Decision of the Competition and Markets Authority

Supply of solid fuel and charcoal products
Case 50366-1

28 March 2018

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

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 Names have been replaced by a general descriptor of the individual's role.

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1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1. By this Decision, the Competition and Markets Authority (the '**CMA**') has concluded that the persons listed at paragraph 1.2 below have infringed the prohibition imposed by section 2(1) of the Competition Act 1998 (the '**Act**') (the '**Chapter I prohibition**') and/or Article 101 of the Treaty on the Functioning of the European Union ('**TFEU**') ('**Article 101 TFEU**').

1.2. This Decision is addressed to:

(i) CPL Distribution Limited ('**CPLD**') and CPL Industries Holdings Limited ('**CPL Industries Holdings**') (together '**CPL**'); and

(ii) Fuel Express Limited, Fuel Express (Bagnalls) Limited (previously known as Bagnalls Haulage Limited, '**Bagnalls**'), Carbo (UK) Limited ('**Carbo UK**') and G.N. Grosvenor Limited ('**Grosvenors**') (together '**Fuel Express**'),

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

1.3. The Parties supply solid fuel and charcoal products to national retailers in the UK.

1.4. Solid fuel products are primarily winter fuels that consumers use for their everyday heating needs. These products include coal, anthracite, smokeless fuel, wood products such as logs and kindling, and firelighters.[1] Charcoal products are primarily summer fuels that consumers use for cooking. These products include charcoal briquettes and disposable barbecues.[2]

1.5. The CMA has found that between at least June 2010 and February 2011 (the '**Relevant Period**') CPL and Fuel Express infringed the Chapter I prohibition of the Act and/or Article 101 TFEU by participating in a single, continuous infringement through an agreement and/or concerted practice that had as its object the prevention, restriction or distortion of competition for the supply of solid fuel and charcoal products to national retailers in the UK.

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1 Solid fuel products also include fuel logs, Woodcoal, Fire Magic, and paraffin, albeit that the latter is a liquid as opposed to a solid fuel – see further paragraphs 2.15 to 2.17. The CMA will use the terms solid fuels and solid fuel products interchangeably throughout this Decision.

2 Charcoal products also include different types of charcoal, including instant light charcoal and lumpwood charcoal, and different types of disposable barbecue – see further paragraphs 2.18 to 2.20. The CMA will use the terms charcoal and charcoal products interchangeably throughout this Decision.

1.6. The CMA has found that during the Relevant Period the Parties participated in an anti-competitive arrangement to share markets by allocating at least some of their customers between them (including through bid-rigging and the exchange of commercially sensitive and confidential pricing information) for the supply of solid fuel and charcoal products to national retailers in the UK (the '**Infringement**').

1.7. More specifically, the CMA has found that the Parties sought to assist each other in maintaining at least some of their pre-existing customer relationships by, in particular:

(i) coordinating their responses to specific invitations to tender. Specifically, in the case of Tesco (for the supply of charcoal for sale in its stores) and Sainsbury's (for the supply of solid fuels for sale in its petrol station forecourts), the Party that was the existing supplier for the customer requested the other Party to quote above or at particular price levels. The other Party then designed a high bid that was consistent with the request, thereby assisting the existing supplier to maintain the customer; and

(ii) exchanging confidential and commercially sensitive pricing information in the context of ongoing tendering processes, including exchanging pricing information relating to a joint bid between Fuel Express and one of CPL's competitors for the supply of solid fuel and charcoal products to Tesco for sale in its petrol station forecourts. The pricing information was exchanged to assist CPL in maintaining its pre-existing relationship with the customer Tesco and with its national petrol station forecourt customers more generally.

1.8. The CMA has found that the Parties engaged in the above anti-competitive conduct on a reciprocal basis. That is to say, Fuel Express assisted CPL to maintain its pre-existing customer relationships while CPL assisted Fuel Express to do the same.

1.9. Agreements and/or concerted practices between undertakings that directly or indirectly involve market sharing and bid-rigging are among the most serious infringements of the Act.

1.10. The CMA has decided to impose a financial penalty on CPL and Fuel Express under section 36 of the Act.

2. FACTUAL BACKGROUND

2.1. The CMA has found that from at least June 2010 to February 2011 the Parties participated in an anti-competitive arrangement to share markets by allocating at least some of their customers between them (including through bid-rigging and the exchange of commercially sensitive and confidential pricing information) for the supply of solid fuel and charcoal products to national retailers in the UK that had as its object the prevention, restriction or distortion of competition, contrary to the Chapter I prohibition and/or Article 101 of the TFEU.

A. The CMA's Investigation

Launch of the Investigation

2.2 In November 2016, the CMA opened a formal investigation (the '**Investigation**') under section 25 of the Act based on intelligence according to which the Parties were alleged to have engaged in anti-competitive conduct (and specifically customer allocation) over many years.

2.3 Following a preliminary investigation, the CMA determined that there were reasonable grounds for suspecting that the Parties had engaged in cartel activity that infringed the Chapter I prohibition and/or Article 101 of the TFEU.

2.4 Between 7 and 8 November 2016, the CMA carried out inspections without notice at the business premises of CPL and Fuel Express Limited under section 27 of the Act.

2.5 The CMA issued compulsory document and/or information requests to CPL, Fuel Express Limited and third parties under section 26 of the Act.

2.6 The CMA also conducted voluntary interviews with the following individuals from CPL in early August 2017:[3]

[3] The interviews with [Director B] and [Director C] took place on 7 August 2017. The interview with [Director A] took place on 8 August 2017.

(i) [Director A] [Senior Employee] of CPL Industries Limited during the Relevant Period. [Director A] is also currently a Director and [Senior Employee] of CPL Industries Group Limited);[4]

(ii) [Director B] ([Employee] of CPLD throughout the Relevant Period and currently [Employee] of CPLD);[5] and

(iii) [Director C] ([Employee] of CPLD during the Relevant Period and currently [Employee] of CPLD).[6]

2.7 The CMA conducted voluntary interviews with the following individuals from Fuel Express on 22 August 2017:

(i) [Director D] (Director of Fuel Express Limited and Director and owner of Grosvenors currently and throughout the Relevant Period; [Director D] is also currently [Senior Employee] of Fuel Express Limited);[7] and

(ii) [Director E] (Director of Fuel Express Limited, Bagnalls and Carbo UK currently and throughout the Relevant Period and joint owner of Bagnalls and Carbo UK throughout the Relevant Period; [Director E]'s current title at Fuel Express Limited is [Senior Employee]; [Director E] is also currently [Senior Employee] of Bagnalls Group (UK) Ltd).[8]

2.8 The Parties also voluntarily provided information to the CMA during the course of the Investigation.

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4 Transcript of CMA interview with [Director A] dated 8 August 2017, p4 – [CMA Document Reference URN1494]. See also CPL Briefing Paper, p103 – [CMA Document Reference URN0551].

5 Companies House https://beta.companieshouse.gov.uk/officers/FPQrfqSh-wHTgOpfCx83Wf5Dt6A/appointments (as at 20 December 2017); see also Transcript of CMA interview with [Director B] dated 7 August 2017, pp5-8 – [CMA Document Reference URN1492].

6 Companies House https://beta.companieshouse.gov.uk/officers/lgBEYLZ5NZTwgmF3gp51GXZGqMg/appointments (as at 20 December 2017); see also Transcript of CMA interview with [Director C] dated 7 August 2017, pp4-5 – [CMA Document Reference URN1493].

7 Companies House https://beta.companieshouse.gov.uk/officers/FT5xDQ8keBtuP4xO3ocOrvQKx3E/appointments (as at 20 December 2017); see also Transcript of CMA interview with [Director D] dated 22 August 2017, pp4-5 – [CMA Document Reference URN1491].

8 Companies House https://beta.companieshouse.gov.uk/officers/jz2mgLj_Pw78ovt6DFTi_cvV9bc/appointments (as at 20 December 2017); see also Transcript of CMA interview with [Director E] dated 22 August 2017, p5 – [CMA Document Reference URN1490].

2.9 During the Investigation, the CMA held State of Play meetings with CPL on 16 October 2017 and Fuel Express Limited, Bagnalls, Bagnalls Group (UK) Ltd, and Grosvenors on 1 November 2017.

2.10 The Investigation initially covered a period spanning at least 2010 to 2015. For reasons of administrative priority, the CMA subsequently decided to focus its Investigation on the Relevant Period.

B. Settlement

2.11 On 2 March 2018, the CMA announced that it had settled the case with CPL and Fuel Express,[9] after each of the Parties:

a. admitted that it had infringed the Chapter I prohibition and/or Article 101 TFEU in the terms set out in a draft Statement of Objections dated 16 February 2018;[10]

b. agreed to accept a maximum penalty as set out in paragraph 6.5; and

c. agreed to cooperate in expediting the process for concluding the CMA's investigation.

2.12 On the same day, the CMA issued a Statement of Objections to the Parties. The Parties made limited representations on the Statement of Objections, consistent with the CMA's settlement policy as set out in the CMA's guidance.[11]

C. Industry overview

Solid fuels and charcoal products

2.13 The Infringement concerns the supply of solid fuel and charcoal products to national retailers in the UK. National retailers include supermarket stores and

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9 See the CMA's press release dated 2 March 2018.

10 As part of the settlement process and consistent with the CMA's settlement policy as set out in the CMA's guidance, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), the Parties had been presented with an earlier draft of the Statement of Objections, dated 21 December 2017, access to the documents referred to in the draft Statement of Objections, a list of the documents on the CMA's file and a draft penalty calculation. As part of the settlement process, the Parties were provided with an opportunity to make limited representations on the draft Statement of Objections and draft penalty calculation, both in writing and orally at settlement meetings held with each of the Parties during January and February 2018.

11 *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8)

their petrol station forecourts, major petrol station forecourts, large garden centres and certain other retailers (see paragraphs 2.29 to 2.35 below).

2.14 Although both Parties supply products and services other than solid fuel and charcoal products to a broader range of customers, the CMA has not seen evidence that the Infringement related to these other products or to customers beyond national retailers. For further detail, see paragraphs 4.30 to 4.35 of *The Relevant Market* section below.

Solid fuels

2.15 Solid fuels are primarily winter fuels. Consumers use these products principally for their domestic heating needs. (Both the terms 'solid' and 'winter' fuels are used in the industry, and will be used interchangeably throughout this Decision).

2.16 As set out above and for present purposes, solid fuels are those solid fuels other than charcoal that the Parties offer for supply to national retailers. These products include (but are not necessarily limited to) both manufactured (either branded or non-branded) and raw fuel material of all volumes and/or quantities, such as house coal,[12] anthracite,[13] manufactured smokeless fuel briquettes,[14] fuel logs,[15] Woodcoal, Fire Magic,[16] traditional wood logs, kindling, 'Snug a fire' (Irish peat briquettes), and firelighters.[17] For ease and for present purposes, solid fuel products also include paraffin,[18] even though it is a liquid.

2.17 Solid fuel products vary in quality and can be premium or discounted. Premium products are generally those which are smokeless, burn at a high

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[12] Coal is a fossil fuel that forms when dead plant matter is converted into peat - https://www.worldcoal.org/coal/what-coal (as at 20 December 2017).

[13] Anthracite is the end product after coal has been converted into lignite, sub-bituminous coal, and bituminous coal. Anthracite is used for domestic/industrial fuel, including for the production of smokeless fuels. - https://www.worldcoal.org/coal/what-coal (as at 20 December 2017).

[14] For example, Blaze and Cosilite are both manufactured briquettes and Fuel Express Limited brand names; Firelite is a manufactured briquette. Briquettes are a small compressed block or brick of coal dust, sawdust or other combustible biomass material such as charcoal or wood chips, used for fuel - https://www.collinsdictionary.com/dictionary/english/briquette) (as at 20 December 2017).

[15] These include Firelog and Heatlog. Both of these products are used in open fires and stoves. Fuel Express Limited's brand name for Firelog is Cosilog.

[16] A solid fuel – CPL response to specification 4 of the CMA's section 26 notice dated 26 May 2017 – [CMA Document Reference URN1693].

[17] CPL response to specification 4 of the CMA's section 26 notice dated 26 May 2017 – [CMA Document Reference URN1693].

[18] Paraffin is a liquid fuel derived from petroleum and is also known as kerosene.

heat, are HETAS[19] approved and otherwise conform to regulatory requirements.[20] For example, CPL's premium branded products include Supertherm,[21] Homefire and Phurnacite.[22] CPL's discounted brands include Brazier and Taybrite.[23]

Charcoal products

2.18 In contrast to solid fuels, charcoal products are primarily summer fuels. Consumers mainly use these products for cooking. As set out above and for present purposes, charcoal products are those charcoal products offered for supply by the Parties to national retailers. These products include (but are not necessarily limited to) charcoal briquettes, lumpwood charcoal, instant light charcoal, and disposable barbecues (including instant disposable grills and party instant disposable grills), whether these products are FSC approved[24] or non-FSC.[25]

2.19 Solid fuel and charcoal products are generally supplied by the pack or by weight (for example kilogram weight bags or litre weight bottles), and the cost of the packaging is included in the price quoted to the customer.[26]

2.20 Buying patterns suggest that demand for solid fuel and charcoal products is primarily seasonal.

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19 HETAS is a not-for-profit organisation that approves biomass and solid fuel heating appliances, fuels and services – https://www.hetas.co.uk/about-hetas/ (as at 20 December 2017).

20 Transcript of CMA interview with [Director C] dated 7 August 2017, p12 – [CMA Document Reference URN1493]; Witness Statement of [Director D] dated 8 September 2017, p3 – [CMA Document Reference URN1496] and Transcript of CMA interview with [Director D] dated 22 August 2017, p31 – [CMA Document Reference URN1491].

21 Transcript of CMA interview with [Director C] dated 7 August 2017, p12 – [CMA Document Reference URN1693].

22 [Director D] Witness Statement dated 8 September 2017 p3 – [CMA Document Reference URN1496].

23 CPL response to specification 3 of the CMA's section 26 notice dated 26 May 2017 – [CMA Document Reference URN1697].

24 Forest Stewardship Council – http://www.fsc-uk.org/en-uk/about-fsc (as at 1 December 2017). An FSC product is one with an FSC logo, which signifies that it has been responsibly sourced.

25 CPL response to specification 4 of the CMA's section 26 notice dated 26 May 2017 – [CMA Document Reference URN1693]. See also CPL Briefing Paper – [CMA Document Reference URN0551].

26 CPL response to Specification 4 of the CMA's section 26 notice: Explanation of Fuel Express price listings dated 26 May 2017 – [CMA Document Reference URN1693].

The supply of solid fuel and charcoal products in the UK

2.21 The Infringement concerns the supply of solid fuel and charcoal products to national retailers for re-sale to consumers only.[27] The current case is not concerned therefore with the supply of the relevant products to other types of retailers or wholesalers, or directly to end consumers (see paragraphs 4.21 and 4.36 to 4.38 of *The Relevant Market* section below).

2.22 Suppliers of solid fuel and charcoal products to national retailers in the UK source the products from importers, producers, wholesalers and/or (where vertically integrated) their own manufacturing arms. They package the goods and deliver them to national retailers using either their own transport or independent hauliers.[28]

2.23 Solid fuel manufacturers include CPL (through Coal Products), Oxbow and M&G Fuels. Solid fuel importers include Hargreaves and Lissan. Solid fuel miners include Celtic Energy. Importers, miners and manufacturers then supply wholesalers, such as Coal Products, Hargreaves, Fernwood Fuels, Lissan and Oxbow.

2.24 There are more than 500[29] approved coal merchants in the UK, including CPLD, Fuel Express Limited, Grosvenors, Bagnalls, Housefuel and Coalmaster.[30] However, unlike CPL and Fuel Express Limited, most coal merchants operate on a regional as opposed to a national basis.[31]

2.25 The supply chain for charcoal products differs in several respects from solid fuels. Charcoal is primarily[32] an imported product and is mainly sourced outside of Europe, including from South Africa, South America, Namibia and

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27 The CMA notes that in the solid fuel and charcoal industry, the term 'retail' is sometimes used to denote direct sales to end consumers, as distinct from 'commercial', which is used to denote sales to retailers and other businesses (see for example Transcript of CMA interview with [Director B] dated 7 August 2017, p7 – [CMA Document Reference URN1492]). In this case, for ease of reference, the CMA will use the term 'retail' or 'commercial' interchangeably to describe the national retailers supplied by the Parties, as distinct from sales to 'wholesale' or 'domestic' customers (i.e. end consumers).

28 https://www.gov.uk/cma-cases/cpl-distribution-ltd-t-h-fergusson-co-ltd (as at 20 December 2017). See also CPL Briefing Paper – [CMA Document Reference URN0551].

29 Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

30 CPL Briefing Paper – [CMA Document Reference URN0551].

31 Most coal merchants operate no more than a 30-40 mile radius from their base – Transcript of CMA interview with [Director C] dated 7 August 2017, p10 – [CMA Document Reference URN1493]. See also Witness Statement of [Director D] dated 8 September 2017, paragraph 4 – [CMA Document Reference URN1496]. [Director D] stated that Grosvenors' core area of business is only within about 20 miles of its yard.

32 There are some small 'cottage industries' producing charcoal in the UK – Transcript of CMA interview with [Director B] dated 7 August 2017, p22 – [CMA Document Reference URN1492].

China.[33] Accordingly there is a longer lead time for delivery of these products to retailers and thus to the end customer, such that negotiations for supply take place further in advance of when the product is required than is the case for solid fuel products. The longer lead times also mean that the supply of charcoal can 'tie up' a supplier's cash flow for a significant period with the result that large accounts such as supermarkets require a significant up-front capital investment from the supplier before they can be supplied.[34] Additionally, charcoal is considered to be a low margin product for suppliers.[35]

2.26 Charcoal is also treated as a chemical for import purposes, which means that under the EU REACH Regulation a company must register with the European Chemicals Agency before it can import charcoal.[36] The need for regulatory approval adds to the costs of supplying the product in the UK.[37]

2.27 The CMA considers that these features of the charcoal supply chain mean that barriers to entry into the charcoal products distribution market may be relatively high. By contrast and according to CPL, barriers to entry into the solid fuels distribution market are relatively low.[38] As discussed in further detail at paragraphs 4.21 to 4.27 below, the CMA considers that for present purposes the markets for the supply of solid fuel and charcoal products in each case include supply to both multi-drop customers, such as petrol station forecourts, and to single-drop customers, such as supermarket stores.

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[33] CPL has represented to the CMA that a number of companies have established long term and exclusive supply relationships with suppliers in these territories. CPL has also represented to the CMA that UK retailers want FSC-approved products, which narrows the potential import supply base – CPL Briefing Paper – [CMA Document Reference URN0551]. Further, in about 2010, Carbo (UK or BV) was one of three charcoal importers which accounted for a large part of the UK market – Witness Statement of [Director E] dated 8 September 2017, paragraph 66 – [CMA Document Reference URN1498].

[34] Witness Statement of [Director E] dated 8 September 2017, paragraph 36 – [CMA Document Reference URN1498]. See also Transcript of CMA interview with [Director B] dated 7 August 2017, p11 – [CMA Document Reference URN1492].

[35] Transcript of CMA interview with [Director B], dated 7 August 2017, p11 – [CMA Document Reference URN1492]. [Director B] also noted that charcoal for a summer season is bought in October of the previous year, and that this 'ties up' a lot of money for the supplier.

[36] Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), which entered into force on 1 June 2007.

[37] Witness Statement of [Director D] dated 8 September 2017, paragraph 22 – [CMA Document Reference URN1496].

[38] CPL's response to specification 3 of the CMA's S.26 Notice of 3 May 2017 – [CMA Document Reference URN1700].

2.28 In terms of geographic scope, competition in the supply of solid fuel and charcoal products takes place at both regional and national levels.[39]

Demand for solid fuel and charcoal products

2.29 The current case concerns supply to national retailers, which are those customers which operate in the UK or a wide area of the UK, as opposed to on a purely regional basis. These customers include supermarket stores and their forecourts (such as Sainsbury's and Tesco), major petrol station forecourts, large garden centres and other retailers.[40]

2.30 Although national retailers generally require both solid fuel and charcoal products over the course of the year, the negotiation and supply processes for solid fuel and charcoal generally happen separately.[41]

2.31 CPLD's experience is that the national retailers typically tender every year or every two years for their requirements, although national petrol station forecourt customers may do so less regularly.[42]

2.32 According to CPL, some national retailers undertake a formal and structured tender process for both charcoal and solid fuel products. Other national retailers take a similarly formal but more ad hoc approach (in terms of timing), whereas others have an informal process according to which the supplier is required to submit a price and range proposal for the relevant season.[43]

2.33 CPLD states that (apart from a few exceptions) it is not awarded exclusive contracts and no fixed term contracts are entered into with suppliers. However, most of its large national retail accounts roll forward on an informal

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[39] See, for example, CPL Briefing Paper – [CMA Document Reference URN0551]

[40] CPL Briefing Paper – [CMA Document Reference URN0551]; see also CPL response to the CMA's turnover information request and Letter to CMA – turnover data dated 30 November 2017 – [CMA Document Reference URN1607].

[41] Transcript of CMA interview with [Director B] dated 7 August 2017 p11 – [CMA Document Reference URN1492]. [Director B] also noted that there are charcoal accounts and mixed accounts, implying that some customers procure charcoal only – see Transcript of CMA interview with [Director B] dated 7 August 2017, p42 – [CMA Document Reference URN1492].

[42] CPL Briefing Paper – [CMA Document Reference URN0551].

[43] CPL response to the CMA's section 26 notice dated 26 April 2017 – 'Draft s.26_108', paragraph 14 – [CMA Document Reference URN1686].

basis on the back of the supplier's rolling submissions around price and product range.[44]

2.34 There may also be differences in the requirements of various national retailers. For example, CPLD and [Director D] have told the CMA that petrol station forecourt customers are particularly interested in receiving supplies of bottled gas along with their solid fuel and charcoal deliveries.[45] CPL has represented that this category of customers may switch suppliers less frequently, and that the barriers to switching suppliers may also be higher for this category of customers compared to others.[46] Moreover, the CMA understands that some national retailers (particularly supermarket stores) may require deliveries to only one location while others (typically forecourts) require multi-drop deliveries.

2.35 CPLD also told the CMA that for various reasons it has largely focused on winning and developing supermarket and discount store accounts, as opposed to petrol station forecourt customers.[47] Fuel Express Limited has represented that its main customers are multi-drop customers such as petrol station forecourt customers.[48] However, the CMA has evidence that both CPLD and Fuel Express have competed for business across the full range of national retailers.[49]

2.36 CPL also listed the following as among its competitors for national retailers for either solid fuel or charcoal products: DJ Davies, Hayes Fuel, Lissan Coal, Rectella, Big K and Direct Charcoal.[50]

2.37 CPL estimates that for the financial year 2016/17, the total value of the market for the supply of solid fuel products (excluding wood) to national retailers in the UK was £[15-20] million. If wood was included in the market,

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44 CPL response to the CMA's section 26 notice dated 26 April 2017 – 'Draft 26_108', paragraph 15 – [CMA Document Reference URN1686].

45 Witness Statement of [Director D] dated 8 September 2017 paragraph 4 – [CMA Document Reference URN1496] – and CPL Briefing Paper – [CMA Document Reference URN0551].

46 CPL Briefing Paper, paragraph 67 – [CMA Document Reference URN0551].

47 CPL stated that the reasons for focusing on winning and servicing larger national accounts include that they provide CPLD with large volume sales opportunities. CPL Briefing Paper, paragraphs 58-64 – [CMA Document Reference URN0551].

48 Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

49 For example, see CPL response to specification 3 of the CMA's section 26 notice dated 3 May 2017 – [CMA Document Reference URN1700] and Witness Statement of [Director E] dated 8 September 2017, paragraph 78 – [CMA Document Reference URN1498].

50 CPL response to specification 8 of the CMA's section 26 notice dated 6 June 2017 – [CMA Document Reference URN1174].

CPL estimates that the market value would increase to £[35–40] million. CPL estimates that for the same period, its market share by value for the supply of solid fuel products (excluding wood)[51] to national retailers in the UK was [✂]%, and that Fuel Express'[52] market share for the same market was [✂]%. It estimates that the next largest market share for the same market was held by DJ Davies (a company owned by one of Fuel Express Limited's shareholders), at [✂]%.[53] If wood was included in the market, CPL estimates that its market share would be lower, at between [✂]% and [✂]%.[54]

2.38 CPL estimates that for the financial year ending 2016/17, the total value of the market for the supply of charcoal products to national retailers in the UK was £[30-35] million. CPL estimates that for the same period it had a market share by value for the supply of charcoal products to national retailers in the UK of [✂]% and that Fuel Express[55] had a market share in the same market of [✂]%. CPL estimates that the largest market share for this same market was held by [competitor], at [✂]%.[56]

D. The Parties

2.39 CPL arose from the privatisation of the British Coal Corporation (formerly known as the National Coal Board), and became a privately-owned entity in 1995.[57] It is the main supplier (and producer) of solid fuel products in the UK.

2.40 In relation to solid fuels, CPL is a vertically integrated business that operates at all levels of the supply chain and across different sales channels.[58]

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51 CPL response to specification 8 of the CMA's section 26 notice dated 6 June 2017 – [CMA Document Reference URN1174]. CPL did not specify the wood products to which it was referring. However, the CMA notes that it includes certain wood products in its definition of the relevant market (see paragraphs 2.16 above and *The Relevant Market* section below).

52 For those purposes, CPL defined Fuel Express as Fuel Express Limited, Fuel Express (Bagnalls) Limited and G. N. Grosvenor Limited.

53 CPL response to specification 8 of the CMA's section 26 notice dated 6 June 2017, paragraph 13 – [CMA Document Reference URN1174].

54 CPL stated that if wood was included in the market, its market share for the supply of solid fuel products to national retailers would be approximately [✂]-[✂]% lower given national retailers' ability to directly source supplies from manufacturers as well as the wide variety of wood suppliers available – CPL response to specification 8 of the CMA's section 26 notice dated 6 June 2017 – [CMA Document Reference URN1174].

55 For the purposes of providing the market share estimate for Fuel Express, CPL defined Fuel Express as including Fuel Express Limited, Bagnalls and Grosvenors but not Carbo UK; CPL response to specification 8 of the CMA's section 26 notice dated 6 June 2017 – [CMA Document Reference URN1174].

56 Ibid.

57 CPL Briefing Paper – [CMA Document Reference URN0551].

58 CPL Briefing Paper – [CMA Document Reference URN0551].

According to its website, CPL is the UK's largest coal merchant and wholesaler.[59] CPL is also a manufacturer of solid fuel products for sale to the UK, Europe and internationally. In particular, CPL is the largest manufacturer of solid fuel briquettes and smokeless fuels in Europe.[60] CPL's products include well-known premium branded solid fuel products such as Homefire, Phurnacite and Ecoal50.[61]

2.41 CPL is also currently one of the main suppliers of charcoal products in the UK.[62] It also supplies certain other products and services.[63]

2.42 Fuel Express, through its constituent entities, is one of the main suppliers of both solid fuel and charcoal products in the UK.

CPL

2.43 CPL Distribution Limited ('**CPLD**'), Coal Products Limited ('**Coal Products**'), CPL Industries Limited ('**CPL Industries**'), and CPL Industries Holdings Limited ('**CPL Industries Holdings**') are currently owned by CPL Industries Group Limited (the '**CPL Group**').

2.44 During the Relevant Period, CPLD, Coal Products and CPL Industries were wholly owned by CPL Industries Holdings.

CPL Distribution Limited

2.45 CPLD is a private limited company registered in England and Wales, with the company number 00544782. It was incorporated on 19 February 1955 and was an active company throughout the Relevant Period. Its registered address is Westthorpe Fields Road, Killamarsh, Sheffield, S21 1TZ.[64]

2.46 CPLD is the supply and distribution arm of the CPL Group. In particular, CPLD sells and distributes solid fuels and charcoal, as well as certain

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59 CPL's website – http://www.cplindustries.co.uk/cpl/ (as at 20 December 2017).
60 CPL's website – http://www.cplindustries.co.uk/cpl/ (as at 20 December 2017).
61 CPL's website – http://www.cplindustries.co.uk/cpl/about-cpl-industries (as at 20 December 2017).
62 CPL response to specification 8 of the CMA's section 26 response dated 6 June 2017 – [CMA Document Reference URN1174]. During the Relevant Period, CPL was one of the few suppliers of charcoal products in the UK.
63 CPL's website, 'About CPL' – http://www.cplindustries.co.uk/cpl/about-cpl-industries (as at 20 December 2017). For example, CPL provides refractory repair services and hydrothermal carbonisation.
64 https://beta.companieshouse.gov.uk/company/00544782 (as at 20 December 2017).

garden care products,[65] to end consumers and to retailers, including supermarkets, garden centres and DIY centres.[66]

2.47 CPLD is 100% owned by Heptagon Limited.[67] Heptagon Limited is wholly owned by CPL Industries (which in turn is wholly owned by CPL Industries Holdings).[68]

2.48 During the Relevant Period, company filings for CPLD indicate that it was wholly owned by Heptagon Limited. In particular, the annual reports of CPLD show that Heptagon Limited held 100% of the shares in CPLD on 5 November 2009, 5 November 2010 and 5 November 2011.[69]

2.49 CPLD was indirectly owned by CPL Industries throughout the Relevant Period. In particular, the annual accounts of CPL Industries show that it owned 100% of the shares in Heptagon Limited during the year ending 31 March 2011 (and therefore throughout the Relevant Period).[70]

2.50 During the Relevant Period, CPLD's directors were [Director A], [director], [director], [Director B], [director] and [director] (from 13 September 2010).[71]

Coal Products Limited

2.51 Coal Products is a private limited company registered in England and Wales, with the company number 01102042. It was incorporated on 15 March 1973 and was an active company during the Relevant Period. Its registered address is Westthorpe Fields Road, Killamarsh, Sheffield, S21 1TZ.[72]

2.52 Coal Products is the manufacturing arm of the CPL Group. It is engaged in the manufacture of smokeless solid fuels and wholesales solid fuels to coal

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65 CPLD page of CPL website – http://www.cplindustries.co.uk/cpl/content/cpl-distribution (as at 20 December 2017).

66 CPL Briefing Paper, paragraph 9 – [CMA Document Reference URN0551].

67 CPLD Confirmation Statement made on 5 November 2017, available at https://beta.companieshouse.gov.uk/company/00544782/filing-history (as at 20 December 2017).

68 Heptagon Limited Confirmation Statement made on 16 March 2017, available at https://beta.companieshouse.gov.uk/company/03034114/filing-history (as at 20 December 2017). At the time of CPL Industries' Annual Report for the year ending 31 March 2016, CPL Industries owned 100% of the shares in Heptagon Limited (CPL Industries full accounts made up to 31 March 2016, available at https://beta.companieshouse.gov.uk/company/02993245/filing-history) (as at 20 December 2017).

69 CPLD annual returns made up to 5 November 2009, 5 November 2010 and 5 November 2011, available at https://beta.companieshouse.gov.uk/company/00544782/filing-history (as at 20 December 2017).

70 CPL Industries annual accounts made up to 31 March 2011 (p19), available at https://beta.companieshouse.gov.uk/company/02993245/filing-history (as at 20 December 2017).

71 https://beta.companieshouse.gov.uk/company/00544782/officers?page=2 (as at 20 December 2017).

72 https://beta.companieshouse.gov.uk/company/01102042 (as at 20 December 2017).

merchants for sale and distribution within and outside the UK.[73] Coal Products supplies CPLD with certain solid fuels. It also supplies certain solid fuels to Fuel Express (Bagnalls) Limited and G. N. Grosvenor Limited (see further *The relationship between the parties* at paragraph 2.103 below).

2.53 Coal Products is a wholly-owned direct subsidiary of CPL Industries and was so during the Relevant Period.[74]

2.54 During the Relevant Period, Coal Products' directors were [director], [director], [Director A], [director], and [director].[75]

CPL Industries Limited

2.55 CPL Industries is a private limited company registered in England and Wales with the company number 02993245 and is now an indirect subsidiary of the CPL Group. It was incorporated in November 1994 and was an active company during the Relevant Period. Its registered address is Westthorpe Fields Road, Killamarsh, Sheffield, S21 1TZ.[76]

2.56 CPL Industries is a diversified manufacturing and distribution company which is, through its directly and indirectly owned subsidiaries, engaged in the manufacture and supply of fuel and ancillary products and services. Its products and services include smokeless solid fuels, bituminous and anthracite coal, renewable fuels including wood logs, activated carbon, protective covers and bags, refractory repair services and hydrothermal carbonisation. It supplies these to domestic and international customers.[77]

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73 CPL Briefing Paper, paragraph 8 – [CMA Document Reference URN0551].

74 The annual returns of Coal Products indicate that CPL Industries was the 100% shareholder of Coal Products as at 23 November 2009, 23 November 2010, and 23 November 2011, with no indication of any change in shareholding during the Relevant Period. See also Coal Products Confirmation Statement made on 21 May 2017, available at https://beta.companieshouse.gov.uk/company/01102042/filing-history (as at 20 December 2017).

75 https://beta.companieshouse.gov.uk/company/01102042/officers (as at 20 December 2017).

76 https://beta.companieshouse.gov.uk/company/02993245 (as at 20 December 2017).

77 http://www.cplindustries.co.uk/cpl/about-cpl-industries (as at 20 December 2017).

2.57 CPL Industries is wholly owned by CPL Industries Holdings and was so throughout the Relevant Period.[78] [79]

2.58 During the Relevant Period, CPL Industries' directors were [Director A], [director], and [director].[80]

CPL Industries Holdings Limited

2.59 CPL Industries Holdings is a private limited company registered in England and Wales with the company number 05754991. It was incorporated on 24 March 2006 and was an active company throughout the Relevant Period. Its registered address is Westthorpe Fields Road, Killamarsh, Sheffield, S21 1TZ. Its primary function is to act as a holding company for CPL Industries.[81]

2.60 During the Relevant Period, CPL Industries Holdings' directors were [director], [Director A], [director], [director], [director], and [director].[82]

2.61 CPL Industries Holdings is now a wholly owned direct subsidiary of CPL Group, a private limited company registered in England and Wales with the company number 07717350. CPL Group was incorporated on 25 July 2011, and thus was not an active company during the Relevant Period.[83] The CPL Group's registered address is Westthorpe Fields Road, Killamarsh, Sheffield, S21 1TZ.[84] The CPL Group's directors are [director] ([✂]), [director], [Director A] ([Senior Employee]), and [director].[85]

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[78] At the time of CPL Industries Holdings' annual accounts for the year ending 31 March 2016, CPL Industries Holdings owned 100% of the shares in CPL Industries (CPL Industries Holdings full accounts made up to 31 March 2016, available at https://beta.companieshouse.gov.uk/company/05754991/filing-history) (as at 20 December 2017).

[79] The annual accounts of CPL Industries Holdings show that it owned 100% of the shares in CPL Industries during the year ending 31 March 2011, which covers the whole of the Relevant Period – see CPL Industries Holding group of companies' accounts made up to 31 March 2011 (page 22), available at https://beta.companieshouse.gov.uk/company/05754991/filing-history (as at 20 December 2017).

[80] https://beta.companieshouse.gov.uk/company/02993245/officers (as at 20 December 2017). CPL Industries' current directors are currently [Director A], [director], [director], [director], and [director].

[81] Companies' House profile https://beta.companieshouse.gov.uk/company/05754991/officers (as at 20 December 2017).

[82] https://beta.companieshouse.gov.uk/company/05754991/officers (as at 20 December 2017).

[83] At the time of CPL Industries Group's annual accounts for the year ending 31 March 2016, CPL Industries Group owned 100% of the shares in CPL Industries Holdings Limited (CPL Group Industries group of companies' accounts made up to 31 March 2016 (page 32), available at https://beta.companieshouse.gov.uk/company/07717350/filing-history) (as at 20 December 2017).

[84] Companies House profile – https://beta.companieshouse.gov.uk/company/07717350 (as at 20 December 2017).

[85] https://beta.companieshouse.gov.uk/company/07717350/officers (as at 20 December 2017).

Fuel Express

Fuel Express Limited

2.62 Fuel Express Limited is a private limited company registered in England and Wales with the company number 03439446. It was incorporated on 25 September 1997 and was an active company during the Relevant Period. Its registered address is Suite 4, Belle Vue Business Centre, Elm Tree Street, Wakefield, West Yorkshire WF1 5EP.[86]

2.63 Fuel Express Limited is engaged in the nationwide supply of solid fuel, charcoal, gas and ancillary products to a range of customers.

2.64 During the Relevant Period, its shareholders were G.N. Grosvenor Limited ('**Grosvenors**') (25% shareholding), Fuel Express (Bagnalls) Limited ('**Bagnalls**') (25% shareholding), the individuals [director] and [shareholder] (25% shareholding), and the individuals [director] and [shareholder] (25% shareholding). These continue to be Fuel Express Limited's shareholders.[87]

2.65 During the Relevant Period, Fuel Express Limited's directors were [Director D], [Director E], [director], and [director].[88] [Director D] and [Director E] were also directors of Bagnalls and Grosvenors respectively.

Origins of Fuel Express Limited

2.66 Fuel Express Limited[89] was formed in 1994 by a group of ten regional coal merchants to act as a national sales and distribution platform. By representing themselves as an organisation with national (as opposed to regional) distribution capabilities, the coal merchants could compete collectively for national supply contracts for solid fuels and charcoal.[90] Fuel

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86 https://beta.companieshouse.gov.uk/company/03439446 (as at 20 December 2017).

87 Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

88 https://beta.companieshouse.gov.uk/company/03439446/officers (as at 20 December 2017).

89 When it was formed in 1997, Fuel Express Limited was known as National Independent Fuel Distributors Limited – Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

90 Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919]. While Fuel Express Limited stated that Fuel Express was formed to enable smaller coal merchants to compete for national petrol forecourt accounts, [Director E]'s evidence is that the intention was to enable competition for national account customers more generally, such as large supermarket and petrol forecourts (see also Witness Statement of [Director E] dated 8 September 2017, paragraph 14 – [CMA Document URN1498]). Fuel Express Limited is recognised as a competitor for the supply of solid fuels and charcoal to national retailers, not only to national forecourt customers.

Express Limited was therefore established as a joint vehicle for the sale and distribution of solid fuel and charcoal products to national retailers in the UK.

2.67 By the beginning of the Relevant Period Fuel Express Limited's membership consisted of four members, including Bagnalls and Grosvenors.[91] These four members continue to be the constituent members of Fuel Express Limited.[92] As the number of shareholders and constituent members began to decrease over time, it was also decided that all shareholders should become directors.[93] At the time of the Relevant Period, [Director E], and [Director D] were shareholders of Fuel Express Limited through their businesses, Grosvenors and Bagnalls, and both were also directors of Fuel Express Limited.

2.68 Fuel Express Limited's nationwide coverage allowed and continues to allow its members, including Grosvenors and Bagnalls, to command enhanced discounts from suppliers.[94] Further, through Fuel Express Limited they are able to sell their own products directly to Fuel Express Limited's customers.[95]

2.69 Fuel Express Limited's shareholders, including Bagnalls and Grosvenors, are all involved in the supply of solid fuel and charcoal products. Fuel Express Limited does not consider that its shareholders or their associated companies are its competitors.[96]

Day to day operations of Fuel Express Limited

[91] The other two members were DJ Davies Fuels Limited and Fordham's Limited – Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

[92] Transcript of CMA interview with [Director D] dated 22 August 2017, p5 – [CMA Document Reference URN1491].

[93] Transcript of CMA Interview with [Director D] dated 22 August 2017, p5 – [CMA Document Reference URN1491].

[94] Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919]. [Director D]'s witness evidence is that membership of Fuel Express Limited has given Bagnalls and Grosvenors in particular greater leverage in relation to the prices charged to them by suppliers – Witness Statement of [Director D] dated 8 September 2017, paragraph 32 – [CMA Document Reference URN1496].

[95] Witness Statement of [Director D] dated 8 September 2017, paragraph 36 – [CMA Document Reference URN1496].

[96] Fuel Express Limited's response to the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919]. See also paragraph 5.47 in section 5B *Undertakings and the attribution of liability* below.

2.70 Fuel Express Limited has a small sales force and concludes its own contracts with customers. However, orders that Fuel Express Limited accepts from its customers are placed predominantly with its shareholders, including Bagnalls and Grosvenors.[97]

2.71 Each of Fuel Express Limited's members:

a. distributes solid fuel and charcoal products to customers within an agreed upon geographical area, further to a distribution agreement with Fuel Express Limited;[98] and

b. supplies solid fuel and charcoal products to Fuel Express Limited, which does not itself import or otherwise source these products.[99]

2.72 Members source solid fuel and charcoal products from various UK wholesalers.[100] Fuel Express Limited and its members also source products from each other. For example, during the Relevant Period, Grosvenors sourced charcoal from Bagnalls.[101]

2.73 Fuel Express Limited's members pack their bulk products into Fuel Express branded and approved packaging which they then distribute to Fuel Express Limited customers within their agreed geographical area.[102] As the number of constituent members reduced over time, it has been necessary for the remaining members to service a wider geographical area and for Fuel

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97 See Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919]; see also Witness Statement of [Director E] dated 8 September 2017, paragraph 51 – [CMA Document Reference URN1498]. Fuel Express Limited does not appear to sell brands in any significant quantities which do not belong to or are not sourced by its shareholder companies. See also paragraph 5.37 in section 5B *Undertakings and the attribution of liability* below.

98 Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919]; see also Witness Statement of [Director E] dated 8 September 2017, paragraph 51 – [CMA Document Reference URN1498]. Fuel Express Limited does not appear to sell brands in any significant quantities which do not belong to or are not sourced by its shareholder companies. See also paragraph 5.37 in section 5B *Undertakings and the attribution of liability* below.

99 Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919]. For example, Grosvenors supplies Fuel Express Limited with coal, charcoal and other products, such as sawdust, which are used by forecourt customers in particular. Bagnalls supplies Fuel Express Limited with more charcoal than Grosvenors – Witness Statement of [Director D] dated 8 September 2017, paragraph 39 – [CMA Document Reference URN1496].

100 Witness Statement of [Director E] dated 8 September 2017, paragraph 51 – [CMA Document Reference URN1498].

101 Grosvenors now imports charcoal itself. Witness Statement of [Director D] dated 8 September 2017, paragraph 22 – [CMA Document Reference URN1496].

102 Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919]. See also Witness Statement of [Director D] dated 8 September 2017, p39 – [CMA Document Reference URN1496].

Express Limited to engage sub-contractors to distribute for the areas of the country that are not serviced by its members.[103]

2.74 Fuel Express Limited also uses other companies to provide it with a 'fulfilment and delivery' service for its forecourt customers, including national retailers. Further to this arrangement, the distributing company purchases pre-packed product from Fuel Express Limited's members which it then distributes to Fuel Express Limited's customers on behalf of Fuel Express Limited.[104] Until recently, CPL was one of the companies that Fuel Express used to provide it with a 'fulfilment and delivery' service.[105] For further details about Fuel Express and CPL's trading relationship, see paragraphs 2.99 to 2.105 below.

2.75 Fuel Express Limited only makes a nominal profit and passes on all customer payments from customers to the relevant member or sub-contractor distributor. Each member pays Fuel Express Limited a monthly management fee which is proportionate to the amount of business they put through Fuel Express Limited for that month.[106]

2.76 Fuel Express Limited's members and its sub-contractor distributors all pay a percentage of the administrative costs of Fuel Express Limited.[107]

[*Director E*] *and* [*Director D*]*'s management role within Fuel Express Limited*

2.77 All directors of Fuel Express Limited provide their time to the entity without charge or remuneration.[108] However, [Director E] and [Director D] are predominantly responsible for strategic decision-making and managing the day-to-day running of Fuel Express Limited. They therefore have a more significant involvement in the strategic decision-making and management of

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[103] Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

[104] For example, Castle Fuels/Innergy (supplied by Grosvenors), Bit of Coal (supplied by Bagnalls) and CPL (supplied by Grosvenors).

[105] The CMA understands that since the CMA commenced its investigation Fuel Express has restructured its distribution in the North West of England and that as from 26 January 2018 CPL is no longer involved in distributing Fuel Express products to Fuel Express' customers.

[106] Fuel Express Limited's response dated 14 November 2017 to the CMA's information request dated 7 November 2017 – [URN1600]. See also Witness Statement of [Director E] dated 8 September 2017, paragraph 55 – [CMA Document Reference URN1498].

[107] Apart from CPL, which has refused to do so since September 2015 – Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

[108] See Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

the day-to-day decisions than the other directors, whose involvement is limited.[109]

2.78 Further, [Director E] and [Director D] have '*significant autonomy*' in their decision-making within their respective regions with the result that they will each take a number of decisions independently of the other.[110] In this regard, [Director E] is more involved on the charcoal side of the Fuel Express Limited business than the coal side.[111]

2.79 Bagnalls and Grosvenors also have a significant financial interest in Fuel Express Limited. In his evidence, [Director E] explained that the majority of Fuel Express Limited's business is conducted through Bagnalls and Grosvenors, and that Bagnalls now accounts for at least half of Fuel Express Limited's business.[112] [Director D] similarly explained that Grosvenors and Bagnalls put by far the most business through Fuel Express Limited.[113]

2.80 [Director E] and [Director D] have used and continue to use Fuel Express company email signatures and addresses to conduct Fuel Express business.[114]

G. N. Grosvenor Limited

2.81 Grosvenors is a private limited company registered in England and Wales with the company number 01418267. It was incorporated on 9 May 1979 (under its former name G. N. G. Smokeless Fuels Limited) and was an active company throughout the Relevant Period.[115] Its registered address is The Coal Yard, Purbrook Road, East Park, Wolverhampton, West Midlands, WV1 2EJ.

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[109] See also paragraph 5.37(i) below.

[110] Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – CMA Document Reference URN0919].

[111] Transcript of CMA Interview with [Director E] dated 22 August 2017, p5 – [CMA Document Reference URN1490].

[112] Witness Statement of [Director E] dated 8 September 2017, paragraphs 16 and 20 – [CMA Document Reference URN1498].

[113] Witness Statement of [Director D] dated 8 September 2017, paragraph 31 – [CMA Document Reference URN1496].

[114] See, for example, email dated 14 June 2010 at 15:01 from [Director E] to [Director A] – [CMA Document Reference URN0409]; email dated 13 November 2017 from [Director E] to the CMA – [CMA Document Reference URN1581]; email dated 15 February 2011 from [Director D] to [Director E] – [CMA Document Reference URN0434].

[115] https://beta.companieshouse.gov.uk/company/01418267 (as at 20 December 2017).

2.82 Grosvenors is a coal merchant that is engaged in the supply of coal and other solid fuel products, gas and charcoal to retailers and end consumers. It also wholesales coal products.[116]

2.83 Grosvenors' shareholder is G N G Holdings Limited (100% shares), which was also its shareholder throughout the Relevant Period.[117] G N G Holdings Limited's shareholders are [Director D] (99%) and [shareholder] (1%), who were also its shareholders throughout the Relevant Period.[118]

2.84 During the Relevant Period, Grosvenors' directors were [Director D] and [shareholder].[119]

Fuel Express (Bagnalls) Limited

2.85 Bagnalls is a private limited company registered in England and Wales with the company number 02695443**.** It was incorporated on 10 March 1992. Its registered address is The Freight Terminal, Bicester Road, Chipping Norton, Oxfordshire, OX7 4NP. During the Relevant Period, it was known as Bagnalls Haulage Company Limited.[120]

2.86 Bagnalls is engaged in the wholesale and retail supply and distribution of solid fuel and charcoal products.

2.87 Throughout the Relevant Period, Bagnalls was jointly owned by [Director E] [✂], [shareholder] and [shareholder] (one third shares each).[121] The most recent company filings for Bagnalls indicate that the company is now 100% owned by Bagnalls Group (UK) Ltd.[122]

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[116] Witness Statement of [Director D] dated 8 September 2017, pp1-2 – [CMA Document Reference URN1496].

[117] G.N. Grosvenor Limited annual returns made up to 8 October 2010 and 8 October 2011, available at https://beta.companieshouse.gov.uk/company/01418267/filing-history (as at 20 December 2017).

[118] G N G Holdings Limited annual returns made up to 15 April 2010 and 15 April 2011 and confirmation statement made on 15 April 2017, available at https://beta.companieshouse.gov.uk/company/06878235/filing-history (as at 20 December 2017).

[119] https://beta.companieshouse.gov.uk/company/01418267/officers (as at 20 December 2017).

[120] https://beta.companieshouse.gov.uk/company/02695443 (as at 20 December 2017).

[121] Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

[122] Bagnalls' annual return made up to 4 March 2016 and confirmation statement made on 4 March 2017, available at https://beta.companieshouse.gov.uk/company/02695443/filing-history?page=1 (as at 20 December 2017). Bagnalls has been wholly-owned by Bagnalls Group (UK) Ltd since 2 September 2013 – https://beta.companieshouse.gov.uk/company/02695443/persons-with-significant-control (as at 20 December 2017).

2.88 During the Relevant Period, the directors of Bagnalls were [Director E] and [✂], [director] and [director]. [Director E] was responsible for the day-to-day running of Bagnalls and as a director was paid a salary and dividends.[123]

2.89 Bagnalls Group (UK) Ltd is a private limited company registered in England and Wales with the company number 08582168. It was incorporated on 24 June 2013, and thus was not active during the Relevant Period.[124] Its registered address is The Freight Terminal Bicester Road, Enstone, Chipping Norton, Oxon, OX7 4NP. Bagnalls Group (UK) Limited is owned by [Director E] and [✂], [shareholder] and [shareholder] (one third shares each).[125] The directors of Bagnalls Group (UK) Limited are [Director E], [director] and [director].

Carbo (UK) Limited

2.90 Carbo (UK) Limited ('**Carbo UK**') is a private limited company registered in England and Wales with the company number 05276677. It was incorporated on 3 November 2004 and was an active company throughout the Relevant Period.[126] Its registered address is The Freight Terminal, Bicester Road, Enstone, Chipping Norton, Oxfordshire, OX7 4NP.[127]

2.91 Carbo UK is engaged in the sale of fuels, ores, metals and industrial chemicals.[128] Its main purpose was to import from Carbo BV[129] to supply charcoal to large customers.[130] Carbo UK did not, however, have a national

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[123] Attachment to Bagnalls' response dated 7 December 2017 to the CMA's information request dated 5 December 2017 – [CMA Document Reference URN1614].

[124] https://beta.companieshouse.gov.uk/company/02695443/persons-with-significant-control (as at 20 December 2017).

[125] Bagnalls Group (UK) Limited annual return made up to 24 June 2016, available at https://beta.companieshouse.gov.uk/company/08582168/filing-history (as at 20 December 2017).

[126] https://beta.companieshouse.gov.uk/company/05276677 (as at 20 December 2017).

[127] https://beta.companieshouse.gov.uk/company/05276677 (as at 20 December 2017).

[128] https://beta.companieshouse.gov.uk/company/05276677 (as at 20 December 2017).

[129] Carbo BV, based in the Netherlands, was part of the Carbo Group. It went into administration during or shortly after the Infringement, and Bagnalls bought the remaining shares from the liquidators – Transcript of CMA interview with [Director E], pp9-10 – [CMA Document Reference URN1490] and Witness Statement of [Director E] dated 8 September 2017, paragraph 29 – [CMA Document Reference URN1498].

[130] Attachment to Bagnalls' response dated 7 December 2017 to the CMA's information response dated 5 December 2017 – [CMA Document Reference URN1614]. According to [Director E], at around the time of the Infringement, Carbo (UK or BV) was one of three charcoal importers who between them effectively accounted for a large part of the UK market – see Witness Statement of [Director E] dated 8 September 2017, paragraph 66 – [CMA Document Reference URN1498]

distribution network, so the focus of its business was on supermarkets which required single drop deliveries to large centralised warehouses.[131]

2.92 During the Relevant Period, Carbo UK was jointly owned by [Director E] and Carbo BV.[132] At that time Carbo UK's directors were [Director E] and [director].

2.93 Carbo UK is now a wholly owned subsidiary of Bagnalls Group (UK) Limited.[133] Its current director is [Director E].[134]

The Relationship between [Director E], Bagnalls and Carbo UK

2.94 During the Relevant Period, [Director E] was the sole UK representative for Carbo UK.[135] He was responsible for the UK side of the Carbo Group's business, with Carbo UK essentially acting as a UK sales agent for charcoal produced abroad.[136] [Director E] was also responsible for the direction and day-to-day running of the company. Carbo BV did not exercise any of these responsibilities.[137]

2.95 Bagnalls had a financial interest in Carbo UK. [Director E] was not paid a dividend as a shareholder, but Bagnalls was paid a fee for its management of Carbo UK. According to [Director E], Bagnalls did not collect outstanding management fees on normal trade terms from Carbo UK, which the CMA infers to mean that Bagnalls collected outstanding management fees at [Director E]'s discretion.[138] [Director E] has also stated that latterly he

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131 Witness Statement of [Director E] dated 8 September – [CMA Document Reference URN1498] - at paragraphs 38 and 39. [Director E] stated that in practice, and for capacity reasons, Carbo (UK) was only really able to service one supermarket at a time – see also Witness Statement of [Director E] dated 8 September 2017, paragraph 33 – [CMA Document Reference URN1498].

132 Carbo (UK)'s annual returns dated 3 November 2009 and 3 November 2010 state that Carbo (UK) Limited and Carbo BV were the joint owners (50% shares) of the company. See also Witness Statement of [Director E] dated 8 September 2017 – [CMA Document Reference URN1498].

133 https://beta.companieshouse.gov.uk/company/05276677/persons-with-significant-control (as at 20 December 2017).

134 https://beta.companieshouse.gov.uk/company/05276677/officers (as at 20 December 2017).

135 Witness Statement of [Director E] dated 8 September 2017, paragraph 25 – [CMA Document Reference URN1498].

136 Transcript of CMA interview with [Director E] dated 22 August 2017, p8 – [CMA Document Reference URN1490].

137 Attachment to Bagnalls' response dated 7 December 2017 to the CMA's information request dated 5 December 2017 – [CMA Document Reference URN1614].

138 Attachment to Bagnalls' response dated 7 December to the CMA's information request dated 5 December 2017 – [CMA Document Reference URN1614].

invoiced one of Carbo UK's customers – the Tesco in-store charcoal account - in Bagnalls' name for ease of administration.[139]

2.96 Further, Bagnalls also had a financial link with Carbo UK through another company, Diamond Fuel Supplies Limited, of which [Director E] was a director and shareholder during the Relevant Period, and to which Bagnalls also charged management fees.[140] Carbo UK purchased solid fuel and charcoal from Diamond Fuel Supplies Limited.[141]

2.97 [Director E]'s evidence is that during the Relevant Period he was doing business through all of Bagnalls, Carbo UK and Fuel Express Limited, and that he was trying to maintain and expand all three businesses by approaching potential customers. [Director E] would decide which of these companies to put the business through based on the customer's requirements and the amount of business involved.[142]

2.98 Thus, as described in this section and at paragraphs 2.77 to 2.80 above, [Director E] played a significant role in the strategic direction and day-to-day running of each of Fuel Express Limited, Bagnalls and Carbo UK. Further, [Director E] and Bagnalls had financial links with Carbo UK, including through Diamond Fuel Supplies Limited.

The Relationship between the Parties

2.99 Both CPL and Fuel Express have described each other as key competitors in the markets for the supply of solid fuel and charcoal products to national retailers. The Parties also acknowledge that their competitive position is complicated by the fact that they are also each other's customers for the supply of certain solid fuel and charcoal products.[143]

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[139] [Director E] noted that he did this 'laterally' (assumedly latterly). It is not clear when this practice began. The CMA has seen evidence that Carbo UK invoiced Tesco during the Relevant Period. Witness Statement of [Director E] dated 8 September 2017 – [CMA Document Reference URN1498], paragraph 43.

[140] Attachment to Bagnalls' response dated 7 December 2017 to the CMA's information request dated 5 December 2017 – [CMA Document Reference URN1614]. Diamond Fuel Supplies Limited's other directors and shareholders during the Relevant Period were members of [Director E]'s family and included [✂] - see Companies House – https://beta.companieshouse.gov.uk/company/01476154/filing-history.

[141] Attachment to Bagnalls' response dated 7 December 2017 to the CMA's information request dated 5 December 2017 – [CMA Document Reference URN1614].

[142] Witness Statement of [Director E] dated 8 September 2017, paragraph 37 – [CMA Document Reference URN1498].

[143] See, for example, transcript of CMA interview with [Director B] dated 7 August 2017, p87 – [CMA Document Reference URN1492].

2.100 CPL operates at all levels of the supply chain and is the main supplier of solid fuel products and one of the few suppliers of charcoal products to national retailers in the UK. CPL is also, through Coal Products, the main producer of manufactured smokeless solid fuel products in the UK.[144] It also wholesales solid fuels to coal merchants within and outside of the UK.

2.101 Since 2008 and until recently,[145] Fuel Express Limited depended on CPL to provide a 'fulfilment and delivery' service on behalf of Fuel Express Limited to Fuel Express Limited's customers in the North West of England. This arrangement began when CPL acquired a coal merchant, E&S Fuels, operating in the North West of England. Through its membership, Fuel Express Limited did not have a strong presence in that region so it used E&S Fuels to provide a delivery service on behalf of Fuel Express Limited. CPL took over this function and continued to deliver on behalf of Fuel Express Limited to its customers in the North West of England, including national retailers such as Euro Garages and Rontec.[146]

2.102 In order to service Fuel Express Limited customers in the North West of England, CPLD purchased Fuel Express branded solid fuel and charcoal products, primarily from Grosvenors.[147] It then invoiced Fuel Express Limited for the delivery service (including the cost of the product).

2.103 CPL also supplies Grosvenors with solid fuels and has supplied it with limited volumes of charcoal.[148] In particular, CPL supplies Grosvenors with branded solid fuels popular with domestic customers, which is the most

[144] Coal Products manufactures a number of well-known solid fuel brands, including Homefire, Brazier/multi-heat, Phurnacite and Supertherm – CPL Briefing Paper – [CMA Document Reference URN0551].

[145] The CMA understands that since the CMA commenced its investigation Fuel Express has restructured its distribution in the North West of England and that as of 26 January 2018 CPL is no longer involved in distributing Fuel Express products to Fuel Express' customers.

[146] CPL response to the CMA's section 26 notice dated 26 April 2017 – Draft s.26_108, paragraph 26 – [CMA Document Reference URN1686].

[147] The products purchased are Housecoal, Blaze, Cosilite, Wood Logs, Heatlogs, Cosilogs and Woodcoal (all solid fuels), kindling, firelighters, lighting fluid, lighting gel and paraffin (which CPL describes as 'heating related products' and lumpwood charcoal, briquette, charcoal, instant charcoal and barbecue trays – CPL Briefing Paper – [CMA Document Reference URN0551].

[148] CPL also supplies Grosvenors with some charcoal from time to time – see Transcript of CMA interview with [Director B] dated 7 August 2017, pp64-65 – [CMA Document Reference URN1492].

profitable part of Grosvenors' business.[149] CPL has also supplied Bagnalls with relevant products, including with smokeless solid fuels.[150]

2.104 Further, CPL purchases certain products from Bagnalls and Grosvenors. In particular, CPL has purchased bottled gas from Grosvenors, which is a significant supplier of the product (due to its relationship with [supplier]). During the Relevant Period, CPL also bought charcoal from Bagnalls.[151]

2.105 The Parties have had close trading relationships with one another, notwithstanding that they are also competitors in the markets for the supply of solid fuel and charcoal products to national retailers.

[149] [Director D] also stated that Grosvenors buys a lot of fuel products from CPL because it is the main supplier – Transcript of CMA interview with [Director D] dated 22 August 2017, pp3, 6, 27 – [CMA Document Reference URN1491]. [Director D] has also described CPL as Grosvenors' most important supplier of fuel products – see for example Witness Statement of [Director D] dated 8 September 2017, paragraph 17 – [CMA Document Reference URN1496].

[150] In his witness evidence, [Director E] described CPL as a Bagnalls supplier, but said that Bagnalls predominantly sources from other competitors – Witness Statement of [Director E] dated 8 September 2017, p23 – [CMA Document Reference URN1498].

[151] See, for example, CPL Briefing Paper, paragraph 42 – [CMA Document Reference URN0551].

3. THE CONDUCT OF THE PARTIES

A. Introduction

3.1. The CMA has found that from at least June 2010 to February 2011, the Parties participated in an anti-competitive arrangement to share markets by allocating at least some of their customers between them (through bid-rigging and the exchange of confidential and commercially sensitive information) for the supply of solid fuel and charcoal products to national retailers in the UK.

3.2. More specifically, the CMA has found that the Parties sought to assist each other in maintaining at least some of their pre-existing customer relationships by, in particular:

(i) coordinating their responses to specific invitations to tender. Specifically, in the case of Tesco (for the supply of charcoal for sale in its stores) and Sainsbury's (for the supply of solid fuel for sale in its petrol station forecourts), the Party that was the existing supplier requested the other Party to quote above or at particular price levels. The other Party then designed a high bid that was consistent with the request, thereby assisting the existing supplier to maintain the customer; and

(ii) exchanging confidential and commercially sensitive pricing information in the context of ongoing tendering processes, including exchanging pricing information relating to a joint bid between Fuel Express and one of CPL's competitors for the supply of solid fuel and charcoal products to Tesco for sale in its petrol station forecourts. The pricing information was exchanged to assist CPL in maintaining its pre-existing relationship with the customer Tesco and with its national petrol station forecourt customers more generally.

3.3. The CMA has found that the Parties engaged in the above anti-competitive conduct on a reciprocal basis. That is to say, Fuel Express assisted CPL in maintaining its pre-existing customer relationships while CPL assisted Fuel Express to do the same.

B. Sources of Evidence

3.4. As described at paragraphs 2.2 to 2.10 above, the CMA obtained documentary evidence (predominantly emails) from the Parties through

inspections and compulsory information and/or document requests issued under section 26 of the Act, and the Parties provided certain documents and information to the CMA on a voluntary basis.

3.5. The CMA also interviewed several witnesses during the investigation. During the interviews, the individuals were asked to comment on a selection of relevant documents that had been provided to them in advance of the interviews. The CMA recorded and transcribed the interviews, which were then checked against the recordings. The relevant transcripts were provided to the Parties and form part of the CMA's file.

3.6. Following the interviews, Fuel Express Limited also voluntarily provided the CMA with witness statements dated 8 September 2017 from [Director D] and [Director E][152] and certain other documents.

Assessment of Witness Evidence – Generally

3.7. As regards the evidence set out below, the CMA has generally placed more weight on the contemporaneous documents than on the witness evidence for the following reasons:

(i) The CMA considers that a document prepared at the time of the events is likely to have greater probative value than an account given later;[153]

(ii) The interviewees all had, to a greater or lesser extent, an incentive to minimise their role in the conduct under investigation, which may have coloured their evidence, whether consciously or otherwise. As noted in paragraphs 2.6 to 2.7 above and paragraph 3.9 below, the individuals concerned are directors of the Parties who are involved in the Infringement. They therefore have a direct interest in the outcome of the Investigation and an incentive to maintain the trust of their customers. In certain instances, the individuals are also shareholders. These individuals therefore have a direct financial interest in the outcome of the Investigation. These interests may be undermined by a finding that the Parties had been involved in serious anti-competitive conduct; and

[152] Witness Statement of [Director D] dated 8 September 2017 – [CMA Document Reference URN1496] and Witness Statement of [Director E] dated 8 September 2017 – [CMA Document Reference URN1498].

[153] See in this regard the judgement in *JJB Sports Plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17, paragraph 287.

(iii) The events occurred more than 7 years before the dates of the interviews and recollections may have diminished, particularly as to the details of the dates, times and sequence of events.

3.8. Given the above, where there is a conflict between the account provided by a witness and the contemporaneous documents, the CMA places more weight on the documentary evidence. However, the CMA has relied on the witness evidence of certain witnesses to supplement the documentary evidence in particular where those witnesses were directly involved in the relevant communications (either because they authored the relevant communication or were the direct recipient of the communication) and where that evidence is consistent with the contemporaneous documentary evidence.

3.9. The following table lists the names of the key individuals who are referred to in the section below.

Business	**Key individual**	**Position (during Relevant Period)**
CPL	[Director A]	[Senior Employee] of CPL Industries[154]
	[director]	[Senior Employee][155]
	[Director B]	[Employee] (CPLD)[156]
	[Director C]	[Employee] (CPLD)[157]
	[account manager]	[account manager][158]
	[procurement officer]	[procurement officer], CPL Industries Limited[159]

[154] Transcript of CMA interview with [Director A] dated 8 August 2017, p4 – [CMA Document Reference URN1494]. See also CPL Briefing Paper, p103 – [CMA Document Reference URN0551].

[155] CPL Briefing Paper, p103 – [CMA Document Reference URN0551].

[156] [Director B] was in the role of [Employee] from around 2006 until approximately May 2012, at which point he moved into the role of [Employee]. [Director B] resigned as director of CPLD on [✂]. See Companies House https://beta.companieshouse.gov.uk/officers/FPQrfqSh-wHTgOpfCx83Wf5Dt6A/appointments (as at 20 December 2017). See also Transcript of CMA interview with [Director B] dated 7 August 2017, pp5-8 – [CMA Document Reference URN1492].

[157] Since April 2012 [Director C] has been employed in the position of [Employee]. See Companies House https://beta.companieshouse.gov.uk/officers/lgBEYLZ5NZTwgmF3gp51GXZGqMg/appointments (as at 20 December 2017). See also Transcript of CMA interview with [Director C] dated 7 August 2017, pp4-5 – [CMA Document Reference URN1493].

[158] Transcript of CMA interview with [Director B] dated 7 August 2017, p30 – [CMA Document Reference URN1492].

[159] Email dated 21 June 2010 16:11 from [procurement officer] (CPL) to [procurement officer] (CPL) – [CMA Document Reference URN0429]. See also Transcript of CMA Interview with [Director B] dated 7 August 2017, p14 – [CMA Document Reference URN1492].

Business		Key individual	Position (during Relevant Period)
Fuel Express	Grosvenors	[Director D]	Director and shareholder (through Grosvenors) of Fuel Express Limited and Director and joint owner of Grosvenors[160]
	Bagnalls	[Director E]	Director and shareholder (through Bagnalls) of Fuel Express Limited and Director and joint owner of Bagnalls[161]
	Carbo UK	[Director E]	Director and joint owner of Carbo UK[162]
	D J Davies	[director]	[Senior Employee] and shareholder of Fuel Express Limited and DJ Davies Fuels Limited[163]
	Fordham's	[director]	[Senior Employee] and shareholder of Fuel Express Limited and Fordham's Limited[164]
Sainsbury's		[buyer]	Buyer – Petrol & Kiosk[165]
Tesco		[buyer]	Buyer[166]
Carbo SA/BV		[representative]	Representative[167]

[160] Companies House (as at 20 December 2017). See also Transcript of CMA interview with [Director D] dated 22 August 2017, pp4-5 – [CMA Document Reference URN1491] and attachment to Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

[161] Companies House https://beta.companieshouse.gov.uk/officers/jz2mgLj_Pw78ovt6DFTi_cvV9bc/appointments (as at 20 December 2017). See also Transcript of CMA interview with [Director E] dated 22 August 2017, p5 – [CMA Document Reference URN1490] and Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

[162] Companies House https://beta.companieshouse.gov.uk/company/05276677/officers (as at 20 December 2017). See also Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

[163] Companies House https://beta.companieshouse.gov.uk/company/03439446/officers (as at 20 December 2017). See also Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

[164] Companies House https://beta.companieshouse.gov.uk/company/03439446/officers (as at 20 December 2017). See also Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference URN0919].

[165] Email dated 30 July 2010 at 16:46 from [buyer] (Sainsbury's) to [Director D] (Fuel Express) – [CMA Document Reference URN0433].

[166] Email Dated 7 June 2010 at 17:40 from [buyer] (Tesco) to [account manager] (CPL) – [CMA Document Reference URN0429].

[167] Transcript of CMA interview with [Director E] dated 22 August 2017, p8 – [CMA Document Reference 1490].

Business	Key individual	Position (during Relevant Period)
Standard Brands	[Employee]	[Employee][168]

C. Anti-competitive arrangement between CPL and Fuel Express

3.10. As set out in detail at paragraphs 2.99 to 2.105, the Parties have close trading relationships with one another. In particular, CPL is a supplier of solid fuel and/or charcoal products to Fuel Express Limited (through Grosvenors and Bagnalls) and to Grosvenors and Bagnalls directly,[169] and until recently CPL also provided a fulfilment and delivery service to Fuel Express Limited's customers, such as Euro Garages and Rontec, in the North West of England.

3.11. In this context from around May 2010 onwards, the Parties were negotiating with one another to establish even further and closer trading relationships between them.[170] During this time, CPL and Bagnalls discussed, among other things, the possibility of establishing a joint venture or open book costing arrangement between CPL, Bagnalls and Carbo UK[171] for the supply of charcoal to national retailers (including for the import and sale of charcoal to Tesco and other supermarkets).[172] CPL also discussed the potential sale of a distribution depot to each of Grosvenors and Bagnalls on the basis that they would distribute CPL branded solid fuel products to CPL's customers in the areas where each depot was located.[173] [174]

3.12. As it related to the possible joint venture for the supply of charcoal, [Director B] explained that it would have been based on maintaining the pre-existing

[168] Email dated 17 November 2010 at 07:09 from [employee] (Standard Brands) to [Director E] (Fuel Express) – [CMA Document Reference URN0569].

[169] Grosvenors has described CPL as its most important supplier – see for example Witness Statement of [Director D] dated 8 September 2017, paragraph 17 – [CMA Document Reference URN1496]. See also CPL Briefing Paper – [CMA Document Reference URN0551].

[170] Transcript of CMA interview with [Director B] dated 7 August 2017, p15 – [CMA Document Reference URN1492].

[171] Witness Statement of [Director E] dated 8 September 2017 in relation to CMA Document Reference URN0134 – [CMA Document Reference URN1498].

[172] Witness Statement of [Director E] dated 8 September 2017, paragraph 67 – [CMA Document Reference URN1498].

[173] Transcript of CMA interview with [Director B] dated 7 August 2017, p15 and p27 – [CMA Document Reference URN1492]. See also Witness Statement of [Director E] dated 8 September 2017, paragraphs 68–69 – [CMA Document Reference URN1498].

[174] Transcript of CMA interview with [Director D] dated 22 August 2017, p10 – [CMA Document Reference URN1491]. [Director D]'s evidence is that at this time CPL also discussed seeking additional supplies from Grosvenors of [supplier product].

relationships that Bagnalls and CPL had had with their respective customers, stating:

> '…[*H*]*ow the joint venture would have worked was we would have both shared the cost, both shared the supply source, been open book, and then where we* [CPL] *had a good relationship with a customer we would have tendered, where he* [Director E] *had a good relationship with a customer, he would have tendered. And he was supplying Tesco at that time.*'[175]

3.13. In the context of their negotiations to establish closer trading relationships, therefore, the Parties discussed maintaining their pre-existing customer relationships.

3.14. In their evidence, [Director E] and [Director D] also each explained how they stood to gain financially from the closer trading relationships and how given the potential financial benefits they (and presumably CPL) would receive they were each prepared to take a more 'positive' approach to their competitor. As a result, [Director D] and [Director E] each explained that during this time the 'usual' competition between the Parties had dampened.

3.15. [Director E] explained the benefits both Bagnalls and Grosvenors each sought to gain from the closer trading relationships with CPL and the co-operative relationship between the Parties that existed during this time as follows:

> '*There was therefore a four or five month period in 2010 when the usual fierce competition between Bagnalls, Grosvenors and FEL* [Fuel Express Limited] *on the one side and CPL on the other side calmed down. The various negotiations in relation to the charcoal joint venture and the Radleigh and Wolverhampton depots affected the way in which* [*Director D*] *and I dealt with CPL. Because we both foresaw the potential advantages for FEL* [Fuel Express Limited] *and our own companies if the potential deals came off we were prepared to be more positive in our approach to CPL and with the benefit of hindsight this may have clouded our thinking towards them. As it turned out, our*

[175] Transcript of CMA interview with [Director B] dated 7 August 2017, p21 – [CMA Document Reference URN1492].

negotiations with them got nowhere and by about the end of 2010 or early in 2011, our relationship returned to normal…'[176]

3.16. [Director D] similarly explained the benefits he understood that Grosvenors and Bagnalls each stood to gain from the closer trading relationships and the co-operative relationship between the Parties that existed during this time as follows:

'*In about 2010, CPL were courting Bagnalls in the charcoal market and were offering Bagnalls use of a depot in the south of England. There was also some talk of a joint venture in charcoal between Bagnalls and CPL at the time…*

At about the same time, CPL's buyers were courting Grosvenors, particularly in relation to obtaining greater supplies of [*supplier gas*]*.*

They offered us a deal on some depot premises at Essington, near Wolverhampton and I appreciated that there could be a £15,000 to £20,000 per annum contribution to Grosvenors' turnover if we could increase our [*supplier gas*] *sales to CPL. As part of our negotiations I remember that we visited various CPL premises with a rep from* [*supplier*] *to carry out on site training…*

In the end, the negotiations that John Bagnall and I were respectively having with CPL got nowhere and after a four or five month period where both sides were courting the other, we reverted back to "business as usual" and a very competitive environment.'[177]

3.17. Based on the witness evidence set out above and the evidence set out in further detail at paragraphs 3.21 to 3.107, the CMA considers that it was in the context of the Parties' ongoing negotiations to establish closer trading relationships between them that they entered into an anti-competitive arrangement to assist each other in maintaining at least some of their pre-existing customer relationships.

3.18. The CMA notes that it is unclear based on the contemporaneous documentary evidence exactly when the negotiations between the Parties may have ended. Nonetheless the CMA considers based on the evidence as

[176] Witness Statement of [Director E] dated 8 September 2017, paragraph 70 – [CMA Document Reference URN1498].

[177] Witness Statement of [Director D] dated 8 September 2017, paragraphs 47, 48 and 58 – [CMA Document Reference URN1496]. See also Transcript of CMA interview with [Director D] dated 22 August 2017, pp9–10 – [CMA Document Reference URN1491].

set out at paragraphs 3.21 to 3.107 that the anti-competitive arrangement between the Parties began in at least June 2010 and continued until at least February 2011.

D. Pre-existing Customer Relationships[178]

3.19. This section sets out the evidence in relation to the following customers, each of which had a pre-existing relationship with one of the Parties during the Relevant Period:

(i) Tesco (in store) (Fuel Express);

(ii) Sainsbury's forecourt (CPL); and

(iii) Tesco forecourt (CPL).[179]

Tesco (in store)[180]

3.20. Tesco purchases solid fuel and charcoal for sale in its stores ('**Tesco (in store**)') separately from its purchases for sale in its petrol station forecourts ('**Tesco forecourts**'). During the Relevant Period, Tesco (in store) was an existing customer of Fuel Express whereas Tesco forecourts was an existing customer of CPL. Throughout the Relevant Period, [Director E] (through Bagnalls and/or Carbo UK) supplied charcoal to Tesco for sale in its stores,[181] and (through Fuel Express Limited and/or Bagnalls) supplied Tesco with solid fuel products for sale in its stores.[182]

3.21. As set out below, in June 2010 and while the Parties were negotiating closer trading relationships with one another, CPL received an invitation to tender from Tesco for the supply of charcoal to its stores for the 2011 summer season. As set out in further detail below, the evidence shows that the Parties co-ordinated their responses to Tesco's invitation to tender. In particular, [Director E] provided a pricing steer to CPL requesting that CPL quote above the prices he had provided. CPL subsequently submitted a bid

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178 For further details about supply to forecourts and 'in store', see paragraphs 2.34 to 2.35 above.

179 CPL's response to specification 3 of the CMA's s.26 Notice dated 3 May 2017 – [CMA Document Reference URN1700].

180 The references to 'Tesco' in this section are to 'Tesco (in store)' for the supply of solid and/or charcoal products.

181 Witness Statement of [Director E] dated 8 September 2017, paragraphs 33 and 47 – [CMA Document Reference URN1498]. For further details, see paragraphs 2.94 to 2.98.

182 Witness Statement of [Director E] dated 8 September 2017, paragraph 47 – [CMA Document Reference URN1498]. See also 2010-11 customer list dated 30 November 2011 – [CMA Document Reference URN1612].

to the customer that was consistent with the pricing steer that [Director E] had provided and that was therefore designed to lose. By engaging in this conduct, CPL sought to assist Fuel Express in maintaining its pre-existing relationship with Tesco. Further and in the context of this conduct, [Director E] and CPL also discussed their relationships with certain other customers, including Focus and Co-op.

3.22. On 7 June 2010 at 17:40 [buyer] of Tesco sent an email to [account manager], who was one of CPL's National Account Managers, inviting CPL to quote for Tesco's '*SS11 Summer Fuel*'.[183] In the invitation to tender, [buyer] listed the summer charcoal products for which Tesco was seeking a quotation from CPL.[184]

3.23. On 14 June 2010 at 15:01 [Director E] (Fuel Express) sent an email with the subject '*re meeting of the 9th June*' to [Director A] (CPL) in which he referred to '*our meeting last week*' and asked, among other things, about co-operation in relation to charcoal, stating:

> '*Charcoal, once you are in a position to discuss further to explore if there is any potential to further co-operation* [sic]*.'*[185]

3.24. A week later, on 21 June 2010 at 16:30, [representative] (who represented Carbo BV)[186] forwarded to [Director E] (Fuel Express) the original invitation to tender dated 7 June 2010 that Tesco had sent to CPL and that CPL had forwarded to [representative]. As part of that email chain, [representative] also forwarded an email in which one of CPL's procurement officers ([procurement officer]) had asked [representative] whether he would like to provide CPL with a quote to supply CPL with the charcoal products listed in Tesco's invitation to tender.[187]

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[183] Email dated 7 June 2010 at 17:40 from [buyer] (Tesco) to [account manager] (CPL) – [CMA Document Reference URN0429].

[184] Email dated 7 June 2010 at 17:40 from [buyer] (Tesco) to [account manager] (CPL) – [CMA Document Reference URN0429]. The products listed were: 5kg briquette (FSC and non FSC); 5kg lumpwood (FSC and non FSC); 4x1kg Instant Lite Lumpwood (FSC and non FSC); Single Instant Disposable Grill (FSC and non FSC); and Party Instant Disposable Grill (FSC and non FSC).

[185] Email dated 14 June 2010 at 15:01 from [Director E] to [Director A] – [CMA Document Reference URN0409]. [Director E] used his Fuel Express Limited email and signature when he sent the email to [Director A.

[186] Witness Statement of [Director E] dated 8 September 2017, paragraph 80 – [CMA Document Reference URN1498]. See also Transcript of CMA interview with [Director E] dated 22 August 2017, pp8-11 and p14 – [CMA Document Reference URN1490].

[187] Email dated 21 June 2010 at 15:30 (+01.00) from [representative] (Carbo BV) to [Director E] – [CMA Document Reference URN0429].

3.25. In his witness statement, [Director E] (Fuel Express) explained that he believed the reason [representative] had forwarded the above emails (including the original invitation to tender that Tesco had sent to CPL) to him was because [representative] '*may have suspected that the end customer was Tesco who were Bagnalls' customer for charcoal at that time,*'[188] and because [Director E] was the sole representative of Carbo UK, which at the time was a joint venture between Carbo BV (which [representative] represented) and Bagnalls.[189] Further details about [Director E]'s relationship with Tesco (in store) are discussed below at paragraphs 3.54 to 3.65.

3.26. On 24 June 2010 at 13:07 [Director E] (Fuel Express) sent an email to [Director B] (CPL), copying [Director D] (Fuel Express). In the email [Director E] referred both to the fact that CPL had contacted [representative] (Carbo BV) for prices for Tesco charcoal and to the possibility of '*getting together*' with [Director D] to discuss pricing, stating:

> *'With regards to the 20 x 1kg instant light, 11.46 tons arriving on the 28th. If you still require price collected ex oxford £470 per ton. If you can let me know either way. Thanks*
>
> ***Can you also indicate a time when getting together with*** **[✂]**[Director D Fuel Express]***; need to put some pricing to bed, thanks again.***[190]

[188] Witness Statement of [Director E] dated 8 September 2017, paragraph 80 – [CMA Document Reference URN1498].

[189] For further details see paragraphs 2.90 to 2.98. See also Witness Statement of [Director E] dated 8 September 2017, at paragraphs 26 and 80 – [CMA Document Reference URN1498]. See also Transcript of CMA interview with [Director E] dated 22 August 2017, pp8-11 and p14 – [CMA Document Reference URN1490].

[190] [Director E] explained that the paragraph related to the fact that Bagnalls and Grosvenors both bought in bulk from CPL and so needed to speak to CPL regularly about negotiating the prices that Bagnalls and Grosvenors would have to pay CPL for CPL's products. [Director B] explained that the paragraph related to price increases for CPL winter fuel products to be sold to [Director D]. See Witness Statement of [Director E] dated 8 September 2017, paragraph 80 – [CMA Document Reference URN1498]. See also Witness Statement of [Director D] dated 8 September 2017, paragraph 73 – [CMA Document Reference URN1496]; Transcript of CMA interview with [Director E] dated 22 August 2017, p12 – [CMA Document Reference URN1490]; Transcript of CMA interview with [Director D] dated 22 August 2017, p6 – [CMA Document Reference URN1491]. See also Transcript of CMA interview with Mr [Director B] dated 7 August 2017, p13 – [CMA Document Reference URN1492].

> ***Ps* [*procurement officer*]** [CPL] ***has been chasing* [*representative*] *for prices for Tesco Charcoal. Can you do the necessary?'***[191] (emphasis added)

3.27. The CMA infers from the final paragraph of the above email that [Director E] (Fuel Express) was asking [Director B] (CPL) to assist Fuel Express by intervening with respect to CPL's proposed tender to supply charcoal for Tesco.

3.28. [Director B] (CPL) replied to [Director E] (Fuel Express) later that day at 19:51, stating:

> *'[Director E] thanks for below.*
>
> *Yes we will require the product and accept the price.*
>
> *If it's coming into Hull etc on the same boat as our other product then would it be easier to deliver direct to Worksop as it will be passing to get to your place?*
>
> ***Will call you tomorrow to discuss the other***' (emphasis added).[192]

3.29. The CMA infers that by '*to discuss the other*' [Director E] was referring to the Tesco account.

3.30. On 30 June 2010 at 14:27 [Director E] (Fuel Express) emailed [Director B] (CPL) with, among other things, price quotations for the charcoal products that were listed in Tesco's original invitation to tender, stating:

> '***1 – With regards to our conversation please quote above the following***
> ***5kg briq 2.49***
> ***5kg l/wood 2.49***
> ***4kg instant 3.54***
> ***Party 3.41***
> ***Std bbq 1.31***
> ***Re winter in store, again happy to use cpl smokeless plus other lines.***

[191] Email dated 24 June 2010 at 13:07 from [Director E] (Fuel Express) to [Director B] (CPL) – [CMA Document Reference URN0131 and URN0132]. [Director E] used his Fuel Express Limited email account and signature when sending the email to [Director B].

[192] Email dated 24 June 2010 at 19:51 from [Director B] (CPL) to [Director E] (Fuel Express) – [CMA Document Reference URN0132].

> ***2 – Ref Focus , can you up date*** **[sic]** ***me soon as, looking to this account to replace the tonnage lost re Co-op last year. would*** [sic] ***use cpl smokeless.***
> ***3 – Co-op, no contact to date.***
> ***4 – Can you propose a date to get together to discuss accounts?'***[193] (emphasis added)

3.31. The CMA infers from the wording of the email that [Director E] had discussed at least the Tesco, Focus and Co-op accounts with [Director B] prior to sending his email. [Director E] starts his email dated 30 June 2010 with the statement '*with regards to our conversation*' and then refers in the second bullet to '*updating*' [Director E] about the Focus account. Likewise, the reference to Co-op in paragraph 3 is sufficiently limited that the CMA considers it must refer to a prior discussion between [Director E] and [Director B] about the account. The CMA therefore infers that [Director B] and [Director E] had already discussed at least these accounts before [Director E] sent [Director B] the pricing steer for the supply of charcoal to Tesco (in store).

3.32. The pricing steer is set out in the first paragraph of [Director E]'s email dated 30 June 2010. In it, [Director E] directed [Director B] to '*please quote above*' the prices set out in his email. The email also shows that [Director E] offered to use CPL's smokeless fuels and other lines for Tesco's (in store) winter range. (At the time, Fuel Express was supplying Tesco (in store) with solid fuel and charcoal products). The CMA considers that [Director E] provided [Director B] with the prices to assist CPL in designing a bid for Tesco that would be higher than that of Fuel Express and would thereby assist Fuel Express in retaining Tesco as a customer (while at the same time giving CPL an opportunity to supply Fuel Express with certain solid fuels).

3.33. In the second paragraph of his email, [Director E] suggests that Fuel Express be allowed to supply one of CPL's customers, Focus, to make up for Fuel Express having lost its contract to supply Co-op to CPL the previous

[193] Email dated 30 June 2010 at 14:27 from [Director E] (Fuel Express) to [Director B] (CPL) – [CMA Document Reference URN0043]. [Director E] used his Fuel Express email account and signature when he sent the email to [Director B].

year.[194] Again [Director E] offered, assumedly as an incentive to CPL, that Fuel Express would use CPL smokeless fuel for the Focus account.[195]

3.34. In the third paragraph of his email, [Director E] advised [Director B] that he had not had any contact to date from Co-op, suggesting that [Director E] and [Director B] had been discussing a potential approach to or from that customer.

3.35. [Director E] concludes his email by asking that [Director B] contact him to 'discuss [other customer] accounts'.

3.36. In summary, [Director E]'s email sets out the ways in which he was looking to CPL to help Fuel Express to assist it to retain one of its major customers, Tesco (in store), to compensate Fuel Express for the loss of another customer, and to discuss customers more generally, including in particular Co-op.

3.37. As it relates to Tesco (in store), the contemporaneous documentary evidence shows that about one hour after receiving the above email dated 30 June 2010[196] from [Director E] (Fuel Express), [Director B] (CPL) forwarded the email internally to [Director A] (CPL) with the subject line '[*Director E*] *and Tesco*', stating:

> '[*Director A*] *please* ***see below prices from* [*Director E*]** *plus other stuff. I have forwarded to you as* [*I*] *don't want* [*account manager*] [CPL] *to see the rest of the email*[.] ***Could you advise* [*account manager*]** [CPL] ***what prices to bid as below.*** *For eg we would be at 2.58 for 5kg briq using next season prices and our usual margin requirements*'[197] (emphasis added).

3.38. In the above cover email to [Director A], [Director B] expressly referred to the prices that [Director E] had provided to [Director B] and [Director B] asked that [Director A] advise a member of the CPL sales staff to bid in accordance

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[194] 'Customer List 2009-2010' dated 30 November 2017 – [CMA Document Reference URN1611]. See also attachment to CPL's response to specification 3 of the CMA's section 26 notice dated 3 May 2017, paragraph 20 – [CMA Document Reference URN1700] and Transcript of CMA interview with [Director B] dated 7 August 2017, pp24-25 – [CMA Document Reference URN1492].

[195] See also paragraph 3.40(ii) below.

[196] Email dated 30 June 2010 at 14:27 from [Director E] (Fuel Express) to [Director B] (CPL) – [CMA Document Reference URN0043].

[197] Email dated 30 June 2010 at 15:39 from [Director B] (CPL) to [Director A] (CPL) – [CMA Document Reference URN0043 and URN0134].

with those quotes, stating '*see below prices from* [*Director E*]*…Could you advise* [*account manager*] *what prices to bid as below*.'

3.39. The contemporaneous documentary evidence therefore shows that [Director B] took into account [Director E]'s request and the pricing information [Director E] had provided in his email dated 30 June 2010. The CMA considers that [Director B] sought to do so to assist [Director E] and Fuel Express to retain its pre-existing customer, Tesco (in store).

3.40. The contemporaneous documentary evidence set out above is corroborated in part by [Director B]:

(i) as it relates to the first paragraph of [Director E]'s email dated 30 June 2010, [Director B] explained that he considered that when [Director E] provided the price quotations to him he was providing a 'pricing steer' for Tesco;[198]

(ii) [Director B] explained that he understood that in the second paragraph of his email [Director E] was proposing that CPL assist Fuel Express by swapping Focus for the Co-op customer account that [Director E] had lost to CPL the year before, stating:

> '…[*W*]*hat I read into that* [ie '*Ref Focus, can you up date* [sic] *me as soon as, looking to this account to replace the tonnage lost re Co-op last year.* [*W*]*ould use cpl smokeless'*] *is that Co-op was an account that he* [Director E] *used to supply, that we tendered for in 2009 and won from him. So the previous year the Co-op was a* [*Director E*] *account...which we won off him. So what he's trying to imply here is, you won Co-op off me last year, I want Focus, which we supplied at the time…and we continued to supply by the way until they went into receivership…I want…Focus back because you pinched Co-op off me. That's what he's implying in this email…'*;[199] and

[198] Transcript of CMA interview with Mr [Director B] dated 7 August 2017, p34 – [CMA Document Reference URN1492] – ([Director B] (CPL) stated: 'As I said to you, I haven't solicited or asked for any pricing steering [sic] from [Director E], he put it in an email').

[199] Transcript of CMA interview with [Director B] dated 7 August 2017, pp24–25 – [CMA Document Reference URN1492]. See also Transcript of CMA interview with [Director A] dated 8 August 2017, p9 – [CMA Document Reference URN1494].

(iii) as it relates to the third paragraph, [Director B] explained that he understood that [Director E] was saying that '[*H*]*e'd lost Co-op…to us* [CPL] *in a* [sic] *open tender…the year before and he's saying he's not had any contact with them* [Co-op].'[200]

3.41. [Director B]'s evidence thus shows that (i) he understood that [Director E] had provided him with a pricing steer for CPL's bid to Tesco and (ii) that [Director E] had offered the pricing steer in a context in which he was also requesting CPL's assistance to help Fuel Express gain another customer, Focus, to compensate for the loss of its customer Co-op to CPL the previous year.

3.42. In summary, the CMA has found based on the contemporaneous documentary evidence and the witness evidence set out above that the Parties sought to assist each other in maintaining at least some of their pre-existing customer relationships and that further to this objective CPL – with the assistance of [Director E] – submitted a bid in response to an invitation to tender from Tesco that was designed to lose and thereby to assist Fuel Express to retain Tesco (in store) as a customer.

3.43. In their interviews, the witnesses put forward various reasons as to why they did not consider that the aforementioned contact between the Parties was anti-competitive. For the reasons set out below, the CMA does not accept these representations.

3.44. [Director E] (Fuel Express) stated that according to his best recollection in his email dated 30 June 2010 he had provided an indication on price to CPL, but that he had done so to determine whether a joint venture between the Parties to supply Tesco with charcoal was worthwhile.[201] The CMA considers, however, that [Director E]'s assertion is contradicted by the contemporaneous documentary evidence, as well as the witness evidence of [Director B] (CPL), who understood that by his email dated 30 June 2010 [Director E] was providing CPL with a pricing steer in relation to its bid for Tesco, rather than seeking to further joint venture discussions. The CMA does not therefore accept [Director E]'s explanation.

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[200] Transcript of CMA interview with [Director B] dated 7 August 2017, p28 – [CMA Document Reference URN1492].

[201] Transcript of CMA interview with [Director E] dated 22 August 2017, p16 – [CMA Document Reference URN1490]. See also Witness Statement of [Director E] dated 8 September 2017, paragraph 80 – [CMA Document Reference URN0134].

3.45. [Director E] also stated that according to his best recollection when he referred to the Focus and Co-op accounts in the second paragraph of his email dated 30 June 2010 he was trying to find out whether CPL intended to quote for the Focus and Co-op accounts.[202] Based on the wording of the email and the witness evidence of [Director B] (who understood that [Director E] was offering to switch accounts), the CMA considers that [Director E] was not simply intending to find out his competitor's intentions, but was actively seeking CPL's assistance to make up for the loss of a pre-existing customer.

3.46. In his interview evidence, [Director B] (CPL) asserted that the contact between the Parties was not anti-competitive because (i) the 30 June 2010 email from [Director E] (Fuel Express) was unsolicited and (ii) in any event CPL intended to bid at its normal margin requirements because it did not want to win the bid. [Director B] said that this was because, as [Director E] was aware, CPL was unable to supply the customer at the time.[203] [Director B] also stated that CPL intended to submit a bid even though it did not intend to win because it did not want to compromise its ability to bid for the customer in the future.[204] [Director B] added that CPL therefore intended to bid non-aggressively and thus at its normal margin requirements, which is what [Director B] asserts he intended by his internal email to [Director A] (CPL).[205]

3.47. In his evidence, [Director A] (CPL) similarly explained that CPL had adopted a strategic policy three years previously that it would not bid competitively for the major charcoal accounts (such as Tesco) and that for these accounts it would price in its 'normal' way.[206] [Director A] explained that the reason CPL would have bid for Tesco was because of its existing relationship with Tesco and so that CPL could position itself should it wish to bid for the customer at some time in the future. [Director A] explained:

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[202] Transcript of CMA interview with [Director E] dated 22 August 2017, p18 – [CMA Document Reference URN1490].

[203] Transcript of CMA interview with [Director B] dated 7 August 2017, p21 – [CMA Document Reference URN1492].

[204] When asked whether CPL had ever lost an account because it did not submit a tender in response to a customer's invitation, [Director B] was unable to provide any specific examples where this had occurred. See Transcript of CMA interview with [Director B] dated 7 August 2017, pp20-21 – [CMA Document Reference URN1492].

[205] Transcript of CMA interview with [Director B] dated 7 August 2017, pp18-21 and pp30-34 – [CMA Document Reference URN1492].

[206] Transcript of CMA interview with [Director A] dated 8 August 2017, pp6-8 and 10 – [CMA Document Reference URN1494].

> '*I mean Tesco was still a, you know would still hold, we still held and still do hold the forecourt…supply to Tesco forecourts, so Tesco is a major customer by anybody's standards so you, you don't want to just no* [sic] *bid and mess…Tesco about. So we, we would have bid at the higher levels that* [Director B] *indicates briefly in his…email to me in the reasonable knowledge that…won't be a winning bid.*'[207]

3.48. Notwithstanding [Director A]'s claim that CPL had, at the relevant time, taken a strategic decision not to bid competitively for major charcoal accounts for in-store supply, the documentary evidence and in particular the email from [procurement officer] (CPL) shows that CPL was actively seeking quotations for the supply of charcoal from Carbo BV for Tesco.[208] The CMA is not persuaded therefore that CPL was not actively considering supplying charcoal for Tesco (in store). In any event, even if CPL had taken a strategic decision not to compete aggressively for the supply of charcoal to Tesco, this would not undermine the CMA's finding that the Parties coordinated their responses to Tesco's invitation to tender prior to CPL submitting its bid so as to assist Fuel Express to retain its customer. Furthermore, as a result of the Parties' conduct, the customer Tesco (in store) was ultimately misled as to the source and extent of competition.

3.49. The CMA is also not persuaded by [Director B]'s (CPL) explanation as to why his email advising [Director A] of the proposed bid referred expressly to [Director E]'s (Fuel Express) email if his intention was to bid at CPL's normal margin requirements. On this issue, [Director B] stated:

> *'Okay, well that's,… just the wording I've used in an email. As I said to you, I haven't solicited or asked for any pricing steer from* [*Director E*]*, he put it in an email…I can't, there's nothing much I can do about that but what I'm trying to suggest to* [*Director A*] *or what I'm trying to advise* [*Director A*] *is if we quoted our normal margin requirements, we would be 2*[.]*58 for briquettes and I think that's exactly what we did. We bid at our normal requirements for that account.*'[209]

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[207] Transcript of CMA interview with [Director A] dated 8 August 2017, p7 – [CMA Document Reference URN1494].

[208] Email dated 21 June 2010 at 15:30 (+01.00) from [representative] (Carbo BV) to [Director E] – [CMA Document Reference URN0429].

[209] Transcript of CMA interview with [Director B] dated 7 August 2017, p34 – [CMA Document Reference URN1492].

3.50. The CMA also does not accept that the email from [Director E] (Fuel Express) was unsolicited. [Director E]'s email dated 30 June 2010 shows that he provided the prices to [Director B] further to a conversation they had had about Tesco charcoal. Further, the wording of [Director B]'s internal email to [Director A] shows that [Director B] took the prices that [Director E] had provided to him into account in designing CPL's losing bid for Tesco.

3.51. [Director B] (CPL) also said that he considered that [Director E]'s (Fuel Express) offer to swap customer accounts was 'not appropriate' and that as a matter of fact the Parties did not swap the Focus and Co-op accounts.[210] [Director B] said that he believed he contacted [Director E] by phone to tell him that he thought the proposed swap was 'inappropriate', albeit that this is unsupported by other evidence.[211] While the CMA acknowledges that the Parties did not, in fact, swap accounts further to [Director E]'s offer, it does not accept as credible [Director B]'s claim that the Parties had not discussed these accounts prior to [Director E]'s 30 June 2010 email given the terms of the email itself.

3.52. Based on the above, the CMA therefore considers that CPL did not act independently in submitting its bid for Tesco for the supply of charcoal for sale in its stores in this instance, but deliberately designed its losing bid following and further to the request it received from [Director E] in order to assist Fuel Express to retain Tesco (in store) as a customer. The CMA notes that Fuel Express ultimately did retain the customer following the bid and for the entirety of the Relevant Period.

3.53. Further, as set out in the following sections, the CMA considers that Fuel Express returned CPL's 'favour' by subsequently assisting it to retain its pre-existing major national forecourt customers such as Tesco and Sainsbury's.

Fuel Express' relationship with Tesco

3.54. The CMA considers that when [Director E] sought CPL's assistance in relation to the customer Tesco for the supply of charcoal to its stores he did so on behalf of and having regard to the interests of each of Fuel Express Limited, Bagnalls and Carbo UK.

[210] Transcript of CMA interview with [Director B] dated 7 August 2017, p25 – [CMA Document Reference URN1492].

[211] Transcript of CMA interview with [Director B] dated 7 August 2017, p26 – [CMA Document Reference URN1492].

3.55. As set out above, in his witness evidence, [Director E] explained that during the Relevant Period he was doing business through all three entities and that he exercised his discretion as to how he would use each one of them to supply a given customer, stating:

> '*By this time, I was doing business through three companies: Bagnalls, Carbo and FEL* [Fuel Express Limited]*. I would be trying to maintain and expand all three businesses by approaching potential customers. Depending on the customers' requirements and the amount of business involved I would decide which company to put the business through*'.[212]

3.56. Consistent with the above and based on the evidence set out at paragraphs 3.57 to 3.63 below, the CMA considers that Fuel Express Limited, Bagnalls and Carbo (UK) each had an interest in the Tesco (in store) contract and that in seeking CPL's assistance [Director E] was acting in the shared interest of all three companies.

3.57. In particular, the majority of sales of charcoal to Tesco were made by Carbo UK which at the time was managed by Bagnalls for a fee.

3.58. Further, where Carbo UK was unable to supply Tesco, Bagnalls on occasion directly supplied charcoal to Tesco for sale in its stores. [Director E] explained Bagnalls' relationship with Tesco as follows:

> '*There were times while CBV* [Carbo BV] *was still involved with Carbo when we could not supply Tesco with all its charcoal requirements. Because of my involvement with Tesco I would sometimes supply their additional requirements via Bagnalls. At that time Bagnalls bought charcoal partly from CBV and partly from another supplier in Spain*[213] *but we were only in a small way of business at that time and so Bagnalls did not do very much business with Tesco*.'[214]

3.59. [Director E] also used the fact that Carbo UK held the Tesco (in store) account for the supply of charcoal to try and sell winter fuel (and thus solid

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[212] Witness Statement of [Director E] dated 8 September 2017, paragraph 37 – [CMA Document Reference URN1498].

[213] The CMA notes that [Director E] has stated separately that Diamond Fuel Supplies Limited also supplied Bagnalls with charcoal during the Relevant Period – see attachment to Bagnalls' response dated 7 December to the CMA's information request dated 7 December 2017 – [CMA Document Reference URN1614].

[214] Witness Statement of [Director E] dated 8 September 2017, paragraph 33 – [CMA Document Reference URN1498].

fuel) products to Tesco (in store) through Bagnalls, which Bagnalls was successful in doing from time to time.[215]

3.60. Bagnalls and Carbo (UK) therefore had a shared direct financial interest in limiting competition from CPL in relation to the supply of charcoal to Tesco for sale in its stores.

3.61. In addition to the direct financial benefit to Bagnalls and Carbo (UK) from co-operating with CPL as set out above, in seeking CPL's assistance in relation to the supply of charcoal to Tesco for its stores, the CMA considers that [Director E] also had regard to the interests of Fuel Express Limited.

3.62. Fuel Express Limited (through Bagnalls) supplied Tesco with relevant solid fuel and/or charcoal products for sale during the Relevant Period.[216] It therefore had a direct financial interest in the Tesco contract and, in particular, in protecting its business with Tesco by limiting CPL's relationship with that customer. Moreover, at the same time that [Director E] (in his email of 30 June 2010) asked CPL to quote above certain prices for charcoal for Tesco (in-store) he offered to use CPL product as part of the Tesco winter range of solid fuels (at a time when Fuel Express supplied Tesco).

3.63. The CMA also notes that when [Director E] communicated with CPL on the two occasions described above, [Director E] used his Fuel Express Limited email and signature. In the case of the email dated 30 June 2010, he also forwarded the email to [Director D]'s Fuel Express Limited email address.

3.64. Based on the above, the CMA considers that when [Director E] sought the assistance of CPL in relation to the Tesco (in store) charcoal contract, he did so on behalf of and having had regard to the interests of all three entities with the aim, among other things, of maintaining their pre-existing relationship with Tesco.

3.65. In any event, as set out at paragraphs 5.37 to 5.49 below, the CMA considers that Fuel Express Limited, Bagnalls, Carbo UK and Grosvenors form one undertaking for the purpose of the Act. Accordingly, it is not necessary for the CMA to determine on whose behalf out of these entities [Director E] was acting when he sought CPL's assistance to, among other things, '*quote above*' the prices he had provided to CPL. The CMA therefore

[215] Witness Statement of [Director E] dated 8 September 2017, paragraph 47 – [CMA Document Reference URN1498].

[216] Fuel Express Limited's response dated 30 November 2017 to the CMA's information request dated 23 November 2017, customer list for 2010-2011 – [CMA Document Reference URN1612].

concludes that Fuel Express (as a single undertaking) sought CPL's assistance in relation to Tesco for the supply of charcoal to assist it in maintaining its pre-existing relationship with Tesco (in store).

Sainsbury's forecourts

3.66. Sainsbury's purchases solid fuel and charcoal for sales in its petrol station forecourts separately from its purchase of these products for sale in store. Sainsbury's was one of CPL's major national petrol forecourt customers.[217] Beginning in 2008 and throughout the Relevant Period, CPL had supplied Sainsbury's with solid fuel and charcoal products for sale in its petrol station forecourts.[218]

3.67. The contemporaneous documentary evidence and witness evidence set out below shows that shortly after the Tesco (in store) conduct described above and against a background of on-going discussions between the Parties about the possibility of establishing closer trading relationships with each other, the Parties similarly co-ordinated their response to an invitation to tender from Sainsbury's forecourts. In this case, however, it was Fuel Express that received a 'pricing steer' from CPL. In accordance with this pricing steer and as a 'favour' to CPL, Fuel Express submitted a bid that was designed to lose in response to an invitation to tender from Sainsbury's forecourts. Fuel Express designed its bid with a view to losing so as to assist CPL in maintaining its pre-existing relationship with the customer.

3.68. On Friday 30 July 2010 at 16:46 [buyer] (Sainsbury's) sent an invitation to tender to [Director D] (Fuel Express), stating:

> '[*I*] *wanted to see if you were interested in tendering for the winter bulk fuels for Sainsbury's. I can send you the full details when I'm back on the 9th August if so*.'[219]

3.69. The contemporaneous documentary evidence shows that [Director D] subsequently spoke to [Director B] (CPL) about the Sainsbury's forecourt account. On 2 August 2010 at 15:04 [Director B] sent [Director D] an email

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[217] CPL's response dated 30 November 2017 ('Letter to CMA – turnover data') to the CMA's information request dated 23 November 2017 – [CMA Document Reference URN1607].

[218] CPL's response to the specification 3 of the CMA's section 26 notice dated 3 May 2017, paragraphs 16 and 17 – [CMA Document Reference URN1700].

[219] Email dated 30 July 2010 at 16:46 from [buyer] (Sainsbury's) to [Director D] (Fuel Express) – [CMA Document Reference URN0433].

with the subject line '[*t*]*hat account you spoke about on Friday*'.[220] In his email, [Director B] listed the following solid fuel products and prices:

> '*H/Coal 10kg £2.30*
> *H/Coal 20kg £4.45*
> *Smokeless 10kg £3.00*
> *Smokeless 20kg £5.80*
> *Anth 25kg £7.20*
> *Logs £2.25*
> *Heat Logs £2.95*
> *Kindling £2.10*
> *Firelighters 1x24 £12.00*
> *Paraffin £18.00*
> *Firelog 1x10 £15.00*'[221]

3.70. Later that day at 20:13, [Director D] replied to [buyer] (Sainsbury's) stating the he was interested in tendering for the winter business and added: '*As soon as I receive the information I will get our tender back to you.*'[222]

3.71. In an email dated 5 August 2010 at 23:49, [Director D] forwarded the above email dated 2 August 2010 from [Director B] internally to [Director E] (Fuel Express), stating: *'Below are the prices* [*Director B*] [CPL] *wants me to quote Sainsburys* [sic]*. He is obviously getting less….*[sic] *no wonder he makes no money!*'[223]

3.72. In an email dated 11 August 2010 at 17:32, [buyer] (Sainsbury's) replied to [Director D] (Fuel Express) with further details relating to the tender, stating:

> '*Hi* [*Director D*]*, Please see tender spreadsheet attached. Quote should be for the delivered price from September to April and include the production of scan cards for our sites to make it easier*

[220] The CMA considers that this is most likely a reference to the previous Friday 30 July 2010, which is the same day that Fuel Express received the Sainsbury's tender request described above.
[221] Email dated 2 August 2010 at 15:04 from [Director B] (CPL) to [Director D] (Fuel Express) – [CMA Document Reference URN0431].
[222] Email dated 2 August 2010 at 20:13 from [Director D] (Fuel Express) to [buyer] (Sainsbury's) – [CMA Document Reference URN0433].
[223] Email dated 5 August 2010 at 23:49 from [Director D] (Fuel Express) to [Director E] (Fuel Express) – [CMA Document Reference URN0468].

from them to process transactions. If you could get back to me by Friday that would be great.'[224]

3.73. On 12 August 2010 at 20:32, [Director D] replied to [buyer] and submitted Fuel Express's bid, stating: '*Hi* [*buyer*]*,* [*a*]*ttached prices. If you would like to discuss further please contact me.*'[225]

3.74. On 1 October 2010 at 19:19 [Director D] forwarded the above correspondence with [buyer] to [Director E], stating: *'Attached what Graeme* [Director B] *told me to quote, I guess he is at least 10% less.*'[226] [Director D]'s email attached a document titled '*Pricelist Prepared for Sainsbury's for the supply of Winter Domestic Fuels direct to the Sainsbury's PFS* [petrol filling station, i.e. forecourts] *network*' which contained Fuel Express' prices for its Sainsbury's bid.[227] These prices matched the prices that [Director B] had previously provided to [Director D] in his email dated 2 August 2010.[228]

3.75. The contemporaneous documentary evidence set out above shows that Fuel Express received a pricing steer from CPL and that Fuel Express – with CPL's assistance — deliberately submitted a high bid that was designed to lose. In so doing, Fuel Express assisted CPL in maintaining its pre-existing customer relationship with Sainsbury's forecourts.

3.76. Further, the contemporaneous documentary evidence shows that the Parties continued to collude in respect of the bids they submitted for Sainsbury's until at least February 2011.

3.77. On 15 February 2011 at 14:05, [Director D] sent an internal email titled '*Re: prices*' to [Director E] in which he referred to the fact that he received prices from [Director B] in relation to a bid for Sainsbury's forecourt, stating:[229]

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[224] Email dated 11 August 2010 at 17:32 from [buyer] (Sainsbury's) to [Director D] (Fuel Express) – [CMA Document Reference URN0433].

[225] Email dated 12 August 2010 at 20:32 from [Director D] (Fuel Express) to [buyer] (Sainsbury's) – [CMA Document Reference URN0433].

[226] Email dated 1 October 2010 at 19:19 from [Director D] (Fuel Express) to [Director E] (Fuel Express) – [CMA Document Reference URN0433].

[227] See email dated 1 October 2010 at 19:19 from [Director D] (Fuel Express) to [Director E] (Fuel Express) – [CMA Document Reference URN0433 and attachment at URN0463]. Attachment name in URN0433 is 'Sainsbury's Winter Price List 2010-11.xls'.

[228] See email dated 2 August 2010 at 15:04 from [Director B] (CPL) to [Director D] (Fuel Express) – [CMA Document Reference URN0431].

[229] This email was sent as a reply to an email dated 25 January 2011 at 10:40 from [Director E] (Fuel Express) to [employee], [director], [Director D] and [director] (all Fuel Express) – [CMA Document Reference URN0434], which related to various matters, including container and transport prices for certain charcoal products.

'*Hi* [*Director E*]*,*

Working on prices……although will finalize [sic] *with you Friday pm……*

What will ex Oxford prices be please? (bold font removed)

I will send an e mail from [***Director B***] [CPL] ***yesterday with what he is going to Sainsburys at and the other column is the rest! (prices up….at last!)***'[230] (emphasis added)

What is the lag time on a 2kg Instant light please for me?'

3.78. The CMA infers that consistent with his past conduct, [Director B] continued to provide [Director D] with the prices that CPL wanted Fuel Express to quote to Sainsbury's forecourts in response to ongoing tendering processes for that customer. The purpose of this information was for Fuel Express to continue to submit bids that were designed to lose and that would thereby assist CPL in retaining Sainsbury's forecourts as a pre-existing customer.

3.79. The contemporaneous documentary evidence set out above is corroborated, in part, by the witness evidence of [Director B] (CPL) and [Director D] (Fuel Express). In his witness evidence, [Director B] (CPL) explained that according to his best recollection in his email dated 2 August 2010 he had provided a 'pricing steer' for Sainsbury's forecourt to [Director D]. He explained that he provided the pricing steer to assist Fuel Express, stating:

'*Yeah, it's it's* [Sainsbury's forecourt] *obviously an account that he'd* [Director D] *rang me up about and didn't want to win at that time, or didn't want to bid for.*

…[*T*]*his is not normal practice I have to say. At that time, we were as I said earlier, discussing the sale of our Essington depot…to GN Grosvenor Limited. So I guess at that time there was an account that he didn't want, he didn't want to upset us, so he's asked me for a steer on pricing which I provided him with...'*

3.80. When asked why [Director D] (CPL) would have asked for a pricing steer, [Director B] (CPL) replied:

[230] Email dated 25 January 2011 at 14:05 from [Director D] (Fuel Express) to [Director E] (Fuel Express) – [CMA Document Reference URN0434]. The CMA infers that [Director D]'s reference to 'prices up….at last' is a comment about the increase in the CPL prices contained in the email from CPL.

'…To ensure he didn't win it [Sainsbury's forecourt]*.'*

3.81. [Director B] added:

> *'…Yeah he could* [sic]*, it's naïve, stupid. He shouldn't have done…what I should have just said was if you don't want to win the account, bid, bid high. You know where high is, just do it, but I didn't*…
>
> *…I guess in the bigger discussions that were going on, it's too cooperative.'*[231]

3.82. In his evidence, [Director D] similarly explained that in the context of negotiations that Bagnalls and Grosvenors were having with CPL at this time '*we got too comfortable with CPL in that period*'.[232] He explained that as it related to the 2 August 2010 email from [Director B], while Fuel Express did not want to win the Sainsbury's forecourt account, Fuel Express submitted a bid for the customer at the prices that CPL requested as a 'favour' to CPL, stating:

> '… *I can't remember if* [Director B] *instigated or I instigated it or why we spoke…because we would have been speaking regularly about the Essington Depot, and also I was in talks to supply them* [*supplier product*] *as well…*[*S*]*o at that time those are the prices* [*Director B*] *wanted me to submit to Sainsbury's, we'd spoken about Sainsbury's I said to him we are not quoting Sainsbury's we don't want Sainsbury's* [because of [✂][233]]…[*H*]*e* [Director B] *obviously would have then said to me would you do me a favour, would you submit these prices to Sainsbury's…so basically I submitted those prices to Sainsbury's at the request of CPL, but I never wanted the account, Fuel Express didn't want the account…I did that with the knowledge of my other Directors* [including [Director E]]...'[234]

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[231] Transcript of CMA interview with [Director B] dated 7 August 2017, pp35-37 – [CMA Document Reference URN1492].

[232] Transcript of CMA interview with [Director D] dated 22 August 2017, p9 – [CMA Document Reference URN1491].

[233] Transcript of CMA interview with [Director D] dated 22 August 2017 pp9-10 – [CMA Document Reference URN1491].

[234] Transcript of CMA interview with [Director D] dated 22 August 2017, pp10–11 – [CMA Document Reference URN1491].

3.83. In his interview, [Director D] admitted that he had done something wrong in relation to the customer by doing CPL a 'favour', stating:

> '[*T*]*hat's the only thing* [referring to the customer Sainsbury's in 2010 and the July bid that Fuel Express submitted to the customer] *in 2010 where CPL and Fuel Express or Grosvenors have ever done anything wrong…it was only that period where we cuddled up too close because of us wanting the depot out of them, and we did them a favour.*'[235]

3.84. [Director E] similarly explained that Fuel Express submitted the bid as a favour to CPL and because of the potential financial benefit it would provide to Fuel Express in the context of the Parties' commercial negotiations, stating:

> '*It was during that period in 2010 that Grosvenors were invited by CPL to quote for some business at Sainsbury's at prices given by CPL. Grosvenors and FEL* [Fuel Express Limited] *had* [✂] *Sainsbury's by this point and had really stopped doing business with them.* [✂].
>
> [*Director D*] *copied me and the other two directors in on his emails with CPL and we discussed the matter and, reluctantly, agreed that, particularly in light of our various negotiations with CPL at the time, there was a potential longer term business advantage in being seen by CPL to be helpful at that time. The issue of a quote in the name of FEL to Sainsbury's was therefore approved…*
>
> *The Sainsbury's situation was a one-off which arose out of my and* [*Director D*]*'s attitude towards CPL at that particular time in light of the charcoal joint venture and the depot negotiations.*'[236]

3.85. Based on contemporaneous documentary evidence and the witness evidence set out above, the CMA considers that further to [Director B]'s email dated 2 August 2010 CPL provided a pricing steer to Fuel Express to assist Fuel Express in designing a bid that was intended to lose. The CMA further considers that Fuel Express submitted the bid that was designed to lose as a 'favour' to CPL to assist it in retaining Sainsbury's forecourt as an

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[235] Transcript of CMA interview with [Director D] dated 22 August 2017, p12 – [CMA Document Reference URN1491]. See also Witness Statement of [Director D] dated 8 September 2017, paragraph 62 – [CMA Document Reference URN1496].

[236] Witness Statement of [Director E] dated 8 September 2017 at paragraphs 71, 72 and 74 – [CMA Document Reference URN1498].

existing customer. As noted above, both [Director D] and [Director E] considered that by submitting a bid of this nature they would be doing CPL a 'favour' and [Director D] confirmed that he understood that what the Parties were doing was 'wrong'. [Director B] also acknowledged that the reason he had provided a pricing steer to Fuel Express was to '*ensure that he* [Director D] *did not win*' the bid. Additionally, all three witnesses accepted that the pricing steer was provided in a context where the Parties were seeking to establish closer trading relationships with another and thus wanted to be '*helpful*', '*were too co-operative*' and '*cuddled up too close*'.[237] The evidence therefore demonstrates that in addition to Tesco (in store for the supply of charcoal), the Parties also colluded with respect to Sainsbury's forecourt in July 2010 and that they continued to collude with respect to the customer until at least February 2011.

3.86. In their evidence, the witnesses put forward explanations that were intended to diminish the significance of the Parties' conduct in relation to Sainsbury's forecourt. For the reasons set out below, the CMA does not accept these representations.

3.87. In his evidence [Director D] asserted that Fuel Express did not want to win the Sainsbury's business at this time because of previous [✂].[238] However, neither Fuel Express nor [Director D] has been able to provide any documentary evidence that directly supports this contention. Moreover and notwithstanding Fuel Express's contention that it did not submit a bid in 2008 and 2009 for the customer, the CMA notes that it did additionally quote for the contract to supply Sainsbury forecourts in August 2011 (for winter fuels 2011-12) and in March and September 2012 (for summer fuels 2012 and winter fuels 2012-13, respectively).[239] The CMA is not persuaded therefore that Fuel Express was not, as a general matter, interested in expanding its business through Sainsbury's. In any event, even if true, this would not undermine the CMA's finding that prior to Fuel Express submitting its bid the Parties coordinated their responses to Sainsbury's invitation to tender so as to assist CPL in retaining its customer. Moreover, as a result of the Parties'

[237] Transcript of CMA interview with [Director D] dated 22 August 2017, p12 – [CMA Document Reference URN1491].

[238] Transcript of CMA interview with [Director D] dated 22 August 2017, pp7-10 – [CMA Document Reference URN1491].

[239] Fuel Express' response dated 6 February 2018 to the CMA's information request dated 2 February 2018 - [CMA Document Reference URN1898].

conduct the customer Sainsbury's was ultimately misled as to the source and extent of competition.

3.88. In his evidence [Director E] submitted that Fuel Express did not know the final bid that CPL (presumably) put into Sainsbury's in response to the customer's July 2010 invitation to tender. [Director E] also asserted that as far as he was aware there were others in the market. However, [Director E] was not able to specify who those other competitors were who bid for Sainsbury's forecourts in response to the customer's invitation to tender.[240] In any event, whether or not there were other competitors who bid does not undermine the CMA's finding that Fuel Express did not act independently in submitting its bid for Sainsbury's, but deliberately designed its bid following a 'pricing steer' from CPL and as a 'favour' to it in order to assist CPL to retain Sainsbury's forecourts.

3.89. Notwithstanding the above, both [Director D] and [Director E] (as set out above) accepted that they had colluded with CPL in relation to the ongoing tendering process for Sainsbury's forecourts in 2010, but asserted that the Sainsbury's conduct was a 'one off' incident. Based on the evidence set out in paragraphs 3.91 to 3.106, the CMA does not accept that the Parties engaged in an anti-competitive arrangement only in relation to Sainsbury's forecourts or that that conduct was limited to 2010. Rather, the evidence shows that the Parties continued to collude with respect to the customer in 2011.

3.90. The evidence also shows that the Parties followed the same pattern of conduct for Tesco (in store) as they did for Sainsbury's. That is, the existing supplier requested the other Party to submit a bid that was designed to lose, provided pricing information to assist them in doing so, and the other Party then took that information into account in submitting its own losing bid. Furthermore, as set out below, there is specific evidence that the Parties colluded with respect to Tesco, another national forecourt customer that was an existing CPL customer, by exchanging confidential and commercially sensitive pricing information.

Tesco forecourts

3.91. Like Sainsbury's forecourts, Tesco was an existing customer of CPL for the sale of solid fuel and charcoal to its petrol forecourt stations ('**Tesco's**

[240] Witness Statement of [Director E] dated 8 September 2017, paragraph 73 – [CMA Document Reference URN1498].

forecourts') and another of its major national forecourt customers.[241] In particular, CPL had supplied Tesco's forecourts with solid fuel and charcoal prior to and throughout the Relevant Period.[242]

3.92. The contemporaneous documentary evidence shows that at around the same time as the Parties engaged in anti-competitive conduct in relation to Tesco's (in store for charcoal) and Sainsbury's forecourts, they also exchanged confidential and commercially sensitive pricing information in the context of an ongoing tender process for Tesco's forecourts. In particular, Fuel Express provided CPL with the pricing information relating to its joint bid with one of CPL's competitors (Standard Brands) for this Tesco tender.

3.93. On 17 November 2010 at 7:09 CPL's competitor, [employee] (a sales representative for Standard Brands), sent an email to [Director E] (Fuel Express), copying [Director D] (Fuel Express). [Employee]'s email was sent with the subject line: '*Cost proposals for the Tesco Forecourt business*' and stated the following:

> '*As discussed, please find attached the cost proposals. The delivered costs for a full customer service package is based on notional customer margins (somewhere between the advice you gave me and our own market intelligence) with suggested RSP's which make sense for Standard Brands. Clearly until I've got feedback from Tesco I will not know exactly how these costs compare to their expectations, therefore inevitably there will be some fine-tuning required. … Please can you send me your comments by this afternoon, including if these costs are acceptable, if not what costs would be acceptable, so I can review the cost model ahead of my meeting with Tesco tomorrow. My expectation is that we could secure the full national listing (excluding Scotland at this stage, though we may need a solution to get the full nationwide listing status), therefore the volumes could be interesting*.'[243]

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[241] Attachment to CPL's response dated 30 November 2017 ('Letter to the CMA – turnover data') to the CMA's information request dated 23 November 2017 – [CMA Document Reference URN1607].

[242] Transcript of CMA interview with [Director A] dated 8 August 2017, p7 – [CMA Document Reference URN1494]. See also attachment to CPL's response dated 30 November 2017 to the CMA's information request dated 23 November 2017 – [CMA Document Reference URN1607].

[243] Email dated 17 November 2010 at 7:09 from [employee] (Standard Brands) to [Director E] (Fuel Express) – [CMA Document Reference URN0044 and URN0569].

3.94. [Employee]'s email also contained two attachments: (i) a table titled '*Fuel Express Commercials Proposals from Stanrad* [sic] *Brands, 17th Nov*,' which lists Fuel Express and Standard Brands' charcoal products and their prices, and (ii) a table titled '*Zip Branded Packaging*', which contained Standard Brands' pricing information for various solid fuel and charcoal products.[244]

3.95. In his interview, [Director E] explained that Standard Brands had sent the cost proposal to [Director E] because they wanted to include Fuel Express products in their bid, stating:

> '*This is an email from* [*employee*]*…he's* [*employee*] *for Standard Brands. And Standard Brands they supply the Zip branded fire lighters and they got… I believe they got an opening to put some products onto Tesco's forecourts…*[*A*]*nd they asked us…but, they had to put a range of products in, their products, but they needed some of Fuel Express' products to go. And that's basically we supply as in…on these price lists we were supplying some products in Fuel Express packaging and they were supplying products in the Zip. And this is basically the prices we were coming to, to do that work for them. They held the account, we would have supplied, supplying the product and…and we ended up doing…delivering the products on a trial in this…in the south…but that's what that's about.'*[245]

3.96. On the same day at 15:11 [Director E] forwarded the above email from [employee] (Standard Brands) to which [Director D] had already been copied to [Director D] directly.[246] In his witness evidence, [Director E] explained that he did so because:

> '*if it was going to be…Fuel Express doing the distribution then obviously he* [Director D] *needed to OK that,* [and] *that he* [Director D] *was happy with the prices to do the job. Because at that point probably didn't know where…the trial was going to be*…'[247]

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[244] CMA Document Reference URN0044, URN0570 and URN0571.

[245] See Transcript of CMA interview with [Director E] dated 22 August 2017, p29 – [CMA Document Reference URN1490].

[246] Email dated 17 November 2010 at 15:11 from [Director E] (Fuel Express) to [Director D] (Fuel Express) – [CMA Document Reference URN0044 and URN0569].

[247] Transcript of CMA interview with [Director E] dated 7 August 2017, p31 – [CMA Document Reference URN1490].

3.97. The next day at 15:50, which was the same day that [employee] planned to meet with Tesco, [Director D] forwarded the email chain containing [employee]'s (Standard Brands) cost proposal for the Tesco forecourt business to [Director B] (CPL) at his personal email address.[248]

3.98. The following day at 14:47 [Director B] forwarded the aforementioned email chain from [Director D], which contained [employee]'s (Standard Brands) cost proposal for the Tesco forecourt business, internally to [Director A] ([Senior Employee] of CPL at the time), copying [director] ([Senior Employee], CPL).

3.99. In the covering email to [Director A] and [Senior Employee, CPL], [Director B] referred to the 'highly confidential' pricing information that [Director D] had sent to him, stating:

> '[*Director A*] *please see below and attached for your info.*
>
> *Basically* ***this is highly confidential and we are not supposed to know about it but*** [*Director E*] *has been in discussion with ZIP (Standard Brands) and has quoted prices as attached for delivery to forecourts and other full pallet and 50 mixed customers for Winter and Summer fuels.*
>
> ***ZIP plan to attack CPL's forecourt customers using F/EX as delivery agent.***
>
> ***E.g. ZIP have quoted Tesco forecourt for Summer Charcoal 2011. (We have quoted below the attached prices)'*** (emphasis added).[249]

3.100. The contemporaneous documentary evidence shows therefore that [Director B] considered that the information that Fuel Express provided to him was '*highly confidential*' and that based on this pricing information [Director B] had determined that one of its competitors was going to use Fuel Express as a delivery agent to 'attack' CPL's forecourt customers for winter and summer fuels. In his email, [Director B] also advised [Director A] and [Senior Employee, CPL] based on the pricing information contained in its

[248] Email dated 18 November 2010 at 15:50 from [Director D] (Fuel Express) to [Director B] (CPL). On 20 November 2010 at 16:38 [Director B] (CPL) forwarded this email from his personal email address to his CPL work account – [CMA Document References URN0044 and URN0569].

[249] Email dated 22 November 2010 at 14:47 from [Director B] (CPL) to [Director A] (CPL) – [CMA Document Reference URN0044 and URN0569].

competitor's cost proposal that CPL's bid for Tesco forecourts for summer charcoal in 2011 was below its competitor's.

3.101. The contemporaneous documentary evidence set out above is corroborated in part by the witness evidence of [Director D] and [Director B].

3.102. In his interview, [Director D] (Fuel Express) explained that he sent the pricing information to [Director B] (CPL) because he thought the bid '*was a dead duck*'[250] and because he stood to gain financially from it, stating:

> '*Just letting him know what's going on there, creeping, trying to pretend I know everything, trying to let him know that I know everything that goes on in the coal trade…it's harder for him to get more money from me….So if he* [[Director B] (CPL)] *thinks that I know absolutely everything in the coal trade that* [*Director D*] *knows everything, he knows what people, everybody else is charging, that I then get the possible best deal for myself.'*[251]

3.103. In his interview, [Director B] explained that he understood that [Director D] had sent him Standard Brand's proposal to advise CPL that Bagnalls was intending to compete against CPL for the Tesco forecourt business, stating:

(i) *'I think it looks as if* [*Director E*] *is trying to partner with Zip or Standard Brands to supply them with charcoal in their own packaging, in Zip packaging, to compete against CPL for the Tesco forecourt business;'*[252] and

(ii) '[*I*]*t's…*[*Director D*] *trying to give us the heads up that* [*Director E*] *is… trying to do a charcoal deal with Zip to enter the charcoal market*.'[253]

3.104. [Director B] further explained that in response to the email from [Director D] he sent an internal email to [Director A] and [Senior Employee, CPL] to

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[250] Transcript of CMA interview with [Director D] dated 22 August 2017, p21 – [CMA Document Reference URN1491]. ([Director D] added that he was not sure why he forwarded to [Director B] (CPL)'s personal email address other than that he had [Director B] (CPL)'s personal email address because he had known [Director B] (CPL) since he started in the coal trade).

[251] Transcript of CMA interview with [Director D] dated 22 August 2017, p24 – [CMA Document Reference URN1491].

[252] Transcript of CMA interview with [Director B] dated 7 August 2017, p53 – [CMA Document Reference URN1492].

[253] Transcript of CMA interview with [Director B] dated 7 August 2017, p55 – [CMA Document Reference URN1492].

advise them of Zip (Standard Brand)'s planned attack on CPL forecourts, stating in relation to his email and the 'highly confidential' pricing information it contained:

(i) *'It's me telling* [*Director A*] *that Zip are in discussions with* [*Director E*] *to enter the forecourt market, winter and summer fuels. Zip plan to attack CPL forecourts using Fuel Express as a delivery agent. We've already quoted summer charcoal below the attached which we would be 'cos as I say, you can't have 3 people in it,'* presumably Standard Brands (Zip), CPL and Fuel Express*;*[254]

(ii) in this context, [Director B] added that he understood that the information was '*highly confidential between* [*Director E*] *and* [*Director D*] […] [*Director D*] *shouldn't be sending it but he did';*[255] and

(iii) that despite considering the information to be highly confidential he nevertheless passed it on to [Director A] and Senior Employee, CPL]: '[*J*]*ust to tell them that Zip are entering the market place more than anything else. They were my boss, he was my boss.*' [Director B] added that their reaction to the email was: '…[*D*]*on't worry about it, they'll never be competitive*.'[256]

The witness evidence of [Director B] corroborates the contemporaneous documentary evidence set out above. It demonstrates both that [Director B] understood that he had received confidential information from [Director D] about Fuel Express' future commercial plans and that he circulated it further within CPL to advise his bosses of the commercial strategy of one of CPL's competitors so that CPL could resist an 'attack' on its existing national

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[254] Transcript of CMA interview with [Director B] dated 7 August 2017, at pp58-59 – [CMA Document Reference URN1492].

[255] Transcript of CMA interview with [Director B] dated 7 August 2017, at p59 – [CMA Document Reference URN1492]. Based on the contemporaneous documentary evidence and [Director B] (CPL)'s evidence and [Director E]'s (Fuel Express)'s evidence set out at paragraph 3.95 above, the CMA does not accept [Director D]'s assertion that the pricing information he sent to [Director B] was in the public domain. Further, when asked to clarify what [Director D] meant by the information was in the public domain, he responded: *'well in the public domain in that Standard Brands has been to every competitor out there trying to do a type of proposal of what they were trying to do, but they were just flogging a dead horse*' (see Transcript of CMA interview with [Director D] dated 22 August 2017, at p26 – [CMA Document Reference URN1491]). [Director D] did not, however, assert that the pricing information found in the cost proposal that was sent to him by [employee] was in the public domain. In any event, the CMA considers that [Director D]'s evidence is contradicted by the contemporaneous documentary evidence and [Director B]'s evidence, as set out at paragraphs 3.91 to 3.104.

[256] Transcript of CMA interview with [Director B] dated 7 August 2017, p61 – [CMA Document Reference URN1492].

forecourt customers, including Tesco forecourts. The fact that according to [Director B], CPL may have already quoted below its competitor's prices does not undermine the CMA's finding that the Parties exchanged confidential and commercially sensitive pricing information to assist CPL in retaining its existing relationships with its national forecourt customers such as Tesco. As noted above, the information was shared in the context of the Parties' ongoing negotiations with the customer and [Director B]'s internal email and his witness evidence demonstrate that he considered the pricing information that [Director D] had provided to him.

3.105. The CMA considers that when [Director D] (Fuel Express) provided the pricing information to [Director B] (CPL) he was acting on behalf of both Grosvenors and Fuel Express Limited. The contemporaneous documentary evidence and [Director E]'s evidence shows that the pricing information related to a joint bid between Fuel Express Limited and one of CPL's competitors. Further, as set out above, [Director D]'s evidence is that he also sought to gain financially in relation to his own business from the exchange. In any event and as noted below, given that the CMA considers that Grosvenors, Bagnalls, Fuel Express Limited and Carbo UK operated as a single undertaking, it is not necessary to determine on precisely whose behalf [Director D] was acting when he forwarded the pricing information to CPL.

3.106. Based on the contemporaneous documentary evidence and the witness evidence set out above, the CMA has found that the Parties exchanged confidential and commercially sensitive pricing information in the context of an ongoing tender process for Tesco forecourts and that they did so to assist CPL to retain its pre-existing relationship with Tesco forecourts and the other national forecourt customers that CPL supplied at this time. As set out above, the CMA notes that CPL ultimately did retain Tesco forecourts during the Relevant Period.[257]

E. Conclusion

3.107. In summary, the evidence set out in paragraphs 3.20 to 3.106 above, when taken together, demonstrates that from at least June 2010 until February 2011, the Parties participated in an arrangement whereby they assisted each other on a reciprocal basis to retain at least some of their pre-existing

[257] Transcript of CMA interview with [Director B] dated 7 August 2017, at p57 – [CMA Document Reference URN1492]. [Director B] (CPL) stated: *'…*[*I*]*f they* [*Standard Brands*] *tendered for Tesco forecourt business, they didn't' win it cos I retained it.*'

customers, including in particular, in the case of Fuel Express, Tesco (in store) for charcoal and, in the case of CPL, national forecourt customers such as Sainsbury's and Tesco.

4. THE RELEVANT MARKET

A. Introduction

4.1. When applying the Chapter I prohibition/Article 101 TFEU, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement and/or concerted practice under investigation has as its object or effect the appreciable prevention, restriction or distortion of competition.[258]

4.2. In the present case, the CMA has decided that it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement and/or concerted practice which had as its object or effect the appreciable prevention, restriction or distortion of competition.

4.3. Nonetheless, the CMA has formed a view of the relevant market in order to calculate the Parties' 'relevant turnover' in the market affected by the Infringement for the purposes of establishing the level of the financial penalties that the CMA has decided to impose.[259]

4.4. For these purposes, it is not necessary to carry out a formal analysis; the relevant market may properly be assessed on a broad view of the particular trade affected by the infringement in question.[260]

4.5. The market definition reached in this case should therefore be viewed in context, and in light of its purpose as outlined above, and is not determinative for the purposes of any future cases.

4.6. 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.

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[258] Judgment in *Volkswagen AG v Commission,* T-62/98, EU:T:2000:180, paragraph 230 and judgment in *SPO and Others v Commission*, T-29/92, EU:T:1995:34, paragraph 74. This principle was also 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…determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement.*'

[259] *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board (the '**Penalties Guidance**', paragraphs 2.1 and 2.3 to 2.11.

[260] *Argos and Littlewoods v OFT and JJB Sports v OFT* [2006] ECWA Civ 1318, paragraphs 169 to 173 and 189 and the CAT judgment on penalty, *Argos and Littlewoods v OFT* [2005] CAT 13, at paragraph [178].

B. Framework for assessing the relevant market

4.7. In assessing the relevant market in this case, the CMA has considered what products and/or services are part of the product market ('**the relevant product market**') and the geographic scope of the relevant market ('**the relevant geographic market**').

4.8. For the reasons set out below, the CMA has found two relevant markets in this case: i) the supply of all solid fuel products offered for supply by the Parties to national retailers in the UK and ii) the supply of all charcoal products[261] offered for supply by the Parties to national retailers in the UK. National retailers are those customers for solid fuel and charcoal products which operate at the retail level of the market (selling to end consumers), and in the UK or wide areas of the UK, as opposed to on a purely regional basis. They include, for example, supermarkets (for example, Sainsbury's and Tesco) (both their stores and petrol forecourts), major petrol forecourts (for example, BP, Shell, Euro Garages and Rontec), large garden centres and other retailers (for example, B+M, Home Bargains, Makro, Wickes and B&Q).[262]

The relevant product market

Focal products – type of product

4.9. To define the relevant product market the CMA considers the competitive pressure faced by companies active in the market. It does so by establishing the closest substitutes to the product(s) or service(s) that is or are the focus of the investigation (the '**focal product(s)**')[263] and considering whether they exercise a competitive constraint on the ability to raise prices of those focal products.[264]

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[261] Including both manufactured (branded or non-branded) and raw material fuel products of all volume and/or quantity variants.

[262] CPL Briefing Paper – [CMA Document Reference URN0551] and CPL response to the CMA's turnover information request dated 30 November 2017 – [CMA Document Reference URN1607]. See also Transcript of CMA interview with [Director B] dated 7 August 2017, pp100-101 – [CMA Document Reference URN1492] – [Director B] described Euro Garages, Murco and Snax 24 as national account customers i.e. national retailers.

[263] See *Market Definition: understanding Competition Law* (OFT403, December 2004, adopted by the CMA Board), paragraph 3.2.

[264] See *Market Definition: understanding Competition Law* (OFT403, December 2004, adopted by the CMA Board), paragraphs 2.9 to 2.10.

4.10. As set out in more detail at paragraphs 2.13 to 2.18, the CMA has found that the Infringement concerns all those solid fuels and charcoal products offered for supply by the Parties to national retailers.[265]

4.11. These solid fuel and charcoal products appear, whether or not under different names, in the evidence set out in paragraphs 3.20 to 3.107 above.

4.12. For the avoidance of doubt, solid fuel and charcoal products include all such products offered for supply by the Parties to national retailers: they are not necessarily limited to the products which appear in the evidence.

4.13. The CMA has considered whether solid fuel and charcoal products are in separate product markets.[266]

4.14. The demand for these products is mostly seasonal: as noted above, solid fuel products are mainly winter fuel products and charcoal products are mainly summer fuel products.[267] This is reflected in the separate tendering and supply processes: although national retailers generally require both solid fuel and charcoal products over the course of the year, the tender and negotiations generally happen separately.[268]

4.15. Solid fuel and charcoal products also have different properties and uses. For example, charcoal products are predominantly used for cooking, whereas solid fuel products are predominantly used for heating. While it is possible that certain solid fuel products for example wood or smokeless fuels could be used

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[265] Including both manufactured (branded and non-branded) and raw fuel material, and all volume and/or quantity variants.

[266] The CMA has also considered whether there are separate relevant product markets for different solid fuels. In its investigation into the completed acquisition by CPL Distribution Limited and T. H. Fergusson & Co Limited (closed on 6 January 2004), the OFT stated that its investigation appeared to show that most customers considered different types of solid fuel (house coal, anthracite and smokeless fuels) to be fully substitutable and suppliers of one type of solid fuel are likely to start supplying another type of solid fuel in the event of a small but significant increase in its price. On this basis, the CMA has decided that there is one product market for all types of solid fuel.

[267] The winter season generally begins on 1 September and the summer season on 1 April – Transcript of CMA interview with [Director B] dated 7 August 2017, pp93-94 – [CMA Document Reference URN1492]. CPL has also described replacing the fuel products for one season with the fuels for the next season in certain customers' fuel bunkers – this suggests that there is little demand for charcoal products in the winter season and little demand for solid fuel products in the summer season – Transcript of CMA interview with [Director B] dated 7 August 2017, p94 – [CMA Document Reference URN1492].

[268] Transcript of CMA interview with [Director B] dated 7 August 2017, p11 – [CMA Document Reference URN1492]. [Director B] noted that there are separate accounts for just charcoal products and for mixed (both solid fuel and charcoal products), which suggests that some customers only buy charcoal – Transcript of CMA interview with [Director B] dated 7 August 2017, p42 – [CMA Document Reference URN1492].

for cooking, they are unlikely to be close substitutes for charcoal. In particular, they are unlikely to be a substitute for convenience charcoal products like pre-packed and portable charcoal barbecue trays. While loose charcoal (for example briquettes) could be used for heating, the fact that charcoal is not supplied as a winter fuel suggests that it is not generally regarded as a suitable fuel for heating.

4.16. From a supply-side perspective, the CMA notes that both Parties already have the capability to, and do, supply both solid fuel and charcoal products to national retailers. CPL has suggested that there are low barriers to entry (presumably for suppliers of fuel products) to supplying certain solid fuel products to national retailers.[269] This may suggest that a supplier of charcoal products to national retailers could switch to supplying at least some solid fuel products to national retailers. However, evidence provided to the CMA suggests that it may be difficult to obtain a reliable source of supply for charcoal, which is mostly imported. Thus, operators currently only supplying solid fuel may find it more difficult to start supplying charcoal (see paragraphs 2.25 to 2.27 above).

4.17. On the basis of the demand-side considerations set out above, the CMA considers that solid fuel products and charcoal products are distinct product markets. However, both types of product were sold to national retailers and were directly affected by the Infringement. Accordingly, the CMA considers that the turnover from both product markets should be included in the 'relevant turnover' for the purpose of assessing the appropriate level of financial penalty.

4.18. The CMA has also briefly considered whether the solid fuel and charcoal product markets could be further subdivided into a number of narrower product markets. This would mean some or all of the different types of solid fuel products and charcoal products offered for supply by the Parties to national retailers being in separate markets.

4.19. From a demand-side perspective, the CMA considers that there are differences between some solid fuel products such that they do not represent functional substitutes.[270] However, other solid fuel products are

[269] See paragraph 2.27 above.

[270] For example, coal and at least some smokeless fuels are unlikely to be substitutes due to their different properties: evidence submitted to the CMA suggests there is particular consumer demand for premium smokeless fuels, and coal isn't smokeless. See Transcript of CMA interview with [Director D] dated 22 August

likely to be substitutes, for example, coal and wood logs may be substitutes for heating purposes. The same is also true for charcoal products.[271]

4.20. From a supply-side perspective, the CMA considers that the conditions of competition are similar across the various products within the wider solid fuel and charcoal product markets. This is because the same manufacturers and distributors supply all or most of the same products. On balance, the CMA therefore considers that there is sufficient demand and supply-side substitutability as between different solid fuel products and different charcoal products for them to be included in, respectively, a single solid fuel products market and a single charcoal products market.

Focal products – type of customer supplied

4.21. The CMA has found that the Infringement concerned the markets for the supply of solid fuel and charcoal products to national retailers in the UK, as distinct from other types of customer supplied by the Parties in the UK. National retailers are those customers of solid fuel and charcoal products which operate at the retail level of the market (re-sale to end consumers), and throughout the UK or in a substantial part of it, as opposed to on a purely regional basis. They include, for example, supermarkets (such as Sainsbury's and Tesco, both their stores and petrol forecourts), major petrol forecourts (such as BP, Shell, Euro Garages and Rontec), large garden centres and other retailers (such as B+M, Home Bargains, Makro, Wickes and B&Q).[272]

4.22. The CMA has briefly considered whether there may be separate markets for the supply of solid fuel and charcoal products to different kinds of national retailers.

2017, p34 – [CMA Document Reference URN1491]. [Director D] stated that he relies on CPL as supplier because CPL manufactures the premium smokeless fuel brands – such as Homefire – which are popular with end consumers.

[271] For example, charcoal briquettes, instant light charcoal and/or lumpwood charcoal for a disposable barbecue grill, given that the latter is a convenience, portable and standalone product for cooking purposes. However, it seems more likely that, for example, instant light charcoal and lumpwood charcoal, would be regarded as substitutes in the event of a small but significant increase in price despite their different properties.

[272] CPL Briefing Paper – [CMA Document Reference URN0551] and CPL response to the CMA's turnover information request dated 30 November 2017 – [CMA Document Reference URN1607]. See also Transcript of CMA interview with [Director B] dated 7 August 2017, pp100-101 – [CMA Document Reference URN1492]. See also CPL letter to the CMA dated 30 November 2017 – [CMA Document Reference URN1616].

4.23. There may be some differences in the requirements between various national retailers. For example, CPL has told the CMA that petrol forecourts are particularly interested in receiving supplies of bottled gas along with their solid fuel and charcoal deliveries, and prefer as few suppliers as possible.[273] CPL has also told the CMA that for various reasons it has largely focused on winning and developing supermarket and discount retailer accounts,[274] as opposed to petrol forecourt customers.

4.24. However, the CMA does not regard the fact that CPL focuses on one type of customer as determinative for present purposes. In any event, the Parties have confirmed that they compete in relation to both types of national retailer and the CMA has seen evidence that this is the case.[275] Moreover, while gas can be provided as a bundle with solid fuels and charcoal, these products are also sold separately.

4.25. The CMA understands that there may be some differences in the distribution infrastructure required to serve multi-drop customers such as petrol station forecourts and single-drop customers such as supermarkets and garden centres. For example, the CMA has been told that multi-drop customers are typically served from relatively small local depots by local haulage companies whereas single-drop customers require a large, central warehouse and access to a haulage company that is capable of hauling relatively large volumes of solid fuel products.

4.26. Despite these differences, given that Fuel Express and CPL together account for approximately[276] 70% of solid fuel sales to national customers

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[273] Witness Statement of [Director D] dated 8 September 2017, paragraph 4 – [CMA Document Reference URN1496] and CPL Briefing Paper – [CMA Document Reference URN0551].

[274] CPL Briefing Paper, pp12-13 – [CMA Document Reference URN0551].

[275] For example, [Director E]'s witness evidence is that while CPL and Fuel Express Limited have 'core' businesses (i.e. 'the sheds' for CPL – supermarkets and out of town shopping centre retailers who purchase products into a centralised warehouse) and multi-drop forecourt customers for Fuel Express Limited, both types of customer have passed between the two Parties – [Director E]'s Witness Statement, paragraph 78. CPL has submitted that it competes with Fuel Express Limited and Bagnalls in relation to large accounts (which are within national retailers) – CPL response to specification 3 of the CMA's section 26 notice dated 26 May 2017 – [CMA Document Reference URN1697]. [Director D]'s witness evidence is that CPL is a competitor of Fuel Express Limited in relation to the 'multi-drop' market in particular – see Witness Statement of [Director D] dated 8 September, p7 – [CMA Document Reference URN1496]. The CMA has also seen evidence of both types of customer switching between the Parties. See, for example, CPL's response to specification 3 of the CMA's section 26 notice dated 26 May 2017 – [CMA Document Reference URN1697].

[276] According to CPL, in 2016/17 the Parties' combined market share for the supply of solid fuel products to national retailers was 80%. However, given CPL stated that this figure did not include 'wood' in circumstances where the CMA has included certain wood products in its market definition, the CMA has taken a conservative

and already have the capability to, and do, serve both multi-drop and single-drop customers for solid fuels and charcoal, and given the significance of these businesses in terms of their share of supply of solid fuels in particular, as well the ease with which they could switch supplies between different types of customer, the CMA considers it would not be appropriate further to segment the market for multi-drop and single drop solid fuel customers for present purposes.

4.27. The CMA considers therefore that multi-drop and single-drop national retailers are in the same market for, separately, solid fuel and charcoal products, for the purpose of assessing the appropriate level of financial penalty.

4.28. As set out in paragraphs 4.9 to 4.12, the focal products for the purpose of the market definition exercise are therefore only those solid fuel and charcoal products offered for supply by the Parties to all national retailers in the UK.

4.29. Starting with these focal products, the CMA has considered whether there are reasons to define the relevant market more broadly for the purpose of calculating any financial penalty. In particular, the CMA has considered whether it would be appropriate to define the market more broadly to cover (i) other fuel products offered for supply by the Parties and/or other fuel merchants to national retailers; and (ii) customers for solid fuel and charcoal products other than national retailers.

Other fuel products supplied by the Parties and/or other fuel merchants to national retailers

4.30. In addition to solid fuel and charcoal products, Fuel Express Limited, through Grosvenors, supplies bottled gas to national retailers (primarily forecourt customers).[277]

4.31. Moreover, there are other fuel products which can be supplied by other fuel merchants to national retailers, such as oil.

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approach and reached the estimate of a 70% combined market share by taking the lower market share figure CPL provided for a solid fuel market which included 'wood'. See CPL response to specification 8 of the CMA's section 26 notice dated 6 June 2017 – [CMA Document Reference URN1174], discussed at paragraph 2.37 above.

[277] Witness Statement of [Director D] dated 8 September 2017, paragraphs 13-15 – [CMA Document Reference URN1496].

4.32. The CMA has briefly considered whether any of these other products should be included in the relevant market.

4.33. From a demand-side perspective, there is some evidence that end consumers (and therefore the retailers which re-sell to end consumers) regard different types of fuel as substitutes for solid fuels. In the context of an OFT merger investigation involving CPLD in 2004, the OFT considered whether alternative energy sources such as oil, electricity, liquified petroleum gas and bottled gas were substitutes for solid fuels (there defined to include, for example, coal, anthracite and smokeless fuels). The OFT found that its investigation appeared to show that most customers considered different types of solid fuel (house coal, anthracite and smokeless fuels) to be fully substitutable and suppliers of one type of solid fuel were likely to start supplying another type of solid fuel in the event of a small but significant increase in its price. However, although, there was some evidence of customers switching to alternative fuels, this principally appeared to be due to convenience as opposed to a 5-10 per cent increase in the price of solid fuel. The OFT therefore took a cautious view that the appropriate frame of reference was the supply of all types of solid fuels only.[278]

4.34. In relation to charcoal products, the CMA considers that it is unlikely that other types of fuel would be a substitute for charcoal products. As set out above, charcoal is primarily a summer fuel used for cooking. Oil is mainly used for heating, and while bottled gas could be used for cooking as well as heating, charcoal is primarily used for barbecue cooking and has particular characteristics suited to that method of cooking. Further, other fuel products are unlikely to be a substitute for convenience charcoal products designed to be portable, such as instant disposable grills.

4.35. Overall, and taking a conservative approach, the CMA's view is that for present purposes other types of fuel products supplied by the Parties and/or

[278] See the OFT merger decision – Completed acquisition by CPL Distribution Limited and T.H Fergusson & Co Limited of certain of each other's businesses and assets, available at - https://www.gov.uk/cma-cases/cpl-distribution-ltd-t-h-fergusson-co-ltd. The OFT's investigation appeared to show that most customers considered different types of solid fuel (house coal, anthracite and smokeless fuels) to be fully substitutable and suppliers of one type of solid fuel were likely to start supplying another type of solid fuel in the event of a small but significant increase in its price. However, the OFT found that although there was some evidence of customers switching to alternative fuels, this principally appeared to be due to convenience as opposed to a 5-10 per cent increase in the price of solid fuel. The OFT stated that it took the cautious view that the appropriate frame of reference in the case appeared to be the supply of all types of solid fuels.

other fuel merchants to national retailers should not be included in the relevant market.

Customers other than national retailers

4.36. As set out above, the CMA has concluded that the focal product markets relate to national retailers in the UK only. However, the CMA has considered whether small account customers in the UK should be included in the relevant market. Small account customers tend to operate on a local or regional basis, and include for example retailers such as independent shops, small garden centres and small hardware stores.[279] The Parties compete to supply solid fuel and charcoal products to customers other than national retailers, and in particular to small account customers,[280] although CPL has (for various reasons) focused on winning national retailers.[281]

4.37. The evidence submitted to the CMA suggests that the requirements of national retailers and small account customers differ in several significant respects. In particular, supplying national retailers requires a national distribution network, and national retailers often have particular procurement or process requirements, such as the use of electronic date interface technology (EDI) and advanced supply notice (ASN).[282] Indeed, the reason that Fuel Express Limited was set up was to allow its parent companies – regional/local coal merchants - to compete on a national scale.

4.38. Therefore, taking a conservative approach, the CMA has concluded that for present purposes solid fuel and charcoal products offered for supply by the Parties to small account customers in the UK form a separate market and should not be included in the relevant market for the purpose of calculating any penalty in this case.

The relevant geographic market

4.39. The CMA has assessed the relevant geographic market for those solid fuel and charcoal products offered for supply by the Parties to national retailers.

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[279] CPL response to specification 3 of the CMA's section 26 notice dated 26 May 2017 – [CMA Document Reference URN1697].

[280] See, for example, CPL Briefing Paper – [CMA Document Reference URN0551] – CPL has stated that it competes with Bagnalls and Grosvenors in relation to small accounts. The CMA has not considered whether wholesale customers or sales directly to end consumers should be included in the relevant market.

[281] CPL Briefing Paper – [CMA Document Reference URN0551].

[282] CPL Briefing Paper – [CMA Document Reference URN0551].

4.40. The CMA considers that the focal geographic point for the Infringement is the area in which either or both of the Parties offer solid fuel or charcoal products for supply to national retailers,[283] which in this case is the whole of the UK, as opposed to only particular parts of the UK.

4.41. National retailers operate across the UK or wide areas of the UK, as opposed to on a purely regional basis.[284] Both CPL and Fuel Express Limited operate nationally.

4.42. Unlike Fuel Express Limited, in addition to operating across the UK, CPL also exports products for supply to customers in Europe and internationally.[285]

4.43. The CMA has briefly considered whether the supply of solid fuel and charcoal products to large retailers outside of the UK should be included in the relevant geographic market.

4.44. Suppliers to large retailers generally need a national distribution network. Moreover, the regulatory requirements for supplying solid fuel and charcoal products differ, to an extent, from country to country. In the circumstances, for present purposes and taking a conservative approach, the CMA considers that the relevant geographic market is national. This means that only the turnover of the Parties from all solid fuel and charcoal products offered for supply to national retailers in the UK should be included in the 'relevant turnover' for the purpose of calculating any financial penalty in this case.

C. Conclusions on the relevant market

4.45. For the reasons set out above, the CMA has concluded that the relevant markets in this case concern (i) the supply of all solid fuel products offered for supply by the Parties to national retailers in the UK and (ii) the supply of all charcoal products offered for supply by the Parties to national retailers in the UK.

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[283] For present purposes, it is not necessary for a retailer to operate in every region of the UK, nor for its operation to be spread evenly throughout the UK, for it be a national retailer.

[284] See, for example, CPL Briefing Paper – [CMA Document Reference URN0551]; and CPL response dated 30 November 2017 to the CMA's turnover information request dated 23 November 2017 – [CMA Document Reference URN1607].

[285] CPL Briefing Paper – [CMA Document Reference URN0551].

5. LEGAL ASSESSMENT

A. Introduction

5.1. The Chapter I prohibition prohibits agreements or concerted practices between 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, unless an exclusion applies or the agreements or concerted practices in question are exempt. References to the UK are to the whole or part of the UK.[286]

5.2. Section 60 of the Act provides, broadly, that the Chapter I prohibition is to be interpreted consistently with Article 101 TFEU.

5.3. For the reasons set out below, the CMA has found that from at least June 2010 to February 2011 each of the Parties infringed the Chapter I prohibition and/or Article 101 TFEU by participating in an arrangement to share markets by allocating at least some of their customers between them, through bid-rigging and the exchange of confidential and commercially sensitive pricing information, for the supply of solid fuel and charcoal products to national retailers in the UK that had as its object the prevention, restriction or distortion of competition.

B. Undertakings and the attribution of liability

Key Legal Principles

5.4. The Chapter I prohibition and Article 101 TFEU apply to agreements and concerted practices between 'undertakings' as well as to decisions by 'associations of undertakings.'[287]

Undertakings

5.5. The term 'undertaking' has been defined by the Court of Justice[288] 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...*'[289]

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[286] Section 2(1) and (7) of the Act.

[287] The concept of an association of undertakings is not discussed further in this document.

[288] Member of the Court of Justice of the European Union ('**the European Courts**'). The other relevant member is the General Court.

[289] Case C-41/90 *Hofner and Elser v Macrotron* [1991] ECR I-1979, EU:C:1991:161, at paragraph 21.

5.6. 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...'*[290]

5.7. 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,[291] partnerships,[292] individuals operating as sole traders,[293] and trade associations[294].

5.8. The concept also designates an economic unit, even if in law that unit consists of several natural or legal persons.[295] It is well established that an undertaking does not correspond to the commonly understood notion of a legal entity, for example under English commercial or tax law; and that a single undertaking may comprise one or more legal or natural persons.[296]

5.9. 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.[297]

Attribution of liability

General

5.10. In determining who is liable for any infringement and therefore, who will be the addressee of an infringement decision, it is necessary to identify the relevant legal or natural persons who form part of the undertaking involved in the infringement.

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[290] Case C-118/85 *Commission v Italy* [1987] ECR 2599, at paragraph 7.

[291] 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).

[292] Commission decision *Breeders' rights*: *Roses*, OJ [1985] L369/9.

[293] Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

[294] Case 71/74 *FRUBO v Commission* [1975] ECR 563.

[295] Case C-97/08 P *Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraph 55.

[296] *Sepia Logistics Limited v Office of Fair Trading* [2007] CAT 13, paragraph 70; Case 170/93 *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas (Hydrotherm)* [1984] ECR 2999, at paragraph 11.

[297] Case C-97/08 P *Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraph 56.

Attribution of liability in relation to undertakings

5.11. For each Party that the CMA has found has infringed the Act, the CMA has first identified the legal entity that was directly involved in the Infringement during the Relevant Period. It has then determined whether liability for the Infringement should be on a joint and several basis with another legal entity on the basis that both form part of the same undertaking.

5.12. In order to determine whether this is the case, the CMA will examine whether another legal entity exercises decisive influence over the entity directly involved in the Infringement, that is, it exerts control or directs the conduct of the other to such an extent that they can be considered to be one and the same undertaking.[298]

Parent/subsidiary considerations

5.13. A legal entity may be held liable for an infringement committed by its subsidiary – without the parent's knowledge or involvement[299] – where, as a matter of economic reality,[300] it can be said to have exercised 'decisive influence' over its subsidiary during its ownership period.[301] This assessment turns, not only on intervention in or supervision of the subsidiary's commercial conduct in the strict sense,[302] but on the economic, organisational and legal links between parent and subsidiary, which may be informal.[303] The assessment is one of substance, not form[304] – liability should be attributed to a legal entity that '*pulls the strings*',[305] whether an industry parent or a financial investor.[306]

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[298] Advocate General Kokott's Opinion in *Akzo* (as referenced by the Court of Justice in its final judgment).

[299] C-90/09 P *General Química SA v Commission*, EU:C:2011:21.

[300] 293/13 P *Del Monte v Commission*, EU:C:2015:416.

[301] C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:356; C-179/12 P *Dow v Commission*, EU:C:2013:605.

[302] C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:356.

[303] C-440/11 *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV* EU:C:2013:514.; C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:356.

[304] C-440/11 *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV* EU:C:2013:514, paragraph 68.

[305] *Sainsbury's Supermarkets Ltd v MasterCard* [2016] CAT 11, paragraph 363(3), citing Opinion of Advocate General Kokott in C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:262, paragraphs 97 to 99.

[306] See, for example, T-54/06 *Kendrion v Commission*, EU:T:2011:667; T-395/09 *Gigaset AG v Commission*, EU:T:2014:23.

5.14. Case law has established that a parent company can be held jointly and severally liable for an infringement committed by a subsidiary company where:

a. the parent company is able to exercise 'decisive influence' over the conduct of the subsidiary,[307] and

b. in such a case, the parent company does in fact exercise such decisive influence,[308]

such that the two entities can be regarded as a single economic unit and thus jointly and severally liable. It is sufficient for the CMA to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary, subject to rebuttal of that presumption.[309]

5.15. In *Akzo Nobel v Commission*, the Court of Justice summarised the legal framework for the assessment of decisive influence:

> '*It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company … having regard in particular to the economic, organisational and legal links between those two legal entities …*
>
> *That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore a single undertaking … Thus, the fact that a parent company and its subsidiary constitute a single undertaking … enables the Commission to address a decision imposing fines to the parent company, without having to*

[307] *Joined cases 32/78, and 36/78 to 82/78, BMW Belgium and Others v European Commission,* judgment of 12 July 1979.

[308] *Case 102/82, AEG-Telefunken v Commission,* judgment of 25 October 1983.

[309] Case C-97/08 P *Akzo Nobel NV v. Commission* [2009] ECR-I-8237, at paragraphs 60 and 61. Case T-24/05. *Alliance One International, Inc., formerly Standard Commercial Corp. and Others v European Commission*, judgment of 27 October 2010, paragraphs 126-130.

establish the personal involvement of the latter in the infringement.'[310] [311]

5.16. This assessment turns not only on the parent's degree of influence on commercial policy in the narrow sense of the subsidiary's commercial conduct – this is one factor that enables the liability of the parent to be established.[312] Rather, the assessment encompasses all the economic, organisational and legal links between the parent and subsidiary. These vary from case to case.[313]

5.17. The assessment is not formalistic, as the Court of Justice explained in *Commission v Stichting*:

> '… *a finding that the author of the infringement and its holding entity form an economic unit does not necessarily presuppose the adoption of formal decisions by statutory organs … on the contrary, that unit may*

[310] C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:536, paragraphs 58 to 59. See also C-155/14 P *Evonik Degussa GmbH v Commission*, EU:C:2016:446, paragraph 27 citing C-93/13 P and C-123/13 P *Commission and Others v Versalis and Others*, EU:C:2015:150, paragraph 40; C-628/10 P and C-14/11 P *Alliance One & Others v Commission*, EU:C:2012:479, paragraph 44; *Durkan v Office of Fair Trading* [2011] CAT 6, paragraphs 15 to 22.

[311] Applying this legal framework '*does not in any way constitute an exception to the principle of personal responsibility, but is the expression of that very principle. That is because the parent company and the subsidiaries under its decisive influence are collectively a single undertaking for the purposes of competition law and responsible for that undertaking … that gives rise to the collective personal responsibility of all the principals in the group structure, regardless of whether they are the parent company or a subsidiary … As the parent company exercising decisive influence over its subsidiaries, it pulls the strings within the group of companies*.' *Sainsbury's Supermarkets Ltd v MasterCard* [2016] CAT 11, paragraph 363(3), citing Opinion of Advocate General Kokott in C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:262, paragraphs 97 to 99.

[312] C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:356, paragraphs 73 to 74, approving Opinion of Advocate General Kokott, paragraph 87: '*the absence of autonomy of the subsidiary in terms of its market conduct is only one possible connecting factor on which to base an attribution of responsibility to the parent company. It is not the only connecting factor, for, according to the Court's case-law, attribution of conduct to the parent company is possible 'in particular' where the subsidiary … does not decide independently upon its own conduct*'. The CAT has confirmed that the relevant factors '*are not limited to* [*a subsidiary's*] *commercial conduct*' (*Durkan v Office of Fair Trading* [2011] CAT 6, paragraph 22(d)). See also T-24/05 *Alliance One & Others v Commission*, EU:T:2010:453, paragraph 170: '*It is also necessary to reject the applicants' argument that the decisive influence that a parent company must exercise in order to have liability attributed to it for the infringement committed by its subsidiary must relate to activities which form part of the subsidiary's commercial policy stricto sensu and which, furthermore, are directly linked to that infringement*'.

[313] C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:356, paragraphs 72 to 74. The principles of attributing liability to a parent apply equally, whether the underlying infringement is of Chapter I CA98 / Article 101 TFEU, or Chapter II CA98 / Article 102 TFEU.

also have an informal basis, consisting inter alia in personal links between the legal entities comprising such an economic unit.'[314]

5.18. In reaching this judgment, the Court followed the opinion of Advocate General Kokott, which emphasised that competition law is concerned with substance over form, and does not depend on technicalities of company law.[315] [316]

5.19. The determinative factor is whether, as a matter of economic reality, the subsidiary is subject to the decisive influence of the parent, whether formally or otherwise, having regard to the links between parent and subsidiary.[317]

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[314] C-440/11 *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV* EU:C:2013:514, paragraph 68.

[315] Opinion of Advocate General Kokott in Case C-440/11 *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV*, EU:C:2012:763, paragraphs 71 to 76: '*The question whether a subsidiary can determine its conduct on the market autonomously or is exposed to the decisive influence of its parent company cannot be assessed solely on the basis of the relevant company law. Otherwise, it would be easy for the parent companies concerned to evade responsibility for infringements of the cartel rules committed by their wholly owned subsidiaries by relying on events falling entirely under company law… the decisive factor is ultimately economic reality, since competition law is guided not by technicalities, but by the actual conduct of undertakings … it would be excessively formalistic and in no way conform to economic reality if questions about influence as between a parent company and a subsidiary were to be appraised solely on the basis of actions governed by company law … …* [*It is*] *of decisive importance, leaving aside all the formal deliberations on company law, to examine the actual effects of the personal links between* [*parent and subsidiary*] *on everyday business activities and to assess purely on the basis of the facts whether* [*the subsidiary*] *… really determined its commercial policy independently*'.

[316] In that case, the General Court was therefore wrong to take the view that '*The mere fact that the holding entity did not adopt any management decision in a manner consistent with the formal requirements of company law*' sufficed to determine that the subsidiary was free of its parent's decisive influence. It was irrelevant that the parent company did not take its first decision in writing, or hold its first formal board meeting, until after the end of the infringement period. The General Court was also wrong to find that the directors on the subsidiary's board who also sat on the board of the parent company could not have controlled the subsidiary both in their capacity as its directors and through the influence exerted by the parent – in so doing, the General Court took an excessively formal approach, relying only on a company law perspective. C-440/11 *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV* EU:C:2013:514, paragraphs 63 to 68.

[317] C-440/11 *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV* EU:C:2013:514, paragraph 66. Economic reality is the decisive factor in the assessment both of the ability to exercise decisive influence, and the actual exercise of such influence. See also C-623/15 P *Toshiba v Commission*, paragraph 46: '*In examining whether the parent company is able to exercise decisive influence over the market conduct of its subsidiary, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to its parent company and, therefore, account must be taken of the economic reality*'. See also C-293/13 P *Del Monte v Commission*, EU:C:2015:416, paragraph 76.

5.20. There is no exhaustive set of criteria that must be fulfilled or 'checklist' to complete in making that assessment: the case law '*does not impose any formal requirement for the exercise of decisive influence'*.[318]

5.21. In particular, the CMA is not required to demonstrate that the parent was involved in, or even aware of, the infringement by its subsidiary.[319]

5.22. It is possible for more than one legal entity each to exercise decisive influence over the same subsidiary, whether or not those legal entities are part of the same corporate group. In relation to joint ventures, for example, it is not necessary for the relevant parent company to have sole control over the subsidiary – both parents, or either parent, can exercise decisive influence over the joint venture company.[320] Decisive influence does not depend on the size of the parents' shareholding; the Court of Justice has confirmed that one parent may exercise decisive influence '*even if the proportion of the subsidiary's share capital owned by that parent company is smaller than that owned by the other parent company'*.[321]

5.23. Factors previously considered relevant to demonstrating decisive influence include:

(i) Percentage shareholding (and whether this is a majority or minority stake);[322]

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[318] C-440/11 *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV* EU:C:2013:514, paragraph 50. The phrase is the Commission's, but was borne out in the Court of Justice's approach to the judgment.

[319] C-90/09 P *General Química SA v Commission*, EU:C:2011:21, paragraph 102: '*what counts is not whether the parent company encouraged its subsidiary to commit an infringement …, or whether it was directly involved in the infringement committed by its subsidiary, but the fact that those two companies constitute a single economic unit and thus a single undertaking … which enables the Commission to impose a fine on the parent company*'. See also C-97/08 *Akzo Nobel v Commission*, EU:C:2009:536, paragraphs 59 and 77.

[320] T-24/05 *Alliance One v Commission*, EU:T:2010:453, paragraph 164, upheld in C-628/10 P and C-14/11 P *Alliance One & Others v Commission*, EU:C:2012:479; T-132/07 *Fuji v Commission*, EU:T:2011:344, paragraphs 181 and 202; T-76/08 *EI du Pont de Nemours v Commission*, EU:T:2012:46 paragraph 74, confirmed in C-172/12 P *EI du Pont de Nemours v Commission*, EU:C:2013:601.

[321] C-628/10 P and C-14/11 P *Alliance One & Others v Commission*, EU:C:2012:479, paragraph 101.

[322] The General Court has confirmed with respect to majority interests that it is generally the case that if a parent company holds a majority interest in the subsidiary's share capital, that can enable it actually to exercise decisive influence on its subsidiary and, in particular, on the subsidiary's market conduct; T-132/07 *Fuji Electric Co. Ltd v Commission*, EU:T:2011:344, paragraph 182; T-104/13 *Toshiba Corp. v European Commission* EU:T:2015:610, paragraph 96.

(ii) Board representation,[323] for example, overlapping directors or senior managers, or where the parent has representatives on the subsidiary's board;

(iii) Influence over strategic decisions and policy;[324]

(iv) Involvement in the subsidiary's management;[325] for example, determining the content of management decisions, or instructions or guidelines on commercial policy;

(v) Voting rights, such as the right of veto/approval;[326]

(vi) Activity on the same market;[327] and

(vii) Other economic, legal and organisational links, including:[328]

a. Same commercial name;[329]

b. Consolidation of accounts and reporting obligations;[330] and

c. Exclusive distribution agreements.[331]

Joint venture considerations

5.24. A joint venture describes a commercial arrangement between two or more entities and can take a number of different forms.

5.25. A joint venture undertaking may be held liable for an infringement in its own right according to the principles outlined above.

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[323] See for example Case COMP/39.437 — *TV and Computer Monitor Tubes* (cathode ray tube cartel) at paragraph 839 onwards.

[324] Case T-190/06 - *Total SA and Elf Aquitaine SA v Commission*.

[325] Case COMP/39181 – *Candle Waxes* (at paragraphs 334 and 335, citing *Avebe*, T-314/01 *Avebe v Commission* [2006] ECR II-3085).

[326] T-104/13 *Toshiba v Commission* EU:T:2015:610, paragraphs 106-113. Upheld in C-623/15 P *Toshiba v Commission*, EC:C:2017:21.

[327] Commission decision in Case COMP/F-1/38.121 – Copper Fittings at paragraph 680.

[328] But not limited to.

[329] Case COMP/F/38.620, Commission Decision of 3 May 2006, *Bleaching Chemicals* cartel; note that this Decision was appealed subsequently on other points.

[330] *Case COMP/39.396 - Calcium carbide and magnesium based reagents for the steel and gas industries* and Case T-384/09 - SKW Stahl-Metallurgie Holding and SKW Stahl-Metallurgie GmbH (decision on this point upheld).

[331] See also C-293/13 P *Del Monte v Commission*, EU:C:2015:416.

5.26. Equally, an undertaking or undertakings which exercise(s) decisive influence over the joint venture can be held jointly and severally liable with the joint venture. It is not necessary for the relevant parent company to have sole control over the subsidiary – both parents, or either parent (for example, in a 50/50 joint venture), can exercise decisive influence over the joint venture company.[332]

5.27. As noted above, decisive influence does not depend on the size of the parent's shareholding; the Court of Justice has confirmed that one parent may exercise decisive influence 'even if the proportion of the subsidiary's share capital owned by that parent company is smaller than that owned by the other parent company'.[333]

5.28. The question is whether the relevant entity exercises decisive influence over the conduct of the other in practice.[334] Thus the factors listed above at paragraph 5.23 that may be relevant for demonstrating decisive influence will also be relevant to 50/50 joint venture structures, as well as arrangements in which one or more joint venture parent holds fewer than 50 per cent of the shares in the joint venture vehicle.

5.29. For the purposes of establishing liability for a competition law infringement, the joint venture and its parent(s) will be regarded as a single undertaking where decisive influence has been demonstrated.[335] It is irrelevant for these purposes that the joint venture may have its own legal personality,[336] or whether it is full-function[337] for the purposes of the Merger Regulation.

Assessment

5.30. The CMA has found that each of CPL and Fuel Express is an entity engaged in economic activities.

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[332] T-24/05 *Alliance One v Commission*, EU:T:2010:453, paragraph 164, upheld in C-628/10 P & C-14/11 P *Alliance One & Others v Commission*, EU:C:2012:479; T-132/07 *Fuji v Commission*, EU:T:2011:344, paragraphs 181 and 202; T-76/08 *EI du Pont de Nemours v Commission*, EU:T:2012:46 paragraph 74, confirmed in C-172/12 P *EI du Pont de Nemours v Commission*, EU:C:2013:601.

[333] C-628/10 P and C-14/11 P *Alliance One & Others v Commission*, EU:C:2012:479, paragraph 101.

[334] It is also possible for one parent in a joint venture to be found solely liable for the JV vehicle's infringement, provided that it exercised decisive influence unilaterally over the vehicle's conduct – *Case T – 541/08 – Sasol*.

[335] Joined cases C-588/15 P and C-622/15 P*, LG Electronics Inc, Koninklijke Philips Electronics NV v Commission*, judgment of 14 September 2017; *EI du Pont de Nemours v Commission* [2013].

[336] Case T-76/08 *Du Pont* paras 75–80; and Case T-77/08 *Dow*.

[337] Merger Reg, Reg 139/2004, OJ 2004 L24/1: Vol II, App D1, Art 3(4).

5.31. During the Relevant Period, CPL was engaged in the manufacture, supply and/or distribution of solid fuel products and charcoal products.

5.32. The CMA has found that each of Fuel Express Limited, Grosvenors, Bagnalls and Carbo UK is an entity engaged in economic activities, as set out below:

(i) During the Relevant Period, Fuel Express Limited was engaged in the supply and/or distribution of solid fuel and charcoal products.

(ii) During the Relevant Period, Grosvenors was engaged in the supply and/or distribution of solid fuel and charcoal products.

(iii) During the Relevant Period, Bagnalls was engaged in the supply and/or distribution of solid fuel and charcoal products.

(iv) During the Relevant Period, Carbo UK was engaged in the supply and/or distribution of charcoal.

5.33. In light of the above and as set out in further detail below, the CMA has found that during the Relevant Period, Fuel Express Limited, Grosvenors, Bagnalls and Carbo UK collectively engaged in economic activities and that together they constituted a single undertaking for the purposes of the Chapter I prohibition and/or Article 101 TFEU.

Undertakings: Application to Parties

CPL

5.34. As set out at paragraphs 2.49 and 2.57 above, during the Relevant Period CPLD was an indirect subsidiary of CPL Industries and CPL Industries Holdings.

5.35. CPL Industries and CPL Industries Holdings therefore had the ability to exercise decisive influence, and are presumed to have exercised decisive influence over CPL during the Relevant Period.

5.36. Based on the above, the CMA has found that CPL Industries and CPL Industries Holdings form part of the same undertaking as CPLD. CPL Industries and CPL Industries Holdings are therefore jointly and severally liable for the infringing conduct of CPLD during the Relevant Period.

Fuel Express

Relationship of [Director E], [Director D], Bagnalls and Grosvenors to Fuel Express Limited

5.37. The CMA has found that Bagnalls and Grosvenors form part of the same undertaking as Fuel Express Limited based, in particular, on the following management, economic and structural links:

(i) Bagnalls and Grosvenors (like the other Fuel Express Limited shareholders) each own 25% of Fuel Express Limited's shares and each appoint one out of the four directors. However, [Director D] and [Director E] are responsible for the majority of the strategic decision-making and the majority of the day to day operations of the company as compared to the other shareholders.[338] The CMA has not seen any evidence that the other shareholders had any involvement in the day to day running of the company.

(ii) The economic links between [Director D] and [Director E], and their respective companies, and Fuel Express Limited are strong, particularly when compared with its other shareholders. Fuel Express Limited makes only a nominal profit; it distributes the payments from customers to the member which carried out the business. [Director E] and [Director D] put the majority of the business through Fuel Express Limited and therefore among the members they benefit the most financially from Fuel Express Limited.

5.38. There are a number of other legal and organisational links between the companies. For example, Bagnalls, (its full name being Fuel Express (Bagnalls) Limited) shares a similar name with Fuel Express Limited and each of [Director D] and [Director E] use only a Fuel Express email account.[339] As set out at paragraph 2.71 above, Fuel Express Limited purchases products from its members and distributes through them to national retailers. The members pack the product into Fuel Express branded packaging which they then deliver to Fuel Express Limited customers.

[338] See Fuel Express Limited's response to Annex 1 of the CMA's section 26 notice dated 22 May 2017 – [CMA Document Reference 0919]. See also Transcript of CMA interview with [Director E] dated 22 August 2017, p5 – [CMA Document Reference URN1490]. See also paragraph 2.77 above.

[339] See, for example, Transcript of CMA interview with [Director D] dated 22 August 2017, pp35-36 – [CMA Document Reference URN1491].

5.39. The CMA further considers that in the context of establishing closer trading relationships with CPL (as discussed in further detail at paragraphs 3.11 to 3.18 above) [Director D] and [Director E] considered the financial benefit that these trading relationships with CPL would have for Fuel Express, including the business they put through Fuel Express Limited. Thus, when [Director D] and [Director E] submitted a high bid to Sainsbury's at the request of and for the benefit of CPL,[340] they did so having regard to the potential financial benefit of co-operating with CPL, both to them and across Fuel Express, namely, Grosvenors, Bagnalls and Carbo UK.

5.40. Likewise, as set out at paragraph 3.30 above, in the same email dated 30 June 2010 in which [Director E] provided prices to CPL and requested that CPL 'please quote above' those prices when bidding for the supply of charcoal to Tesco (in store),[341] [Director E] also proposed other ways in which the Parties could co-operate in relation to current or previous customers of Fuel Express Limited, namely Tesco in-store (solid fuels) and Co-op.[342] Accordingly, in seeking the assistance of CPL [Director E] had regard to the potential benefit that the co-operation between the Parties would have for Fuel Express Limited and its members, Bagnalls and Grosvenors.

5.41. When the above factors are taken together, the CMA considers that Grosvenors and Bagnalls exercised decisive influence over Fuel Express Limited during the Relevant Period within the meaning of the applicable case law. The CMA considers in this respect that [Director E] and [Director D] exercised this influence having regard to their mutual interest in ensuring the collective success of Grosvenors, Bagnalls and Fuel Express Limited, as well as Carbo UK, which is discussed in further detail below.

Relationship between Bagnalls, Carbo UK, Grosvenors and Fuel Express Limited

5.42. For the reasons set out below, the CMA has found that [Director E] exercised decisive influence over Bagnalls and Carbo UK, as well as Fuel Express Limited, and that the management, economic and structural links between these entities were such that these entities, together with

[340] See paragraphs 3.67 to 3.89 above.

[341] In this instance, [Director E] proposed to supply the customer through his joint venture with Carbo BV, Carbo UK. The relationship between Bagnalls, Carbo UK, Grosvenors and Fuel Express Limited is discussed further at paragraphs 2.94 to 2.98 above.

[342] Email dated 30 June 2010 at 13:27 from [Director B] (CPL) to [Director E] (Fuel Express) – [CMA Document Reference URN0043].

Grosvenors, formed part of a single economic unit as defined by the Court of Justice in *Hydrotherm.*[343] Indeed, the economic and structural links between Fuel Express Limited, Bagnalls, Carbo UK and Grosvenors ultimately eliminated the possibility of competition between them.[344]

5.43. As Operations Director [Director E] was responsible for the day to day running of Bagnalls.[345]

5.44. As set out at paragraphs 2.92 and 2.94 above, [Director E] was also solely responsible for the business of Carbo UK, which was involved in the sale and distribution of charcoal to certain national retailers in the UK. [Director E] was a joint shareholder and director of Carbo UK and was responsible for its strategic direction and the day-to-day running of the company.

5.45. Moreover, [Director E]'s evidence is that during the Relevant Period he was doing business through all of Bagnalls, Carbo UK and Fuel Express Limited, and that he was trying to maintain and expand all three businesses by approaching potential customers. [Director E] would at his own discretion decide which of the three companies to put business through, based on the customer's requirements and the amount of business involved.[346] Accordingly, [Director E] had regard to the interests of all three companies when he was deciding how to maintain or expand customer relationships.

5.46. Carbo UK and Bagnalls were also financially interlinked. As set out at paragraph 2.95, [Director E] was not paid a dividend as a shareholder. However, Bagnalls was paid a management fee for [Director E]'s services in managing Carbo UK. According to [Director E], Bagnalls did not collect outstanding management fees on normal trade terms, from which the CMA infers that these fees were collected at his discretion. In this way, Bagnalls supported Carbo UK financially, in circumstances where Carbo UK had to wait to be paid by Carbo BV.[347] [Director E] has also stated that he invoiced one of Carbo UK's customers – the Tesco in-store charcoal account - in Bagnalls' name for ease of administration.[348] The businesses of Carbo UK and Bagnalls were therefore financially interlinked in a comparable way to

[343] *Hydrotherm,* [1984] ECR 2999.
[344] *Hydrotherm,* [1984] ECR 2999, at paragraph 11.
[345] See paragraphs 2.88 above.
[346] See paragraph 2.97 above.
[347] [Director E]'s evidence is that Carbo BV paid Carbo UK a handling fee – see Witness Statement of [Director E] dated 8 September 2017, paragraph 28 – [CMA Document Reference URN1498].
[348] See paragraph 2.95.

the businesses of Fuel Express Limited and each of Bagnalls and Grosvenors.

5.47. Consistent with the CMA's findings about the management, economic and structural links between these entities as described above, the CMA considers that during the Relevant Period Carbo UK, Bagnalls, Fuel Express Limited and Grosvenors did not compete with each other for business in the markets for solid fuel and charcoal products to national retailers. Rather, as set out above, [Director E]'s would decide which of Bagnalls, Carbo UK and Fuel Express Limited to put business through based on the customer's requirements and the amount of business involved.[349] Similarly, Grosvenors did not supply national retailers during the Relevant Period other than through Fuel Express Limited. Thus, Grosvenors, Bagnalls and Carbo UK did not compete with one another for the supply of solid fuel and charcoal products to national retailers in the UK. This is consistent with the fact that although Grosvenors and Bagnalls would invoice customers they supplied through Fuel Express Limited in their own names, [Director E] and [Director D] corresponded with customers (and suppliers) using a Fuel Express Limited email account and they therefore presented themselves on the market in a unified manner, ie as Fuel Express Limited.

5.48. Further, as noted above at paragraphs 3.14 to 3.16, [Director E] and [Director D] also explained that by establishing closer trading relationships with CPL, Fuel Express as a whole (namely, Carbo UK, Bagnalls, Grosvenors and Fuel Express Limited) stood to benefit financially.

5.49. In light of the factors outlined above, and the very particular nature of the relationships between the various Fuel Express entities, the CMA has found that, during the Relevant Period, the businesses of Fuel Express Limited, Bagnalls, Carbo UK and Grosvenors were interlinked such that they comprised, as a matter of commercial reality, a single undertaking.

5.50. In any event and as described below, the CMA considers that even were these entities to be considered as separate undertakings, they were each directly involved in a single continuous infringement and therefore would each be liable for the Infringement.

[349] See paragraph 2.97 above.

Attribution of Liability: Application to Parties

CPL

5.51. The CMA has found that CPLD was directly involved in, and is therefore liable for, the Infringement.

5.52. The CMA has also found that CPL Industries Holdings is jointly and severally liable with CPLD for the Infringement. During the Relevant Period, CPLD was 100% owned by Heptagon Limited; CPL Industries held, directly or indirectly, 100% of the shares in Heptagon Limited; and CPL Industries Holdings held, directly or indirectly, 100% of the shares in CPL Industries. CPL Industries Holdings is therefore presumed to have exercised decisive influence over CPLD during the Relevant Period, and therefore to form part of the same undertaking.

5.53. The Decision is therefore addressed to CPLD and CPL Industries Holdings.

Fuel Express

5.54. The CMA has found that Fuel Express Limited, Grosvenors, Bagnalls and Carbo UK were all directly involved in, and are therefore liable for, the Infringement.

5.55. The CMA has also found that Grosvenors, Bagnalls, Fuel Express Limited and Carbo UK operated as an economic unit in the markets for the supply of solid fuel and charcoal products to national retailers in the UK. The CMA has therefore found that Fuel Express Limited, Grosvenors, Bagnalls and Carbo UK form part of the same undertaking and are therefore all jointly and severally liable for the Infringement.

5.56. Based on the above, the Decision is addressed to Fuel Express Limited, Grosvenors, Bagnalls and Carbo UK.

C. Agreements and/or concerted practices between undertakings

Key Legal Principles

5.57. The Chapter I prohibition and Article 101 TFEU apply to '*agreements*' and '*concerted practices*' and '*decisions by associations of undertakings*'.[350]

Agreements

5.58. The Chapter I prohibition and Article 101 TFEU are intended to catch a wide range of agreements, including oral agreements and '*gentlemen's agreements*'.[351] 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.[352] Tacit acquiescence may also be sufficient to give rise to an agreement for the purpose of the Chapter I prohibition or Article 101 TFEU.[353] An agreement may also consist of either an isolated act or a series of acts or a course of conduct.[354] 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'*.[355]

5.59. Although it is necessary to show the existence of a joint intention[356] 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.[357]

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[350] Section 2(1) of the Act and Article 101(1) TFEU.

[351] Judgment of 15 July 1970, *ACF Chemiefarma v Commission* C-41/69, EU:C:1970:71, paragraphs 106 to 114.

[352] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [658]; Commission Decision of 9 December 1998, *Greek Ferries*, Case IV/34466, paragraph 141 (upheld on appeal).

[353] See for example *Bayer v Commission*, Case T-41/96, [2000] ECR II-3383, EU:T:2000:242 at paragraph 102; OFT decision No. CA98/08/2004, 8 November 2004, Case *CE/2464-03 (double glazing)*.

[354] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 81.

[355] Judgment of 26 October 2000, *Bayer v Commission* T-41/96, EU:T:2000:242, paragraph 69 (upheld on appeal in Judgment of 6 January 2004, *BAI and Commission v Bayer*, joined cases C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 96 and 97) and Judgment in *Hercules Chemicals v Commission*, EU:T:1991:75, paragraph 256.

[356] *GlaxoSmithKline Services Unlimited v Commission*, T-168/01, EU:T:2006:265, paragraph 76

[357] Judgment of 27 September 2006, *GlaxoSmithKline Services Unlimited v Commission*, T-168/01, EU:T:2006:265, paragraph 77 (upheld on appeal in Judgment of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission*, Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610).

Concerted Practices

5.60. The concepts of *'agreements'* 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.[358]

5.61. 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.[359]

5.62. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the prices and commercial terms it offers to customers.[360] This requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the future conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of 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.[361]

5.63. A concerted practice is '*a form of coordination between undertakings'* which falls short of '*having reached the stage where an agreement properly so-called has been concluded',* and where competitors knowingly substitute

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[358] Judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 2; see also Judgment in *Commission v Anic Partecipazioni,* EU:C:1999:356, paragraph 131 and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, paragraph 206(ii).

[359] Judgment of Court of Appeal, 19 October 2006, *Argos, Littlewoods and JJB*, at paragraph 22.

[360] Judgment of 16 December 1975, *Suiker Unie and Others v Commission* C-40/73, EU:C:1975:174, paragraph 173. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(iv).

[361] Judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 33.

practical cooperation between them for the risks of competition.'[362] The Court of Justice 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*'.[363]

5.64. The coordination comprises *'any direct or indirect contact'* between undertakings which has the object or effect of influencing the conduct on the market of an actual or potential competitor[364] thereby creating conditions of competition which do not correspond to the normal conditions of the market in question.[365]

5.65. It follows that '*a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.*' However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition.[366] In addition, the Court of Justice in *Hüls v Commission* stated that '*subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period.*'[367] Therefore, in order to prove concertation, it is not necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular

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[362] Judgment of 14 July 1972, *ICI v Commission* C-48/69, EU:C:1972:70, paragraph 64. See also Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraphs 151 to 153.

[363] Judgment in *ICI v Commission*, EU:C:1972:70, paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 151.

[364] Judgment in *Suiker Unie and Others v Commission*, EU:C:1972:70, paragraph 174. See also Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, at paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 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.

[365] Judgment of 14 July 1981, *Züchner v Bayerische Vereinsbank* C-172/80, EU:C:1981:178, paragraph 14; Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 117; and Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 33.

[366] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(xi).

[367] Judgment of 1999, *Hüls v Commission (Polypropylene)* C-199/92, paragraph 162.

course of conduct or that the competitors have expressly agreed a particular course of conduct on the market. It is sufficient that the exchange of information should have removed or reduced the degree of uncertainty as to the conduct in the market to be expected on his part.

Agreements and/or concerted practice

5.66. It is not necessary, for the purpose of finding an infringement, to distinguish between agreements and concerted practices, or to characterise conduct exclusively as an agreement, a concerted practice or a decision by an association of undertakings.[368] Nothing turns on the precise form taken by each of the elements comprising the overall agreement and/or concerted practice. As explained by the Court of Justice, '*it is settled case-law that, although Article* [*101 TFEU*] *distinguishes between 'concerted practice', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibition of that article catch different forms of coordination between undertakings of their conduct on the market* […] *and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct.*'[369]

Assessment

5.67. The CMA has found that there was a concurrence of wills between the Parties and/or a coordination of conduct between them in which they knowingly substituted practical cooperation between them for the risks of competition. The CMA concludes therefore that the Parties participated in an agreement and/or concerted practice in respect of the supply of solid fuels and charcoal products to national retailers in the UK.

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[368] *Argos, Littlewoods and JJB*, at paragraph 21. See also Judgment of 17 December 1991, *Hercules Chemicals v Commission* T-7/89, EU:T:1991:75*,* paragraph 264; Judgment of 24 October 1991, *Rhône-Poulenc v Commission* T-1/89, EU:T:1991:56, paragraph 127; Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraphs 131 and 132; and Commission Decision 86/399/EEC of 10 July 1986 (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.

[369] Judgment of 11 September 2014, *MasterCard and Others v Commission* C-382/12 P, EU:C:2014:2201; *Judgment in MasterCard and Others v Commission, EU:C:2014:2201*, paragraph 63 and the case law cited. See Judgment of 20 March 2002, *HFB and Others v Commission* T-9/99, EU:T:2002:70, paragraphs 186 to 188; Judgment of 23 November 2006, *ASNEF-EQUIFAX C-238/05*, EU:C:2006:734, paragraph 32. See also Judgment of 20 April 1999*, LVM v Commission,* joined cases T-305/94, T-306/94, etc, EU:T:1999:80, paragraph 696: '*In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article* [*101*] *of the Treaty*.'

5.68. In particular, the CMA has found that the Parties expressed a joint intention and/or common understanding to assist each other in maintaining at least some of their pre-existing customer relationships. In reaching this conclusion, the CMA relies on the evidence of the Parties' conduct as set out at paragraphs 3.20 to 3.106 and, in particular, on the evidence as set out below.

5.69. As set at out paragraphs 3.11 to 3.16 witnesses from both Parties gave evidence that at the beginning of the period of the Infringement the Parties sought to co-operate rather than compete with one another because they wanted to establish closer trading relationships that would benefit each of them financially and that during this time competition between the Parties had dampened.[370] In particular, witnesses from both Parties admitted that further to their discussions, they had colluded with one another in the context of an ongoing tendering process for Sainsbury's forecourts, with the intention of ensuring that Fuel Express did not win the bid. The witnesses from Fuel Express admitted that they had submitted a high bid for the customer as a favour to CPL. They did so to assist CPL in retaining its customer.

5.70. The Parties' joint intention not to compete during the Relevant Period, or to do so less aggressively, is also demonstrated by the email from [Director E] to [Director B] dated 30 June 2010 (described at paragraphs 3.30 to 3.36) which evidences that the Parties discussed how they could cooperate with respect to maintaining their pre-existing relationships with, in particular, Tesco for the sale of both charcoal and solid fuel products to its stores.

5.71. In line with their mutual intention as set out above, the Parties assisted each other in maintaining at least some of their pre-existing customer relationships by coordinating their prices in response to specific tenders so as to ensure that the existing supplier retained its customer. In particular, the evidence shows that:

(i) Tesco (in store) was a customer of Fuel Express during the Relevant Period. Following the customer's invitation to tender in June 2010, Fuel Express (through the above email dated 30 June 2010) offered price quotes to CPL to quote above for Tesco (in store) for the supply of

[370] Transcript of CMA interview with [Director B] dated 7 August 2017, pp35–37 – [CMA Document Reference URN1492]; Witness Statement of [Director E] dated 8 September 2017, paragraph 70 – [CMA Document Reference URN1498]. See also Transcript of CMA interview with [Director D] dated 22 August 2017, p12 – [CMA Document Reference URN1491] and Witness Statement of [Director D] dated 8 September 2017, paragraph 62 – [CMA Document Reference URN1496].

charcoal to ensure that CPL would lose the bid. The evidence demonstrates that CPL took the pricing steer into account in designing its high bid and that Fuel Express retained the Tesco (in store) account for charcoal and solid fuel throughout the Relevant Period (see paragraphs 3.37 to 3.39 above);

(ii) Sainsbury's was an existing customer of CPL for the supply of both charcoal and solid fuel for sale in petrol station forecourts. As discussed above, following an invitation to tender from the customer in July 2010, CPL provided Fuel Express with a list of prices that it wanted Fuel Express to quote at when submitting its bid for solid fuels to the customer. As a 'favour' to CPL, Fuel Express duly complied with CPL's request and submitted a high bid that was designed to lose and ultimately did lose. The evidence shows that in February 2011, CPL again provided a pricing steer to Fuel Express in the context of an ongoing tendering process for Sainsbury's forecourts. The CMA infers that it did so to assist CPL in maintaining its pre-existing customer relationship. Throughout the Relevant Period, CPL retained Sainsbury's forecourts as a customer (see paragraph 3.66 above); and

(iii) the Parties exchanged commercially sensitive and confidential pricing, including information that related to a joint bid between Fuel Express and one of CPL's competitors in the context of an ongoing tendering process for Tesco's forecourts (for the supply of solid fuel and charcoal). The pricing information was intended to assist CPL in maintaining its pre-existing customer relationship with Tesco's forecourts and with its national forecourt customers more generally (see paragraphs 3.91 to 3.106 above).

5.72. The CMA has found that the Parties engaged in the foregoing conduct on a reciprocal basis and that this further evidences their mutual intention to assist each other in maintaining at least some of their respective pre-existing customer relationships. In particular, CPL assisted Fuel Express to retain Tesco for the supply of charcoal to its stores and Fuel Express assisted CPL to retain its national forecourt customers such as Sainsbury's and Tesco.

5.73. The CMA has not found any documentary evidence that the Parties sought to distance themselves publicly from their arrangement.[371] On the contrary,

[371] While [Director B] states that he called [Director E] after the email dated 30 June 2010 to tell him that it was inappropriate, the CMA considers that [Director B]'s evidence is not credible for the reasons set out at paragraph 3.51.

the evidence shows that during the Relevant Period the Parties took direct steps to assist each other to maintain at least some of their pre-existing customer relationships.

5.74. Based on the above and the evidence set out at paragraphs 3.20 to 3.106, the CMA concludes that the arrangement between the Parties to assist each other in maintaining at least some of their pre-existing customer relationships constituted an agreement(s) and/or concerted practice(s) for the purposes of the Chapter I prohibition and/or Article 101 TFEU.

D. Single, continuous infringement

Key Legal Principles

5.75. 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.[372]

5.76. When establishing that an undertaking was involved in a single continuous infringement it is necessary to show that: '*… the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.*'[373]

5.77. Agreements and/or concerted practices may constitute a single continuous infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.[374]

Assessment

5.78. The CMA has found that the conduct of Fuel Express and CPL consists of several anti-competitive contacts, all of which pursued a common anti-competitive objective: namely, to share the markets for the supply of solid fuel and charcoal products to national retailers in the UK by allocating at least some of their customers between them.

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[372] Judgment in *Rhône-Poulenc v Commission*, EU:T:1991:56, paragraph 126.

[373] Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 87; see also cases T-204/08 and T-212/08, *Team Relocations NV and others v European Commission* ECLI:EU:T:2011:286*,* at paragraph 37, upheld in relation to this point in C-444/11 P, ECLI:EU:C:2013:464 at paragraphs 49-57.

[374] Judgment of 20 March 2002, *LR AF 1998 v Commission*, T-23/99, EU:T:2002:75, paragraphs 106-109.

5.79. The Parties sought to achieve their anti-competitive objective by assisting each other in maintaining at least some of their pre-existing customer relationships. This involved bid-rigging and the exchange of confidential and commercially sensitive pricing information in the context of ongoing tendering processes.

5.80. The CMA considers that the existence of a common anti-competitive objective is further supported both by the Parties' subjective intention of dampening competition between them (see paragraphs 3.11 to 3.17 and paragraph 3.81) and the fact that the conduct took place on a reciprocal basis so that each Party assisted the other to retain at least some of its existing customers.

5.81. Based on the above, the CMA therefore concludes that the Parties participated in a single, continuous infringement.

E. Object of preventing, restricting or distorting competition

Key Legal Principles

5.82. The Chapter I prohibition and Article 101 TFEU prohibit agreements between undertakings or concerted practices which:

> '…*have as their object or effect the prevention, restriction or distortion of competition.*'

5.83. 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.[375]

5.84. 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.[376]

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[375] Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:T:1994:20, paragraph 50; Judgment in *MasterCard and Others v Commission*, EU:C:2014:2201, paragraph 185.

[376] Judgment of 13 July 1966, *Consten and Grundig v Commission*, C-58/64 (joined Cases C-56/64, C-58/64), EU:C:1966:41, paragraph 342. See also *Cityhook Limited v OFT*, at paragraph 269.

5.85. The object of an agreement is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives and the legal and economic context of the agreement.[377] 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.[378] Where appropriate, the way in which the coordination (or collusive behaviour) is implemented may be taken into account.[379] The object of an agreement and/or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it.[380]

5.86. 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 finding that there is an anti-competitive restrictive object.[381]

5.87. Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition. This will be the case even if the agreement or concerted practice had other objectives.[382]

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[377] Judgment in *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 36 and Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 53. See also Judgment in *GlaxoSmithKline Services Unlimited v Commission*, EU:C:2009:610, paragraph 58; Judgment of 20 November 2008, *Competition Authority v Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraphs 16 and 21; Judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08, EU:C:2011:631, paragraph 136.

[378] Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 53 and Judgment in *Allianz Hungária Biztosító* and Others, EU:C:2013:160, paragraph 36.

[379] *Cityhook Limited v OFT* [2007] CAT 18 ('*Cityhook Limited v OFT*'), at paragraph 268, which noted the provisions of paragraph 22 of the Commission Notice: *Guidelines on the application of Article 81(3) of the Treaty* (now Article 101(3) TFEU), OJ C 101/97, 27 April 2004 ('*Article 101(3) Guidelines*'). 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*'.

[380] Judgment of 28 March 1984, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, joined cases 29/83 and 30/83, EU:C:1984:130, paragraphs 25 and 26.

[381] Judgment in *Allianz Hungária Biztosító* and Others, EU:C:2013:160, paragraph 37 and Judgment in *Groupement des cartes bancaires and Europay International v Commission*, EU:C:2014:2204, paragraph 54.

[382] For example, Judgment of 8 November 1983, *NV IAZ International Belgium and others v Commission of the European Communities*, joined cases 96-102, 104, 105, 108 and 110/82, EU:C:1983:310, paragraphs 22 to 25.

Market-sharing

5.88. The Chapter I prohibition and Article 101 TFEU both apply, in particular, to agreements or concerted practices which 'share markets or sources of supply'.[383]

5.89. The Court of Justice has held that market-sharing agreements constitute serious breaches of competition rules and that such agreements have, in themselves, the object of restricting competition.[384]

5.90. Businesses may agree to share markets in a number of different ways. The European Commission and European Courts have found that market sharing through the allocation of customers on the basis of pre-existing commercial relationships restricts competition by object.[385]

5.91. For example, in the *Pre-Insulated Pipe* case, the European Commission found that a market-sharing agreement among suppliers to respect each other's 'pre-existing' customer relationships restricted competition by its very nature.[386] For each supply contract, the pre-existing supplier would inform other participants in the arrangement of the price they intended to quote, and the other suppliers would quote higher prices to ensure the maintenance of the pre-existing customer relationship. The mechanism whereby participants quote elevated prices so as to avoid drawing customers away from agreed supply relationships is a common method of market sharing by customer allocation.[387]

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[383] Article 101(1)(c); and section 2(2)(c) of the Act.

[384] C-373/14 P *Toshiba Corporation v Commission*, EU:C:2016:26, paragraph 28. See also C-239/11, C-489/11 and C-498/11 *Siemens AG and Others v Commission*, EU:C:2013:866, paragraph 218; *ING Pensii v Commission*, EU:C:2015: 484, paragraphs 32-34.

[385] Commission Decision 83/546/EEC of 17 October 1983 (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694; Commission Decision 86/399/EEC of 10 July 1986 (IV/31.371 – *Roofing Felt*) (OJ 1991 L 232/15) and Commission Decision 2002/759/EC of 5 December 2001 (Case COMP/37.800/F3 – *Luxembourg Brewers*) (OJ 2002 L 253/21) (appeals dismissed in Judgment of 27 July 2005, *Brasserie Battin v Commission*, T-51/02 (joined cases T-49/02, T-50/02, T-51/02), EU:T:2005:298). Note that it is not necessary for the arrangement to cover all of the market, or to exclude all competition – see for example Case COMP/C.39181 - *Candle Waxes*), at paragraph 322. See also, for example, Case COMP 38866/ *Animal Feed Phosphates*, at paragraph 123 (parties free to compete for some customers in Spain but nevertheless found to have adhered to a common strategy which limited their individual commercial conduct).

[386] Commission Decision 1999/60/EC of 21 October 1998 (Case No IV/35.691/E-4 – *Pre-Insulated Pipe Cartel*) (OJ 1999 L 24/1). See also Commission Decision 2005/566/EC of 9 December 2004 (Case No C.37.533 – *Choline Chloride*) (OJ 2005 L 190/22).

[387] For example, Commission Decision 2005/566/EC of 9 December 2004 (Case No C.37.533 – *Choline Chloride*) (OJ 2005 L 190/22).); COMP/ 39406 *Marine Hoses*, Case T-146/09 *RENV Parker Hannifin Manufacturing Srl, formerly Parker ITR Srl and Parker-Hannifin Corp. v European Commission*,

5.92. The CMA has also found more recently the practices of market-sharing and coordinating commercial behaviour through bid-rigging (amongst other things) to be an infringement of the Chapter I prohibition and/or Article 101 TFEU. In the *Drawer Wraps* case,[388] the parties exchanged confidential information on (and agreed to 'back off' from) each other's customers. On occasion, they also shared pricing information for the purposes of submitting 'tactical quotes' to customers.

5.93. Further, in *Apex Asphalt*,[389] the Competition Appeal Tribunal ('**CAT**') upheld the OFT's finding in *West Midland Roofing Contractors*[390] that cover pricing (also referred to as collusive tendering or bid-rigging) amounted to an infringement of the Chapter I prohibition. In the context of that case, the OFT described cover pricing as arising when a supplier/bidder submits a price for a contract that is not intended to win the contract; rather it is a price that has been decided upon in conjunction with another supplier/bidder that wishes to win the contract.[391]

5.94. It is irrelevant for the finding of an infringement that the party which was supplied with pricing information intended to submit an uncompetitive bid in any event.[392]

5.95. It is also irrelevant for the finding of an infringement that there were other bidders from which the tenderer could choose, apart from the parties who were colluding.[393]

ECLI:EU:T:2016:411; COMP/39125 *Car Glass*, Cases T-56/09 and T-73/09 *Saint-Gobain Glass France SA and Others v European Commission*, ECLI:EU:T:2014:160.

388 Supply of products to the furniture industry (drawer wraps), CMA decision of 27 March 2017.

389 *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4.

390 *West Midland Roofing Contractors*, OFT decision of 17 March 2004.

391 One aspect of this practice is that the customer is deceived as to the extent of competition – see for example cases T-204/08 and T-212/08, *Team Relocations NV and others v European Commission* ECLI:EU:T:2011:286, C-444/11 P, ECLI:EU:C:2013:464 at paragraph 13 ("*The members of this cartel also cooperated in submitting cover quotes, which led customers… into the mistaken belief that they could choose according to competition-based criteria*." See also, for example, *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4 at paragraphs 208, 209, 250 and 251.

392 This is based on the principle that the parties' subjective intentions are irrelevant in establishing the object of an anti-competitive arrangement (see above at paragraphs 5.85 to 5.86 and see also *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4 at paragraph 250.

393 See *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4 at paragraph 251, which states that submitting an anti-competitive cover bid had the object or effect of restricting competition because
(a) it reduces the number of competitive bids submitted in respect of that particular tender;
(b) it deprives the tenderee of the opportunity of seeking a replacement (competitive) bid;

Price-fixing and the exchange of commercially sensitive information

5.96. The Chapter I prohibition and Article 101 TFEU also both apply to agreements or concerted practices which '*directly or indirectly fix purchase or selling prices or any other trading conditions*'.[394]

5.97. In this regard, the case law is clear that both the Chapter I prohibition and Article 101 TFEU prohibition will apply to any form of agreement that might restrict or dampen price competition, either directly or indirectly. This includes, for example, an agreement to adhere to published price lists or not to quote a price without consulting potential competitors,[395] or not to undercut a competitor.[396] An agreement may restrict price competition even if it does not entirely eliminate it.[397]

5.98. The European Courts and the European Commission have also held on numerous occasions that agreements or concerted practices which involve the sharing amongst competitors of pricing or other information of commercial or strategic significance restrict competition by object.[398]

5.99. The Court of Justice has therefore held that the exchange of information between competitors is liable to be incompatible with Article 101 TFEU (and EU Member States' equivalent national competition laws) 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.[399] 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

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(c) it prevents other contractors wishing to place competitive bids in respect of that particular tender from doing so;

(d) it gives the tenderee a false impression of the nature of competition in the market, leading at least potentially to future tender processes being similarly impaired.

394 Article 101(1)(c); and section 2(2)(c) of the Act.

395 Commission Decision 83/546/EEC of 17 October 1983 (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694.

396 Agreements between manufacturers of glass containers, OJ [1974] L160/1, at paragraphs 34 and 35.

397 *Guidance on Agreements and Concerted Practices*, paragraphs 3.5 and 3.6, adopted by the CMA Board.

398 See for example: Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraphs 113 to 127; Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343. See also Horizontal Cooperation Agreements Guidelines; and Article 101(3) Guidelines, paragraphs 72 to 74.

399 Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 121; Judgment of 11 March 1999, *Thyssen Stahl v Commission*, C-194/99 P, EU:C:2003:527, paragraph 81; Judgment in *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 35.

their conduct on the market must be regarded as pursuing an anti-competitive object.[400]

Assessment

5.100. The Infringement took the form of co-ordinating commercial behaviour through bid-rigging and the exchange of confidential, competitively sensitive pricing information between Fuel Express and CPL during the Relevant Period with the object of sharing markets by allocating at least some of their customers between them.

5.101. Sections 2.C and 2.D - *Industry overview* and *The Parties* - describe the economic context in which these anti-competitive contacts took place, including the significant position of CPL and Fuel Express in the markets for the supply of solid fuel and charcoal products to national retailers in the UK.

5.102. Paragraphs 5.88 to 5.95 above set out the relevant legal principles that establish that market sharing and bid-rigging amount to serious infringements of the Chapter 1 prohibition and/or Article 101 TFEU.

5.103. The CMA considers that the anti-competitive objective of the Parties' agreement and/or concerted practice is supported by the evidence of the Parties' subjective intention in entering into the agreement and/or concerted practice which, as described at paragraphs 3.11 to 3.17 and paragraph 3.81 above, was to dampen competition between them in order to progress their commercial negotiations that would have benefitted each of them financially.

5.104. As set out in section 3.D - *Pre-existing Customer Relationships* - the evidence shows that Fuel Express and CPL assisted each other in maintaining at least some of their pre-existing customer relationships by submitting on at least two occasions bids that were designed to lose the relevant business so as to assist the existing supplier in maintaining the customer, and by exchanging confidential and commercially sensitive pricing information, including in relation to a competitor's bid and its pricing strategy for one of the Parties' existing customers. In all instances, the existing supplier retained the relevant customer during the Relevant Period. Further the evidence shows that the Parties engaged in the foregoing conduct on a reciprocal basis: CPL assisted Fuel Express in maintaining its pre-existing customer relationships and Fuel Express assisted CPL to do the same.

[400] Judgment in *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 122; Judgment in T-Mobile Netherlands and Others, EU:C:2009:343, paragraph 41.

5.105. During the course of the CMA's investigation it was suggested that the exchange of the pricing information between the Parties did not impact the Parties' commercial strategy.[401] However, given that the pricing information with respect to Tesco for the sale of charcoal to its stores and Sainsbury's for the sale of solid fuels to its petrol forecourt stations was used to design bids, and that the 'Standard Brands' pricing information was circulated as 'highly confidential' and taken into account within CPL, and further given that the Parties engaged in the foregoing conduct in the context of ongoing tendering processes, the CMA does not consider that this position is credible.

5.106. The CMA has found that, consistent with the relevant principles set out in paragraphs 5.82 to 5.99 above, the Parties coordinated their competitive and pricing behaviour through bid-rigging and the exchange of competitively sensitive information with the object of sharing markets by allocating at least some of their customers between them. Such conduct is an obvious restriction of competition and can be regarded, by its very nature, as being harmful to the proper functioning of normal competition. The CMA therefore has found that the Parties' conduct had as its object the prevention, restriction or distortion of competition.

F. Appreciable restriction of competition

Key Legal Principles

5.107. An agreement and/or concerted practice will only infringe the Chapter I prohibition and/or Article 101 TFEU if it has as its object or effect the appreciable prevention, restriction or distortion of competition[402] within the UK or a part of it, or within the EU internal market, respectively.

5.108. The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.[403] In accordance with section 60(2) of

[401] See paragraphs 3.46, 3.47, 3.86 and 3.104 above.

[402] 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 Judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 16.

[403] Judgement in *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 37; and Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 13.

the Act,[404] this principle also applies *mutatis mutandis* in respect of the Chapter I prohibition: accordingly, an agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

Assessment

5.109. As noted above, the CMA has found that the arrangement between the Parties had as its object the prevention, restriction and distortion of competition. The CMA therefore considers that it had by its very nature an appreciable effect on competition for the purposes of Article 101 TFEU and the Chapter I prohibition.

G. Effect on trade within the UK

5.110. For the reasons set out below, the CMA has found that the Infringement satisfies the requisite test for an effect on trade within the UK.

Key Legal Principles

5.111. 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.*'

5.112. The CAT has held that 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 and that there is no requirement that the effect on trade within the UK should be appreciable.[405]

Assessment

5.113. During the Infringement, CPL was the main supplier of solid fuel products, and one of the few suppliers of charcoal products, to national retailers in the

[404] Section 60(2) of the Act provides that, when determining a question in relation to the application of Part 1 of the Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. See also *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraph 148 onwards.

[405] *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at paragraphs 459 & 460. The CAT considered this point also in *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, at paragraphs 48-51 & 62 but considered that it was '*not necessary* […] *to reach a conclusion*'.

UK. Fuel Express, through its constituent entities, was also one of the main suppliers of both solid fuel and charcoal products in the UK.[406]

5.114. The CMA has found that the Infringement covered the whole of the UK and that it dampened competition for solid fuel and charcoal products within the UK. The CMA therefore concludes that the arrangement between the Parties may have affected trade within the UK within the meaning of the Chapter I prohibition and that, in so far as required, the effect on trade within the UK was appreciable.

H. Effect on trade between Member States

Key Legal Principles

5.115. Article 101(1) TFEU applies where an agreement and/or concerted practice has the potential to affect trade between EU Member States. Such an effect on trade must be appreciable.

5.116. 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.[407] In this context, the concept of 'effect on trade' has a wide scope and is not limited to exchanges of goods and services across borders.[408]

5.117. Trade between Member States may be affected notwithstanding that the relevant market may be national or sub-national in scope.[409] Moreover, horizontal cartels covering a whole Member State are normally capable of affecting trade between Member States.[410] The European 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*

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406 CPL's response to the CMA's section 26 notice dated 6 June 2017, Specifications 7 and 8 – [CMA Document Reference URN1174].

407 First stated in Judgment of 30 June 1966, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, C-56/65, EU:C:1966:38, p.249. See further, for example*, van Landewyck* (fn523), paragraph 12; Judgment of 11 July 1985, *Remia BV and others v Commission of the European Communities*, C-42/84, EU:C:1985:327, paragraph 22. See also Commission Notice (EC) Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C101/07) (the '*Notice on the Effect on Trade'*), paragraph 24.

408 Judgment in *Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraph 18; and see the Notice on the Effect on Trade, paragraph 19.

409 Notice on the Effect on Trade, paragraph 22.

410 Notice on the Effect on Trade, paragraphs 78 to 80.

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.'[411]

Assessment

5.118. The CMA has found that the arrangement between the Parties related to the supply of solid fuel and charcoal products to national retailers and therefore covered the whole of the UK. The arrangement between the Parties was therefore by its nature capable of having an appreciable effect on trade between Member States within the meaning of Article 101 TFEU.

I. Exclusions and exemptions

5.119. The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of Schedules 1 to 3 of the Act.[412]

5.120. The CMA has found that none of the relevant exclusions or exemptions applies to the Infringement.

5.121. The Parties have not argued that the arrangement between them is exempt from the Chapter I prohibition by the operation of section 9 of the Act, or from Article 101(1) TFEU by the operation of Article 101(3) TFEU.

5.122. Although it is for the Parties to demonstrate that the conditions for exemption have been satisfied, the CMA does not consider that these conditions would be satisfied in this case given, in particular, the nature of the Infringement. Further:

(i) no block exemption order exists under section 6 of the Act that would exempt the Parties' conduct from the Chapter I prohibition;

(ii) there is no EU Council or Commission Regulation that would apply to exempt the Parties' conduct from Article 101 TFEU;

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[411] Judgment of 19 February 2002, *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 95. See also the *Notice on the Effect on Trade*, paragraph 78. For the purposes of assessing whether an agreement and/or concerted practice may affect trade between EU Member States to an appreciable extent the CMA follows the approach set out in the European Commission's published guidance.

[412] Section 3 of the Act sets out the following exclusions: Schedule 1 covers mergers and concentrations, Schedule 2 covers competition scrutiny under other enactments; and Schedule 3 covers general exclusions.

(iii) there is also no parallel exemption from the Chapter I prohibition under section 10 of the Act that would apply; and

(iv) none of the exclusions from the Chapter I prohibition as set out in section 3 of the Act applies in this case.

6. THE CMA'S ACTION

A. The CMA's decision

6.1 In light of the above, the CMA has found that, between at least June 2010 and February 2011, the Parties infringed the Chapter I prohibition and/or Article 101 TFEU by participating in a single and continuous infringement that had as its object the prevention, restriction or distortion of competition in relation to the supply of solid fuel and charcoal products to retailers in the UK.

B. Directions

6.2 Section 32(1) of the Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition, it may give such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

6.3 As the CMA considers that the Infringement has come to an end it has decided not to issue directions in this case.

C. Financial penalties

General points

6.4 Section 36(1) of the Act provides that on making a decision that an agreement has infringed the Chapter I prohibition, the CMA may require an undertaking which is party to the agreement concerned to pay the CMA 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 in force at the time when setting the amount of the penalty (the '**Penalties Guidance**').[413]

6.5 The CMA has decided to require each of CPL and Fuel Express to pay a penalty in respect of the Infringement as follows:

a. CPL - £ 2,816,514; and

b. Fuel Express - £ 627,867.

[413] *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board.

In each case, the legal entities which comprise the undertaking are jointly and severally liable for payment of the penalty.

6.6 The CMA has calculated the penalty in accordance with the CMA's published guidance[414] and relevant legislation.[415]

The CMA's margin of appreciation in determining the appropriate penalty

6.7 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000,[416] 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.[417] The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.[418] Rather, the CMA makes its assessment on a case-by-case basis,[419] having regard to all relevant circumstances and the objectives of its policy on financial penalties. In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will also have regard to the seriousness of the infringement and the desirability of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour that breaches the prohibition in Chapter I of the Act (as well as other prohibitions under the Act and the TFEU as the case may be).[420]

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414 *Guidance as to the appropriate amount of a Penalty* (OFT 423, September 2012), adopted by the CMA Board.

415 The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) and the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

416 Ibid.

417 *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at paragraph [102].

418 See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 *(Eden Brown*), at paragraph [78].

419 See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at paragraph [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown*, at paragraph [97] where the CAT observed that '*decisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.

420 Section 36(7A) of the Act and Penalties Guidance, paragraph 1.4.

Small agreements

6.8 The CMA has found that section 39 of the Act (which provides for limited immunity from penalties in relation to the Chapter I prohibition) does not apply in the present case on the basis that:

(i) the combined applicable turnover of the Parties exceeded the relevant threshold;[421]

(ii) the Infringement amounted to a 'price fixing agreement' within the meaning of section 39(9) of the Act; and

(iii) section 39 does not apply in respect of infringements of Article 101 TFEU.

Intention/negligence

6.9 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition or Article 101 TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.[422] However, the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.[423]

6.10 The CAT has defined the terms '*intentionally*' and '*negligently*' as follows:

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

6.11 This is consistent with the approach taken by the Court of Justice, which has confirmed:

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[421] See Companies House for CPL Industries Holdings Limited - https://beta.companieshouse.gov.uk/company/05754991/filing-history (as at 21 December 2017).

[422] Section 36(3) of the Act.

[423] *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs 453 to 457; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 221.

'*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.*'[424]

6.12 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement and/or concerted practice or conduct in question has as its object the restriction of competition.[425]

6.13 Ignorance or a mistake of law does not prevent a finding of intentional infringement.[426]

6.14 Based on the evidence set out at paragraphs 3.20 to 3.106, the CMA has found that the Infringement had as its object the prevention, restriction or distortion of competition, and that the Parties must therefore have been aware (or could not have been unaware), and at the very least ought to have known, that their conduct was capable of harming competition. The CMA therefore concludes that the Infringement was committed intentionally or, at the very least, negligently.

Calculation of the penalty

6.15 As noted at paragraph 6.4 above, when setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time. The Penalties Guidance sets out a six-step approach for calculating the penalty.

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[424] Judgment of 14 October 2010 in *Deutsche Telekom v Commission*, C-2080/08P, EU:C:2010:603, paragraph 124.

[425] See *OFT's Guidance on Competition law application and Enforcement* (OFT407, December 2004), adopted by the CMA Board ('Guidance on Enforcement'), paragraph 5.9.

[426] See Judgment of 18 June 2013 in *Bundeswettbewerbsbehörde v Schenker & Co AG*, C-681/11, EU:C:2013:404, 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*'. See also Guidance on Enforcement, paragraph 5.10.

Step 1 – starting point

6.16 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the relevant turnover of the undertaking and the seriousness of the infringement.[427]

6.17 The 'relevant turnover' is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's last business year.[428] The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.[429]

6.18 In order to reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30 per cent of the undertaking's relevant turnover.[430] The actual percentage which is applied to the relevant turnover depends on the nature of the infringement. The more serious and widespread the infringement, the higher the starting point.[431] While making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.[432] The CMA will use a starting point towards the upper end of the range for the most serious infringements of competition law, including hardcore cartel activity.[433] The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future. The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.[434]

Step 2 – adjustment for duration

6.19 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an

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[427] Penalties Guidance, paragraphs 2.3 to 2.11.

[428] Penalties Guidance, 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).

[429] Penalties Guidance, paragraph 2.7.

[430] Penalties Guidance, paragraph 2.5.

[431] Penalties Guidance, paragraph 2.4.

[432] In accordance with paragraph 2.6 of the Penalties Guidance, these factors include the nature of the product, 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 may also take into account other relevant factors.

[433] Penalties Guidance, paragraph 2.5.

[434] Penalties Guidance, paragraph 2.6.

infringement. Where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement. 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.[435]

Step 3 – adjustment for aggravating and mitigating factors

6.20 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors. A non-exhaustive list of aggravating and mitigating factors is set out in the Penalties Guidance.[436]

Step 4 – adjustment for specific deterrence and proportionality

6.21 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future). The penalty may also be adjusted to ensure that it is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.[437] At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.

6.22 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. An increase to the penalty at this step may also apply 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.[438] In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or

[435] Penalties Guidance, paragraph 2.12.

[436] Penalties Guidance, paragraphs 2.13 – 2.15.

[437] Penalties Guidance, paragraph 2.16. The CMA has considered a range of financial indicators in this regard, based on accounting information publicly available and/or provided by the Parties at the time of calculating the penalty. Those financial indicators included relevant turnover, total worldwide turnover for the last financial year, average total worldwide turnover over a three-year period, average profit after tax over a three-year period, net assets for the last financial year, and dividends over a three-year period.

[438] Penalties Guidance, paragraph 2.17.

excessive having regard to the infringing undertaking's size and financial position and the nature of the infringement.[439]

6.23 Conversely, where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.[440]

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

6.24 The CMA may not impose a penalty for an infringement that exceeds 10 per cent of an undertaking's 'applicable turnover', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision or, if figures are not available for that business year, the one immediately preceding it.[441]

6.25 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another EU Member State in respect of the same agreement or conduct.[442]

Step 6 – application of reduction for leniency and settlement

6.26 The CMA will reduce the undertaking's penalty where the undertaking has a leniency agreement with the CMA in accordance with the CMA's published guidance on leniency, provided always that the undertaking meets the conditions of the leniency agreement.[443]

6.27 The CMA will reduce an undertaking's financial penalty at step 6 where the undertaking has agreed to settle the case with the CMA. This will involve,

[439] Penalties Guidance, paragraph 2.19.
[440] Penalties Guidance, paragraph 2.20.
[441] Section 36(8) of the Act and the 2000 Order, as amended. See also Penalties Guidance, paragraph 2.21.
[442] Penalties Guidance, paragraph 2.24.
[443] Penalties Guidance, paragraph 2.25. See also the Leniency Guidance.

among other things, the undertaking admitting its participation in the infringement.[444]

Financial hardship

6.28 In exceptional circumstances, the CMA may reduce a penalty where the undertaking is unable to pay the penalty proposed due to its financial position. Such financial hardship adjustments will be exceptional and there can be no expectation that a penalty will be adjusted on this basis.[445]

Penalty Calculation

6.29 In determining the penalties for the Parties the CMA has had regard to the six-step approach as set out in the Penalties Guidance, which is described above.

Step 1 – starting point

6.30 For the purpose of calculating the penalties for the Parties, the CMA used a starting point of 23 per cent of relevant turnover.

6.31 The 23 per cent starting point was applied to the following relevant turnover figures for each of the Parties:

a. CPL - £12,890,223, whose 'last business year' was the financial year ending 31 March 2010; and

b. Fuel Express – £8,979,793, whose 'last business year' was as follows: the financial year ending 31 July 2010 for Fuel Express Limited, 31 August 2010 for Bagnalls and Carbo UK, and 30 April 2010 for Grosvenors.[446]

6.32 In arriving at a starting point of 23 per cent the CMA had regard to the following factors:

a. the Infringement involved serious types of cartel behaviour. More specifically, it involved a market sharing arrangement by which the Parties sought to assist each other to retain at least some of their pre-

[444] Penalties Guidance paragraph 2.26.

[445] Penalties Guidance, paragraph 2.27.

[446] In the absence of consolidated accounts for Fuel Express, the CMA has calculated this figure on the basis of the financial information provided to it by each of the above Fuel Express Parties.

existing customers, including through bid-rigging and the exchange of confidential and commercially sensitive pricing information;

b. the Infringement involved two of the main suppliers in the relevant markets. In relation to the market for the supply of solid fuels to national retailers in particular, the Parties have a high combined market share; and

c. the Infringement involved sales of solid fuel and charcoal products to national retailers operating throughout the UK.

6.33 In setting the level of the starting point, the CMA also had regard to the fact that there were other competitors in the relevant markets during the Relevant Period, particularly in the market for the supply of charcoal to national retailers, and that the specific evidence of anticompetitive conduct related to only some of the Parties' customers.

Step 2 – adjustment for duration

6.34 The CMA has applied a multiplier of 1 to the starting point to reflect the duration of the Infringement, which lasted from at least June 2010 to February 2011.

Step 3 – adjustment for aggravating and mitigating factors

6.35 In the circumstances of the case, the CMA has made the following adjustments at step 3.

- *Aggravating factor: involvement of directors or senior management*

6.36 The penalty for each of the Parties includes a 15 per cent increase at step 3 for director or senior manager involvement in the Infringement:

a. In respect of CPL, [Director A], who was and remains [Senior Employee] of CPL Industries, and [Director B] who was [Employee], both directly participated in the Infringement, as described in more detail at paragraphs 3.1 to 3.107 above; and

b. In respect of Fuel Express, [Director D], who was a Director and shareholder (through Grosvenors) of Fuel Express Limited and Director and joint owner of Grosvenors; and [Director E], who was Director and shareholder (through Bagnalls) of Fuel Express Limited, a Director and

joint owner of Bagnalls and a Director and shareholder of Carbo UK, both directly participated in the Infringement, as described in more detail at paragraphs 3.1 to 3.107 above.

- *Mitigating factor: cooperation*

6.37 The penalties for CPL and Fuel Express include a 10 per cent reduction at step 3 to reflect the Parties' cooperation with the CMA's investigation, including the fact that each of them made key witnesses (including the directors named above) available for interview on a voluntary basis. This enabled the CMA to conclude its investigation more quickly and efficiently than would otherwise have been possible.

- *Mitigating factor: adequate steps having been taken to ensure compliance with competition law*

6.38 The penalties for Fuel Express and CPL each include a 10 per cent discount for steps taken to ensure compliance with Articles 101 and 102 TFEU and the Chapter I and Chapter II prohibitions. In each case this includes appropriate steps as regards risk identification, assessment, mitigation and review, as well as a public statement regarding their commitment to complying with competition law.

Step 4 – adjustment for specific deterrence and proportionality

6.39 The penalties for the Parties include adjustments at step 4 of the penalty calculation, as follows:

- *CPL*

6.40 The penalty for CPL includes a 25 per cent increase at step 4 to ensure that the penalty is sufficient for deterrence and is both proportionate and appropriate, having regard to CPL's size and financial position.

6.41 In assessing the penalty for CPL in the round at step 4, the CMA has taken into account:[447]

a. CPL's average annual turnover (over the three year period ending 31 March 2017);

[447] References in this paragraph to CPL's financial information are to that of the CPL Industries Group Limited.

b. CPL's average annual profit after tax (over the three year period ending 31 March 2017); and

c. CPL's adjusted net assets.[448]

- *Fuel Express*

6.42 The penalty for Fuel Express includes a 60 per cent decrease at step 4 to ensure that the level of the penalty is proportionate and appropriate in the circumstances, having regard to Fuel Express' size and financial position.

6.43 In assessing the penalty for Fuel Express in the round at step 4, the CMA has taken into account:[449]

a. Fuel Express' average annual turnover over the three year period ending on 30 April 2017 (for Grosvenors), 31 July 2017 (for Fuel Express Limited) and 31 August 2017 (for Bagnalls and Carbo UK);

b. Fuel Express' average annual profit after tax over the three year period ending on 30 April 2017 (for Grosvenors), 31 July 2017 (for Fuel Express Limited) and 31 August 2017 (for Bagnalls and Carbo UK); and

c. Fuel Express' adjusted net assets.[450]

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

6.44 The CMA has assessed the Parties' penalties after step 4 against the statutory maximum penalty. Further to this assessment no reduction to the penalty is required at step 5 of the penalty calculation for either Party. No penalty has been imposed by any other EU body so there is no need for any adjustment to avoid double jeopardy.

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[448] Being net assets in the financial year ending 31 March 2017, together with dividends paid out in the financial years ending 31 March 2017, 31 March 2016, and 31 March 2015. The CMA has also taken into account the representations and additional financial information provided to it by CPL on 23 January 2018, 30 January 2018 and 2 February 2018.

[449] In the absence of consolidated group accounts for Fuel Express, the CMA used the financial information provided to it by each of the Fuel Express entities to produce composite financial indicators for Fuel Express. References in this paragraph to Fuel Express' financial information are to these composite financial indicators.

[450] Being net assets in the financial year ending 2017, together with dividends paid out in the financial years ending 2015, 2016, and 2017. The CMA has also taken into account the representations and additional financial information provided to it by Fuel Express on 23 January 2018, 1 February 2018 and 6 February 2018.

Step 6 – application of reduction for leniency and settlement

- *Leniency*

6.45 As neither undertaking has a leniency agreement with the CMA, no reduction is necessary in this case in that regard.

- *Settlement*

6.46 The penalty for each of the Parties includes a 20 per cent discount to reflect the fact that they have admitted the Infringement and agreed to cooperate in expediting the process for concluding the Investigation (provided that the Parties comply with the continuing requirements of settlement, as set out in the settlement agreement between each of the Parties and the CMA).

- *Financial hardship*

6.47 The penalties for the Parties do not include any adjustment for financial hardship. The CMA does not consider that such an adjustment would be warranted in the case of either Party.

D. Payment of penalties

6.48 The CMA therefore requires CPL to pay a penalty of £2,816,514 and Fuel Express to pay a penalty of £627,867.

6.49 The penalty will become due to the CMA on 29 May 2018[451] and must be paid to the CMA by close of banking business on that date or on such other date or dates as agreed in writing with the CMA. [452]

[451] The next working day two calendar months from the expected date of receipt of the Decision.
[452] Details on how to pay the penalty are set out in the letter accompanying this Decision.

Summary table of final penalties for the Parties

Step	Description		CPL	Fuel Express
	Relevant turnover		**£12,890,223**	**£8,979,793**
1	Starting point as a percentage of relevant turnover		x 23%	x 23%
2	Adjustment for duration		x 1	x 1
3	Adjustment for aggravating or mitigating factors	Aggravating: director / senior manager involvement	+ 15%	+ 15%
		Mitigating: cooperation	- 10%	- 10%
		Mitigating: compliance	- 10%	- 10%
4	Adjustment for specific deterrence or proportionality		+ 25%	- 60%
5	Adjustment to take account of the statutory maximum penalty		No adjustment necessary	No adjustment necessary
6	Settlement discount		-20%	-20%
	Final penalty		**£2,816,514**	**£627,867**

SIGNED: [ ]

Senior Legal Director - Cartels and Consumer Protection
For and on behalf of the Competition and Markets Authority

28 March 2018