trade within the UK

4.132 As set out in Annex A at paragraphs A.73 to A.76, 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).

4.133 The CMA has concluded that the services which are the subject of the infringements are provided throughout the UK (see the map included in Chapter 3 section B Figure 3.5). 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.

⁷⁴⁴ Effect on Trade Guidelines, paragraph 52. See also the Commission's 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 (2014/C 291/01) ('De Minimis Notice'), paragraph 4.

⁷⁴⁵ Effect on Trade Guidelines, paragraph 50.

⁷⁴⁶ URN 1143, Email from [CESP Ltd employee K] to a number of representatives of CESP LLPs dated 7 December 2011.

H. Exemption under Section 9 / Article 101(3)

4.134 Decisions by associations of undertakings which have as their object or effect an appreciable prevention, restriction or distortion of competition, but which satisfy all the conditions laid out in section 9(1) of the Act and/or Article 101(3) TFEU are exempted.

4.135 Prior to admitting to the infringements in the settlement agreement with the CMA, CESP Limited made a number of claims to the CMA asserting that the joint setting of a price through the IPPP agreements falls outside the scope of the Chapter I prohibition or, alternatively, that it meets the criteria of section 9(1) of the Act and/or Article 101(3) TFEU. The burden of proof to demonstrate that a decision which infringes the Chapter I prohibition satisfies the four conditions in section 9(1) of the Act and/or Article 101(3) TFEU is on the undertaking or association of undertakings seeking to defend the decision.⁷⁴⁷ CESP Limited has provided some limited qualitative evidence in support of its claims, but not quantitative evidence. The CMA has assessed on the basis of the evidence available to it whether any indications exist which may lead to non-application of the Chapter I prohibition to, or individual exemption of, the infringements.

The claim that the IPPP is objectively necessary and falls outside the scope of the Chapter I prohibition

4.136 Prior to entering into settlement discussions with the CMA, CESP Limited indicated to the CMA that it views the IPPP as a commercialisation agreement.⁷⁴⁸ Setting a collective price is objectively necessary to provide the PMI provider with national coverage. No individual LLP could provide this national coverage. It has to be a collective arrangement between the LLPs. Moreover, no PMI provider would enter into an arrangement with CESP Limited without an agreed price covering all the CESP LLPs, as it would not be efficient or practical for the PMI provider to have to negotiate a separate price with each CESP LLP.⁷⁴⁹ Therefore, CESP Limited was of the view that the IPPP falls outside the scope of the Chapter I prohibition. CESP Limited did

⁷⁴⁷ Section 9(2) of the Act and Article 2 of Regulation 1/2003.

⁷⁴⁸ In general, commercialisation agreements involve co-operation between competitors in the selling, distributing or promotion of their substitute products. This type of agreement can have a widely varying scope. At one end of the spectrum, joint selling agreements may lead to a joint determination of all commercial aspects related to the sale of the product, including price. At the other end, there are more limited agreements that only address one specific commercialisation function, such as distribution, after-sales service, or advertising (European Commission's Guidelines on the applicability of Article 101(1) of the TFEU to horizontal co-operation agreements, paragraph 225).

⁷⁴⁹ CESP Limited submission to the CMA dated 31 March 2015, paragraph 3.2.

not uphold these claims following the commencement of settlement discussions.

4.137 For completeness, The CMA notes that this argument only relates to the IPPP infringement, not the [PMI Provider 3] infringement and the [Facility 2] infringement. Therefore, these arguments do not seek to excuse these other infringements.

4.138 As indicated by CESP Limited, a commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the co-operation, for example, because of the costs involved.⁷⁵⁰ This argument assumed (i) that there is a market for offering packaged ophthalmic services, separate from the market on which consultants can offer their services under the traditional model; (ii) that it is objectively necessary to provide national coverage to be active on this separate market; and (iii) that for individual LLPs to become active on this separate market, it is objectively necessary for them to collectively set the IPPP.

4.139 The CMA concludes that the contention that CESP LLPs or individual consultants could not individually enter the market for the supply of ophthalmic services to PMI providers is not supported by the evidence. Firstly, consultants have a number of routes to the privately insured market which do not involve package prices set by a consultant group, as set out in detail in Chapter 3 section A. The joint offering of ophthalmic services under a fixed IPPP is, therefore, not objectively necessary to enter this market. Second, the majority of UK consultants offer their services to the privately insured market without using the IPPP. Third, [PMI Provider 3], the largest PMI provider on the market, has not considered it necessary to come to an IPPP agreement with CESP Limited. Fourth, while some trading CESP LLPs regularly use the IPPP agreements when they treat insured patients,⁷⁵¹ others estimate that procedures under the IPPP agreements only constitute less than [0 – 5]% of their LLP turnover,⁷⁵² which demonstrates that these CESP LLPs have access to the market without the IPPP agreements as well. Finally, when an IPPP

⁷⁵⁰ CESP Limited submission to the CMA dated 31 March 2015, paragraph 3.3.

⁷⁵¹ URN 0112, CESP Board Meeting Slides, 14 May 2011.

⁷⁵² URN 3569, Transcript of State of Play Meeting, page 80, lines 14-24: 'Well, okay, let's look at our [LLP 12] since formation'. What proportion of our activity was this IPPP? And of the CESP turnover it was [%] per cent but the CESP turnover doesn't include that private practice that occurred outside of CESP as an individual consultant doing a [PMI Provider 3] case under his own name, if you like, and billed with his name at the top of the invoice. So, our estimate is that [%] per cent of work goes through the CESP – insured work, that is, and [%] per cent is traditional private practice. So, the amount of IPPP work done in [%], if you like, amounts to less than [%] per cent of the entire private market'.

price was agreed with [PMI Provider 1] which would for certain CESP LLPs not lead to LLP profit if an anaesthetist was used, some trading CESP LLPs actively sought confirmation that they could bill [PMI Provider 1]-insured patients outside the IPPP agreement as sole traders.⁷⁵³ Therefore, the CMA finds that it would not be appropriate to define a market for offering packaged ophthalmic services, separate from the market on which consultants can offer their services under the traditional model.

4.140 Furthermore, [PMI Provider 1], the [S<] provider in the market, initially entered into an agreement with CESP Limited which only covered four trading CESP LLPs. This undermines the argument that even if there was a separate market for offering packaged ophthalmic services, it would be necessary to provide national coverage to enter this market. In addition, the CESP IPPP in most cases provides for a differentiated price for London and non-London. This further supports the conclusion that it is not objectively necessary to offer national coverage, let alone to fix a common price. Also, [PMI Provider 3] has recently entered into an agreement involving a package price with [LLP 15] without the involvement of CESP Limited. This, again, shows that national coverage would not be necessary to be active on a hypothetical market for packaged ophthalmic services. Finally, other providers of packaged ophthalmic services, including providers such as Optegra, are not organised along national lines, yet they offer these services successfully to PMI providers. Even the largest hospital group, BMI, cannot offer a facility in every catchment area. PMI providers must be able to offer national coverage to their customers, but they do so from a range of providers, and range of locations depending on the size and geographic coverage of the provider.

4.141 Even if (and unsupported by the evidence), there was a separate market for offering packaged ophthalmic services with national coverage, it is not objectively necessary to have a common national price. If there was such a separate market, CESP Limited could offer common terms to PMI providers, which nevertheless leave the pricing element of those terms open to competition or, as a minimum, allow for a lower local IPPP when an anaesthetist is not used or when the local facility fee is low.

4.142 Finally, even if there were such a market and the IPPP was objectively necessary, then CESP Limited would still need to demonstrate that the trading CESP LLPs would not have been able to enter that market with a more limited

⁷⁵³ URN 0426, Email from [Consultant 16c] to [CESP Ltd senior employee A] re [PMI Provider 1], dated 11 June 2014 and URN 0427, Email from [CESP LLP employee 1a] to [CESP Ltd senior employee A] re [PMI Provider 1], dated 11 June 2014.

number of parties than are effectively taking part in the co-operation.⁷⁵⁴ The number of trading LLPs has increased from 2008 until 2013, whereas IPPP agreements were already in place from 2008. Even if there were such a market and the IPPP was objectively necessary, this proves that this market could have been entered into by a more limited number of parties.

- 4.143 The CMA therefore concludes that the collective setting of IPPP prices is not objectively necessary to the extent that it would fall outside the scope of the Chapter I prohibition. Any assessment of efficiencies of jointly offering the trading LLPs' services should, therefore, take place under Section 9 of the Act and/or Article 101(3) TFEU.

The claim that the IPPP does not amount to price fixing

- 4.144 CESP Limited also submitted prior to entering into settlement discussions with the CMA that it carries out each negotiation with a single PMI provider that agrees the price with CESP Limited. Therefore, there was no price fixing in CESP Limited's view: there is no agreement between the CESP LLPs to fix the price at which they will offer their services generally to the market. The price is negotiated and agreed on an individual basis with each PMI provider. The CESP LLPs then agree to provide their services to the PMI provider on the basis of the price agreed with the PMI provider. CESP Limited did not uphold these claims following the commencement of settlement discussions.
- 4.145 For completeness, the CMA finds that the claim that an arrangement would not amount to price fixing simply because a different price applies to different customers is unfounded. The IPPP arrangements fix a price for each PMI provider that trading CESP LLPs can charge. They, therefore, restrict price competition between trading CESP LLPs when they offer ophthalmic services to these PMI providers. Moreover, the circulation by CESP Limited of the IPPP price lists to the CESP LLPs is liable to prompt the CESP LLPs to align their prices for each PMI provider, or at least provide a benchmark that influences their price setting, irrespective of their cost prices. Finally, as the IPPP prices are not binding on the trading CESP LLPs, but the PMI providers are contractually bound to pay the IPPP prices, they set a price floor for insured procedures. For an arrangement to amount to price fixing it is by no means necessary that one single price is fixed at which the CESP LLPs offer their services generally to the market. On the contrary, the circulated IPPP price lists provide extremely detailed pricing information for large numbers of procedure codes and specified by PMI provider. This significantly reduces

⁷⁵⁴ European Commission's Guidelines on the applicability of Article 101(1) of the TFEU to horizontal co-operation agreements, paragraph 237.

uncertainty to a great level of detail for each of the trading CESP LLPs as to the foreseeable conduct of their competitors with regard to each PMI provider and for each procedure code covered by the relevant IPPP agreements.

- 4.146 CESP Limited submitted, in addition, that the arrangements are analogous to a joint bid in response to a tender where the tenderer is specifically requesting a joint bid. It stated that it cannot be the case that such joint bids amount to restrictions of competition by object where they have been specifically invited by the buyer. CESP Limited did not uphold these claims following the commencement of settlement discussions.
- 4.147 For completeness, the CMA notes that for this claim to be successful, CESP Limited would firstly need to show for each IPPP agreement, including the agreements with smaller PMI providers, that the relevant PMI provider specifically requested a joint bid.⁷⁵⁵
- 4.148 The evidence shows that CESP Limited actively approached PMI providers and that the IPPP offering was by no means a response to a specific request from a PMI provider. For example, in 2011, CESP Limited actively approached [PMI Provider 1] for a new agreement, seeking a [~~X~~] % price increase. This does not support the assertion that it was [PMI Provider 1] that ‘*specifically invited*’ a joint bid. Also, the correspondence and negotiations leading up to the 2014 [PMI Provider 1] agreement (see Chapter 3 section C paragraphs 3.181- 3.204) do not suggest that [PMI Provider 1] specifically requested a joint bid from the CESP LLPs. Rather, the evidence suggests that [PMI Provider 1] was unhappy with Consultants shortfalling patients and considered the prices it paid to be uncompetitive. As a result, it was minded to terminate the agreement.⁷⁵⁶ The only example in the evidence seen by the CMA of a tender was when [PMI Provider 3] put its cataract network out to tender in 2009. In that instance, the CESP LLPs collectively decided not to participate in this tender, as charging [PMI Provider 3] through an IPPP arrangement was preferred.⁷⁵⁷

⁷⁵⁵ CESP Limited would also need to show that none of the CESP LLPs could participate in these specifically requested joint bids on its own or in a smaller sub-set of CESP LLPs. Furthermore, CESP Limited and the participating CESP LLPs would have to ensure that only the minimum amount of information strictly necessary for the formulation of the joint bid and the performance of the IPPP agreement (if awarded) is shared between the members of the consortium and is restricted to relevant staff on a ‘need to know’ basis. Finally, the CESP LLPs must ensure that they compete vigorously as normal in all other contexts.

⁷⁵⁶ URN 0338, Email exchange between [CESP Ltd employee J] (CESP Limited) and [PMI Provider employee 1a] [PMI Provider 1], 26 November 2013; and URN 0410, Email from [PMI Provider employee 1a] to [CESP Ltd senior employee A], 9 May 2014.

⁷⁵⁷ CESP Limited board meeting 1 April 2009 (URN 2557): ‘On [PMI Provider 3] cataract network, the four generic options were discussed. Board recognized it was preferable to contract under the IPPP and LLPs that value control of their practices could inform their hospitals that they are willing to work in this way with [PMI Provider 3].’

Joint sales as an efficiency

- 4.149 As set out above, the CMA has concluded that the IPPP infringement should be characterised as a series of decisions by an association of undertakings, rather than a joint selling or joint commercialisation agreement. However, the characterisation as a decision by an association of undertakings does not exclude that there could also be a joint selling agreement. The CMA has, therefore, analysed the IPPP infringement⁷⁵⁸ against the general efficiencies associated with joint selling agreements.
- 4.150 Agreements limited to joint selling generally have the object of coordinating the pricing policy of competing service providers. Such agreements may eliminate price competition and are, therefore, likely to restrict competition by object.⁷⁵⁹ That assessment does not change if the agreement is non-exclusive (that is to say, where the parties are free to sell individually outside the agreement), as long as it can be concluded that the agreement will lead to an overall coordination of the prices charges by the parties.⁷⁶⁰

(i) Efficiency gains

- 4.151 The efficiencies to be taken into account when assessing whether a commercialisation agreement fulfils the criteria of Article 101(3) will depend on the nature of the activity and the parties to the co-operation. Price fixing can generally not be justified, unless it is indispensable for the integration of other marketing functions, and this integration will generate substantial efficiencies.⁷⁶¹
- 4.152 In addition, the efficiency gains must not be savings that result from the elimination of costs that are inherently part of competition, but must result from the integration of economic activities. Efficiency gains must be demonstrated by CESP Limited and/or its members. An important element in this respect would be the contribution by the parties of significant capital, technology or other assets. Cost savings through reduced duplication of resources and facilities can also be accepted. However, if the joint commercialisation represents no more than a sales agency without any

⁷⁵⁸ Any efficiencies relating to joint selling would, in the CMA's view, only apply to the IPPP, not the other forms of coordination that are the subject of this Decision.

⁷⁵⁹ Guidelines on the applicability of Article 101(1) of the TFEU to horizontal co-operation agreements, paragraph 234. See also for example OFT740rev *How competition law applies to co-operation between farming businesses: Frequently asked questions*, November 2011, page 5 and A16.

⁷⁶⁰ Guidelines on the applicability of Article 101(1) of the TFEU to horizontal co-operation agreements, paragraph 235.

⁷⁶¹ Guidelines on the applicability of Article 101(1) of the TFEU to horizontal co-operation agreements, paragraph 246.

investment, it is likely to be a disguised cartel and as such unlikely to fulfil the conditions of Section 9 of the Act and Article 101(3).⁷⁶²

- 4.153 Prior to entering into settlement discussions with the CMA, CESP Limited claimed that *‘a CESP contract with an insurer allows the insurer to benefit from national coverage without the need for individual negotiations with each LLP. It also means that the insurer receives one invoice covering the whole treatment pathway (rather than separate invoices for the surgeon, anaesthetist, facility and any other services). This significantly reduces administrative costs for the insurer’*⁷⁶³ CESP Limited explained that various online sources *‘cite the costs of processing an invoice as between £10 to £25 and sometimes as much as £50. It could be argued that by using only one invoice for a cataract pathway instead of, say, a total of five (or more) using the “traditional” method, then there is a potential saving of around £40 - £100.’*⁷⁶⁴ CESP Limited did not uphold these claims following the commencement of settlement discussions.
- 4.154 Having established that collectively setting the IPPP is not objectively necessary for individual consultants or CESP LLPs to be active on the market for the provision of ophthalmic services (or indeed on a hypothetical separate market for the provision of **packaged** ophthalmic services), analysis of the first condition of Section 9 of the Act and Article 101(3) requires an examination of the appreciable objective advantages arising specifically from a collectively set IPPP and not from the concept of a package price in general or from the cooperation through CESP Limited as a whole.⁷⁶⁵
- 4.155 The reduction in administrative costs resulting from the PMI provider receiving only one invoice rather than separate invoices is not a direct benefit of the collectively set IPPP, but rather of the concept of a package price in general.
- 4.156 CESP Limited claimed the IPPP creates revenue for the CESP LLPs which is invested to improve the service given to patients. CESP Limited offered to provide copies of invoices for the purchase of *‘various pieces of critical diagnostic equipment, for example [LLP 12] have invested over £ [X]k in equipment over approximately the past 5 years.’*⁷⁶⁶ This is not a direct benefit of the collectively set IPPP and revenue for the LLP could be achieved via

⁷⁶² Guidelines on the applicability of Article 101(1) of the TFEU to horizontal co-operation agreements, paragraphs 247 and 248.

⁷⁶³ CESP Limited submission to the CMA dated 31 March 2015, paragraph 3.12, first bullet.

⁷⁶⁴ URN 3829, CESP Limited initial response to draft calculation

⁷⁶⁵ Case C-382/12 P *MasterCard*, paragraph 232.

⁷⁶⁶ URN 3829, CESP Limited initial response to draft calculation. See also URN 3567, transcript of interview with [CESP senior board member 5a] page 24

other means. Therefore, the CMA finds that this is a result of efficiencies at the CESP LLP level rather than of a collectively set IPPP price.

4.157 In line with the European Commission's Guidelines, the CMA views the IPPP as a '*disguised cartel*', which is unlikely to fulfil the conditions of Section 9 of the Act and Article 101(3).⁷⁶⁷

4.158 In any event, the CMA notes that it would have been difficult to prove that the direct benefits of the IPPP outweigh the significant level of the IPPPs agreed by CESP Limited when compared to, for example, the lower package price offered by [LLP 15] without coordination by CESP Limited. In other words, the efficiency savings for PMI providers would have to be of significant size to outweigh the adverse effects on competition that are the result of the IPPP. This will be even more so as the IPPP's amount increases, as is the case for smaller PMI providers.

(ii) *Indispensability*

4.159 In accordance with the European Commission's Guidelines on the application of Article [101(3)] of the Treaty,⁷⁶⁸ it is appropriate when assessing a case against these criteria, to reverse the second and third conditions and to establish first whether the restrictions pass the indispensability test.⁷⁶⁹ The indispensability test under Section 9 of the Act and Article 101(3) is different from the one applied to CESP Limited's claim that the IPPP is objectively necessary and, therefore, falls outside the scope of the Chapter I prohibition.⁷⁷⁰ The test to be applied here is whether the IPPP was indispensable to the efficiency gains, while allowing consumers a fair share of the resulting benefits.

4.160 Prior to entering into settlement discussions with the CMA, CESP Limited claimed that '*insurers would not be prepared to enter into arrangements with CESP without a single price across all LLPs, as the cost of negotiating individual prices with each LLP would make the arrangements uneconomic. The single price also provides the insurer with cost certainty*'.⁷⁷¹

4.161 For completeness, the CMA notes that restrictions that go beyond what is necessary to achieve the efficiency gains generated by a commercialisation agreement (if any) do not fulfil the criteria of Section 9 of the Act and Article

⁷⁶⁷ Guidelines on the applicability of Article 101(1) of the TFEU to horizontal co-operation agreements, paragraphs 247 and 248.

⁷⁶⁸ OJ [2004] C 101/97.

⁷⁶⁹ Guidelines on the application of Article [101(3)] of the Treaty, paragraph 39.

⁷⁷⁰ Case C-382/12 P *MasterCard*, paragraph 93.

⁷⁷¹ CESP Limited submission to the CMA dated 31 March 2015, paragraph 3.12, second bullet.

101(3). The question of indispensability is especially important for those agreements concerning price fixing, which can only under exceptional circumstances be considered indispensable.

- 4.162 On the basis of the evidence available to it, the CMA has found that a fixed IPPP is not indispensable to achieve the efficiency benefit of a reduction in administration costs for the PMI providers. One of the CMA's significant concerns regarding the IPPP is that it does not allow for a lower price if no anaesthetist is used or if the local facility fee is lower than the facility fee that another LLP pays. Instead, the consultant and/or the LLP retains the difference. The CMA does not see how the cost savings for PMI providers that CESP Limited claims result from the IPPP outweigh the significant additional cost the PMI provider faces by being charged, for example, an anaesthetist fee without an anaesthetist actually having been used. This is a direct result of the fixed nature of the IPPP.⁷⁷² An IPPP that would allow for these savings to be passed on would be less restrictive, take into account differences in cost efficiencies between LLPs and allow for direct cost savings for the PMI provider, who faces a lower cost. The evidence available to the CMA does not show how the cost savings that CESP Limited claims outweigh these restrictions.

Other potential efficiencies

- 4.163 The CMA recognises that there is a potential for cooperation through CESP Limited to lead to an improvement in the distribution of ophthalmic services, in that PMI providers can deal with one sole contractor, while being ensured of national coverage.⁷⁷³ They may, therefore, face lower administration costs. There is also a potential for the CESP model to lead to a downward pressure on facility fees. However, given the considerable restriction on competition outlined above, the CMA would wish to see a detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts,⁷⁷⁴ and shows that any advantages claimed of the decisions outweigh the detriments it might produce. Such a detailed, robust and compelling analysis has not been provided in this case. The CMA notes, in any event, that it would have been difficult to justify the higher package prices charged to

⁷⁷² While it is true that if a national hospital group offers a package price, it also retains the anaesthetist's fee if one is not used, this is not the result of a restriction of competition, as is the case for the IPPP, as national hospital groups generally form one single undertaking.

⁷⁷³ Any cost benefits for LLPs or individual ophthalmologists relating from the central setting of a price should be disregarded, as cost savings that arise simply from the exercise of market power, for example by fixing prices cannot be taken into account.

⁷⁷⁴ Commission decision of 19 December 2007 in *MasterCard*, paragraph 690.

smaller PMI providers, which are on occasion even higher than the prices charged to self-pay patients who are not insured.

5. THE CMA'S ACTION

- 5.1. Further to the CMA's finding of three infringements of the Chapter I prohibition and Article 101(1) TFEU, as set out at Chapter 1, Section C above (for ease of reference, the infringements are set at paragraph 1.12), this section of the Decision sets out the enforcement action which the CMA is taking and its reasons for taking that action.

A. Directions

- 5.2. Section 32(1) of the Act provides that if the CMA has made a decision that an agreement⁷⁷⁵ infringes the Chapter I prohibition and Article 101(1) TFEU, it may give to such person(s) as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.
- 5.3. In this Decision, the CMA has found three separate infringements of the Chapter I prohibition and Article 101(1) TFEU, with different start dates and different end dates.
- 5.4. CESP Limited confirmed to the CMA that it will no longer have any involvement in agreements with PMI providers or any other purchaser of ophthalmic services.⁷⁷⁶ In the particular circumstances of this case, the CMA considers that this action by CESP Limited effectively amounts to termination of the IPPP infringement.
- 5.5. The CMA has not found evidence that the [PMI Provider 3] infringement continued after December 2013. It has also not found evidence that the [Facility 2] infringement continued after October 2012.
- 5.6. The CMA notes that CESP Limited has adopted a compliance programme at its Board meeting on 22 July 2015. This is a further indication that the infringements have stopped. In light of these case-specific circumstances, the CMA considers that it is not necessary to give directions to CESP Limited.

B. Financial Penalties

General points

- 5.7. Section 36(1) of the Act provides that on making a decision that a decision by an association of undertakings⁷⁷⁷ has infringed the Chapter I prohibition

⁷⁷⁵ Or, as appropriate, concerted practice or decision by an association of undertakings – see section 2(5) of the Act.

⁷⁷⁶ URN 3884, Overview of competition law compliance programme dated 7 July 2015.

⁷⁷⁷ Or, as appropriate, agreement or concerted practice – see section 2(5) of the Act.

and/or Article 101(1) TFEU, the CMA may require an undertaking which is a party to the decision 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 applicable at the time when setting the amount of the penalty (the Penalties Guidance).⁷⁷⁸

- 5.8. Penalties in respect of the infringements are imposed on the addressee of the Decision, CESP Limited.

The CMA's margin of appreciation in determining the appropriate penalty

- 5.9. Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act⁷⁷⁹ and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the 2000 Order),⁷⁸⁰ 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.⁷⁸¹ The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.⁷⁸² Rather, the CMA makes its assessment on a case-by-case basis⁷⁸³ having regard to all relevant circumstances of the case concerned 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 Chapter I prohibition and Article 101(1) TFEU (as well as other prohibitions under the Act and the TFEU as the case may be).⁷⁸⁴

⁷⁷⁸ 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.

⁷⁷⁹ Section 36(8) is addressed at paragraphs 5.60 and following below.

⁷⁸⁰ SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁷⁸¹ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [168] and *Umbro Holdings and [LLP 17] United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].

⁷⁸² See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 (*Eden Brown*), at [78].

⁷⁸³ 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 782), 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*'.

⁷⁸⁴ 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.

Small agreements

- 5.10. 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 ('the small agreements immunity'). This immunity does not apply to infringements of Article 101(1) TFEU. A decision by an association of undertakings may benefit from the small agreements immunity if the aggregate applicable turnover of the undertakings that are members of the association does not exceed £20 million for the business year ending in the calendar year preceding one during which the infringement occurred;⁷⁸⁵ and provided the decision by an association of undertakings does not qualify as a price fixing agreement.⁷⁸⁶
- 5.11. For the purposes of this immunity, a price fixing agreement is defined under section 39(9) of the Act as '*an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates*'.
- 5.12. The small agreements immunity does not apply to infringements of Article 101(1) TFEU. The CMA has found in this decision that CESP Limited has infringed Article 101(1) TFEU in that the infringements are capable of having an effect on trade between Member States. CESP Limited can, therefore, not benefit from the small agreements immunity in relation to the infringements of Article 101(1) TFEU.
- 5.13. Moreover, the CMA finds that the IPPP infringement and the [PMI Provider 3] infringement constitute 'price fixing' as defined in section 39(9) of the Act, for the following reasons.
- 5.14. The CESP LLPs are both the authors and the addressees of the series of decisions by an association of undertakings.⁷⁸⁷ Indeed, by giving delegated authority to [CESP Ltd senior employee M] to enter into agreements with PMI providers on their behalf, they took a decision to empower CESP Limited to continuously coordinate their pricing conduct. Similarly, when [PMI Provider 3] lowered its benefit maxima, the recommendations issued by CESP Limited to its consultant members reflected the position agreed at the conference call

⁷⁸⁵ Section 7 of the Schedule to The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000.

⁷⁸⁶ 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.

⁷⁸⁷ Case 45/85 *Verband der Sachversicherer* [1987] ECR I-447, paragraph 38.

between LLP leads (who are the Board members of CESP Limited) of 28 May 2013.⁷⁸⁸

- 5.15. As outlined in paragraph 4.40, CESP Limited resolved to continuously coordinate the pricing conduct of the CESP LLPs in the market by agreeing IPPP prices (consisting of highly detailed price lists) that were in line with the CESP LLPs' interests. When a price could be agreed with [PMI Provider 3], but the level of that price was not in the interest of the CESP LLPs with higher local costs, CESP Limited did not enter into an IPPP contract with [PMI Provider 3]. For PMI providers with which IPPP prices were agreed, detailed price lists were then circulated to all trading CESP LLPs. Therefore, the IPPP prices are not just prices fixed between CESP Limited and the PMI provider,⁷⁸⁹ they entail coordination both in the setting of the price levels at a level acceptable to the trading CESP LLPs and in the subsequent circulation of the detailed price lists to the trading CESP LLPs. As such, the IPPP infringement has the object of fixing prices between trading CESP LLPs. The IPPP infringement can therefore be characterised as 'price fixing' as defined in section 39(9) of the Act, as it restricts the freedom of the trading CESP LLPs to determine the price to be charged for the ophthalmic services for which they are able to charge an IPPP price.
- 5.16. In addition, it would be artificial to interpret the definition of 'price fixing' in a vacuum, without also taking account of the wider case-law and legislation dealing with arrangements between competitors relating to price. In this respect both the Chapter I prohibition and Article 101(1) TFEU apply explicitly to decisions by an association of undertakings which 'directly or indirectly fix purchase or selling prices'. As outlined in paragraph 4.75, the IPPP prices constitute, as a minimum, non-binding recommended current and future prices. It is settled case-law that such recommendations can be considered decisions by an association of undertakings which directly or indirectly fix purchase or selling prices.⁷⁹⁰ The same has been held for 'target prices', even if they are rarely adhered to in practice.⁷⁹¹
- 5.17. As for the [PMI Provider 3] infringement, it is highly relevant that CESP Limited's recommendations directly followed the reduction in [PMI Provider 3]'s benefit maxima and [PMI Provider 3]'s drive to expand the pool of fee-assured consultants. The CMA finds that the recommendation not to be a fee-assured consultant, as well as the recommendation to charge [PMI

⁷⁸⁸ See paragraph 3.286

⁷⁸⁹ And, therefore, not the price to be charged '*between that party [CESP Limited] and another party [the PMI provider] to the agreement*', as excluded from the definition of price fixing in section 39(9) of the Act.

⁷⁹⁰ Case 45/85 *Verband der Sachversicherer* [1987] ECR I-447, paragraph 41.

⁷⁹¹ Case 8/72 *Vereeniging van Cementhandelaren* [1972] ECR I-977, paragraphs 16 and 19.

Provider 3] the LLP's IPPP price or the LLP's self-pay price instead of the benefit maxima are essentially decisions by an association of undertakings that had as their object, or one of their objects, restricting the freedom of CESP LLPs and their consultant members to determine the price to be charged for ophthalmic services (predominantly cataract surgery) provided to [PMI Provider 3]-insured patients.

- 5.18. By agreeing on the recommendations, subsequently addressing them to all CESP LLPs and their consultant members, and finally re-iterating these recommendations a number of times and actually implementing them, CESP Limited and the CESP LLPs restricted consultant members' freedom to accept [PMI Provider 3]'s benefit maxima. An agreement, decision by an association of undertakings or concerted practice to collectively reject a price offer made in the market – such as [PMI Provider 3]'s benefit maxima – forms as a minimum indirect price fixing, which fits directly with the definition in the Chapter I prohibition and Article 101(1) TFEU outlined in paragraph 5.16, above.
- 5.19. The CMA makes no finding on whether or not the [Facility 2] infringement can be considered 'price-fixing' for the purpose of section 39 of the Act. As the [Facility 2] infringement only had a duration of one month and the CMA has decided to impose a single fine for the IPPP infringement and the [PMI Provider 3] infringement (see below), the CMA will not impose a separate financial penalty for the [Facility 2] infringement.
- 5.20. Therefore, the CMA finds that the small agreements immunity does not apply to the IPPP infringement and the [PMI Provider 3] infringement and the CMA will impose a financial penalty on CESP Limited.

Intention/negligence

- 5.21. The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition and/or Article 101(1) TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.⁷⁹² However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.⁷⁹³
- 5.22. The CAT has defined the terms 'intentionally' and 'negligently' as follows:

⁷⁹² Section 36(3) of the Act.

⁷⁹³ *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].

*‘...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’.*⁷⁹⁴

5.23. 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’.*⁷⁹⁵

5.24. 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.⁷⁹⁶

5.25. The CMA finds that CESP Limited must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition.⁷⁹⁷

5.26. In the alternative, at the very least CESP Limited ought to have known that its conduct would result in a restriction or distortion of competition.⁷⁹⁸

⁷⁹⁴ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [221].

⁷⁹⁵ 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.

⁷⁹⁶ 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 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].

⁷⁹⁷ 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 CESP Limited’s conduct could be anti-competitive were, for instance, communicated to CESP Limited by third parties. See the [Facility 13] concerns, outlined in URN 0212, Email exchange between [CESP Ltd employee I] and [Facility Senior Manager 13a]], dated 8 March 2013. Moreover, both FIPO and the BMA warned consultants not to collude in their responses to [PMI Provider 3]’s initiatives to introduce open referrals, widen the pool of fee-assured consultants and lower its benefit maxima (see paragraphs 3.284 and 4.88 of this Decision).

⁷⁹⁸ 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.

5.27. In conclusion, the CMA has found that CESP Limited committed the Infringement intentionally or negligently.

Single penalty for CESP Limited

5.28. 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.⁷⁹⁹ In the present case, the CMA considers it appropriate to calculate a separate penalty for both the IPPP infringement and the [PMI Provider 3] infringement since there are distinctive elements to the two infringements. In particular, the IPPP infringement only covered the trading CESP LLPs, whereas the [PMI Provider 3] infringement covered all CESP LLPs and their consultant members. Furthermore, both infringements had a different duration. The CMA considers it appropriate in these circumstances to calculate a separate penalty for each infringement up to and including step 3 of the penalty calculation. Ultimately, however, the penalty in this case will be imposed on CESP Limited. The CMA must ensure that the final cumulative figure arrived at, being the total of the penalties calculated for the IPPP infringement and the [PMI Provider 3] infringement, is proportionate. From step 4 of the penalty calculation, the CMA will, therefore, proceed on the basis of one single penalty, which is comprised of the penalties for the IPPP infringement and the [PMI Provider 3] infringement, as arrived at after step 3.

5.29. As the [Facility 2] infringement only had a duration of one month and the CMA has decided to impose a financial penalty up to step 3 (i.e. absent the adjustment for proportionality) for both the IPPP infringement and the [PMI Provider 3] infringement which, as set out in paragraph 5.55 below, would already exceed the statutory maximum and what is proportionate in this case, the CMA does not consider it necessary to calculate an additional financial penalty for the [Facility 2] infringement.

Calculation of penalties

5.30. As noted at paragraph 5.7 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.

5.31. In determining CESP Limited's financial penalty, the CMA takes into account its members' turnover and, when it comes to assessing the penalty's proportionality, its members' financial position. This is in line with the General

⁷⁹⁹ See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [179].

Court's approach, according to which, '*[t]he influence which an association of undertakings has been able to exert on the market does not depend on its own 'turnover', which discloses neither its size nor its economic power, but on the turnover of its members, which constitutes an indication of its size and economic power*'.⁸⁰⁰

Step 1 - starting point

Relevant turnover

- 5.32. The starting point for determining the level of financial penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.⁸⁰¹ The 'relevant turnover' is defined in the Penalties Guidance as the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.⁸⁰² The 'last business year' is the undertaking's most recent financial year preceding the date when the infringement ended.⁸⁰³
- 5.33. In the present case, the CMA has determined the relevant turnover for CESP Limited in accordance with the general principle set out in paragraph 5.31 above. Therefore, CESP Limited's relevant turnover is based on the turnover of its members.
- 5.34. Consequently, the relevant turnover for CESP Limited in respect of the IPPP infringement and the [PMI Provider 3] infringement comprises the aggregate turnover generated by CESP LLPs (where they form undertakings for the purpose of competition law) or individual consultants (being, in turn, the members of CESP LLPs that are associations of undertakings) in the provision of privately funded ophthalmic services.

⁸⁰⁰ Joined Cases T-39/92 and T-40/92 *CB and Europay* [1994] ECR II-49, paragraph 137. The general rule for the 10%-maximum to be applied to associations of undertakings is in line with this approach: the turnover of the association shall be the aggregate turnover of the undertakings that are members of the association and active on the market affected by the infringement (Schedule to the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) Order 2004, section 3).

⁸⁰¹ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraphs 2.3 to 2.6.

⁸⁰² *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).

⁸⁰³ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.7.

5.35. However, for the IPPP infringement, the CMA considers that it is appropriate in this specific case only to take into account turnover generated by the **trading** CESP LLPs when it calculates the relevant turnover, as the fine should reflect '*[t]he influence which an association of undertakings has been able to exert on the market*'. The CMA considers that the IPPP infringement primarily coordinated the trading CESP LLPs' pricing conduct and that the trading CESP LLPs are undertakings for the purpose of competition law (see paragraph 4.10 above). The CMA does not hold in this Decision that the IPPP infringement coordinated the conduct of the non-trading CESP LLPs and their consultant members. Therefore, it is reasonable and proportionate to base the relevant turnover for the IPPP infringement on the turnover of the **trading** members only.⁸⁰⁴ Therefore, the CMA considers that CESP Limited's relevant turnover for the IPPP infringement should in this particular case be based on the relevant turnover of the trading CESP LLPs and not their consultant members.⁸⁰⁵

5.36. With the [PMI Provider 3] infringement, CESP Limited sought to coordinate the commercial conduct of **all** of its members. The CMA, therefore, considers that it is in principle appropriate to base the relevant turnover for the [PMI Provider 3] infringement on the turnover generated by **all** CESP LLPs (where they form undertakings for the purpose of competition law) or individual consultants (where their CESP LLPs are associations of undertakings). In this specific case, however, the CMA has exercised its discretion not to seek turnover data from each of the 200 individual consultant members. The CMA considers that an appropriately deterrent penalty can be achieved without relying on the individual turnover of the consultant members. In light of this, the CMA further considers that seeking turnover data from each of the 200 individual consultants would place an unduly significant burden on the consultants involved, without any practical benefit given the proportionality adjustment being made at step 4 (discussed below). It would also take up significant CMA resources to process financial data from such a large group of consultants. The CMA has, therefore, decided to base the financial penalty for the [PMI Provider 3] infringement on the relevant turnover of the trading CESP LLPs and of those non-trading CESP LLPs which report a turnover in their annual accounts. This is to the benefit of CESP Limited at step 1, as it

⁸⁰⁴ This is without prejudice to the CMA in future cases calculating a financial penalty for an association of undertakings on the basis of the relevant turnover of all of its members.

⁸⁰⁵ The CMA notes that the IPPP prices could also function as a price floor for individual consultants, at least for cataracts and Yag procedures. However, the CMA considers that the LLP turnover provides a better reflection of the IPPP infringement's impact on the relevant market than individual consultant members' turnover.

leads to a lower starting point in the process of determining the level of the financial penalty to be imposed.⁸⁰⁶

Starting point percentage

- 5.37. In order to reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30% of the relevant turnover.⁸⁰⁷ 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.⁸⁰⁸ 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 damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.⁸⁰⁹
- 5.38. The starting point for each penalty in this case takes into account the fact that the IPPP infringement and the [PMI Provider 3] infringement are characterised as 'price fixing', which would generally be considered to be among the most serious infringements of the Chapter I prohibition and Article 101(1) TFEU.
- 5.39. The IPPP infringement was not, or at least not completely, secret in nature. The CMA estimates that CESP LLPs use the IPPP agreements for around 20% of all revenue put through the CESP LLPs.⁸¹⁰ It also only covered the trading CESP LLPs, not the entire membership of CESP Limited. The turnover directly generated through the IPPP differed from LLP to LLP, but was in some cases limited, although the CMA also notes that the IPPP could, at least for cataracts and Yag procedures, function as a price floor.

⁸⁰⁶ The CMA notes that this approach is highly case-specific and that it may take into account the turnover of individual sole traders (provided they are 'undertakings' for the purpose of competition law) in future cases.

⁸⁰⁷ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.5.

⁸⁰⁸ *Ibid.*, paragraph 2.4.

⁸⁰⁹ *Ibid.*, paragraph 2.6.

⁸¹⁰ URN 3829, CESP Ltd initial response to CMA draft penalty statement, URN 3830, CESP Turnovers 2011 - 2014, CESP LLPs generated 22% of their private revenue from IPPP contracts, the remainder originated from the self-pay market.

5.40. With the [PMI Provider 3] infringement, CESP Limited sought to coordinate the commercial conduct of all of its consultant members. The [PMI Provider 3] infringement was also more secretive in nature, as it sought to coordinate individual consultants' responses to [PMI Provider 3], rather than to present [PMI Provider 3] openly with a collective stance taken by all CESP Limited members. On the other hand, the [PMI Provider 3] infringement only indirectly related to a price in that one of the recommendations from CESP Limited to its members was not to accept a specific price offering made by [PMI Provider 3].

5.41. The CMA has considered the following factors in assessing the seriousness of the infringements:

- *The nature of the product/services*: The relevant product market(s) comprise the market(s) for the provision of privately funded ophthalmic services.⁸¹¹ Price, whether set by consultants through package prices (including the IPPP) or offered by PMI providers in the form of benefit maxima, forms an important parameter of competition in the relevant product market(s).
- *The structure of the market and market shares of the undertakings involved*: Membership of CESP Limited was around 200 consultants in 2014.⁸¹² As set out in paragraph 4.105(c) above, the aggregate **national** market share of all members of CESP Limited is at least 16%. The market share of individual CESP LLPs in any local market may be significantly higher.
- *Entry conditions*: The CMA has taken into account entry conditions in paragraphs 4.116 – 4.128 where it discusses why the infringements are capable of having an effect on trade between Member States. The infringements may have an impact on entry from other Member States as set out in the paragraphs mentioned.
- *Impact on competitors and third parties*: The infringements had a clear impact on the PMI providers with regard to whom CESP Limited sought to coordinate its members' conduct. Moreover, the IPPP infringement may indirectly have an impact on the premiums that consumers pay and the [PMI Provider 3] infringement had a direct impact on those patients who were charged a shortfall as a result of CESP Limited's

⁸¹¹ See paragraph 3.45.

⁸¹² See paragraph 3.50

recommendation to charge [PMI Provider 3]-insured patients up-front the LLP's self-pay price.

- 5.42. The CMA has also taken into account the need to deter other undertakings from engaging in such infringements in the future and the damage caused to consumers whether directly or indirectly. Taking the above in the round, the CMA has applied a starting point of 20% of relevant turnover for the IPPP infringement and of 22% for the [PMI Provider 3] infringement.

Step 2 – adjustment for duration

- 5.43. The starting point under Step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement.⁸¹³ 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.⁸¹⁴
- 5.44. Accordingly, the CMA has applied the following multipliers to the figure reached at the end of Step 1 to take account each infringement's duration. Each infringement's duration multiplier has been rounded up to the nearest quarter year.

Infringement	Period the infringement was in place	Duration	Multiplier to step 1 figure
IPPP infringement	13 September 2008 until 14 May 2015 ⁸¹⁵	6 years, 8 months and 1 day	6.75
[PMI Provider 3] infringement	28 May 2012 until 12 December 2013	1 year, 6 months and 14 days	1.75

Step 3 - adjustment for aggravating and mitigating factors

- 5.45. The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are

⁸¹³ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.12.

⁸¹⁴ *Ibid*, paragraph 2.12.

⁸¹⁵ The end date is the date the settlement discussions between CESP Limited and the CMA commenced. From this date, CESP Limited sought to terminate the IPPP infringement in discussions with the CMA, which led to full termination on 5 July 2015. The CMA recognises CESP Limited's intention and efforts to terminate the IPPP infringement from 14 May 2015 and considers it fair and reasonable to hold this as the end date in the context of this specific case.

mitigating factors.⁸¹⁶ A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.⁸¹⁷ In the circumstances of this case, the CMA has considered at step 3 the factors set out below.

*Mitigating factors*⁸¹⁸

Genuine uncertainty as to whether the conduct constituted an infringement

- 5.46. The CMA may decrease the penalty at step 3 where it considers there was genuine uncertainty on the part of the undertaking or the association of undertakings as to whether the agreement, concerted practice or decision by an association of undertakings constituted an infringement.
- 5.47. The CMA considers that it is appropriate to decrease the penalty at step 3 for the IPPP infringement to reflect that there was genuine uncertainty among CESP Limited and its members as to whether the collective setting of prices under the IPPP infringed competition law. The CMA considers that a 10% reduction for genuine uncertainty is appropriate for CESP Limited in the circumstances of this case.

Cooperation

- 5.48. 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).⁸¹⁹
- 5.49. The CMA considers that it is appropriate to decrease the penalty at step 3 to reflect CESP Limited's cooperation in promptly making key staff available for voluntary interviews and meetings at the CMA's offices, responding promptly and comprehensively to all voluntary requests for information from the CMA and voluntarily submitting evidence to the CMA, which assisted in improving the CMA's estimates of the size of the market, thus in turn enabling the enforcement process to be concluded more efficiently. Given CESP Limited's small size, this cooperation placed a material burden on the business. Nonetheless, CESP Limited has provided full, continued and prompt

⁸¹⁶ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.13.

⁸¹⁷ *Ibid*, paragraphs 2.14 and 2.15.

⁸¹⁸ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.15.

⁸¹⁹ *Ibid*, paragraph 2.15 and footnote 28.

cooperation throughout the investigation. The CMA considers that a 10% reduction for cooperation is appropriate and proportionate for CESP Limited in the circumstances of this case.

Compliance

- 5.50. The CMA may decrease the penalty at step 3 because adequate steps have been taken with a view to ensuring future compliance with Articles 101 and 102 TFEU and the Chapter I and Chapter II prohibitions. The CMA will consider carefully whether evidence of compliance activities merits a discount of up to 10 per cent.⁸²⁰
- 5.51. Following the CMA's investigation and the settlement discussions between CESP Limited and the CMA in the present case, CESP Limited has introduced an organisation-wide competition law compliance programme, to which its Board has fully and publicly committed, which is based on a thorough risk assessment and envisages a comprehensive risk mitigation strategy. The CMA therefore considers that this merits the maximum discount of 10%.
- 5.52. The CMA notes that CESP Limited has actively put in place a compliance programme which, among other things, showed a clear and unambiguous commitment at Board level to compliance and marks a significant change in CESP Limited and its members' approach to compliance. The CMA also considers that CESP Limited's commitment to compliance sets a good example for other membership organisations in the medical professions. In light of this, with a view to more fully reflect the discount in the overall penalty, and taking into account the specific circumstances of this case, which include a large reduction for proportionality at step 4, the CMA has decided to take account of the 10% reduction for the introduction of a compliance programme as part of step 4.

Step 4 - adjustment for specific deterrence and proportionality

- 5.53. The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing association of undertakings 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 association of undertakings and its members as well as any other relevant

⁸²⁰ *Ibid*, paragraph 2.15 and footnote 26.

circumstances of the case.⁸²¹ 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.

- 5.54. The CMA has assessed proportionality of the financial penalty imposed on CESP Limited by considering the financial position of its members, the CESP LLPs.⁸²² The CMA has also assessed what the amount of the penalty would be per CESP LLP and per consultant member if CESP Limited were to seek contributions from its members to pay the penalty.
- 5.55. 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 3.⁸²³ Following its assessment of the proportionality of the financial penalty as set out in paragraph 5.54, the CMA does not consider it appropriate to increase the penalty figure at step 4.
- 5.56. 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 size and financial position of the association of undertakings and its members, the nature of the infringement, the role of the association of undertakings in the infringement and the impact of the its infringing activity on competition.⁸²⁴
- 5.57. CESP Limited's penalty after step 3 is £ [X] for the [PMI Provider 3] infringement and £ [X] for the IPPP infringement. The CMA considers that this figure should be decreased to ensure that the level of penalty is not

⁸²¹ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.16.

⁸²² The CMA has considered a range of financial indicators in this regard, based on accounting information publicly available and/or provided by CESP Limited and the CESP LLPs 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 CESP Limited; for the avoidance of doubt, such financial indicators have been taken into consideration.

⁸²³ *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.

⁸²⁴ *Ibid*, paragraph 2.20. See also paragraph 5.54 of this Decision.

disproportionate or excessive. In reaching this view, the CMA has had regard to the following factors:

5.57.1. *CESP Limited's members' size and financial position*: Having regard to a range of financial indicators,⁸²⁵ the CMA considers that CESP Limited's 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:

- be in excess of CESP LLPs' aggregate worldwide turnover of £ [X] for the financial year 2014 and as an average over the last three financial years (£[X]);⁸²⁶
- be significantly in excess of CESP LLPs' profit before members' remuneration and profit share, both for the financial year 2014 (£[X]) and as an average over the last three financial years (£[X]);⁸²⁷ and
- be significantly in excess of CESP LLPs' net assets, both for the financial year 2014 (£[X]) and as an average over the last three financial years (£[X]).⁸²⁸

5.57.2. *The nature of the infringements*: The infringements were a serious breach of the Chapter I prohibition and Article 101(1) TFEU.⁸²⁹ 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.

5.57.3. *CESP Limited's role in the infringements*: CESP Limited played a leading role in driving forward the infringements. It, however, forms the only party on which a penalty will be imposed in this case, so in the

⁸²⁵ See footnote 826 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 CESP Limited was accepted by the CMA.

⁸²⁶ Aggregate worldwide turnover was based on the figures for the 18 trading CESP LLPs. The non-trading CESP LLPs do not report a turnover. The CMA's assessment of proportionality is, therefore, conservative.

⁸²⁷ Aggregate profit before members' remuneration and profit share was based on the figures of the 21 CESP LLPs that report profits, which includes the 18 trading CESP LLPs. The CMA's assessment of proportionality is, therefore, conservative.

⁸²⁸ Aggregate net assets was based on the figures of the 24 CESP LLPs that report net assets, which includes the 18 trading CESP LLPs. The CMA's assessment of proportionality is, therefore, conservative.

⁸²⁹ See paragraphs 5.37 – 5.42 above.

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.

5.57.4. The impact of CESP Limited's infringing activity on competition: 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.

5.58. In view of the foregoing, in the circumstances of this case, the CMA has decreased CESP Limited's penalty at step 4, to a figure of £500,000. Assessing the resulting penalty in the round, including against CESP Limited's members' ability to pay this penalty and the level of the penalty per CESP LLP and per consultant member, when CESP Limited seeks contributions from its members in order to pay the penalty,⁸³⁰ the CMA considers that the adjusted penalty of £500,000 is appropriate to deter CESP Limited from breaching competition law in the future without being disproportionate or excessive.

5.59. As set out in paragraph 5.51 above, the CMA considers that CESP Limited's steps to ensure compliance with Articles 101 and 102 and the Chapter I and Chapter II prohibitions merit a 10% discount, to be included as part of step 4 of the penalty calculation. The CMA has, therefore, further reduced the adjusted penalty of £500,000 by 10% at step 4, leading to a final penalty after step 4 of £450,000.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

5.60. Where any infringement by an association of undertakings such as CESP Limited 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.⁸³¹

5.61. The CMA has assessed CESP Limited's penalty against the threshold set out in the preceding paragraph. This assessment has not necessitated any reductions to penalties at step 5 of the penalty calculations.

5.62. 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

⁸³⁰ With a penalty of £500,000, each LLP would have to contribute £13,000. If all consultant members were to contribute to the fine in equal amounts, this would lead to a contribution of £2,500 per consultant.

⁸³¹ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.23.

in another Member State in respect of the same agreement or conduct.⁸³² As no such penalty or fine in respect of the same decisions by an association of undertakings has been imposed by any of the above, no adjustments are necessary in this case.

Step 6 - application of reductions for settlement

5.63. The CMA will reduce an undertaking's financial penalty at step 6 where it has agreed to settle the case with the CMA; which will involve, amongst other things, the undertaking admitting its participation in an infringement.⁸³³

5.64. As set out at paragraph 1.9, CESP Limited has agreed to settle the case by admitting the facts and allegations of infringements as set out in the Statement of Objections (subject to limited representations on manifest factual inaccuracies contained therein), which are now reflected in this Decision. In light of those admissions, and CESP Limited's agreement to cooperate in expediting the process for concluding the investigation, the CMA has reduced CESP Limited's financial penalty by 15% at step 6.

Payment of penalty

5.65. The CMA requires CESP Limited to pay the penalty applicable to it as set out in the table below. A detailed calculation 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)
CESP Limited	£450,000	£382,500

5.66. The penalty will become due to the CMA in its entirety on 5 October 2015⁸³⁴ 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

⁸³² *Ibid*, paragraph 2.24.

⁸³³ *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board, paragraph 2.26.

⁸³⁴ 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.⁸³⁵

SIGNED

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Ann Pope, for and on behalf of the Competition and Markets Authority
Senior Director

5 August 2015

⁸³⁵ Section 37(1) of the Act.

ANNEX A: LEGAL FRAMEWORK

A. Introduction

- A.1. This section sets out the legal framework against which the CMA has assessed the evidence in this case.
- A.2. The relevant legal provisions are set out in Section 2(1) of the Act, known as the ‘Chapter I prohibition’ and in Article 101(1) of the Treaty on the Functioning of the European Union (‘Article 101 TFEU’).

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.⁸³⁶
- A.4. Article 101(1) TFEU prohibits agreements and concerted practices between undertakings and decisions by associations of undertakings which may affect trade between EU Member States and have as their object or effect the prevention, restriction or distortion of competition within the EU. Such agreements, decisions or concerted practices are prohibited unless exempt, excepted or excluded in accordance with the provisions of Part I of the Act or Article 101(3) TFEU.
- A.5. Section 2(2) of the Act and Article 101(1) TFEU provide that the prohibition applies, in particular, to agreements, decisions or concerted practices which:

‘directly or indirectly fix purchase or selling prices or any other trading conditions’.

C. Application of section 60 of the Act – consistency with EU law

- A.6. 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

⁸³⁶ Sections 2(1), 2(3) and 2(7) of the Act.

in a manner which is consistent with the treatment of corresponding questions under EU competition law.

- A.7. 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.⁸³⁷ The CMA must, in addition, have regard to any relevant decision or statement of the European Commission.⁸³⁸
- A.8. The provision in EU competition law closely corresponds to the Chapter I prohibition is Article 101(1) TFEU, on which the Chapter I prohibition is modelled.

D. Application of Article 101 TFEU - effect on interstate trade

- A.9. When applying national competition law to an agreement or concerted practice between undertakings which has the potential to affect trade between EU Member States, the CMA must also apply Article 101 TFEU.⁸³⁹
- A.10. The principles for determining whether an agreement or concerted practice may affect trade between Member States are set out in the European Commission's Guidelines on the effect on trade concept⁸⁴⁰ and summarised at [section K below].

E. Undertakings and the attribution of liability

- A.11. The Chapter I prohibition applies to agreements and concerted practices between 'undertakings' as well as to decisions by 'associations of undertakings'.

⁸³⁷ 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.

⁸³⁸ 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 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.

⁸³⁹ Article 3, Regulation 1/2003.

⁸⁴⁰ 'Guidelines on the effect on trade concept contained in Articles 81 and 82', Commission Notice 2004/C101/07, OJ C101/81.

Undertakings

- A.12. 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...*'.⁸⁴¹
- A.13. 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...*'.⁸⁴²
- A.14. 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,⁸⁴³ partnerships,⁸⁴⁴ individuals operating as sole traders,⁸⁴⁵ and trade associations.⁸⁴⁶ Members of the professions can be undertakings for the purposes of the competition rules.⁸⁴⁷ In *Pavlov*, the Court of Justice held that self-employed medical specialists were undertakings.⁸⁴⁸ Any such characterisation depends on an analysis of the specific circumstances of the case at issue.
- A.15. The concept also designates an economic unit, even if in law that unit consists of several natural or legal persons.⁸⁴⁹ 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.⁸⁵⁰
- A.16. The Chapter I prohibition does not apply to agreements between entities belonging to the same undertaking. The test of whether two entities are part of a single undertaking is whether or not there is unity in their conduct on the market. Thus, it may prove necessary to establish whether two entities that have distinct legal identities form, or fall within, one and the same undertaking

⁸⁴¹ Case C-41/90 *Hofner and Elser v Macrotron* [1991] ECR I-1979, at paragraph 21.

⁸⁴² Case C-118/85 *Commission v Italy* [1987] ECR 2599, at paragraph 7.

⁸⁴³ 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).

⁸⁴⁴ Commission decision *Breeders' rights: Roses*, OJ [1985] L369/9.

⁸⁴⁵ Case C-413/13 *FNV Kunsten*, not yet reported, paragraph 27; and Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

⁸⁴⁶ Case 71/74 *FRUBO v Commission* [1975] ECR 563.

⁸⁴⁷ See for example Case C-35/96 *Commission v Italy* [1998] ECR I-3851, in which the Court of Justice held that customs agents were undertakings; Commission decision of 26 May 1978 in Case 29.559 *RAI/Unitel*, in which the Commission held that opera singers were undertakings.

⁸⁴⁸ Case C-180/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 77.

⁸⁴⁹ Case C-97/08 *P Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraph 55.

⁸⁵⁰ Case C-97/08 *P Akzo Nobel NV v Commission* [2009] ECR-I-8237, at paragraph 56.

or economic entity adopting the same course of conduct on the market.⁸⁵¹

These principles are relevant to determining (i) whether individual sole traders who form groups such as limited liability partnerships (LLPs) retain their characterisation as separate undertakings, and (ii) whether a membership organisation and its members together form one single undertaking.

A.17. Two entities form part of the same undertaking for the purpose of the Chapter I prohibition and Article 101(1) TFEU when one entity is able to exercise decisive influence over the other and where, in such a case, it does actually exercise decisive influence over the other, such that the two entities can be regarded as a single economic unit and thus jointly and severally liable.⁸⁵²

A.18. As to the interpretation of 'decisive influence', the CAT noted in *Durkan*⁸⁵³ that the European Courts have established, among other things, that such influence may be indirect and can be established even where an entity such as a parent company does not interfere in the day to day business of an entity such as a 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*'.⁸⁵⁴

Associations of undertakings

A.19. An 'association of undertakings' consists of '*undertakings of the same general type*' and '*makes itself responsible for representing and defending their common interests vis-à-vis other economic operators, government bodies and the public in general*'.⁸⁵⁵ The concept of association of undertakings has been given a broad interpretation as designating any body, even one without legal personality or a non-profit making body,⁸⁵⁶ and irrespective of its legal classification under national law⁸⁵⁷ and of the fact that its members are natural

⁸⁵¹ Case T-325/01 *DaimlerChrysler v Commission*, paragraph 85 and the case law there cited.

⁸⁵² Case C-97/08 P *Akzo Nobel NV v Commission* [2009] ECR I-8237, at paragraph 58.

⁸⁵³ *Durkan Holdings Limited and others v OFT* [2011] CAT 6.

⁸⁵⁴ *Durkan Holdings Limited and others v OFT* [2011] CAT 6 at [22].

⁸⁵⁵ Case C-309/99 *Wouters* [2002] ECR I-1577, [2002] 4 CMLR 913, paragraph 61 of the Opinion of Advocate General Léger.

⁸⁵⁶ Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 88.

⁸⁵⁷ Case 123/83 *Clair* [1985] ECR 391, paragraph 17; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 40; and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 85. See also *Trade associations, professions and self-regulating bodies* (OFT 408, December 2004, adopted by CMA Board), paragraph 1.4.

or legal persons or are themselves associations of undertakings.⁸⁵⁸ The concept 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.⁸⁵⁹ It is irrelevant how the association is organised, or the exact legal form that the association takes.⁸⁶⁰

A.20. For the purpose of the Chapter I prohibition and Article 101(1) TFEU, any body formed to represent the interests of its members in commercial matters may be an ‘association of undertakings’.⁸⁶¹

A.21. Matters that can be taken into account when determining whether an organisation qualifies as an ‘association of undertakings’, and forms an ‘institutionalised form of coordination’ between the undertakings,⁸⁶² that is to say, a situation in which ‘economic operators act through a collective structure or a common body’,⁸⁶³ include:

A.21.1. In *Verband der Sachversicherer, FNCBV, Eurofer and Fenex*: the fact alone that the association acts in the interest of its members, who are undertakings (or, in turn, associations of undertakings) was considered sufficient to hold that an organisation qualified as an association of undertakings for the purpose of Article 101(1).⁸⁶⁴

A.21.2. When determining in the *MasterCard* case whether MasterCard had remained an association of undertakings after it was floated on the stock exchange (through an IPO), the General Court re-affirmed that the Commission needed to prove that the MasterCard payment organisation formed ‘an institutionalised form of coordination’.⁸⁶⁵ The General Court approved the Commission’s reliance on a combination of the existence of

⁸⁵⁸ See Case T-193/02 *Piau v Commission* [2005] ECR II-209, paragraph 69, and Joined Cases T-217/03 and T-245/03 *FNCBV and Others v Commission* [2006] ECR II-4987, paragraph 49, upheld in Joined Cases C-101/07 P and C-110/07 P *Coop de France bétail et viande and Others v Commission* [2008] ECR I-10193.

⁸⁵⁹ Case C-309/99 *Wouters* [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.

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⁸⁶¹ See *Trade associations, professions and self-regulating bodies* (OFT408; December 2004, adopted by the CMA Board), paragraph 1.4.

⁸⁶² Case C-382/12 P *MasterCard v Commission*, not yet reported, paragraph 69.

⁸⁶³ Case T-111/08 *MasterCard v Commission*, paragraph 243.

⁸⁶⁴ Case 45/85 *Verband der Sachversicherer*, paragraph 29; Joined Cases T-217/03 and T-245/03 *FNCBV and Others v Commission* [2006] ECR II-4987, paragraph 54; Case T-136/94 *Eurofer v Commission* [1999] ECR II-266, paragraph 110; and Commission decision of 5 June 1996 in Case 34.983 *Fenex* (OJ L 181/21), paragraph 31.

⁸⁶⁵ Case T-111/08 *MasterCard v Commission*, paragraph 244. Upheld in Case C-382/12 P *MasterCard v Commission*, paragraph 69.

a commonality of interests⁸⁶⁶ between the association and its members⁸⁶⁷ (invoking *Verband der Sachversicherer*) and the fact that the banks retained decision making power within the association.⁸⁶⁸

- A.21.3. Where the association has other shareholders than the parties whose market conduct it coordinates: the fact that the interests of those shareholders do not conflict with those of the parties is also relevant.⁸⁶⁹

Attribution of liability

General

- A.22. In determining who is liable for any infringement and therefore, who will be the addressee of an SO and any ensuing 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 associations of undertakings

- A.23. An association of undertakings may itself be held liable for an infringement of the Chapter I prohibition or Article 101(1) TFEU.⁸⁷⁰ Where the infringement of an association of undertakings relates to the activities of its members, the maximum penalty that may be imposed is 10 per cent of the sum of the worldwide turnover of each member active on the market affected by the infringement.⁸⁷¹

- A.24. 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

⁸⁶⁶ The General Court held that (i) the existence of a commonality of interests or a common interest is a relevant factor for the purposes of assessing whether there is a decision by an association of undertakings; and (ii) the banks had an interest in the multilateral interchange fee to be set at a high level (see paragraphs 244-259 of the General Court's judgment). The concept of 'commonality of interest' is described in more detail below, where we discuss when certain conduct forms a decision by an association of undertakings.

⁸⁶⁷ Case T-111/08 *MasterCard v Commission*, paragraphs 244-259. Upheld in Case C-382/12 P *MasterCard v Commission*, in which the Court made clear that these factors should be taken together (paragraph 67 and 69).

⁸⁶⁸ Case T-111/08 *MasterCard v Commission*, paragraph 259.

⁸⁶⁹ Case T-111/08 *MasterCard v Commission*, paragraph 258.

⁸⁷⁰ 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).

⁸⁷¹ S 36(8) CA 98, see OFT 408, para 8.4.

between undertakings or associations.⁸⁷² It may itself be a party to that agreement or concerted practice, or may enter into an agreement for the benefit of its members.⁸⁷³

- A.25. 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(1)) 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’*.⁸⁷⁴

F. Co-ordination between undertakings

General

- A.26. 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.⁸⁷⁵ 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’*.⁸⁷⁶

- A.27. 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

⁸⁷² 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.

⁸⁷³; 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.

⁸⁷⁴ *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.

⁸⁷⁵ *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 Partecipazioni* [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.

⁸⁷⁶ 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 Partecipazioni* [1999] ECR I-4125, paragraph 131). See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at [206(ii)].

'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'.⁸⁷⁷

- A.28. 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.⁸⁷⁸

Agreements and concerted practices

Agreements

- A.29. The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements and 'gentlemen's agreements'.⁸⁷⁹ 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.⁸⁸⁰ Acquiescence may also be sufficient to give rise to an agreement for the purpose of the Chapter I prohibition.⁸⁸¹ An agreement may also consist of either an isolated act or a series of acts or a course of conduct.⁸⁸² 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...'.⁸⁸³

⁸⁷⁷ 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 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.'

⁸⁷⁸ See paragraphs A.45 to A.51 below.

⁸⁷⁹ Case C-41/69 *ACF Chemiefarma NV v European Commission* [1970] ECR 661 (in particular, at paragraphs 106 to 114).

⁸⁸⁰ *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).

⁸⁸¹ See Case C74/04 P, *Commission v Volkswagen AG* 13 July 2006, paragraph 39; and European Commission Guidelines in Vertical Restraints, paragraph 25.

⁸⁸² Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 81.

⁸⁸³ Case T-7/89 *Hercules Chemicals NV SA v Commission* [1991] ECR II-1711, at paragraph 256.

- A.30. 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*’.⁸⁸⁴
- A.31. 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 CMA is not required to establish a joint intention to pursue an anti-competitive aim.⁸⁸⁵
- A.32. 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.⁸⁸⁶ 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.⁸⁸⁷

Concerted practices

- A.33. As noted at A.26 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’.⁸⁸⁸
- A.34. 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.⁸⁸⁹
- A.35. 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).⁸⁹⁰

⁸⁸⁴ 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).

⁸⁸⁵ 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).

⁸⁸⁶ Case T-99/04 *AC-Treuhand AG v Commission*, [2008] 5 CMLR 13, at paragraph 122.

⁸⁸⁷ Case T-99/04 *AC-Treuhand AG v Commission*, [2008] 5 CMLR 13, at paragraph 127.

⁸⁸⁸ 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)].

⁸⁸⁹ *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 22.

⁸⁹⁰ 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

A.36. 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’.⁸⁹¹ 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*’⁸⁹²

A.37. The coordination (which is prohibited by the requirement of independence) comprises ‘any direct or indirect contact’ between undertakings,⁸⁹³ which has the object or effect⁸⁹⁴ to influence the conduct on the market of an undertaking⁸⁹⁵ thereby creating conditions of competition which do not correspond to the normal conditions of the market in question, and⁸⁹⁶

Implementation

A.38. 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

decision in *Video Games, Nintendo Distribution and Omega-Nintendo* OJ 2003 L255/33, paragraph 323-324 (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). See also Court of Appeal, *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 28.

⁸⁹¹ 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*, ECR I-4529, at paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151] to [153].

⁸⁹² 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].

⁸⁹³ 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*, ECR I-4529, at paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [206(v)].

⁸⁹⁴ 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*, 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.

⁸⁹⁵ 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*, ECR I-4529, at paragraph 33; and *Apex Asphalt and Paving Co 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 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.

⁸⁹⁶ 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*, 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.

participated only under pressure from other parties, does not mean that it is not party to the agreement or concerted practice.⁸⁹⁷

- A.39. Parties may show varying degrees of commitment to the common plan: the fact that a party does not abide by the outcome of meetings⁸⁹⁸ 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.⁸⁹⁹ 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.⁹⁰⁰
- A.40. 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.⁹⁰¹
- A.41. 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.⁹⁰² 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.⁹⁰³

⁸⁹⁷ *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 Partecipazioni* [1999] ECR I-4125, at paragraphs 79 and 80.

⁸⁹⁸ Case T-25/95 *Cimenteries* [2000] ECR II-491, at paragraph 1389.

⁸⁹⁹ Case C-277/87 *Sandoz v Commission* [1990] ECR I-45 (summary judgment), at paragraph 3.

⁹⁰⁰ Case C-246/86 *Belasco v Commission* [1989] ECR 2117, at paragraphs 15 to 16.

⁹⁰¹ 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).

⁹⁰² 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 Partecipazioni* [1999] ECR I-4125, at paragraph 87.

⁹⁰³ 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'.

Decisions by associations of undertakings

A.42. The concept of a decision of an association covers any measure, even if it is not binding or fully complied with by the members,⁹⁰⁴ which, regardless of what its precise legal status may be, constitutes '*the faithful reflection of the [association's] resolve to coordinate the conduct of its members*'.⁹⁰⁵ It may include, for example, the constitution or rules of an association of undertakings, or its recommendations or other activities, including the facilitating of the exchange of commercially sensitive information between competitors.⁹⁰⁶ 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. It is clear from the case law that a decision by an association of undertakings can take a broad range of forms. 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.⁹⁰⁷

A.43. Matters that have been taken into account when determining whether a measure '*constitutes the faithful reflection of the association's resolve to coordinate the conduct of its members*' have included:

A.43.1. In *Verband der Sachversicherer*,

- the fact that the undertakings who were members of the association had a common interest in putting the market on a viable footing by means of an increase in premiums.⁹⁰⁸
- the wording of the measure: although the measure '*was described as a 'non-binding recommendation', it lays down in mandatory terms*

⁹⁰⁴ 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.

⁹⁰⁵ Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, paragraph 32.

⁹⁰⁶ Case C-179/99 *Eurofer ASBL v Commission*.

⁹⁰⁷ *Trade associations, professions and self-regulating bodies* (OFT 408, December 2004, adopted by CMA Board), paragraph 2.2; *National Sulphuric Acid* [1980] OJ L260/24; *BPICA* [1977] OJ L299/18.

⁹⁰⁸ Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, paragraph 29.

*a collective, flat-rate and across-the-board increase in premiums*⁹⁰⁹, also named the '*de-facto binding nature of the recommendation*'.⁹¹⁰

- The statutes of an association, when they empower it to coordinate the activities of its members.⁹¹¹

A.43.2. In *Fenex* the Commission relied on the three conditions outlined in *Verband der Sachversicherer* as follows:

- It found that Fenex (the association) had for many years regularly and consistently engaged in the horizontal practice of drawing up and circulating recommended tariffs. The members had a common interest in drawing up and circulating the tariffs, as they enabled each of them to predict with a reasonable degree of certainty what the pricing policy of the other companies would be. In the context of the relevant market (characterised by low margins), any anti-competitive practice, even if restricted to part of the total price, affects competition.⁹¹²
- Fenex, moreover had a '*desire to coordinate its members' conduct on tariffs*', which followed from a circular which stated that the '*Tariffs Committee wishes to make clear that the tariff is a minimum tariff and that in general Fenex's tariffs constitute a guideline on the basis of which each member can set its individual forwarding charges*'.⁹¹³ Circulars also expressed Fenex's '*firm desire that its recommendations should be put into effect*'.⁹¹⁴
- Fenex was clearly empowered for the drawing up and circulation of recommended tariffs. This formed '*an important and habitual activity of the association*', which was also specified in its presentational booklet.⁹¹⁵

A.43.3. In *MasterCard* pre-IPO: decisions from MasterCard on interchange fees were binding upon member banks. The interchange fees transferred revenues from acquirers to issuers in order to 'correct' the prices that issuers charge to cardholders and acquirers to merchants.

⁹⁰⁹ Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, paragraph 30. See also Commission decision of 24 June 2004 *Belgian Architects*, paragraph 69: both the measure's '*title and its preamble contain statements that have an intentionally rule-making or prescriptive tone*'.

⁹¹⁰ Commission decision in Case 34.579 *MasterCard I*, paragraph 369.

⁹¹¹ Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, paragraph 31.

⁹¹² Commission decision of 5 June 1996 in Case 34.983 *Fenex* (OJ L 181/21), paragraphs 48-51.

⁹¹³ Commission decision of 5 June 1996 in Case 34.983 *Fenex* (OJ L 181/21), paragraph 54.

⁹¹⁴ Commission decision of 5 June 1996 in Case 34.983 *Fenex* (OJ L 181/21), paragraph 56.

⁹¹⁵ Commission decision of 5 June 1996 in Case 34.983 *Fenex* (OJ L 181/21), paragraph 58.

The decisions, therefore, were the faithful expression of the association's resolve to coordinate the commercial conduct of its members in the market.⁹¹⁶

- In *MasterCard* post IPO, the Court of Justice stated that '*the General Court correctly found that when decisions [on interchange fees] are taken, [the] undertakings intend or at least agree to coordinate their conduct by means of those decisions and that their collective interests coincide with those taken into account when those decisions are adopted, particularly in circumstances where the undertakings in question pursued, over several years, the same objective of joint regulation of the market within the framework of the same organisation, albeit under different forms*'.⁹¹⁷
- In *Eurofer v Commission*, the General Court took into account the following when establishing that the association had been empowered to coordinate its members activities: '*staff could not have organised the exchange of information in issue without authorisation by the competent organs or, at least the express or tacit approval of its members*'.⁹¹⁸
- In *Northern Ireland Livestock and Auctioneers' Association*, the Office of Fair Trading 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.⁹¹⁹

A.44. It is clear from the case law outlined above that a decision by an association of undertakings does not have to be binding on the association's members for it to infringe the Chapter I prohibition. In *Eurofer v Commission*, the General Court held in this respect: '*an act may be described as a decision by an association of undertakings without necessarily being binding on the members concerned, at least to the extent to which the members concerned by the decision comply with it ... In the present case that hypothesis is sufficiently established by the fact that the undertakings communicated their figures to the applicant on a continuous basis and, without raising any objections, received the tables prepared by the applicant on the basis of all the information sent to it. Those facts show that the applicant at least recommended that all the*

⁹¹⁶ Commission decision in Case 34.579 *MasterCard I*, paragraph 371.

⁹¹⁷ C-382/12 P *MasterCard v Commission*, not yet reported, paragraph 76.

⁹¹⁸ Case T-136/94 *Eurofer v Commission* [1999] ECR II-266, paragraph 113.

⁹¹⁹ *Northern Ireland Livestock and Auctioneer's Association* OFT decision of 3 February 2003, [2003] UKCLR 433, paragraphs 35 and 36.

*undertakings concerned exchange information and that the undertakings did as it recommended’.*⁹²⁰

G. Single continuous infringement

A.45. 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 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.⁹²¹ 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.⁹²²

A.46. As the CJ has held in *Anic*, although the prohibition in Article 101(1) 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].’*⁹²³

A.47. 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.⁹²⁴

A.48. When establishing that an undertaking was involved in a single overall infringement it is necessary to show that:

⁹²⁰ Case T-136/94 *Eurofer v Commission* [1999] ECR II-266, paragraph 116.

⁹²¹ *European Union Law of Competition*, Bellamy & Child, Seventh Edition, at 2.071.

⁹²² Case C-49/92P *Commission v Anic Partecipazioni* [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.

⁹²³ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 113.

⁹²⁴ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraphs 83-85 and 203.

'... 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'.⁹²⁵

A.49. Accordingly, various agreements or concerted practices can be considered to form part of a single continuous infringement where:

A.49.1. the agreements or concerted practices pursued a common objective or objectives;

A.49.2. through its own conduct, each undertaking intended to contribute to the common objective(s) pursued by all the participants; and

A.49.3. 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.50. In such circumstances, each participating undertaking may bear personal responsibility not only for its own conduct, but also for the operation of the overall anti-competitive arrangement during the period in which it participated in it.⁹²⁶

A.51. 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.⁹²⁷ 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.⁹²⁸

H. Prevention, restriction or distortion of competition

A.52. 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'.

⁹²⁵ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 87.

⁹²⁶ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 83.

⁹²⁷ Case T-29/05 *Deltafina v Commission* [2010] ECR II- 4077, at paragraphs 46-49. See also Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501, at paragraphs 129-136.

⁹²⁸ Case T-99/04 *AC-Treuhand v Commission* [2008] ECR II-1501, at paragraph 132.

A.53. 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.⁹²⁹

Anti-competitive object

A.54. The CJ has held 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.⁹³⁰ 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.⁹³¹

A.55. Consequently, certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods or services, that it may be considered redundant, for the purposes of applying the Chapter I prohibition, to prove that they have actual effects on the market.

A.56. The object of an agreement is to be identified from an examination of objective factors, such as the content of its provisions, its objectives and the legal and economic context of the agreement.⁹³² 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.⁹³³ Where appropriate, the way

⁹²⁹ 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; Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others*, judgment of 13 December 2012, at paragraph 36; Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, judgment of 11 September 2014, paragraph 51; and Case C-286/13 P *Dole Food Company Inc v Commission*, judgment of 19 March 2015, paragraph 115.

⁹³⁰ Case C-286/13 P *Dole Food Company Inc v Commission*, judgment of 19 March 2015, paragraph 113; and Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, judgment of 11 September 2014, paragraph 49 and the case-law cited.

⁹³¹ Case C-286/13 P *Dole Food Company Inc v Commission*, judgment of 19 March 2015, paragraph 114; Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, judgment of 11 September 2014, paragraph 50; and Case C-32/11 *Allianz Hungária Biztosító Zrt and Others*, judgment of 14 March 2013, paragraph 35.

⁹³² Case C-286/13 P *Dole Food Company Inc v Commission*, judgment of 19 March 2015, paragraph 117; 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. 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.

⁹³³ 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.

in which the coordination (or collusive behaviour) is implemented may be taken into account.⁹³⁴

- A.57. 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.⁹³⁵
- A.58. An agreement, decision or concerted practice may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.⁹³⁶
- A.59. Only where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition must the effects of the coordination be considered. In those circumstances, for it to breach the Chapter I prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent.⁹³⁷

Recommendations by an association of undertakings

- A.60. The Commission and EU Courts have held on numerous occasions that agreements, decisions or concerted practices which relate to the recommendation, fixing or exchange of prices and other coordination between competitors restrict competition by object.⁹³⁸ For the purpose of this annex, three cases that specifically held that a decision by an association of undertakings restricted competition by object are listed below:⁹³⁹

A.60.1. In *Verband der Sachversicherer*, the CJ stated that *‘the aim of the recommendation was to restore sound financial conditions for the undertakings whose financial position was adversely affected by*

⁹³⁴ *Cityhook Limited v OFT*, CAT [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’*.

⁹³⁵ 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.

⁹³⁶ Case C-551/03 *General Motors BV v Commission* [2006] ECR I-3173, at paragraph 64.

⁹³⁷ Case C-67/13 P *Cartes Bancaires*, not yet reported, paragraph 52.

⁹³⁸ See for example: Joined Cases T-217/03 and T-245/03 *FNCBV and Others v Commission* [2006] ECR II-4987 (an agreement case that also involved an association of undertakings); and Case C-8/08 *T-Mobile Netherlands and Others v NMa* [2009] ECR I-4529. See also European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements; and European Commission Guidelines on the application of Article 81(3) of the Treaty, paragraph 23.

⁹³⁹ This is for illustrative purposes only. The Court of Justice made clear in Case C-8/08 *T-Mobile* [2009] ECR I-4529, paragraph 24: *‘that the criteria laid down in the Court’s case-law for the purpose of determining whether conduct has as its object or effect the prevention, restriction or distortion of competition are applicable irrespective of whether the case entails an agreement, a decision or a concerted practice’*.

insufficient premium income against the foreseeable costs of claims. It was with that in mind that the recommendation tackled the cause of the imbalance, namely competition by means of ever lower premiums, by providing for an across-the-board increase in premiums. Thus through the instrument of the recommendation the association sought to achieve a collective fixed-rate increase in the price of the services offered by its members. In that respect it must be noted that the very first example given by Article [101(1)(a)] of anti-competitive conduct concerns an agreement, decision or concerted practice whose object is “directly or indirectly [to] fix purchase or selling prices or other trading conditions”.⁹⁴⁰

A.60.2. In *Fenex*, the Commission held ‘[w]hile it is normal practice for a trade organisation to provide management assistance to its members, it must not exercise any direct or indirect influence on competition, notably in the form of tariffs applicable to all undertakings regardless of their own cost price structure. The circulation of recommended tariffs by a trade organisation is liable to prompt the relevant undertakings to align their tariffs, irrespective of their cost prices. Such a method dissuades undertakings whose costs are lower from lowering their prices and thus creates an artificial advantage for undertakings which have the least control over their production costs’.⁹⁴¹

A.60.3. In *Belgian Architects*, the Commission held that the decision fixing the fees scale (known as Ethical Standard No 2), had as its object the restriction of competition. The Commission made clear that although recommended prices do not automatically and always infringe Article 101(1), in the circumstances of this case the decision fixing the scale had the object of restricting competition.⁹⁴² The Commission took into account:

A.60.3.1. the ‘*intentionally rule making tone*’ of the recommendation (paragraph 82)

A.60.3.2. the inclusion of the recommended prices in a standard agreement (paragraph 83)

A.60.3.3. the fact that the association’s appeal board had acknowledged the anticompetitive nature of a provision in the association’s code of

⁹⁴⁰ Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405, paragraphs 40 and 41.

⁹⁴¹ Commission decision of 5 June 1996 in Case 34.983 *Fenex* (OJ L 181/21), paragraphs 60 and 61.

⁹⁴² Commission decision of 24 June 2004 *Belgian Architects*, paragraphs 75-90.

ethics and the failure of the association to notify all members of the finding of the appeal board (paragraphs 84 and 85)

A.60.3.4. the principle that the circulation of recommended tariffs by a professional organisation is liable to prompt the relevant undertakings to align their tariffs, irrespective of their cost prices, except when the circulation of information relates to information that would help the undertakings to calculate their own cost price structures so as to enable them to establish their selling prices independently (paragraph 88), and

A.60.3.5. the principle that any help provided by a professional organisation to members towards management must not directly or indirectly affect the free play of competition within the profession (paragraph 89).

A.61. These cases show that, although decisions that fix or recommend prices or coordinate members' commercial conduct are routinely held to restrict competition by object, an analysis of the terms of the decision, its objective aims, and the relevant legal and economic context is necessary to find in a specific case that a decision relating to prices does, indeed, have the object of restricting competition.⁹⁴³

Exchange of information

A.62. The Commission and EU Courts have also held on numerous occasions that agreements, decisions or concerted practices which relate to the exchange of certain commercially sensitive information between competitors restricts competition by object.⁹⁴⁴ Indeed, the notion that each economic operator must determine independently the policy which he intends to adopt on the market is inherent in the Chapter I prohibition and Article 101(1) TFEU.⁹⁴⁵

A.63. This requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or

⁹⁴³ Commission decision of 24 June 2004 *Belgian Architects*, paragraph 80.

⁹⁴⁴ See for example: Case C-286/13 P *Dole Food Company, Inc. v Commission*, not yet reported; and Case C-8/08 *T-Mobile Netherlands and Others v NMa* [2009] ECR I-4529. See also European Commission *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*; and European Commission *Guidelines on the application of Article 81(3) of the Treaty*, paragraph 72-74.

⁹⁴⁵ Case C-286/13 P *Dole Food Company, Inc. v Commission*, not yet reported, paragraph 119; and Case C-8/08 *T-Mobile Netherlands and Others v NMa* [2009] ECR I-4529, paragraph 32.

disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.⁹⁴⁶

- A.64. The CJ has therefore held that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.⁹⁴⁷ In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object.⁹⁴⁸

I. Appreciability

- A.65. An agreement, concerted practice or decision by an associations of undertakings will infringe the Chapter I prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition⁹⁴⁹ within the UK or a part of it.
- A.66. The CMA takes the view (as stated in its guidance)⁹⁵⁰ that in determining whether an agreement, concerted practice or decision by an associations of undertakings 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.⁹⁵¹

⁹⁴⁶ Case C-286/13 P *Dole Food Company, Inc. v Commission*, not yet reported, paragraph 120; and Case C-8/08 *T-Mobile Netherlands and Others v NMa* [2009] ECR I-4529, paragraph 33.

⁹⁴⁷ Case C-286/13 P *Dole Food Company, Inc. v Commission*, not yet reported, paragraph 121; Case C-149/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 86; and Case C-8/08 *T-Mobile Netherlands and Others v NMa* [2009] ECR I-4529, paragraph 35.

⁹⁴⁸ Case C-286/13 P *Dole Food Company, Inc. v Commission*, not yet reported, paragraph 122; and Case C-8/08 *T-Mobile Netherlands and Others v NMa* [2009] ECR I-4529, paragraph 41.

⁹⁴⁹ 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 Autorité 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.

⁹⁵⁰ *Agreements and Concerted Practices* (OFT401, December 2004, adopted by the CMA Board), at paragraph 2.18.

⁹⁵¹ *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

- A.67. Accordingly, in respect of an agreement or concerted practice between or a decision by an associations of undertakings that relates to competing undertakings,⁹⁵² the CMA takes the view that it does not appreciably restrict competition within the meaning of Article 101(1) TFEU 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.⁹⁵³
- A.68. However, an agreement (whether between competing or non-competing undertakings) which has the object of preventing, restricting or distorting competition constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction of competition.⁹⁵⁴

J. Effect on trade between Member States

- A.69. Where the CMA applies national competition law to agreements, decisions or concerted practices which may affect trade between EU Member States, the CMA must also apply Article 101(1).⁹⁵⁵
- A.70. An effect on trade means that the agreement, decision 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.71. For the purposes of assessing whether an agreement, decision or concerted practice may affect trade between EU Member States the CMA follows the approach set out in the Commission's published guidance.⁹⁵⁶ The CMA will have regard to this guidance when considering whether agreements, decisions or concerted practices are likely to affect trade between Member States appreciably.

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.

⁹⁵² That is, undertakings which are actual or potential competitors on any of the relevant markets affected by the agreement.

⁹⁵³ *Agreements and Concerted Practices* (OFT401, December 2004, adopted by the CMA Board), at paragraph 2.16.

⁹⁵⁴ 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.

⁹⁵⁵ 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.

⁹⁵⁶ Commission *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (2004/C 101/07).

A.72. Horizontal cartels covering a whole Member State are normally capable of affecting trade between Member States, provided the product covered by the agreement or concerted practice is susceptible to imports.⁹⁵⁷

K. Effect on trade within the UK

A.73. 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.74. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.⁹⁵⁸ The test is not read as importing a requirement that the effect on trade within the UK should be appreciable.⁹⁵⁹

A.75. It should be noted that to infringe Article 101(1) TFEU or the Chapter I prohibition an agreement or concerted practice does not actually have to affect trade as long as it is capable of affecting trade.⁹⁶⁰

A.76. It is possible that an agreement may be caught by Chapter I 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.⁹⁶¹ 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 demarcate the boundary line between the application of EU competition law and national competition law.⁹⁶² 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.⁹⁶³ Finally, an agreement or concerted practice is not in fact required to affect trade provided it is capable of doing so.⁹⁶⁴

⁹⁵⁷ Commission Notice 2004/C101/07, OJ C101/81, at paragraphs 78 to 80 and footnotes thereto.

⁹⁵⁸ Section 2(7) of the Act.

⁹⁵⁹ *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at paragraphs 459 and 460.

⁹⁶⁰ Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035, at paragraph 78 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, at paragraph 235.

⁹⁶¹ Section 2(7) of the Act.

⁹⁶² *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*'.

⁹⁶³ *North Midland Construction plc v OFT* [2011] CAT 14, at [62].

⁹⁶⁴ Case T-202/98 *Tate & Lyle plc v Commission* [2001] ECR II-2035, paragraph 78.

L. Exclusion or exemption

Exclusion

A.77. 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.78. Agreements or concerted practices which satisfy the criteria set out in Article 101(3) TFEU benefit from an exception to the prohibition in Article 101(1) TFEU. Similarly, those which satisfy the criteria set out in section 9 of the Act benefit from exemption from the Chapter I prohibition.

A.79. Guidance on how to apply these criteria is set out in the European Commission's Guidelines on the application of Article [101(3)] of the Treaty⁹⁶⁵ and its Guidelines on Horizontal Co-operation Agreements.⁹⁶⁶ The principles set out in these Guidelines apply equally to exemption under the Act as to the legal exception in Article 101(3) TFEU.

A.80. 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).⁹⁶⁷

A.81. It is for the parties wishing to rely on these provisions to adduce evidence that the exemption criteria are satisfied.⁹⁶⁸ The CMA will consider this evidence against the likely impact of the restrictive agreement on competition when assessing whether the criteria in section 9 of the Act and in Article 101(3) TFEU are satisfied.

A.82. Severe restrictions of competition⁹⁶⁹ are unlikely to benefit from individual exemption as such restrictions generally fail the first two conditions for

⁹⁶⁵ *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.

⁹⁶⁶ *European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*.

⁹⁶⁷ Section 10(2) of the Act.

⁹⁶⁸ Section 9(2) of the Act.

⁹⁶⁹ These are usually 'black-listed' in block exemption regulations or identified as hardcore restrictions in Commission guidelines and notices (see paragraph 46) .

exemption (objective economic benefits and benefits to consumers) and the third condition (indispensability).⁹⁷⁰ However, each case ultimately falls to be assessed on its own merits.

M. Burden and standard of proof

Burden of proof

A.83. The burden of proving an infringement of the Chapter I prohibition and/or Article 101(1) TFEU lies with the CMA.⁹⁷¹ However, this burden does not preclude the CMA from relying, where appropriate, on inferences or evidential presumptions. In *Napp*, the CAT stated that:⁹⁷²

'[t]hat approach does not in our view preclude the Director,⁹⁷³ 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'.

Standard of proof

A.84. The CMA is required to demonstrate that an infringement has occurred on the balance of probabilities which is the civil standard of proof.⁹⁷⁴ The CAT clarified in the *Replica Kit* appeals that:⁹⁷⁵

'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'.

⁹⁷⁰ *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.

⁹⁷¹ *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].

⁹⁷² *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 at [110].

⁹⁷³ References to the 'Director' are to the former Director General of Fair Trading (DGFT). The post of DGFT was abolished under the EA02 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.

⁹⁷⁴ *Tesco Stores Limited v Office of Fair Trading* [2012] CAT 31, at [88].

⁹⁷⁵ *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.85. The Supreme Court has further clarified that this standard of proof is not connected to the seriousness of the suspected infringement.⁹⁷⁶ The CAT has also expressly accepted the reasoning in this line of case law.⁹⁷⁷

⁹⁷⁶ *Re S-B* [2010] 2 WLR, at paragraph 34. See also *Re B* [2009] 1 AC 11, at paragraph 72.

⁹⁷⁷ *North Midland Construction plc v OFT* [2011] CAT 14, at [15] and [16].

ANNEX B: SUMMARY OF CMA'S INVESTIGATION

Complaint to the OFT and informal investigation

- B.1. On 26 May 2013, the Office of Fair Trading (OFT) received a written complaint from [The complainant] in relation to the private ophthalmology sector. [The complainant] was specifically concerned that CESP LLPs, via CESP Limited's collective negotiation strategy, were agreeing prices and sharing price and non-price information between themselves rather than acting as independent bodies and competing with each other.
- B.2. [The complainant] met with the OFT on 27 November 2013 and provided a further written submission on how the ophthalmology sector operated. This was in response to an information request issued by the OFT.
- B.3. In February 2014 the OFT issued an informal information request to CESP Limited and a limited number of CESP LLPs. Responses were received from CESP Limited and five CESP LLPs.
- B.4. On 1 April 2014, the CMA assumed responsibility for handling the complaint on the transfer of the OFT's relevant functions to the CMA.

The formal investigation

- B.5. Following internal investigation and having established reasonable grounds for suspecting a breach of the Chapter I prohibition in relation to the infringements the CMA launched a formal investigation on 17 July 2014 under section 25 of the Act.

Section 27 inspection of business premise

- B.6. On 17 July 2014 the CMA conducted a without notice site inspection at the premises of CESP Limited under section 27 of the Act. During this inspection the CMA obtained hardcopy email and documentary evidence. The CMA also forensically imaged IT material from the relevant servers and other electronic devices held at CESP Limited's premises, for the purpose of preserving electronically held information. Master copies of these images were preserved by the CMA whilst copies were given to CESP Limited.

Section 26 notices issued

- B.7. Between July and August 2014 the CMA issued section 26 notices to all CESP LLPs, CESP Limited and to two PMI providers. In March 2015 further section 26 notices were issued to CESP Limited and to two CESP LLPs.
- B.8. Responses have been received to all section 26 notices issued to date.

Interviews conducted

- B.9. In September 2014, the CMA conducted interviews with a number of individuals, as set out below:

Name of witness	Role	Date of interview
[CESP Ltd senior employee A]	[REDACTED]	8 September 2014
[CESP Ltd senior employee M]	[REDACTED]	16 September 2014
[CESP Ltd senior employee B]	[REDACTED]	24 September 2014

- B.10. In February 2015 the CMA subsequently conducted interviews with the following individuals:

Name of witness	Role	Date of interview
[CESP senior board member 34a]	[REDACTED]	4 February 2015
[CESP senior board member 5a]	[REDACTED]	13 February 2015
[CESP LLP employee 5a]	[REDACTED]	13 February 2015

Meetings and telephone calls

- B.11. Further evidence gathering has consisted of a telephone call with CESP Limited and meetings and telephone calls with a number of PMI providers.
- B.12. In March 2015, the CMA held an initial State of Play meeting with CESP Limited, and a second State of Play meeting in April 2015.

Settlement

- B.13. On 7 May 2015 CESP Limited approached the CMA expressing a genuine interest and willingness to enter into settlement discussions. The CMA

entered into formal settlement discussions with CESP Limited on 14 May 2015 following which, on 22 May 2015, the CMA issued a draft SO to CESP Limited for the purpose of enabling CESP Limited to determine its position regarding a possible settlement of this case.⁹⁷⁸ A revised version of the draft SO was sent to CESP Limited on 27 May 2015.⁹⁷⁹ A redacted version of the revised draft SO was sent to [CESP senior board member 5a] on 2 June 2015 at CESP Limited's request. A further redacted version of the revised draft SO for restricted circulation to CESP LLPs was sent to CESP Limited on 25 June 2015, again at CESP Limited's request.

- B.14. On 1 June 2015, the CMA issued a draft penalty calculation to CESP Limited.
- B.15. CESP Limited made limited representations on material factual inaccuracies contained in the draft SO and the draft penalty calculation on 4, 5, 16, 18 and 29 June 2015. The CMA and CESP Limited held conference calls on 2 and 18 June 2015. CESP Limited attended a meeting at the CMA's offices on 30 June 2015.
- B.16. On 7 July 2015, the CMA sent its final penalty calculation for the purpose of settlement to CESP Limited.
- B.17. On 10 July 2015, CESP Limited entered into a settlement agreement with the CMA. It admitted that it had infringed the Chapter I prohibition and Article 101(1) TFEU and agreed to co-operate in expediting the process for concluding the investigation. The settlement letter signed by CESP Limited and the Terms of Settlement annexed to the settlement letter dated 10 July 2015 set out all the conditions of the agreement.⁹⁸⁰

Statement of Objections

- B.18. On 14 July 2015, the CMA issued an SO to CESP Limited. On 17 July 2015 CESP Limited made limited representations on material factual inaccuracies contained in the SO.

⁹⁷⁸ According to paragraph 14.13 of the CMA's *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), a business with whom settlement discussions take place will be presented with a Summary Statement of Facts. As the CMA's investigation had significantly progressed by the time CESP Limited entered into settlement discussions and the CMA had already prepared a draft SO, CESP Limited was presented with the draft SO instead.

⁹⁷⁹ The revisions were corrections to cross-references. In order to assist CESP Limited in identifying the changes made to the revised draft SO of 27 May 2015, a version of the final SO highlighting all amendments was sent to CESP Limited on 14 July 2015.

⁹⁸⁰ URN 3895, CESP Limited signed Settlement Letter and URN 3896, CESP Limited signed Terms of Settlement

Compliance

- B.19. On 22 July 2015 CESP Limited's Board adopted a comprehensive competition law compliance programme.

ANNEX C: OPHTHALMIC PROCEDURES

C.1. Ophthalmology encompasses many different kinds of eye procedure. The below table sets out the top 30 ophthalmic procedures delivered to [PMI Provider 3] members between August 2012 and July 2013.

[X] top 30 ophthalmic services, August 2012 to end July 2013

Top 30 ophthalmic services
Phakoemulsification of lens with implant – unilateral (cataracts)
Pars plana vitrectomy with internal tamponade, scleral buckling and retinexepy (including dissection or excision of epiretinal membrane/macular surgery)
Intravitreal injection of pharmaceutical for neovascular age related macular degeneration
Yag Laser photodisruption of posterior capsule of lens (including laser capsulotomy)
Laser iridotomy
Laser trabeculoplasty
Puncto-canaliculoplasty
Excision of lesion of eyelid
Pars plana vitrectomy with internal tamponade, scleral buckling and retinexepy
Ocular photography (as sole procedure)
Surgical trabulectomy or other penetrating glaucoma procedures
Laser photocoagulation/cryotherapy of lesion of retina
Probing of nasolacrimal system +/- syringing and/or irrigation
Curettage/cryotherapy of lesion of eyelid
Eye correction of ptosis of eyelid - bi-lateral
Dacryocystorhinostomy including insertion and lateral removal of tube

Correction of lower lid ectropion without graft/flap
Surgical correction of squint - horizontal 2 muscles (in one eye, or one muscle in each of two eyes)
Blepharoplasty - two eyelids
Surgical correction of squint with adjustable sutures
Eye yag laser photodisruption of posterior capsule of lens - bi-lateral
Correction of ptosis of eyelid - simple (including tarsomullerectomy)
Total reconstruction of eyelid - unilateral
Phakoemulsification of lens with implant - bilateral
Fluorescein angiography of eye (including ocular photography)
Biopsy of lesion of eyelid
Dacryocystorhinostomy (endoscopic/laser assisted) (including insertion and later removal of tube)
Intravitreal injection of pharmaceutical for central retinal vein occlusion
Complex glaucoma surgery (including anti-metabolites/ insertion of seton devices)
Lamellar graft (keratoplasty) to cornea
Total

Source: [PMI Provider 3].⁹⁸¹

⁹⁸¹ URN 2622, [PMI Provider 3] response to questions, Table 1: [3<] Top 30 ophthalmology codes, [3<]

ANNEX D: CURRENT CESP MEMBERS

D.1 According to Companies House data the following were members of CESP Limited [3<]:

CESP LLP	Incorporation Date
CESP (Somerset) LLP	26 March 2004
CESP (London) LLP	11 November 2004
CESP (South West) LLP	02 March 2005
CESP (North East) LLP	28 June 2006
CESP (Dorset and New Forest) LLP	09 October 2006
CESP (South coast) LLP	10 February 2007
CESP (Surrey) LLP	23 February 2007
CESP (Gloucestershire) LLP ⁹⁸²	7 March 2007
CESP (York) LLP	21 March 2007
CESP (BBDG) LLP	01 June 2007
CESP (Portsmouth) LLP	07 June 2007
CESP (Mid Kent) LLP	20 June 2007
CESP (Norfolk) LLP	26 June 2007
CESP (Southampton and Winchester) LLP	26 June 2007
CESP (Torbay) LLP	02 July 2007
CESP (Oxford) LLP	03 July 2007
CESP (Berkshire) LLP	06 July 2007
CESP (Peninsular) LLP	17 July 2007

⁹⁸² [3<].

CESP (Cardiff) LLP	12 September 2007
CESP (South Thames) LLP	15 October 2007
CESP (Cheshire and Wirral) LLP	03 April 2008
CESP (Coventry) LLP	15 July 2010
CESP (Canterbury) LLP	25 November 2010
CESP (Manchester) LLP	13 January 2011
CESP (Chester) LLP	29 June 2011
CESP (Hereford) LLP	20 December 2011
CESP (Bedford) LLP	01 May 2012
CESP (West End) LLP	14 December 2012
CESP (Stoke) LLP	19 March 2013
CESP (Peterborough) LLP	04 April 2013
CESP (West Yorkshire) LLP	05 April 2013
CESP (North Derbyshire) LLP	10 April 2013
CESP (Central and Eastern Cheshire) LLP	05 June 2013
CESP (Leicester) LLP	27 June 2013
CESP (Oxfordshire) LLP	05 September 2013
CESP (Birmingham) LLP	21 February 2014
CESP (Scotland) LLP	06 October 2014

Source: Companies House.

ANNEX E: PMI AGREEMENTS CONCLUDED AND PRICES AGREED

[✂]

ANNEX F: EXAMPLE FEE SPLIT

Highest insurer price	C7122 Cataract	C7340 YAG	
IPPP Package Price (Total)	£[X]	£[X]	An example of a procedure code. CESP has IPPP with most PMI providers which vary.
Hospital Fee	£[X]	£[X]	Average example- The fee is agreed locally by CESP LLP/hospital.
Surgeon Fee	£[X]	£[X]	Average example- This can vary as Ophthalmologists decide what their fee should be.
Anaesthesia	£[X]	N/A	Average example- varies as actual fee agreed locally CESP LLP/Anaesthetist. Ophthalmologists are paid this fee if they do this or if no anaesthetist is needed.
PAYG Fee to CESP Limited	£[X]	£[X]	[X]% Pay as you go fee to CESP Limited.
Virtual Practice Management Service VPMS	£[X]	£[X]	Optional Service- Fee for CESP VPMS team to do all billing to insurers and patients. They will also receive and chase payments, send out letters and patient satisfaction surveys etc.
Margin to the LLP	£[X]	£[X]	Used to cover local CESP LLP costs such as CQC registration. Usually profit in LLP after all costs is split between partners as per local CESP Partnership agreement (Note will be £[X] extra if VPMS service is not used).

Source: An Introduction to CESP.⁹⁸³

⁹⁸³ URN 0087, An Introduction to CESP.

ANNEX G: PENALTY CALCULATION

		[PMI Provider 3] infringement		IPPP infringement	
Step	Description	Adjustment	Figure	Adjustment	Figure
	Relevant turnover: based on aggregate applicable turnover of members of the association		£[X] ⁹⁸⁴		£[X] ⁹⁸⁵
1	Starting point as a percentage of relevant turnover	22%	£[X]	20%	£[X]
2	Adjustment for duration	1.75	£[X]	6.75	£[X]
3	Mitigating: Genuine uncertainty as to whether conduct infringed		£0	-10%	-£[X]
	Mitigating: Cooperation	-10%	-£[X]	-10%	-£[X]
	Total Adjustment		-£[X]		-£[X]
	Total penalty after step 3	£[X]		£[X]	
4	Adjustment for specific deterrence or proportionality	Adjustment to £500,000 for proportionality.			
	Mitigating: Compliance Programme	-10%	-£50,000		
	Total penalty after step 4		£450,000		
5	Adjustment to take account of the statutory maximum penalty	£[X]	No adjustment necessary.		
	Total penalty after step 5				
6	Settlement discount	-15%	-£67,500		
	Total penalty after step 6				

⁹⁸⁴ This does not reflect the turnover of individual consultants. The CMA exercised its discretion not to seek individual turnover figures on this occasion as this would require an allocation of significant CMA resources and place a burden on individual consultants. The CMA considers this reasonable and proportionate, as individual turnover figures would highly likely lead to a higher relevant turnover, taking into account the number of CESP consultants and the average private practice income per consultant.

⁹⁸⁵ As above footnote