

# Decision of the Competition and Markets Authority

Supply of products to the construction industry  
(pre-cast concrete drainage products)

Case 50299

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

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 Names have been replaced by a general descriptor of the individual's role.

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## 1. INTRODUCTION AND SUMMARY

1.1 By this Decision (the '*Decision*'), the Competition and Markets Authority (the '*CMA*') has concluded that the following undertakings (each a '*Party*', together the '*Parties*') have infringed the prohibition imposed by section 2(1) (the '*Chapter I prohibition*') of the Competition Act 1998 (the '*Competition Act*') and Article 101(1) of the Treaty on the Functioning of the European Union ('*Article 101*');

(a) Stanton Bonna Concrete Limited ('*SB*') and its parent companies:

(i) Bonna Sabla SA ('*Bonna Sabla*'); and

(ii) Consolis Finance SAS, Consolis SAS, and Consolis Group SAS ('*Consolis*');

together, '*SBC*';

(b) CPM Group Limited ('*CPM*'); and

(c) FP McCann Limited ('*FPM*').

1.2 The CMA has concluded that, from at least as early as 6 July 2006 to 13 March 2013 (the '*Relevant Period*'), SBC, CPM and FPM infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement through an agreement or a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of certain pre-cast concrete drainage products<sup>1</sup> to customers in Great Britain (the '*Infringement*').

1.3 The Infringement took the form of:

(a) price fixing or price coordination between competitors, including by the agreement of price lists for spot market work,<sup>2</sup> which reduced uncertainty as regards the pricing to be adopted by SB, CPM and FPM, with the aim of increasing prices (see Chapter 4, Section F);

(b) market sharing between competitors through:

(i) the allocation of customers (including by bid rigging). This included an arrangement in respect of the pricing for, and allocation of, customers

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<sup>1</sup> As defined in paragraph 2.1 of this Decision.

<sup>2</sup> That is: work secured on a deal-by-deal basis in the open market.

supplied under certain fixed price agreements<sup>3</sup> (see Chapter 4, Sections G to H); and

(ii) an agreement to maintain specified market shares (see Chapter 4, Section H); and

(c) the regular and systematic exchange of competitively sensitive information (see Chapter 4, Sections C to H).<sup>4</sup>

1.4 The arrangement between SB, CPM and FPM was agreed and reinforced in regular, secret meetings attended by representatives of SB, CPM and FPM (see Chapter 4, Section D and Annex A), as well as in bilateral exchanges concerning particular customers.

1.5 The representatives of SB, CPM and FPM who were the most active in agreeing and operating the arrangement on behalf of the undertakings for which they worked are listed in the table below.

Company	Name	Position during the Relevant Period
SB	[SB senior employee 1]	[redacted]
CPM	[CPM senior employee 1]	[redacted]
	[CPM senior employee 2]	[redacted]
	[CPM senior employee 3]	[redacted]
FPM	[FPM senior employee 1]	[redacted]
	[FPM senior employee 2]	[redacted]
	[FPM senior employee 3]	[redacted]

1.6 The Infringement amounts to a serious infringement of competition law, involving the most serious forms of anti-competitive conduct, by the leading suppliers of pre-cast concrete drainage products in Great Britain, over a significant period of time.

1.7 There is evidence that the arrangement was initiated in response to difficult market conditions, with the express intention of addressing the deterioration of prices in the market (see Chapter 4, Section C). Statements made by individuals attending recorded meetings highlight that the ongoing object of the arrangement was to increase prices and maintain market positions (see,

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<sup>3</sup> Specifically: term deal agreements, under which a manufacturer agreed to supply a range of products to an end customer (either directly or through a builders' merchant) at a particular price for a fixed period; and stock deal agreements, under which a manufacturer agreed to supply a stockist builders' merchant at preferential rates for a fixed period.

<sup>4</sup> The arrangement between SB, CPM and FPM will sometimes be referred to in this Decision as the 'cartel'.

for example, paragraphs 4.55, 4.59, 4.269, 4.292, and 4.294). Documentary evidence shows that individuals went to cartel meetings well prepared, taking a structured and rigorous approach to the ongoing operation and monitoring of the arrangement (see paragraphs 4.84 to 4.93).

- 1.8 There is evidence that SB, CPM and FPM sought to keep the arrangement secret (see paragraphs 4.94 to 4.100, 4.248 and Annex A), with discussions about how to disguise the existence of the arrangement from customers, including by ensuring that agreed prices were not exactly the same (see paragraphs 4.134 to 4.138, and 4.173 to 4.175).
- 1.9 As regards the impact on customers, the CMA notes that pre-cast concrete drainage products are high value items which are used in large infrastructure projects including drainage and water management, roads and railways, as well as in other construction projects of varying sizes. Typical customers include civil engineering companies, construction companies and suppliers to the construction industry, utilities providers, as well as (for publicly-funded projects) local and national government. End customers include house-buyers, construction companies and tax-payers (through their contribution to publicly-funded projects).
- 1.10 By this Decision, the CMA is imposing financial penalties under section 36 of the Competition Act.
- 1.11 Annex C includes a table of abbreviations and defined terms used in this Decision.

## 2. FACTUAL BACKGROUND

### A. Industry overview

#### ***Pre-cast concrete drainage products***

2.1 The Infringement concerns the supply of the pre-cast concrete drainage products set out in the table below (the '*Products*') to the construction industry in Great Britain.<sup>5</sup> Pre-cast concrete drainage products are used in large infrastructure projects including drainage and water management, roads and railways, as well as in other construction projects of varying sizes. Typical customers include civil engineering companies, construction companies and suppliers to the construction industry, utilities providers, as well as (for publicly-funded projects) local and national government.<sup>6</sup>

Flexible pipes <sup>7</sup> and perforated flexible pipes – various sizes from 250 mm to 2400 mm diameter	Chamber rings/manholes – various sizes from 900 mm to 3000 mm diameter – and steps
Cover slabs – various sizes from 900 mm to 3000 mm diameter	Reducing/landing slabs – various sizes from 1200 mm to 3000 mm diameter
Seating rings	Gullies and cover slabs <sup>8</sup> – various sizes from 300 mm to 450 mm diameter
House Inspection Chambers ('HICs') and rectangular manholes – various sizes from 600 mm to 1200 mm diameter	Caissons <sup>9</sup>

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<sup>5</sup> The CMA notes that SB, CPM and FPM did not each produce all of the Products.

<sup>6</sup> Further information on the type of products supplied by, and customers of, each of the Parties is set out in Section 2B (Factual Background – Parties).

<sup>7</sup> FPM has noted its understanding that the term '*flexible*' or '*flex*' refers to the fact that, although the pipes themselves are rigid, the pipe joint allows a nominal angular deviation of 2 degrees (or flex) between adjacent pipes (which does not occur with jacking pipes): FPM's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, paragraph 1.2.2, URN S0115.

<sup>8</sup> Gullies are generally used at the side of roadways to drain away excess water. Gully cover slabs are laid on top of gully pots, and can be used in place of engineering bricks to take the required depth up to the cover at ground level.

<sup>9</sup> Caissons are manholes with cutting shoes which allow the caisson to be pushed into the ground without the need for excavation of a wide area, which is useful near buildings or in confined spaces.



- 2.2 SB, CPM and FPM are competitors in the same market. As set out in Chapter 4, during the Relevant Period, the Products were the subject of unlawful discussions and arrangements between SB, CPM and FPM on pricing, term deals and stock deals, restricting competition between them; and they were the products in respect of which SB, CPM and FPM exchanged competitively sensitive information.<sup>10</sup>
- 2.3 The principal raw materials required for the production of the Products were cement, aggregates (sand and gravel) and steel.<sup>11</sup>
- 2.4 A number of factors influenced the pricing of the Products, including the cost of raw materials, labour costs, fuel costs, manufacturing costs, transport/haulage costs, negotiations with customers, and the route to market.<sup>12</sup>

### ***Routes to market***

- 2.5 The following paragraphs describe the key routes to market for the Products during the Relevant Period.

### ***Builders' merchants***

- 2.6 The Products were often supplied via builders' merchants, who acted as '*middle men*', sourcing the Products from manufacturers and selling them to end customers.<sup>13</sup>
- 2.7 Within that arrangement, builders' merchants carried the commercial risk of the end customer not being able to pay for the products supplied.<sup>14</sup> This had a beneficial effect on manufacturers' credit insurance rates,<sup>15</sup> allowing them to

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<sup>10</sup> As noted at footnote 4, the arrangement between SB, CPM and FPM will sometimes be referred to in this Decision as the '*cartel*'.

<sup>11</sup> Witness statement of [CPM employee 13], dated 20 June 2014, paragraph 6, URN 26971. SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 81, URN S0107.

<sup>12</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 54 to 70, URN S0107; FPM's response dated 23 February 2018, to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.2, URN S0106; CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 4, URN S0110.

<sup>13</sup> See, for example, [§<]; SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 62, URN S0107. Witness statement of [CPM employee 3], dated 25 November 2016, paragraph 11, URN 26981. Witness statement of [Burdens employee 1], dated 14 November 2016, paragraph 12, URN 27103.

<sup>14</sup> [§<].

<sup>15</sup> See witness statement of [FPM employee 6], dated 25 March 2014, paragraph 16, URN 27060.

give builders' merchants preferential prices by way of a discount<sup>16</sup> or rebate.<sup>17</sup> Builders' merchants could either keep such discounts/rebates as profit, or use them to reduce prices to end customers (thereby increasing their chances of winning the business).

2.8 There were two ways for builders' merchants to sell the Products to end customers:

(a) 'ex yard', from stock in the merchant's yard; and

(b) 'direct to site', arranging for the delivery of the Products from the manufacturer directly to the construction site.<sup>18</sup>

#### *Ex yard – 'stock deals'*

2.9 Builders' merchants which stocked one or more manufacturers' products in their yards were known as 'stockists' (or 'stocking' or 'stockholder' merchants). Stockists did not generally stock the full range of pre-cast concrete drainage products, but would instead purchase only those products that they anticipated customers would buy (typically manholes and gullies).<sup>19</sup>

2.10 Manufacturers supplied stockists through fixed price agreements<sup>20</sup> at preferential rates for a fixed period.<sup>21</sup> These fixed price agreements were sometimes known as 'stock deals'.<sup>22</sup> According to FPM, stock deals

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<sup>16</sup> Typically, this would be a discount on the global amount of the invoice to the merchant of up to [x] below the level of the invoice from the merchant to the end customer/contractor. Discounts were applied in relation to specific deals. [x].

<sup>17</sup> According to [FPM senior employee 3], it was industry practice for manufacturers to make cash rebate payments to merchants; these were calculated as a percentage, between [x] and [x], of the global direct to site business done between the manufacturer and the merchant. Rebates were applied in relation to the totality of the merchant's business with the manufacturer. [x]. See also, for example, transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 770, URN 20224, on the use of rebates.

<sup>18</sup> See, for example, witness statement of [Burdens employee 1], dated 14 November 2016, paragraphs 29 to 31, URN 27103.

<sup>19</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 65, URN S0107. FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.6.2, URN S0106. CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 4, URN S0110.

<sup>20</sup> Fixed price agreements are sometimes referred to as 'FPAs'.

<sup>21</sup> See, for example, witness statement of [FPM employee 6], dated 25 March 2014, paragraphs 21 and 24, URN 27060.

<sup>22</sup> Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, pages 61 to 62, URN 27592. Witness statement of [FPM employee 3], dated 9 September 2014, paragraph 7, URN 27086. FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.6, URN S0106.

accounted for approximately 10% to 15% of its pre-cast concrete drainage product sales during the Relevant Period.<sup>23</sup>

- 2.11 Stock deal prices were often referred to as '*depot rates*' or '*stock rates*',<sup>24</sup> and were lower than open market prices (also known as '*spot market*' prices).
- 2.12 It was possible for more than one manufacturer to have a stock deal in place with the same stockist; such stockists were referred to as '*shared stockists*' or '*dual stockists*'.

#### *Direct to site*

- 2.13 Builders' merchants who arranged for the supply of the Products to customers '*direct to site*' would obtain a price for the relevant product on the spot market, or agree a specific price deal with a manufacturer on behalf of a particular customer.

#### *Spot market*

- 2.14 The Products were supplied to end customers via the spot market (either directly from the manufacturer or through a builders' merchant), on a deal-by-deal basis, where there was no price agreement<sup>25</sup> in place with the manufacturer.<sup>26</sup> According to FPM, sales via the spot market accounted for approximately 30% of FPM's pre-cast concrete drainage product sales during the Relevant Period.<sup>27</sup> Similarly, CPM has estimated that one third of its pre-cast concrete drainage products were sold via the spot market.<sup>28</sup>
- 2.15 Manufacturers would quote a '*spot price*' by reference to an internal price list, which would include a target price for each product (and, depending on the

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<sup>23</sup> See FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.4.2, URN S0106.

<sup>24</sup> See, for example, transcript of a record of the November 2012 meeting, page 135, URN 20204A; transcript of a record of the January 2013 meeting, pages 238 and 273, URN 20205A; transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 669, 670, 747, 770 and 795, URN 20224.

<sup>25</sup> For example, a term deal between the manufacturer and the end customer; or a stock deal/customer specific price deal between the manufacturer and the merchant.

<sup>26</sup> See for example, FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.7.1, URN S0106; SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 63, URN S0107. Witness statement of [MPS employee], dated 5 December 2016, paragraphs 24 and 29, URN 27102.

<sup>27</sup> See FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.4.3, URN S0106.

<sup>28</sup> CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 4, URN S0110.

manufacturer, various other price bands).<sup>29</sup>

### *Term deals*

- 2.16 Term deals were fixed price agreements to supply a full range of products to an end customer (either directly from the manufacturer or through a builders' merchant<sup>30</sup>) at a particular price (according to an agreed schedule of rates) for a fixed period (usually one year, but, on occasion, three or six months).<sup>31</sup> Products were then ordered under the term deal as and when the customer required.<sup>32</sup>
- 2.17 Term deals provided benefits to manufacturers such as reduced administrative, marketing and selling expenses.<sup>33</sup> As a result, term deal prices were lower than the minimum rates on spot market price lists, sometimes by 15% to 20%.<sup>34</sup>
- 2.18 FPM has stated that term deal pricing was agreed after negotiation between the manufacturer and end-user or merchant, and would be subject to factors such as expected volume of supply, geographic factors and customer

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<sup>29</sup> See for example, URN 0216 page 50, URN 2863 and URN 13205 (for SB); URN 0408 (for CPM); and URN 0164 and URN 0165 (for FPM). See also: FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.7, URN S0106; SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 54 to 57 and Annex 6.1, URN S0107. Witness statement of [CPM employee 5], dated 29 July 2014, paragraph 8, URN 26974. Witness statement of [CPM employee 2], dated 11 September 2014, paragraph 6, URN 26978. Witness statement of [CPM employee 6], dated 6 June 2014, paragraph 11, URN 26980. Witness statement of [FPM senior employee 5], dated 26 October 2016, paragraph 36, URN 27057. Witness statement of [FPM employee 6], dated 25 March 2014, paragraphs 22 and 23, URN 27060. Witness statement of [FPM employee 7], dated 20 December 2015, paragraphs 4 and 5, URN 27063. Witness statement of [SB employee 1], dated 10 June 2016, paragraph 67, URN 27066. Witness statement of [SB senior employee 2], dated 18 July 2016, paragraph 44, URN 27124.

<sup>30</sup> See witness statement of [Burdens employee 1] dated 14 November 2016, paragraphs 35 and 36, URN 27103; and witness statement of [Central Civil Supplies employee], dated 22 February 2016, paragraph 8, URN 27106.

<sup>31</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraphs 4.5.1 and 4.5.2, URN S0106. SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 61 and 62, and Annexes 6.2 and 6.3, URN S0107. See also: witness statement of [CPM employee 2], dated 11 September 2014, paragraph 15, URN 26978. Witness statement of [CPM employee 6], dated 6 June 2014, paragraph 15, URN 26980. Witness statement of [CPM employee 3], dated 25 November 2016, paragraph 25, URN 26981. Witness statement of [FPM employee 5], dated 3 May 2015, paragraph 27, URN 27056. Witness statement of [FPM employee 6], dated 25 March 2014, paragraph 20, URN 27060.

<sup>32</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 61, URN S0107.

<sup>33</sup> See transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 63, URN 27592. See FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraphs 4.5.2 and 4.5.3. URN S0106.

<sup>34</sup> [S<]. SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 61, URN S0107. FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.5.4, URN S0106. Witness statement of [CPM employee 12], dated 13 May 2017, paragraph 12, URN 27172. Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 740, URN 20224.

relationships.<sup>35</sup> Where the Products were supplied through the merchant route to market, rebates (based on the totality of the business related to a particular customer) were a common feature of the term deal arrangement.<sup>36</sup>

- 2.19 FPM has said that, in the term deal context, the route to market for the Products was nearly always through a merchant, with term deal end customers being charged the term deal price agreed with the manufacturer, but the supply and logistics being arranged by a merchant who specialises in these aspects of the supply chain.<sup>37</sup> FPM has stated that the manufacturer / merchant relationship is important as strong relationships bring reciprocal benefits (a manufacturer winning work, and a merchant winning a share of the end price charged through route to market services).<sup>38</sup>
- 2.20 Term deals did not contain exclusivity or minimum ordering requirements. Accordingly, it was possible for more than one manufacturer to have a term deal in place with the same end customer;<sup>39</sup> and that customer would have a choice as to which term deal it would utilise for any particular order. Such arrangements were referred to as '*shared term deals*' (albeit that this expression referred to manufacturers having a customer in common, and did not indicate that any particular term deal was shared between such manufacturers).
- 2.21 FPM has said that term deals accounted for somewhere between 55% and 75% of its sales during the Relevant Period.<sup>40</sup> CPM has estimated that term deals (along with stock deals) counted for two thirds of its pre-cast concrete

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<sup>35</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.34.1 (see also paragraph 5.69), URN S1363, citing the witness statement of [JN Bentley employee], dated 17 August 2016, paragraphs 26 to 27, URN 27026; and witness statement of [Skanska employee], dated 12 July 2016, paragraph 12, URN 27048.

<sup>36</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.34.2, URN S1363.

<sup>37</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.69.3, URN S1363.

<sup>38</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.69.4, URN S1363, citing the witness statement of [Skanska employee], dated 12 July 2016, paragraph 12, URN 27048.

<sup>39</sup> [redacted]. FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.5.1, URN S0106. URN 1293, URN 4992.

<sup>40</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.4.1 (in which it said that term deals accounted for approximately 55% to 60% of its pre-cast concrete drainage product sales during the Relevant Period), URN S0106. FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.69.1 (in which it said that term deals accounted for '*approximately 70-75% of FPM's business*'), URN S1363.

drainage product sales.<sup>41</sup> SB has estimated that term deals accounted for approximately 75% of sales by volume in England and Wales.<sup>42</sup>

### *Tenders and orders to place*

- 2.22 Products were sometimes supplied via a ‘*tender*’ process.
- 2.23 The term ‘*tender*’ was typically used to denote a construction job that had been put out to tender to building contractors. Building contractors would submit a bid for the tendered work, taking into account the price quoted for the required pre-cast concrete drainage products (either by a manufacturer or a builders’ merchant).
- 2.24 The price quoted for the required pre-cast concrete drainage products would be either a spot market, term deal or stock deal price, depending on whether the manufacturer had a term deal/stock deal in place with the building contractor/merchant in question.<sup>43</sup>
- 2.25 Within this tender process, quotations for pre-cast concrete drainage products were required at two stages:
- (a) first: a quotation was required at the ‘*tender*’ stage, that is, before the construction contract had been awarded to the successful building contractor. This quotation would be high enough to allow for any potential increase in costs which might occur before the contract was awarded;
  - (b) second: a firm quotation would be provided at the ‘*order to place*’ stage, after the construction contract had been awarded. This quotation would be lower than the quotation provided at the ‘*tender*’ stage.<sup>44</sup>

## **B. The Parties**

- 2.26 Throughout the Relevant Period, SB, CPM and FPM together accounted for the majority of the market in Great Britain for the manufacture of the Products. From June 2006, SB, CPM and FPM together accounted for over 50% of that

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<sup>41</sup> CPM’s response dated 3 March 2018 to the CMA’s information request dated 16 January 2018 (as amended by the CMA’s information request dated 23 January 2018), question 4, URN S0110.

<sup>42</sup> SB’s response dated 16 February 2018 to the CMA’s information request dated 16 January 2018, paragraph 62, URN S0107.

<sup>43</sup> See, for example, witness statement of [CPM employee 6], dated 6 June 2014, paragraph 12, URN 26980; transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 534 to 537, URN 20224.

<sup>44</sup> See, for example, witness statement of [CPM employee 5], dated 29 July 2014, paragraph 13, URN 26974. Witness statement of [CPM employee 2], dated 11 September 2014, paragraph 5, URN 26978. Witness statement of [FPM employee 3], dated 9 September 2014, paragraphs 12 to 15, URN 27086.

market; and from 2010, following a series of acquisitions by CPM and FPM, they accounted for over 90% of that market.<sup>45</sup>

## **SBC**

- 2.27 SB is a limited liability company registered in England and Wales, with company number 02263795. It was incorporated on 1 June 1998. SB's registered address is Littlewell Lane, Stanton by Dale, Ilkeston, Derbyshire, DE7 4QW.<sup>46</sup>
- 2.28 SB is a manufacturer and supplier of pre-cast concrete pipes, manholes, and culverts for drainage, as part of a comprehensive range of pre-cast offsite solutions for the construction industry.<sup>47</sup> It supplies customers who are involved in all aspects of the construction market particularly the water, highways, rail, housing, telecom and power sectors.<sup>48</sup> Its drainage range includes circular and elliptical pipes, manholes, manhole slabs, catchpits, junctions, bends, road gullies, jacking pipes and pre-cast concrete headwalls.<sup>49</sup>
- 2.29 During the Relevant Period, SB supplied the Products to customers such as Barhale, McNicolas Construction, Morrison Construction, M V Kelly Limited, Keyline, Paul John Construction Limited and Tamdown Group Limited.<sup>50</sup> SB also engaged in inter-manufacturer trading, supplying products to, and ordering products from, CPM and FPM. For example, SB would source products that it didn't produce itself, or did not have capacity to produce, from CPM and FPM in order to fulfil customers' orders. The majority of inter-manufacturer purchases were made by SB because of its limited production capacity.<sup>51</sup>

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<sup>45</sup> See SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, schedule 2, URN S0107; CPM's response to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 8, URN S0110; FPM's response dated 23 February 2018, to the CMA's information request dated 16 January 2016 (as amended by the CMA's information request dated 23 January 2018), paragraphs 7.1 to 7.5, URN S0106; and FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.136, URN S1363.

<sup>46</sup> <https://beta.companieshouse.gov.uk/company/02263795>

<sup>47</sup> <http://www.stanton-bonna.co.uk/>

<sup>48</sup> <http://www.stanton-bonna.co.uk/about-us/?GTTabs=1>

<sup>49</sup> <http://www.stanton-bonna.co.uk/drainage-systems/>. See also: SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 18 to 23, URN S0107.

<sup>50</sup> See SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 138 and Schedule 3, URN S0107.

<sup>51</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2016, paragraphs 23, 29, 30, 37 and 38 and Schedule 3, URN S0107.

- 2.30 During the period 6 July 2006 to 14 May 2008, 80% of SB's share capital was held by Bonna Sabla, and 20% of SB's share capital was held by Saint-Gobain Pipelines plc (now Saint-Gobain PAM UK Limited<sup>52</sup>) ('*Saint-Gobain*'). On 14 May 2008, Bonna Sabla acquired all shares held by Saint-Gobain, and, since that date, Bonna Sabla has been the 100% owner of the share capital of SB.<sup>53</sup>
- 2.31 Bonna Sabla is a French *société anonyme*, registered in Nanterre, France under company number RCS 562 087 346. It was incorporated on 5 July 1994. Bonna Sabla's registered address is Tour Europe, 33 Place des Corolles, 92400 Courbevoie, France.<sup>54</sup>
- 2.32 Saint-Gobain is a company registered in England and Wales, with company number 00056433.<sup>55</sup> Its registered office is Saint-Gobain House, Binley Business Park, Coventry CV3 2TT. During the period 6 July 2006 to 14 May 2008, it was owned by Saint-Gobain plc (now Saint-Gobain Limited<sup>56</sup>).<sup>57</sup>
- 2.33 Consolis Finance SAS holds 99.99% of Bonna Sabla's share capital and has done so since the beginning of the Relevant Period.<sup>58</sup> Consolis Finance SAS is a French *société par actions simplifiée*, registered in Nanterre, France under company number 123 484 443. Consolis Finance SAS was incorporated in 1999. Its registered address is 33, place des Corolles, Tour Europe La Défense, 92400 Courbevoie, France.<sup>59</sup>
- 2.34 Consolis Finance SAS is, and was throughout the Relevant Period, wholly owned by Consolis SAS.<sup>60</sup> Consolis SAS is a French *société par actions simplifiée*, registered in Nanterre, France under company number 483 537

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<sup>52</sup> Certificate of incorporation on change of name and re-registration of a public company as a private company dated 31 December 2008.

<sup>53</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 3 to 5 and Annex 1.1, URN S0107.

<sup>54</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 7, URN S0107.

<sup>55</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 4, URN S0107. <https://beta.companieshouse.gov.uk/company/00056433>

<sup>56</sup> Certificate of incorporation on re-registration of a public company as a private company, dated 1 April 2009.

<sup>57</sup> Saint-Gobain Annual Returns made up to 29 June 2006, 29 June 2007 and 29 June 2008.

<sup>58</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 12 and Annex 1.1, URN S0107.

<sup>59</sup> SB's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, paragraph 4, URN S0114.

<sup>60</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Annex 1.1, URN S0107



122. Consolis SAS was incorporated in 2005. Its registered address is 33, place de Corolles, Tour Europe La Défense, 92400 Courbevoie, France.<sup>61</sup>

- 2.35 Since 6 March 2007, Consolis SAS has been wholly owned by Consolis Group SAS.<sup>62</sup> Consolis Group SAS is a French *société anonyme*, registered in Nanterre, France under company number RCS 562 087 346. It was incorporated on 2 February 2007. Its registered address is Tour Europe, 33 Place des Corolles, 92400 Courbevoie, France.<sup>63</sup>
- 2.36 On its creation in 2007, the majority owners of Consolis Group SAS were LBO France Gestion SAS (with the remaining share capital being held by Consolis managers). Since April 2017, Consolis Group SAS has been 100% owned by Compact Bidco BV, which is ultimately owned by Bain Capital.<sup>64</sup>

### **CPM**

- 2.37 CPM is a limited liability company registered in England and Wales, with company number 01005164. It was incorporated on 18 March 1971. Its registered address is Landscape House Premier Way, Lowfields Business Park, Elland HX5 9HT.<sup>65</sup>
- 2.38 CPM is currently wholly owned by Marshalls Mono Limited; Marshalls Mono Limited is wholly owned by Marshalls Group Limited; and Marshalls Group Limited is wholly owned by Marshalls plc.<sup>66</sup> CPM became non-trading on 1 July 2018, following the transfer of all the trade and net assets of CPM to its parent company, Marshalls Mono Limited.<sup>67</sup> Marshalls Mono Limited has retained the CPM brand, which is referred to as '*Marshalls CPM*'.<sup>68</sup>
- 2.39 CPM was, and Marshalls CPM is, a manufacturer and supplier of pre-cast concrete products. The precast concrete business is split into six product lines: drainage, retaining walls, off site solutions, water management, rail

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<sup>61</sup> SB's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, paragraph 9, URN S0114.

<sup>62</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Annex 1.1, URN S0107. Consolis Group SAS was known as Consolis Holding SAS from its creation in 2007 until it changed its name to Consolis Group SAS on 24 September 2018: URN S1109; URN S1110.

<sup>63</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 13, URN S0107.

<sup>64</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 17, URN S0107.

<sup>65</sup> <https://beta.companieshouse.gov.uk/company/01005164>

<sup>66</sup> CPM's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, question 1, URN S0113.

<sup>67</sup> CPM annual accounts for the financial year ending 31 December 2018.

<sup>68</sup> See for example: <http://www.cpm-group.com>

products, specialist pre-cast.<sup>69</sup> The drainage range includes pre-cast concrete flexible jointed pipes and fittings, chamber rings, cover slabs, house inspection chambers, caissons, road gullies, box culverts, catchpits and pre-formed chamber sections.<sup>70</sup>

- 2.40 During the Relevant Period, CPM supplied the Products to customers such as Wolseley Utilities Limited (trading as Burdens), Travis Perkins Trading Co Ltd, Grafton Merchanting GB Ltd, and Saint-Gobain Building Distribution Limited (Jewson, Millington, First Stop and Frazer).<sup>71</sup> There was also some inter-company trading between CPM and SB and FPM; CPM has said that where a product was not manufactured by one company it was still supplied to a customer but sourced from competitors.<sup>72</sup>
- 2.41 During the Relevant Period, CPM was owned by [X] acting as trustees of the [X] retirement benefit scheme trust; [X] Pension Trustees Limited; [X]; [X]; [X]; Salop Sand and Gravel Supply Company Limited (until 2008); and [X] (from 2008).<sup>73</sup>

## **FPM**

- 2.42 FPM is a limited liability company registered in Northern Ireland, with company number NI013563. It was incorporated on 30 April 1979. Its registered address is Knockloughrim Quarry, 3, Drumard Road, Magherafelt, Co. Londonderry, BT45 8QA.<sup>74</sup>
- 2.43 Through its quarries, surfacing, readymix and pre-cast plants, FPM supplies a wide range of heavy building materials to the construction industry throughout the UK.<sup>75</sup>

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<sup>69</sup> <http://www.cpm-group.com/about/>

<sup>70</sup> <http://www.cpm-group.com/products/drainage/>

<sup>71</sup> CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 11 and Annex 3, URN S0110.

<sup>72</sup> CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), questions 3(iii), 11 and Annex 3, URN S0110.

<sup>73</sup> CPM Annual Returns made up to 9 October 2006, 9 October 2007, 9 October 2008, 9 October 2009, 9 October 2010, 9 October 2011, 9 October 2012, 9 October 2013.

<sup>74</sup> <https://beta.companieshouse.gov.uk/company/NI013563>. FPM changed its name from F.P. McCann Limited to FP McCann Limited on 1 September 2015: Certificate of Incorporation on change of name given at Companies House on 1 September 2015.

<sup>75</sup> <http://www.fpmccann.co.uk/about-us>. FPM has stated that, from its factory in Knockloughrim, constructed in 2001, 'it developed as a supplier into the pre cast concrete drainage market in Northern Ireland, Ireland and Scotland and, to a much lesser extent, the northern counties of England', albeit that its 'ability to serve the wider market in GB was restricted by the remoteness of its manufacturing plant (in Northern Ireland) and the high cost of shipping and transport of pre-cast products': FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 2.3 to 2.4, URN S1363. In November 2005, FPM acquired the assets (and employees under TUPE) of Hepworth Concrete, which enabled FPM to acquire manufacturing plant at Ellistown,

- 2.44 FPM is the UK's largest manufacturer and supplier of pre-cast concrete solutions, including in relation to drainage and water management, tunnels and shafts, power and infrastructure, railways, walling, flooring, and tanks and chambers.<sup>76</sup> Within its drainage and water management solutions division, it supplies pipes, manhole chambers and soakaways, gullies and slabs, kerbs and channel range, headwalls and storm attenuation systems.<sup>77</sup>
- 2.45 During the Relevant Period, FPM supplied the Products to customers such as Burdens, Keyline, Saint-Gobain Pipe Systems Plc, MP Builders Merchants Ltd, Wolseley UK Ltd and Jewson Ltd (trading as Frazer).<sup>78</sup> During the Relevant Period, FPM also supplied the Products to SB and CPM, although it bought the Products from them only rarely.<sup>79</sup>
- 2.46 Throughout the Relevant Period, FPM was owned by [X], [X], [X], [X], [X] and [X].<sup>80</sup>
- 2.47 FPM is currently owned by FP McCann Group Limited.<sup>81</sup> FP McCann Group Limited is a limited liability company, registered in Northern Ireland with company number NI638170. It was incorporated on 29 April 2016. Its registered address is Knockloughrim Quarry, 3 Drumard Road, Knockloughrim, Magherafelt, County Londonderry, Northern Ireland, BT45 8QA.<sup>82</sup>
- 2.48 FP McCann Group Limited is currently owned by [X], [X], [X], [X], [X] and [X].<sup>83</sup>

## C. Trade associations

- 2.49 British Precast is the trade association of pre-cast concrete manufacturers.<sup>84</sup>

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Leicestershire, and expand into the wider GB market: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 2.5 to 2.7, URN S1363.

<sup>76</sup> <http://www.fpmccann.co.uk/precast-concrete>

<sup>77</sup> <http://fpmccann.co.uk/drainage>

<sup>78</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 11, Annex 9, URN S0106.

<sup>79</sup> Witness statement of [FPM employee 10], dated 14 February 2014, paragraph 12, URN 27077.

<sup>80</sup> FPM Annual Returns made up to 30 November 2006, 30 November 2007, 30 November 2008, 30 November 2009, 30 November 2010, 30 November 2011, 30 November 2012, 30 November 2013.

<sup>81</sup> Form CS01(ef) dated 20 November 2017.

<sup>82</sup> <https://beta.companieshouse.gov.uk/company/NI638170>

<sup>83</sup> Form CS01(ef) dated 28 April 2017.

<sup>84</sup> [www.britishprecast.org](http://www.britishprecast.org)

- 2.50 The British Precast Drainage Association ('BPDA') is a specialist group within British Precast, and is formed from the integration of the Concrete Pipeline Systems Association ('CPSA') and the Box Culvert Association ('BCA').<sup>85</sup>
- 2.51 SB, CPM and FPM were members of British Precast and the CPSA throughout the Relevant Period.<sup>86</sup>

### **CPSA meetings**

- 2.52 During the Relevant Period, representatives from SB, CPM and FPM attended CPSA meetings on behalf of each of those companies.<sup>87</sup> Persons attending CPSA meetings were asked to sign the CPSA Attendance Register form, which included the following statement:

*'This document confirms that there will be no discussion at the meeting on subjects that are prohibited by the Competition Act 1998. In particular the subject of prices and market share, as prohibited by the Act, will not be raised'.<sup>88</sup>*

- 2.53 There is no evidence to suggest that SB, CPM or FPM discussed any aspect of the Infringement at official CPSA meetings.

### **CPSA reporting requirements**

- 2.54 During the Relevant Period, the timely supply of accurate output tonnage data<sup>89</sup> was a prerequisite of membership of the CPSA.<sup>90</sup> The list of products reported on was agreed by the CPSA members, and evolved over the years.<sup>91</sup>
- 2.55 During the Relevant Period, the products reported on included flexible pipes of various sizes from 225 mm to 1200+ mm; gulleys; manholes and

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<sup>85</sup> www.precastdrainage.co.uk. The CPSA merged with the Box Culvert Association to form the BPDA in 2017.

<sup>86</sup> URN 7120; URN 8525; URN 8526. Witness statement of [CPSA employee 1], dated 18 January 2017, paragraph 38, URN 27019; transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 181 to 183, URN 20224.

<sup>87</sup> URN 7120.

<sup>88</sup> URN 7120. Witness statement of [CPSA employee 5], dated 1 August 2016, paragraphs 43 and 44, URN 27021. Witness statement of [CPSA employee 4], dated 11 July 2016, paragraphs 49 to 53, URN 27018.

<sup>89</sup> In management accounts, tonnage is the unit of measurement in terms of the weight of pre-cast concrete drainage products made and sold: see witness statement of [CPM employee 13], dated 20 June 2014, paragraph 6, URN 26971.

<sup>90</sup> Witness statement of [CPSA employee 1], dated 18 January 2017, paragraph 96, URN 27019.

<sup>91</sup> Witness statement of [CPSA employee 1], dated 18 January 2017, paragraphs 93 and 95, URN 27019.

soakaways of various sizes from 900 mm to 3000/4000 mm; and covers and reducing slabs of various sizes from 900 mm to 3000/4000 mm.<sup>92</sup>

- 2.56 Members of the CPSA were required to file a return (in standard form), setting out their output and sales measured in tonnes, broken down by product group.<sup>93</sup> In turn, the CPSA circulated within the membership, in a standard form, the combined gross industry output volumes for the period measured.<sup>94</sup>
- 2.57 The CPSA drew up a set of strict rules for reporting. Figures were only reported where at least three companies manufactured a particular product, and where no single company was responsible for more than 60% of the market.<sup>95</sup> This was intended to ensure that companies were unable to calculate each other's individual figures. Reports were circulated by the CPSA with a time lag.<sup>96</sup> From the third quarter of 2008 the aggregated totals were disseminated at least three months in arrears, *'to stop members reacting to fluctuations in market share'*.<sup>97</sup>

## D. The CMA's investigation

### ***Enterprise Act 2002 ('criminal') investigation***

- 2.58 The CMA's investigation into suspected cartel conduct in relation to the supply of pre-cast concrete drainage products to the construction industry began as a criminal cartel investigation under section 192 of the Enterprise Act 2002 in March 2013.
- 2.59 One individual, [redacted], was charged with, and pleaded guilty to, the criminal cartel offence in March 2016.
- 2.60 [redacted].

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<sup>92</sup> URN 8623.

<sup>93</sup> Witness statement of [CPSA employee 1], dated 18 January 2017, paragraphs 90 and 96, URN 27019. Witness statement of [CPSA employee 4], dated 11 July 2016, paragraph 62, URN 27018. See also: URN 8535. Output tonnage data (both the raw data provided by the members and the collated figures disseminated by the CPSA) was held securely on the BPCF computer system: witness statement of [CPSA employee 1], dated 18 January 2017, paragraph 92, URN 27019. Witness statement of [CPSA employee 2], dated 15 September 2016, paragraph 32, URN 27016. The CMA is not aware of any breaches of these security arrangements.

<sup>94</sup> Witness statement of [CPSA employee 1], dated 18 January 2017, paragraph 90, URN 27019.

<sup>95</sup> Witness statement of [CPSA employee 3], dated 20 July 2016, paragraph 11, URN 27017. Witness statement of [CPSA employee 2], dated 15 September 2016, paragraph 28, URN 27016.

<sup>96</sup> Witness statement of [CPSA employee 2], dated 15 September 2016, paragraph 29, URN 27016. Witness statement of [CPSA employee 3], dated 20 July 2016, paragraph 11, URN 27017.

<sup>97</sup> See, for example, URN 1069, page 16.

2.61 In September 2017, [X] was sentenced to two years' imprisonment suspended for two years, made the subject of a six month curfew order, and disqualified from acting as a company director for seven years.<sup>98</sup>

### **Competition Act 1998 ('civil') investigation**

2.62 The CMA opened an investigation under the Competition Act into suspected anti-competitive conduct in relation to the supply of pre-cast concrete drainage products to the construction industry on 30 March 2016.

2.63 This Decision relates to the investigation into a suspected infringement of the Chapter I prohibition and Article 101.

2.64 Material obtained during the criminal investigation and considered relevant to the civil investigation was placed on the civil case file. This includes certain documents seized from individuals attending cartel meetings, certain documents seized pursuant to warrants issued under section 194 of the Enterprise Act 2002, information and documents obtained under section 193 of the Enterprise Act 2002, interview transcripts, and witness statements.

2.65 Audio-visual recordings were made of meetings between SB, CPM and FPM held on:

(a) 29 August 2012 (the '*August 2012 meeting*');

(b) 27 November 2012 (the '*November 2012 meeting*');

(c) 28 January 2013 (the '*January 2013 meeting*'); and

(d) 12 March 2013 (the '*March 2013 meeting*'),

which together, are described in this Decision as the '*recorded meetings*'. The transcripts of those recordings were also placed on the civil file.<sup>99</sup>

2.66 During the course of the civil investigation, the CMA sent CPM and FPM notices requiring the production of documents and information under section

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<sup>98</sup> <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>. The director disqualification order was granted by the judge as part of the criminal sentencing, which is separate from the CMA's power to apply for Competition Disqualification Orders under the Company Directors Disqualification Act 1986, as amended.

<sup>99</sup> Audio-visual DVD recording of meeting at Novotel Coventry dated 29/08/2012 and transcript, URN 20203A; Audio-visual DVD recording of meeting at Fieldhead Hotel dated 27/11/2012 and transcript, URN 20204A; Audio-visual DVD recording of meeting at Novotel Coventry dated 28/01/2013 and transcript, URN 20205A; and Audio-visual DVD recording of meeting at Novotel Coventry dated 12/03/2013 and transcript, URN 20206A.

26 of the Competition Act, and letters to SB requesting documents and information without recourse to the CMA's formal powers.

### *SBC's leniency application*

- 2.67 On 13 November 2013, SB approached the CMA's predecessor organisation, the Office of Fair Trading (the '*OFT*'), with an application for Type B leniency under the OFT's leniency policy (which was adopted by the CMA, and is reflected in the CMA's current guidance on penalties).<sup>100</sup>
- 2.68 The CMA signed a leniency agreement with SBC on 6 August 2018.

### *Settlement and admissions of infringement by SBC and CPM*

- 2.69 Both SBC and CPM expressed an interest in exploring settlement with the CMA.
- 2.70 In accordance with the CMA's settlement policy, on 20 July 2018, the CMA provided SBC and CPM with a draft Statement of Objections<sup>101</sup> together with access to the documents referred to in the draft Statement of Objections and a list of documents on the CMA's file. On 23 July 2018, the CMA provided SBC and CPM with a draft penalty calculation.
- 2.71 SBC and CPM were provided with an opportunity to make representations on the draft Statement of Objections and draft penalty calculation, both in writing and orally at settlement meetings in October and November 2018.
- 2.72 On 7 December 2018, both SBC and CPM:
- (a) admitted that they had infringed the Chapter I prohibition and Article 101, by way of the arrangement that is described in this Decision as '*the Infringement*' (in the terms set out in a revised draft of the Statement of Objections dated 26 November 2018);
  - (b) agreed to accept a maximum penalty; and

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<sup>100</sup> Under the CMA's leniency policy, where the CMA is conducting a pre-existing investigation, the CMA may offer total immunity or a reduction of up to 100% from financial penalties to a participant who is the first to come forward and who satisfies the conditions of leniency; such an applicant is known as the Type B applicant. *Guidance as to the appropriate amount of a Penalty* (CMA73, 18 April 2018), paragraphs 3.4, and 3.16 to 3.17.

<sup>101</sup> Under paragraph 14.13 of the CMA's guidance, *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases* (CMA8), a business in settlement discussions will be presented with a Summary Statement of Facts. In the present case, as a Statement of Objections was already in preparation, SBC and CPM were provided with the draft Statement of Objections.

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

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

### *Statement of Objections*

2.74 On 13 December 2018, the CMA issued a Statement of Objections to the Parties.

2.75 Following the issue of the Statement of Objections, a Case Decision Group was appointed within the CMA to act as the decision-maker<sup>102</sup> on:

(a) whether or not the legal test for establishing an infringement had been met; and

(b) the appropriate amount of any penalty.

2.76 On 22 February 2019, FPM submitted written representations on the Statement of Objections, and confirmed that it did not wish to make oral representations on the matters referred to in its response.<sup>103</sup> The settling parties made no representations on the Statement of Objections.

### *Draft Penalty Statement*

2.77 On 28 June 2019, the CMA issued a Draft Penalty Statement to FPM, and summary draft penalty calculations to SBC and CPM. FPM provided written representations on the matters set out in the Draft Penalty Statement on 19 July 2019 and 18 October 2019.<sup>104</sup> SBC and CPM made no representations on their respective draft penalty calculations.

### ***Competition Disqualification Orders***

2.78 On 14 December 2018, the CMA wrote to [SBC]:

(a) informing them that the CMA was considering whether to apply for a Competition Disqualification Order against them under section 9A of the

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<sup>102</sup> Taking account of the facts and evidence before it and the Parties' representations.

<sup>103</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, URN S1363.

<sup>104</sup> FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, URN S1446. FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, URN S1628.



Company Directors Disqualification Act 1986, as they were directors of their respective companies during the Relevant Period; and

- (b) giving them an opportunity to offer a legally binding Competition Disqualification Undertaking to avoid the need for court proceedings.

2.79 [X].

2.80 On 26 April, the CMA announced that it had secured Competition Disqualification Undertakings from [X]. [X] has given a Competition Disqualification Undertaking not to act as a director of any UK company for 7 years and 6 months. [X] has given a Competition Disqualification Undertaking not to act as a director of any UK company for 6 years and 6 months.<sup>105</sup>

## E. Key individuals and their evidence

2.81 The following paragraphs describe the nature of the evidence concerning the individuals who the CMA considers were the most active in agreeing and operating the arrangement on behalf of the undertakings for which they worked.<sup>106</sup>

### SB

2.82 SB was represented at the meetings between SB, CPM and FPM by [SB senior employee 1].<sup>107</sup>

2.83 [X].<sup>108</sup> [X].<sup>109</sup> [X].<sup>110</sup> [X].<sup>111</sup>

2.84 [SB senior employee 1] had received competition compliance training from Consolis, but admitted to avoiding signing compliance documents from as early as 2006, knowing that he was not complying with their terms.<sup>112</sup>

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<sup>105</sup> <https://www.gov.uk/cma-cases/supply-of-precast-concrete-drainage-products-director-disqualification>.

<sup>106</sup> The CMA has further considered the evidence base in this case in Chapter 4, Section B (Evidence Base).

<sup>107</sup> On one occasion (in January 2009), an SB employee named [SB senior employee 2] was sent to a meeting in [SB senior employee 1's] place. See: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 208 to 218, and 279, URN 20224; and witness statement of [SB senior employee 2], dated 18 July 2016, paragraphs 76 to 87, URN 27124 (which refers to [SB senior employee 2's] attendance at two 'CPSA' meetings, one with [SB senior employee 1] and one without).

<sup>108</sup> [X].

<sup>109</sup> [X].

<sup>110</sup> [X].

<sup>111</sup> [X].

<sup>112</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 783 to 784, URN 20224.

Eventually, in March 2011, he was compelled to sign a ‘*compliance commitment*’, undertaking to comply with the Consolis compliance policy.<sup>113</sup> He said he felt very uncomfortable and isolated doing so, but that he was in no doubt as to what he was signing up to.<sup>114</sup>

2.85 [REDACTED]<sup>115</sup>

2.86 [REDACTED]<sup>116</sup> [REDACTED]<sup>117</sup> [REDACTED]<sup>118</sup> [REDACTED]

2.87 FPM has made representations suggesting that the interview evidence of [SB senior employee 1] is untruthful, inconsistent and unreliable.<sup>119</sup>

2.88 The CMA accepts that [SB senior employee 1’s] account in interview was, in some respects, internally inconsistent and contradictory, [REDACTED].<sup>120</sup> [REDACTED].

2.89 However, [SB senior employee 1’s] evidence is internally consistent as regards the key characteristics, operation and purpose of the cartel, and, in this respect, is also consistent with, and corroborated by, certain contemporaneous documentary evidence (including discussions held during the recorded meetings), and/or other witness evidence. The CMA considers [SB senior employee 1’s] evidence concerning these matters to be credible and reliable.

2.90 Moreover, the CMA considers it important to consider information from individuals directly involved in the cartel.

2.91 Accordingly, the CMA has relied on [SB senior employee 1’s] evidence in relation to the key characteristics, operation and purpose of the cartel to corroborate or supplement the contemporaneous documentary evidence, in particular where he was directly involved in the relevant conduct and/or where his evidence is consistent with other witness accounts.

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<sup>113</sup> URN 7374.

<sup>114</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 785 to 786, URN 20224.

<sup>115</sup> [REDACTED].

<sup>116</sup> [REDACTED].

<sup>117</sup> [REDACTED].

<sup>118</sup> [REDACTED].

<sup>119</sup> FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraphs 4.3 to 4.5, URN S1363, citing the transcript of interviews with [SB senior employee 1] held on 21 to 23 November 2016, paragraphs 21, 101, 147 and 181, URN 27596; and the transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 64, URN S0455.

<sup>120</sup> [REDACTED].

## **CPM**

2.92 CPM was represented at the meetings between SB, CPM and FPM by [CPM senior employee 1], [CPM senior employee 2] and [CPM senior employee 3] (the people attending meetings varied from time to time).<sup>121</sup>

*[CPM senior employee 1]*

2.93 [redacted]<sup>122</sup> [redacted].

2.94 As regards competition compliance and [CPM senior employee 1's] knowledge of competition law, the CMA notes that:

(a) [redacted];<sup>123</sup>

(b) he had at least some knowledge of the role of the then OFT;<sup>124</sup>

(c) he signed declarations that he would not discuss matters such as prices or market shares, or engage in anti-competitive practices, [redacted].<sup>125</sup>

2.95 [redacted].<sup>126</sup>

2.96 [redacted].<sup>127</sup> [redacted].

2.97 [redacted] during an interview in September 2018 in connection with the civil investigation, [CPM senior employee 1] gave the CMA a full account of the workings of the cartel and of his participation in it.<sup>128</sup> [redacted]

(a) [redacted];

(b) [redacted]

(c) [redacted].<sup>129</sup>

2.98 On 10 December 2018 [CPM senior employee 1] signed a witness

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<sup>121</sup> On one occasion, at the November 2012 meeting, CPM was also represented by [CPM senior employee 4]. [redacted]. [CPM senior employee 4] was [redacted] interviewed in August 2019 in connection with the civil investigation: transcript of an interview with [CPM senior employee 4] held on 29 August 2019, URN S1545.

<sup>122</sup> [redacted].

<sup>123</sup> [redacted].

<sup>124</sup> See URN 13045; URN 8535, pages 7 and 16.

<sup>125</sup> [redacted].

<sup>126</sup> [redacted].

<sup>127</sup> [redacted].

<sup>128</sup> Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, URN S0455.

<sup>129</sup> [redacted].

statement.<sup>130</sup>

- 2.99 FPM has made representations that [CPM senior employee 1's] witness evidence is unreliable, inconsistent and in some respects based on hearsay or matters outside his immediate knowledge.<sup>131</sup>
- 2.100 However, the CMA is of the view that [CPM senior employee 1] has provided measured and internally consistent evidence to the CMA in relation to the cartel conduct (see also paragraphs 4.19 and 4.20 in relation to the provision of witness evidence in hybrid settlement cases). The CMA further notes that [CPM senior employee 1's] evidence is consistent with, and corroborated by, certain other documentary and witness evidence. His evidence is also consistent with and corroborates the evidence of [SB senior employee 1] as regards the key aspects of the cartel conduct. The CMA considers [CPM senior employee 1's] evidence to be credible and reliable.
- 2.101 The CMA also considers it important to consider information from individuals directly involved in the cartel.
- 2.102 The CMA has therefore relied on [CPM senior employee 1's] witness evidence to corroborate or supplement the contemporaneous documentary evidence, in particular where he was directly involved in the relevant conduct and/or where there is consistency with other witness accounts.

*[CPM senior employee 2]*

- 2.103 [redacted].<sup>132</sup> [redacted]
- 2.104 As regards competition compliance and his knowledge of competition law, the CMA notes that [CPM senior employee 2] had signed an undertaking confirming that he had read and understood CPM's Competition Compliance Guidelines.<sup>133</sup>
- 2.105 [redacted].<sup>134</sup>

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<sup>130</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, URN S1111.

<sup>131</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 4.8 to 4.9, URN S1363, which refers to the transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 6 ([redacted]), URN S0455; and the witness statement of [Kijlstra employee 3], dated 10 February 2014, paragraph 39 ([redacted]), URN 27098.

<sup>132</sup> [redacted].

<sup>133</sup> URN 5599; URN 7415.

<sup>134</sup> [redacted].

2.106 [REDACTED].<sup>135</sup> [REDACTED].

2.107 [REDACTED].

*[CPM senior employee 3]*

2.108 [REDACTED].<sup>136</sup> [REDACTED].

2.109 As regards competition compliance and his knowledge of competition law, the CMA notes that [CPM senior employee 3] had signed an undertaking confirming that he had read and understood CPM's Competition Compliance Guidelines.<sup>137</sup>

2.110 [REDACTED].<sup>138</sup> [REDACTED].

2.111 [REDACTED], during an interview in September 2018 in connection with the civil investigation, he gave the CMA a full account of the workings of the cartel and of his participation in it.<sup>139</sup> [REDACTED]:

(a) [REDACTED];

(b) [REDACTED];

(c) [REDACTED].<sup>140</sup>

2.112 On 11 December 2018 [CPM senior employee 3] signed a witness statement.<sup>141</sup>

2.113 FPM has made representations that [CPM senior employee 3's] witness evidence is unreliable, inconsistent and in some respects based on hearsay or matters outside his immediate knowledge.<sup>142</sup>

2.114 However, the CMA is of the view that [CPM senior employee 3] has provided measured and internally consistent evidence to the CMA in relation to the cartel conduct (see also paragraphs 4.19 and 4.20 in relation to the provision of witness evidence in hybrid settlement cases). The CMA further notes that [CPM senior employee 3's] evidence is consistent with, and corroborated by,

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<sup>135</sup> [REDACTED].

<sup>136</sup> [REDACTED].

<sup>137</sup> URN 20234; URN 7415.

<sup>138</sup> [REDACTED].

<sup>139</sup> Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, URN S0456.

<sup>140</sup> [REDACTED].

<sup>141</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, URN S1120.

<sup>142</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 4.8 to 4.9, URN S1363.

certain other documentary and witness evidence. His evidence is also consistent with and corroborates the evidence of [SB senior employee 1] as regards the key aspects of the cartel conduct. The CMA considers [CPM senior employee 3's] evidence to be credible and reliable.

2.115 The CMA also considers it important to consider information from individuals directly involved in the cartel.

2.116 The CMA has therefore relied on [CPM senior employee 3's] witness evidence to corroborate or supplement the contemporaneous documentary evidence, in particular where he was directly involved in the relevant conduct and/or where there is consistency with other witness accounts.

### **FPM**

2.117 FPM was represented at meetings between SB, CPM and FPM by [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3] (noting that the attendees at particular meetings varied).

#### *[FPM senior employee 1]*

2.118 [REDACTED].<sup>143</sup> [REDACTED].

2.119 As regards competition compliance and his knowledge of competition law, documentary evidence suggests that [FPM senior employee 1] had some knowledge of competition law and the role of the then OFT and Competition Commission.<sup>144</sup> He also signed declarations confirming that he would not discuss prices or market shares, or engage in anti-competitive practices, [REDACTED].<sup>145</sup> In interview, [FPM senior employee 1] confirmed that, when he signed these declarations, he understood that he '*should not be fixing prices or market shares*'.<sup>146</sup>

2.120 [REDACTED].<sup>147</sup> [REDACTED]<sup>148</sup> [REDACTED].<sup>149</sup> [REDACTED].

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<sup>143</sup> [REDACTED].

<sup>144</sup> See, for example, transcript of a record of the August 2012 meeting, pages 108 and 290, URN 20203A; URN 8133; URN 8359; URN 8360; URN 8362; URN 8535, page 7, URN 13045; URN 20656; URN 20630.

<sup>145</sup> [REDACTED].

<sup>146</sup> Transcript of an interview with [FPM senior employee 1] held on 10 May 2019, page 37 (see also page 104), URN S1387.

<sup>147</sup> [REDACTED].

<sup>148</sup> [REDACTED].

<sup>149</sup> [REDACTED].

2.121 On 10 May 2019 [FPM senior employee 1] was interviewed by the CMA about the matters referred to in the CMA's Statement of Objections.<sup>150</sup> During that interview, he either said that he could not recall the matters referred to, or answered the questions in a manner consistent with FPM's representations on the CMA's Statement of Objections,<sup>151</sup> or referred to FPM's representations on the CMA's Statement of Objections. The CMA has therefore referred explicitly to [FPM senior employee 1's] witness evidence in this Decision, for the most part, to the limited extent that it relates to matters which were not referred to, or referred to only in part, in FPM's representations on the CMA's Statement of Objections.

*[FPM senior employee 2]*

2.122 [redacted].<sup>152</sup> [redacted].

2.123 As regards competition compliance and his knowledge of competition law, documentary evidence suggests that [FPM senior employee 2] had at least some knowledge of competition law and the role of the then OFT and Competition Commission;<sup>153</sup> and the CMA notes that he signed declarations that he would not discuss prices or market shares, or engage in anti-competitive practices, [redacted].<sup>154</sup> However, in interview, [FPM senior employee 2] said that he did not read the [redacted] declarations that he signed and that he would not have understood them in any event, as he had not had any Competition Act training, and did not know what the Competition Act was.<sup>155</sup>

2.124 [redacted].<sup>156</sup> [redacted].

2.125 On 9 May 2019 [FPM senior employee 2] was interviewed by the CMA about the matters referred to in the CMA's Statement of Objections.<sup>157</sup> During that interview, he either said that he could not recall the matters referred to, or answered the questions in a manner consistent with FPM's representations on the CMA's Statement of Objections,<sup>158</sup> or referred to FPM's representations on the CMA's Statement of Objections. The CMA has

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<sup>150</sup> Transcript of interview with [FPM senior employee 1] held on 10 May 2019, URN S1387.

<sup>151</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, URN S1363.

<sup>152</sup> [redacted].

<sup>153</sup> URN 8133, URN 8535, pages 7 and 16.

<sup>154</sup> [redacted].

<sup>155</sup> Transcript of an interview with [FPM senior employee 2] held on 9 May 2019, pages 39 to 42 (see also pages 196 to 198), URN S1386.

<sup>156</sup> [redacted].

<sup>157</sup> Transcript of interview with [FPM senior employee 2] held on 9 May 2019, URN S1386.

<sup>158</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, URN S1363.

therefore referred explicitly to [FPM senior employee 2's] witness evidence in this Decision only to the limited extent that it relates to matters which were not referred to, or referred to only in part, in FPM's representations on the CMA's Statement of Objections.

[FPM senior employee 3]

2.126 [redacted].<sup>159</sup> [redacted].

2.127 As regards competition compliance and his knowledge of competition law, documentary evidence suggests that [FPM senior employee 3] had at least some knowledge of competition law and the role of the then OFT and Competition Commission,<sup>160</sup> and the CMA notes that he signed declarations that he would not discuss prices or market shares, or engage in anti-competitive practices, [redacted].<sup>161</sup> However, in interview, [FPM senior employee 3] said that he did not have a proper understanding of competition law during the Relevant Period, and did not read the [redacted] declarations that he signed, although he acknowledged that he had heard about the Competition Act and that it provided that '*companies weren't supposed to talk ... [a]bout their business tradings and dealings*'.<sup>162</sup>

2.128 [redacted].<sup>163</sup> [redacted]<sup>164</sup> [redacted].

2.129 On 30 August 2019, [FPM senior employee 3] was interviewed by the CMA about the matters referred to in the CMA's Statement of Objections,<sup>165</sup> and his interview evidence is referred to in this Decision insofar as it informs the CMA's understanding of contemporaneous or other witness evidence, or the matters referred to in FPM's representations on the CMA's Statement of Objections.

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<sup>159</sup> [redacted].

<sup>160</sup> URN 8133, URN 8535, page 16.

<sup>161</sup> [redacted].

<sup>162</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 101, and more generally pages 92 to 108, URN S1546.

<sup>163</sup> [redacted].

<sup>164</sup> [redacted].

<sup>165</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, URN S1546.



### 3. THE RELEVANT MARKET

#### A. Introduction

- 3.1 When applying the Chapter I prohibition and Article 101, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement or concerted practice under investigation had as its object or effect the appreciable prevention, restriction or distortion of competition.<sup>166</sup> No such obligation arises in this case.
- 3.2 However, 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 any financial penalties that the CMA may decide to impose.<sup>167</sup> When assessing the relevant market 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.<sup>168</sup>

#### B. Relevant product market

- 3.3 The Infringement concerns the supply of the Products (listed in the table below<sup>169</sup>) to the construction industry in Great Britain.

Flexible pipes <sup>170</sup> and perforated flexible pipes – various sizes from 250 mm to 2400 mm diameter	Chamber rings/manholes – various sizes from 900 mm to 3000 mm diameter – and steps
Cover slabs – various sizes from 900 mm to 3000 mm diameter	Reducing/landing slabs – various sizes from 1200 mm to 3000 mm diameter

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<sup>166</sup> Judgment of 6 July 2000, *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, paragraph 230 and judgment of 21 February 1995, *SPO and Others v Commission*, T-29/92, EU:T:1995:34, paragraph 74.

<sup>167</sup> *Guidance as to the appropriate amount of a penalty* (CMA73, 18 April 2018), paragraphs 2.1 and 2.3 to 2.15.

<sup>168</sup> *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraphs 169 to 173 and 189; *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraphs 176 to 178. The Competition Appeal Tribunal held that in Chapter I cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement. It also held that it would be disproportionate to require the OFT (in that case) to devote resources to a detailed market analysis, where the only issue is the penalty.

<sup>169</sup> The CMA notes that SB, CPM and FPM did not each produce all of the Products.

<sup>170</sup> FPM has noted its understanding that the term '*flexible*' or '*flex*' refers to the fact that, although the pipes themselves are rigid, the pipe joint allows a nominal angular deviation of 2 degrees (or flex) between adjacent pipes (which does not occur with jacking pipes): FPM's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, paragraph 1.2.2, URN S0115.

Seating rings	Gullies and cover slabs <sup>171</sup> – various sizes from 300 mm to 450 mm diameter
House Inspection Chambers ('HICs') and rectangular manholes – various sizes from 600 mm to 1200 mm diameter	Caissons <sup>172</sup>

3.4 Throughout the Relevant Period, SB, CPM and FPM manufactured and/or supplied a number of other drainage products. For example:

- (a) SB, CPM and FPM sold other pre-cast concrete drainage products including: sealed manholes, catchpits, flow control chambers, valve chambers, rain harvesting chambers, headwalls, box culverts, elliptical and jacking pipes, chamber rings that could not be made in a standard mould, and other bespoke products;<sup>173</sup>
- (b) SB sold limited volumes of glass-reinforced plastic liner, a complementary drainage solution that is not made from concrete;<sup>174</sup> and
- (c) FPM supplied ready mix concrete to end customers including for the purposes of drainage works.

3.5 The CMA has therefore focused its product market definition analysis on the following questions:

- (a) whether the Products are all in the same product market as each other;
- (b) whether the Products are in the same product market as other pre-cast concrete drainage products; and

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<sup>171</sup> Gullies are generally used at the side of roadways to drain away excess water. Gully cover slabs are laid on top of gully pots, and can be used in place of engineering bricks to take the required depth up to the cover at ground level.

<sup>172</sup> Caissons are manholes with cutting shoes which allow the caisson to be pushed into the ground without the need for excavation of a wide areas, useful near buildings or in confined spaces.

<sup>173</sup> However, SB, CPM and FPM did not each manufacture all of these products. SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 18 to 23, URN S0107; CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), Annex 2.2, URN S0110; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraphs 2.1, 2.2, Annex 2, Annex 3(a) and Annex 3(b), URN S0106.

<sup>174</sup> SB response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 53 and 104, URN S0107.

- (c) whether the Products are part of a wider market, including drainage products which were made from materials other than pre-cast concrete (*'non-pre-cast concrete drainage products'*).
- 3.6 There is some disagreement between the Parties about the scope of the product market. Most notably:
- (a) FPM has argued that the product market includes all types of drainage products (to include pipes, manholes, gullies, and other products); and that drainage products made from materials other than concrete should also be included within this market (with a possible distinction between smaller and larger diameter pipes);<sup>175</sup>
- (b) SB has argued that the Products fall within different product markets delineated by the function of the product (for example pipe of a particular diameter; manhole of a certain size), with no distinction being made between products made from different materials.<sup>176</sup>

### ***Are the Products all in the same product market?***

#### ***Demand-side substitutability***

- 3.7 From a demand-side perspective, each of the Products has its own specific characteristics (for example, in terms of capacity), function or application, and is supplied in response to a customer's specific needs on a particular construction project or in response to local area/merchant stock demands.<sup>177</sup>
- 3.8 Accordingly, the Products are not readily substitutable for each other. For instance, although pipes of various diameters may be considered, to an extent, interchangeable with each other in that they carry water underground and can be arranged in various configurations to yield equivalent flow capacity,<sup>178</sup> in practice a small diameter pipe may not be a sufficiently good

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<sup>175</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 6.6, URN S0106. FPM's response to the CMA's Statement of Objections, dated 22 February 2019, Section 3 (and evidence cited within Section 3), URN S1363.

<sup>176</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 119, URN S0107.

<sup>177</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 24 to 26, URN S0107; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.1, URN S0106.

<sup>178</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.2 and Annex 5(a), URN S0106; SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 25, URN S0107.

alternative for a large diameter pipe.<sup>179</sup> By way of example, SB has said that the larger size and higher minimum flow rate required for a pipe to be self-cleaning means that a small diameter pipe is typically not an effective substitute for a larger diameter pipe.<sup>180</sup>

3.9 The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone. However, there are circumstances where the CMA may aggregate several narrow relevant markets into one broader one on the basis of considerations about the response of suppliers to changes in prices. It may do so when:

- (a) production assets can be used by firms to supply a range of different products that are not demand-side substitutes, and the firms have the ability and incentive quickly (generally within a year) to shift capacity between these different products depending on demand for each; and
- (b) the same firms compete to supply these different products and the conditions of competition between the firms are the same for each product.<sup>181</sup>

#### *Switching production between the Products*

3.10 The evidence in relation to the ability of, and incentives for, manufacturers to switch production easily between the Products is mixed.

3.11 On the one hand, there is some overlap in some of the equipment required to produce each of the Products. In particular, all of the Products are made from the same concrete; and Products in different category sizes are capable of being made in the same machine (although each product size requires its own bespoke pallet and mould as a minimum).<sup>182</sup>

3.12 FPM has said that it has the capacity and could easily switch production between Products in order to respond to market demands or particular project requirements.<sup>183</sup> It argues that, although pipes and manholes are manufactured on different types of machines, a '*pipe machine*' can be altered

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<sup>179</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 25, URN S0107.

<sup>180</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 91, URN S0107.

<sup>181</sup> The CMA's Merger Assessment Guidelines (CC2 (Revised)), paragraph 5.2.17.

<sup>182</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 92, URN S0107.

<sup>183</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraphs 3.6 and 6.5.1, URN S0106.

within approximately four hours to produce a different diameter of pipe. Likewise, a 'manhole machine' can be altered within a similar timeframe to produce a different size of manhole, soakaway or chamber ring.<sup>184</sup>

3.13 On the other hand, CPM has said that it is highly unlikely that a competitor would switch to manufacturing a product which it did not supply unless there were long-term commercial benefits in doing so. CPM notes that the manufacture of a new product requires different machinery to be ordered and implemented, with an associated lead-in time, as well as financial costs.<sup>185</sup>

3.14 In this respect, the CMA notes that:

(a) although CPM and FPM had similar product ranges throughout the Relevant Period, SB had a limited production capacity by comparison, and did not supply as wide a product range. For example, SB did not produce gullies, and may not have sold any [redacted] manufactured in-house, during the Relevant Period;<sup>186</sup>

(b) in around 2013, an SB proposal predicted that it would take at least [redacted] to pay off an investment in the pallets and moulds necessary to make its own [redacted].<sup>187</sup>

#### *Conditions of competition for the supply of the Products*

3.15 Although the Products are not readily substitutable for one another on the demand-side, they are complementary to each other. A drainage system will contain a combination of different sized pipes, together with manholes, slabs, gullies and other products where appropriate, as the terrain/ground conditions and anticipated flow rates require, to suit a particular customer application.<sup>188</sup> Therefore, most customers demand a range of complementary Products,<sup>189</sup> and typically demand them from one supplier offering a full range of products.

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<sup>184</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 6.5.1, URN S0106.

<sup>185</sup> CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 3(iii), URN S0110.

<sup>186</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.7, URN S0106; SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 18 and 38, URN S0107.

<sup>187</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 93 and Annex 8.1, URN S0107.

<sup>188</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 26, URN S0107. FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.1, URN S0106.

<sup>189</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018, paragraph 6.5.2(a), URN S0106.

For example, FPM has said that, in its experience, customers usually preferred to deal with one supplier of pre-cast concrete drainage pipes for an entire project, as this would facilitate streamlined administration, delivery, off-loading, storage arrangements and site logistics.<sup>190</sup> Therefore, the conditions of competition in the supply of each of the Products throughout the Relevant Period were similar in that the same suppliers were broadly active across the various Products.<sup>191</sup>

- 3.16 The CMA further notes that, in practice, SB, CPM and FPM simply sourced the Products that they did not produce, or did not have the capacity to produce, from other manufacturers, in order to fulfil customers' orders.<sup>192</sup> For example, SB supplied customers with gullies that it had purchased from CPM and FPM.<sup>193</sup>
- 3.17 SB has explained that it made commercial sense for it to source pre-cast concrete drainage products from other manufacturers given the investment necessary to manufacture new pre-cast concrete drainage products. [§].<sup>194</sup>
- 3.18 Although this evidence suggests that manufacturers might not have the incentive to switch to producing some of the Products that they did not manufacture in response to a small but significant increase in price relative to the Products that they did manufacture, it is also indicative of the fact that SB, CPM and FPM competed to provide a full range of products to suit a particular customer application.
- 3.19 From a technical viewpoint, the Products produced by different manufacturers throughout the Relevant Period were largely interchangeable or compatible to

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<sup>190</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.4, URN S0106.

<sup>191</sup> For example, SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 27 and Schedule 2, URN S0107; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 7.3, URN S0106; CPM's response dated 3 March to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 8, URN S0110.

<sup>192</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 29, 30, and 37, URN S0107; CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 3(iii), URN S0110; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.6, URN S0106.

<sup>193</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 38, URN S0107.

<sup>194</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 29 to 30 and 92 to 93, URN S0107.

the extent that they used similar seals and manufacturing machinery.<sup>195</sup> For example:

- (a) a variety of manufacturers' pre-cast concrete drainage pipes could be used in the same project;<sup>196</sup>
- (b) manhole rings with a similar joint profile and any manufacturer's cover slab could be used on any chamber type. In addition, one supplier's pipes could be used with its own and any other's manhole rings and ancillary products within a customer application.<sup>197</sup>

3.20 This evidence explains why manufacturers might source products from each other to satisfy a customer's requirements.

3.21 However, CPM has noted that, although the Products produced by other manufacturers may satisfy the same purpose, they would not always be compatible. For example:

- (a) throughout the Relevant Period, any CPM pipe utilising its loose rolling rubber ring fitment was not compatible with the products of any of CPM's known competitors;
- (b) CPM's 1125 mm, 1350 mm, 1500 mm, 1600 mm and 1800 mm pipe has never been compatible with that of any other manufacturer;
- (c) although cover slabs from one manufacturer could be used on another manufacturer's manholes, there would not necessarily be an exact fit on the chamber ring. For example, the profile of chamber rings might differ, and without suitable amendments by the installer, water tightness could not be guaranteed.<sup>198</sup>

3.22 Consequently, the evidence as to whether the Products all fall within the same or separate product markets is mixed.

3.23 However, this is not material in the present case. Defining separate product markets for different Products will make no difference to the relevant turnover

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<sup>195</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 28, URN S0107. FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.3 and 3.5 and 6.5.5, URN S0106.

<sup>196</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.3, URN S0106.

<sup>197</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.5, URN S0106.

<sup>198</sup> CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 3(i) and 3(ii), URN S0110.

used for calculating the financial penalty imposed on each Party in this case, given that any penalty will be calculated on the basis of the turnover in relation to those Products that each Party manufactured and supplied during the Relevant Period. The CMA does not, therefore, consider that it is necessary to come to a conclusion on this issue.

***Are the Products in the same product market as other pre-cast concrete drainage products?***

3.24 From a demand-side perspective, the Products and other pre-cast concrete drainage products have largely distinct characteristics and fulfil different customers' needs or applications. The prices of other pre-cast concrete drainage products – in particular '*bespoke*' or '*special project business*' products – also tend to be higher than the prices of the Products, further limiting the extent of demand-side substitution as customers would be unlikely to switch to other pre-cast concrete drainage products in response to a small increase in the price of the Products.<sup>199</sup> For example:

- (a) a jacking pipe or elliptical pipe is likely only to be used where the use of a much cheaper Product (i.e. cylindrical pipe) of the same capacity is impractical;<sup>200</sup>
- (b) bespoke pre-cast concrete drainage products are cast for a particular application and unlikely to be used interchangeably with the '*standardised*' Products.<sup>201</sup>

3.25 Thus, other pre-cast concrete drainage products are not readily substitutable for the Products.

3.26 From a supply-side perspective, there is evidence that the conditions of competition in the supply of the Products and other pre-cast concrete drainage products throughout the Relevant Period were different.

3.27 For example, SB has said that:

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<sup>199</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 87, URN S0107.

<sup>200</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 21, 22, 25 and 95 to 99, URN S0107.

<sup>201</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.2, URN S0106. Although some of SB's bespoke products have become standardised as a result of their becoming popular (for example, troughs for electrical cabling), these products are not substitutable for the Products and are [redacted]: SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 88, URN S0107.



- (a) during the Relevant Period, its competitors in relation to the Products were different from its competitors for elliptical and jacking pipes:
- (i) SB was the only manufacturer of elliptical pipe, which was seen as a niche, premium product that did not directly compete with standard concrete pipes;<sup>202</sup>
  - (ii) FPM manufactured jacking pipes during the Relevant Period; however, CPM did not;<sup>203</sup>
  - (iii) there were (to its knowledge) no inter-manufacturer purchases of jacking pipes or elliptical pipes, either during the Relevant Period or since, suggesting that customers did not regard these products as necessary components of a full range of products;<sup>204</sup>
  - (iv) the European Commission examined non-circular pipes in a recent merger decision,<sup>205</sup> and noted that they formed part of a separate product market, including because they were offered by a narrower range of companies than circular pipes. The same decision also considered jacking pipes<sup>206</sup> to be a separate market.
- (b) the per-product design and capital costs (for example moulds) for bespoke special project pre-cast concrete drainage products are much higher than the costs for the ‘*standardised*’ Products (which in turn means that the per tonne price of bespoke pre-cast concrete drainage products can be much higher than that of standardised Products).<sup>207</sup>

3.28 As regards the ability of manufacturers to switch production from other pre-cast concrete drainage products to the Products, the evidence is mixed.

3.29 For example, evidence provided by FPM suggests that manufacturers would be able to switch production in this way. FPM has suggested that it could switch its concrete delivery equipment and pipe machines to the production of

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<sup>202</sup> SB’s response dated 16 February 2018 to the CMA’s information request dated 16 January 2018, paragraphs 34 and 100, URN S0107.

<sup>203</sup> SB’s response dated 16 February 2018 to the CMA’s information request dated 16 January 2018, paragraph 100, URN S0107.

<sup>204</sup> SB’s response dated 16 February 2018 to the CMA’s information request dated 16 January 2018, paragraph 32, URN S0107.

<sup>205</sup> European Commission decision of 3 August 2017 declaring a concentration to be compatible with the common market pursuant to Article 6(1)(b) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area (Case No COMP/M.8356 - *Weitersdorfer/Amiantit/HOBAS JV*).

<sup>206</sup> Referred to in the European Commission decision as pipes used in ‘micro-tunnelling’.

<sup>207</sup> SB’s response dated 16 February 2018 to the CMA’s information request dated 16 January 2018, paragraph 87, URN S0107.

elliptical pipes by investing in the particular moulds that would be required.<sup>208</sup> The CMA is of the view that the same principle could apply as regards switching from other pre-cast concrete drainage products to the Products.

- 3.30 However, as noted in paragraphs 3.13 to 3.14, CPM and SB have both suggested that there may be significant costs associated with the manufacture of a new product.
- 3.31 Based on the evidence set out above, therefore, the CMA concludes, for the purposes of determining the level of any financial penalty in this case, that the relevant product market should not be defined so as to include other pre-cast concrete drainage products.

***Are the Products part of a wider product market, including non-pre-cast concrete drainage products?***

- 3.32 A question also arises as to the extent to which the relevant product market should be defined more widely, to encompass non-pre-cast concrete drainage products.

***Glass reinforced plastic liner***

- 3.33 Glass reinforced plastic liner is not itself a pipe but rather a pipe-lining product that is put into existing pipes to extend their lifetimes or upgrade their performance. SB has argued that glass reinforced plastic liner does not fall within the same product market as the Products on the basis that:
- (a) most contractors do not consider a pipe restored or improved by a glass reinforced plastic liner to be a substitute for a new pipe;
  - (b) a glass reinforced plastic liner is produced by a mandrel winding machine and resin spray system, with the end product needing to be cured. Neither this equipment nor these production processes are used (or could be used) in the manufacture of the Products;
  - (c) purchasers of glass reinforced plastic liners tend to be specialist contractors. During the Relevant Period, glass reinforced plastic liner was not purchased by any of SB's pre-cast concrete drainage customers and was not included in any fixed price agreements;

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<sup>208</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.8, URN S0106.

(d) the European Commission has previously held that sewage relining is a separate market from pipes.<sup>209</sup>

3.34 For these reasons, the CMA is of the view that, for the purposes of imposing any financial penalty, glass reinforced plastic liners do not fall within the same product market as the Products.

#### *On-site casting*

3.35 There is evidence that on-site casting (ready-mixed concrete) may not be a good substitute for pre-cast in the vast majority of cases given the significant advantages of pre-cast. For example:

(a) pre-cast products do not need to be installed immediately upon delivery and do not need time to set;

(b) pre-cast products can be made to a much higher standard in a dedicated factory environment;

(c) pre-casting means that the time spent carrying out construction at the construction site itself is reduced.<sup>210</sup>

3.36 For these reasons, the CMA is not including on-site casting within the relevant product market.

#### *Other non-pre-cast concrete drainage products*

3.37 From a demand-side perspective, there is evidence that some non-pre-cast concrete drainage products, in particular clay and plastic products, could be used as alternatives to some of the Products in some circumstances.<sup>211</sup> FPM also notes the development of reinforced steel pipes by AquaSpira.<sup>212</sup>

3.38 On the supply side, the fundamentally different nature of these products means that they are produced using different equipment and by different

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<sup>209</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 53, and 104 to 107, URN S0107; Case No COMP/M.8356 *Wietersdorfer/Amiantit/Hobas JV*.

<sup>210</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 81 to 83, URN S0107.

<sup>211</sup> SB's response to the CMA's information request dated 16 January 2018, paragraphs 40 to 52, URN S0107; CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 3(iv), URN S0110; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraphs 3.9 to 3.11, 6.5.3 to 6.5.6, Annex 2, Annex 4, Annex 6 and Annex 7, URN S0106.

<sup>212</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 3.23, URN S1363.

manufacturers, which indicates that supply-side substitution is, at most, very limited and the conditions of competition are different.<sup>213</sup> Indeed, SB, CPM and FPM do not supply clay or plastic products to the construction industry.<sup>214</sup>

- 3.39 In a recent merger decision,<sup>215</sup> the European Commission found that pipes made of different materials all compete in the drainage market. However, the European Commission noted that certain materials were more or less suitable for pipes of differing diameters with concrete being more suitable for large diameter pipes above 3000 mm. Ultimately, the question as to whether different types of material compete was left open.<sup>216</sup>
- 3.40 FPM has indicated that, from a technical standpoint, non-pre-cast concrete drainage products are in general interchangeable within the same construction application because the joint detail is common between manufacturers.<sup>217</sup> However, SB has explained that for certain (very niche) uses, plastic pipes cannot be used and so cannot be a substitute for the Products, for example:
- (a) where high temperature water is being drained, in areas where fire-resistance is required (for example at fuel stations);
  - (b) where traffic is expected to drive over the surface immediately above the pipelines;

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<sup>213</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 108, URN S0107.

<sup>214</sup> SB's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, paragraph 15, URN S0114; SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 120, URN S0107; CPM's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, paragraph 2(ii), URN S0113; FPM's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, paragraph 1.3.1, URN S0115.

<sup>215</sup> European Commission decision of 3 August 2017 declaring a concentration to be compatible with the common market pursuant to Article 6(1)(b) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area (Case No COMP/M.8356 - *Weitersdorfer/Amiantit/HOBAS JV*).

<sup>216</sup> The CMA further notes that the European Commission has concluded in other cases that sewage and drainage products exist on the same product market as their equivalents made from other materials: European Commission decision of 24 April 1995 declaring a concentration to be compatible with the common market according to Council Regulation (EEC) No 4064/89 (Case No IV/M.565 - *Solvay / Wienerberger*); European Commission decision of 28 February 2001 declaring a concentration to be compatible with the common market (Case No COMP/M.2294 *Etexgroup/Glynwed Pipe Systems*).

<sup>217</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 6.5.3, URN S0106. FPM also notes that other pre-cast concrete drainage products may be connected within the same drainage system, for example, pre-cast concrete drainage pipe products could be used with in-situ concrete or brick built manholes, or indeed manholes in plastic although these are limited to lower diameters (FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 3.10, URN S0106).

(c) where a pipeline must be resistant to damage from petrochemicals.<sup>218</sup>

3.41 A key factor in determining which materials can be used is the diameter of the pipe. Clay pipes are only an option where the required diameter is small.<sup>219</sup> Plastic pipes are suitable for a wider range of applications,<sup>220</sup> but are less likely to be suitable for larger diameter pipes. FPM has said that:

*'with a growing diameter of a pipe, the range of suitable materials may decrease... smaller drainage networks (used primarily on housing developments, light industrial) lend themselves to the use of smaller diameter pipe networks, which would tend to favour materials such as plastic. Large drainage networks (primarily infrastructure and heavy commercial developments) tend to favour large diameter pipes, which favours precast concrete.'*<sup>221</sup>

3.42 SB has indicated that interchangeability at larger diameters increased over the Relevant Period. It has noted an internal report from 2004 which highlighted that Polypipe was marketing a new type of plastic pipe which was being tried by contractors up to the 750 mm diameter and a report from 2007 noting a new generation of plastic pipes that purported to be able to withstand 4,000 psi of water jetting force, which is said to have previously been a barrier to plastic pipes entering the sewage market for pipes over 300 mm diameter.<sup>222</sup> FPM has indicated that technical improvements in larger diameter plastic pipes drove the competitive threat on concrete pipes.<sup>223</sup>

3.43 One of the key differences between plastic pipes and pre-cast concrete drainage products is the strength of the pipes. FPM has said that:

*'when diameters exceed around 400-600mm, a plastic pipe requires additional support or concrete filling around it in order to maintain its strength,*

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<sup>218</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 46, URN S0107.

<sup>219</sup> For example, CPM has stated that *'Clay products are a small part of the market as they supply a limited size range, typically small diameter pipes'*: CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 3(iv), URN S0110.

<sup>220</sup> For example, CPM stated that plastic pipes can be *'used interchangeably with some sizes of concrete drainage products'*: CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 3(iv), URN S0110.

<sup>221</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 6.5.7, URN S0106.

<sup>222</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 48, URN S0107.

<sup>223</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 3.22, URN S1363.

*and therefore PCD pipes are often preferred at these larger diameters*'.<sup>224</sup> SB similarly states that, *'plastic pipes require higher standards of bedding, often necessitating a wider trench to be dug during installation'*.<sup>225</sup>

- 3.44 A further important difference between plastic pipes and pre-cast concrete drainage products relates to ease of use and speed of instalment. FPM has highlighted minutes of CPSA meetings discussing this issue. For example, at a meeting on 12 November 2009 it is recorded that members considered that, *'the main challenge for the concrete pipe industry is to provide an alternative to plastic that is considered equally easy to handle and quick to install'*.<sup>226</sup> SB has provided a copy of advertising material for a make of plastic pipe which emphasises its lightness compared to other materials which makes it easy to handle<sup>227</sup> and a log entry dated 13 December 2010 noting that a contractor was considering glass reinforced plastic and plastic pipes because of issues with the weight of pre-cast concrete drainage pipes.<sup>228</sup> FPM has highlighted that [WH Malcolm employee] of WH Malcolm has stated that he would purchase plastic pipes as *'a first choice as the logistics around delivery were easier'*.<sup>229</sup>
- 3.45 Although there is evidence that in many cases technical specifications could be met by either pre-cast concrete drainage products or plastic pipes, it appears that the differences between the products (in particular in terms of strength and weight) are significant. As a result, it appears that for particular projects customers are likely to have a strong preference for one or the other type of pipe. FPM has said that its experience is that customers normally specify or identify a preferred material.<sup>230</sup> SB has said that *'whether a contractor uses PCDs or non-concrete drainage products will often be because of personal preference.'*<sup>231</sup> This suggests that pre-cast concrete

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<sup>224</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 6.5.7, URN S0106.

<sup>225</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 45, URN S0107.

<sup>226</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, footnote 27, URN S1363.

<sup>227</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Annex 5.4.1, URN S0107.

<sup>228</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Annex 5.8, URN S0107.

<sup>229</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 3.45.3(b), URN S1363, citing the witness statement of [WH Malcolm employee], dated 4 April 2017, paragraph 7 (and 11), URN 27395.

<sup>230</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 6.5.4, URN S0106.

<sup>231</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 50, URN S0107.

drainage products and plastic pipes are neighbouring product markets rather than differentiated products within the same market.

3.46 There is witness evidence that there was, in practice, significant competition from the makers of clay and plastic pipes.<sup>232</sup> In addition, SB has noted that it monitored the loss of sales to plastic pipes<sup>233</sup> and highlighted some examples of customers using plastic pipes rather than pre-cast concrete drainage products;<sup>234</sup> and FPM has highlighted two ‘*case study*’ examples of when pre-cast concrete drainage products were chosen over plastic.<sup>235</sup> There is also evidence that over recent years, other drainage materials have increasingly been used in drainage applications in which concrete drainage products would have traditionally been used. For example:

- (a) over the past 10 to 15 years, Highways England has switched from using pre-cast concrete drainage pipes to plastic pipes in the construction of road drainage;<sup>236</sup>
- (b) plastic pipes have increasingly been used by water companies in situations where pre-cast concrete drainage products would previously have been used, for example FPM cited examples of Severn Trent Water using plastic pipes in a sewer management system in around 2012 and Scottish Water using them in a storm water attenuation tank in 2012/13.<sup>237</sup>

3.47 The CMA further notes that materials generated by the CPSA promote the use of pre-cast concrete drainage products rather than plastic pipes. In particular:

- (a) the CPSA developed a materials cost calculator<sup>238</sup> for comparing prices for plastic pipes and pre-cast concrete drainage pipes, using four classes

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<sup>232</sup> See, for example, witness statement of [CPM employee 2], dated 11 September 2014, paragraph 11, URN 26978; witness statement of [CPM employee 16], dated 17 May 2016, paragraph 9, URN 26984; witness statement of [FPM senior employee 5], dated 26 October 2016, paragraph 12, URN 27057.

<sup>233</sup> For example, SB has provided a minute of a sales meeting at which attendees were asked to report losses of sales to plastic pipes: SB’s response dated 16 February 2018 to the CMA’s information request dated 16 January 2018, Annex 5.6, URN S0107.

<sup>234</sup> For example, SB has provided an email noting that Dean Valley fire station was using plastic pipes rather than pre-cast concrete drainage pipes: SB’s response dated 16 February 2018 to the CMA’s information request dated 16 January 2018, paragraph 49 and Annex 5.7, URN S0107.

<sup>235</sup> FPM’s response dated 23 February 2018 to the CMA’s information request dated 16 January 2018 (as amended by the CMA’s information request dated 23 January 2018), paragraph 6.5.5 and Annex 5, URN S0106.

<sup>236</sup> SB’s response dated 16 February 2018 to the CMA’s information request dated 16 January 2018, paragraph 44, URN S0107.

<sup>237</sup> FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, see examples in paragraph 3.30, URN S1363.

<sup>238</sup> An updated version of the materials cost calculator was placed on the website of the BPDA.

of bedding for rigid concrete pipes and the single bedding class usually used for plastic pipes;<sup>239</sup>

- (b) in June 2011 the CPSA launched a carbon footprint campaign.<sup>240</sup> This was part of a long running campaign, started in 2009, which included a report by sustainability experts, Carbon Clear, that concluded that the carbon footprint of concrete pipes is up to 35% lower than that for plastic pipes;<sup>241</sup>
- (c) also in 2011, the CPSA developed a handling and installation campaign with the objective of neutralising the perceived handling and installation advantages of plastic pipes. A '*sales toolkit*' was published in December 2011 which provided materials designed to help companies show that pre-cast concrete drainage pipes offer advantages over plastic pipes in terms of installed cost, construction time, service life and embodied carbon.<sup>242</sup>

3.48 These examples and materials are consistent with pre-cast concrete drainage products and plastic pipes being in neighbouring markets rather than differentiated products within the same market. The examples cited suggest that over time the size of the plastic pipe market increased: as the products changed, they became suitable for use in a wider range of situations. The materials produced by the CPSA can be seen as an attempt to reverse this trend.

3.49 There is some evidence of more direct competition between pre-cast concrete drainage products and plastic pipes. SB has provided internal reports indicating demand for its products had increased because of broken equipment at a major plastic pipe supplier<sup>243</sup> and following a rise in raw material costs for plastic pipe manufacturers.<sup>244</sup> FPM has also highlighted some occasions where it was competing directly with Polypipe, a plastic pipe

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<sup>239</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 51, 111, 112, 113 and Annex 8.2, URN S0107.

<sup>240</sup> See for example, a report to the CPSA council dated 6 July 2011: SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Annex 5.10, URN S0107.

<sup>241</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), Annex 6, URN S0106.

<sup>242</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Annex 5.11, URN S0107.

<sup>243</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Annex 8.6, URN S0107.

<sup>244</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Annex 8.7, URN S0107.



manufacturer.<sup>245</sup> However, it appears that projects typically specified either pre-cast concrete drainage products or plastic pipes and the focus of competition to supply those projects was then between manufacturers of the type of pipe chosen.

- 3.50 This interpretation is consistent with discussions at the January 2013 meeting, during which the participants talked about the need to *'hit back at plastic'*,<sup>246</sup> with [FPM senior employee 1] saying *'it's too late once it's even got to the contractor'*,<sup>247</sup> and later noting that:

*'in [the contractor's] mind he wants to do plastic as they've always done it ... and we're now going to have to change his mindset. Just the way plastic's changed it'*, and [SB senior employee 1] stating *'[the contractor's] made the decision virtually before he's got the best price from the industry'*.<sup>248</sup>

- 3.51 On the basis of this evidence, the CMA considers that suppliers of pre-cast concrete drainage products faced a strong competitive constraint from other suppliers of pre-cast concrete drainage products and a much weaker competitive constraint from suppliers of drainage products made from other materials, such as plastic. This suggests that it is appropriate to define the relevant product market as pre-cast concrete drainage products, with drainage products made from other materials constituting a neighbouring market.
- 3.52 The CMA notes that defining the relevant product market as including clay and plastic products, or not including such products, makes no difference to the relevant turnover for the purpose of calculating financial penalties in this case given that, during the Relevant Period, SB, CPM and FPM did not manufacture or supply such products.
- 3.53 FPM has made representations that the market definition is, however, relevant to the assessment of whether it is *'obvious'* that there was an arrangement or agreement that could have or did prevent, restrict or distort competition.<sup>249</sup> It argues that the relevant market includes drainage products of other materials, including clay and plastic<sup>250</sup> and that the CMA *'fails to show*

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<sup>245</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), footnote 2 in paragraph 6.5.5, URN S0106.

<sup>246</sup> Transcript of a record of the January 2013 meeting, pages 169, URN 20205A.

<sup>247</sup> Transcript of a record of the January 2013 meeting, pages 170 to 171, URN 20205A.

<sup>248</sup> Transcript of a record of the January 2013 meeting, pages 172 to 173, URN 20205A.

<sup>249</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 3.10, URN S1363.

<sup>250</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 3.8, URN S1363.

*that any discussion on or exchange of prices between the parties was ever capable of being implemented especially having regard to price competition from clay, plastic and steel drainage pipe products'.<sup>251</sup>*

- 3.54 The CMA does not accept this argument. As set out above, the evidence suggests that the relevant product market does not include drainage products other than those made from pre-cast concrete. Even if the market did include drainage products made from other materials, such products provide a significantly weaker competitive constraint. As such, given the nature and context of the sector, it is the CMA's view that an arrangement or agreement relating only to pre-cast concrete drainage products would be capable of preventing, restricting or distorting competition.

### **Conclusions on the relevant product market**

- 3.55 For the reasons set out above, the CMA is of the view that, for the purpose of determining the level of any financial penalty in this case, the relevant product market is the supply of the Products to the construction industry.

## **C. Relevant geographic market**

- 3.56 In its assessment of the relevant geographic market, the CMA has considered the constraints on the supply of the Products to the construction industry in Great Britain from both outside and within Great Britain during the Relevant Period.
- 3.57 The CMA notes that, whereas FPM sold products in Northern Ireland during the Relevant Period, neither SB nor CPM sold products outside Great Britain.<sup>252</sup>
- 3.58 There is some disagreement between the Parties as regards the geographic scope of the market:

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<sup>251</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 3.7.2 (see also paragraph 6.12), URN S1363.

<sup>252</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 71 to 73, URN S0107; CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), questions 4(iv) and 5(ii), URN S0110; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 6.8, URN S0106.

- (a) FPM has argued that the geographic market for the Products extends at a minimum throughout the UK, and possibly also includes the Republic of Ireland;<sup>253</sup>
- (b) CPM considers the geographic market for the Products to be Great Britain;<sup>254</sup> and
- (c) SB has argued that the geographic market for the Products is England and Wales.<sup>255</sup>

### ***Competitive constraints from outside Great Britain***

3.59 The evidence indicates that some customers in Great Britain sourced the Products from suppliers with plants based outside Great Britain. For example:

- (a) FPM supplied customers in Great Britain both from its production facilities in Great Britain and also from its Knockloughrim production facilities in Northern Ireland;<sup>256</sup> and
- (b) suppliers from the Republic of Ireland and the Netherlands marketed to or supplied customers based in Great Britain.<sup>257</sup>

3.60 However, SB has said that, although there were imports of pre-cast concrete drainage products into Great Britain, the volume of such imports was not, in its view, significant.<sup>258</sup>

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<sup>253</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 6.8, URN S0106.

<sup>254</sup> CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 6, URN S0110.

<sup>255</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 122, URN S0107.

<sup>256</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 6.8.2, URN S0106.

<sup>257</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraphs 6.8.4, 9.1, and 10.2 URN S0106. Witness statement of [Kijlstra employee 3], dated 10 February 2014, paragraph 9, URN 27098. CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), questions 9 and 10, URN S0110. Witness statement of [CPM employee 12], dated 23 September 2016, paragraph 23, URN 26973. Witness statement of [CPM employee 13], dated 20 June 2014, paragraph 17, URN 26971. Witness statement of [CPM employee 2], dated 11 September 2014, paragraph 10, URN 26978. Witness statement of [CPM employee 3], dated 25 November 2016, paragraph 52, URN 26981. Witness statement of [CPM employee 15], dated 29 December 2014, paragraph 21, URN 26982. Witness statement of [CPM employee 16], dated 23 February 2015, paragraph 13, URN 26983. Witness statement of [CPM employee 7], dated 29 March 2016, paragraph 31, URN 26988.

<sup>258</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 122, 133 and 137, URN S0107.

- 3.61 Moreover, there is evidence that there may have been compatibility or other difficulties with products supplied from outside Great Britain or the UK;<sup>259</sup> and that further difficulties arose as a result of overseas companies having to meet British, rather than European or international, standards.<sup>260</sup>
- 3.62 As regard costs, FPM has said that although transportation costs are higher for supplying customers in Great Britain from its Northern Irish manufacturing facility, these may be outweighed by lower raw material and labour costs in Northern Ireland, in particular for sales to Scotland and Northern England.<sup>261</sup>
- 3.63 Nevertheless, FPM takes a regional approach in relation to price, with separate price lists for each of Great Britain, Northern Ireland and the Republic of Ireland, reflecting differences in transportation, material and labour costs.<sup>262</sup>
- 3.64 Given that the evidence is mixed,<sup>263</sup> the CMA is adopting a conservative approach for the purposes of determining the relevant turnover of the Parties. Accordingly, the CMA takes the view that the geographic market for the supply of the Products is Great Britain.

### ***Constraints from inside Great Britain – regional segmentation***

- 3.65 There is evidence of a regional focus to SB's, CPM's and FPM's sales operations in so far as sales teams, prices and price negotiations were organised along regional and local lines; and there is evidence that the

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<sup>259</sup> Witness statement of [CPM employee 3], dated 25 November 2016, paragraph 52, URN 26981. Witness statement of [CPM employee 15], dated 29 December 2014, paragraph 21, URN 26982.

<sup>260</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 122, 135 and Annex 8.10 URN S0107. Witness statement of [Kijlstra employee 2], dated 6 March 2014, paragraph 14, URN 27096. The CMA also notes that witnesses from Kijlstra have said that it was difficult to obtain BSI standards given the nature of the market / relevant bodies in the UK: see for example, witness statement of [Kijlstra employee 1] dated 20 January 2014, paragraph 22, URN 27091; witness statement of [Kijlstra employee 3], dated 10 February 2014, paragraphs 26 to 27, URN 27098.

<sup>261</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 6.8.2, URN S0106.

<sup>262</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraphs 4.2.4, 4.8 and 6.8.2, URN S0106.

<sup>263</sup> The CMA also notes that, in its consideration of the drainage pipe market, the European Commission found that the geographic market was at least as wide as an individual country and was likely to include neighbouring countries: European Commission decision of 3 August 2017 (Case No. COMP/M.8356 *Wietersdorfer/Amiantit Hobas JV*), which considered in particular the market for glass reinforced pipes. However, in a different decision in relation to a merger of plastic pipes, manufacturers found that price and commercial strategy suggested geographic markets no wider than national in scope: European Commission decision of 4 June 2012 (Case No COMP/Case M.6563 *Mexichem SIH/Wavin*).

conditions of competition may have varied materially between Scotland, England and Wales.<sup>264</sup>

3.66 But although this might suggest that the geographic market may be delineated along regional lines, doing so will make no difference to the level of the financial penalty imposed on each Party in this case. The Infringement concerns the supply of the Products in Great Britain. Thus, any penalty will be calculated on the basis of the turnover in relation to those Products that the Parties supplied to their customers in Great Britain, and any segmented markets will be covered by that penalty calculation.

3.67 The CMA does not, therefore, consider that it is necessary to come to a conclusion on this issue.

### ***Conclusions on the relevant geographic market***

3.68 For the reasons set out above, the CMA finds that, for the purpose of determining the level of any financial penalty in this case, the relevant geographic market is Great Britain.

## **D. Conclusions on the relevant market**

3.69 In the light of the evidence considered above, the CMA finds that for the purpose of determining the level of any financial penalty in this case the relevant market is the supply of the Products to the construction industry in Great Britain.

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<sup>264</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraphs 5.3 to 5.5, URN S0106. CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), questions 4(iv) and 5(iv), URN S0110. SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 67 to 73 and 122, URN S0107.

## 4. CONDUCT OF THE PARTIES

### A. Introduction

- 4.1 The CMA finds that, from at least as early as 6 July 2006 to 13 March 2013, SBC, CPM and FPM infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement through an agreement or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of the Products to customers in Great Britain.
- 4.2 This Chapter sets out the evidence found by the CMA of contacts between SB, CPM and FPM as regards the arrangement put in place between them in relation to the supply of the Products during that period.

### B. Evidence base

- 4.3 This Section B sets out the three broad categories of evidence supporting the CMA's findings.

#### ***Recorded meetings***

- 4.4 As noted in paragraph 2.65, audio-visual recordings (and transcripts of those recordings) were made of the following four meetings that took place between SB, CPM and FPM (together the '*recorded meetings*')
- (a) the August 2012 meeting, which was held at the Novotel Hotel in Coventry and attended by [SB senior employee 1], [CPM senior employee 1], [CPM senior employee 2], [CPM senior employee 3], [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3];
  - (b) the November 2012 meeting, which was held at the Fieldhead Hotel in Leicester and attended by [CPM senior employee 1], [CPM senior employee 2], [CPM senior employee 4], [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3]. This meeting was held primarily to discuss the Scottish market;
  - (c) the January 2013 meeting, which was held at the Novotel Hotel in Coventry and attended by [SB senior employee 1], [CPM senior employee 1], [CPM senior employee 2], [CPM senior employee 3], [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3]; and
  - (d) the March 2013 meeting, which was held at the Novotel Hotel in Coventry and attended by [SB senior employee 1], [CPM senior employee 1], [CPM

senior employee 2], [CPM senior employee 3], [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3].

- 4.5 These audio-visual recordings and transcripts capture over 13 hours of discussions, providing very strong objective contemporaneous evidence of cartel conduct.

### **Documentary evidence**

- 4.6 The CMA is in possession of a significant amount of documentary evidence, including emails, diary and notebook entries, annotated term deal lists / customer allocation lists, price lists, and notes of internal sales meetings.
- 4.7 The documentary evidence is more limited during the early part of the Relevant Period.<sup>265</sup> The CMA considers that this is to be expected, largely given the passage of time, and also because cartel meetings tend to take place in clandestine fashion, with associated documentation reduced to a minimum. Nevertheless, as set out in detail in Annex A, there is documentary evidence of regular meetings between SB, CPM and FPM throughout the Relevant Period; and from 2011, there is evidence of the rigorous, regular and detailed recording of discussions between SB, CPM and FPM in the notebooks of individuals participating in those discussions.
- 4.8 Moreover, there is a large degree of consistency in the documentary evidence generated throughout the Relevant Period; and that evidence is consistent with, and corroborated by, discussions held during the recorded meetings as regards the operation and monitoring of the arrangement.
- 4.9 For example, much of the documentary evidence in the CMA's possession comes from the notebook and diary entries of the key individuals within SB, CPM and FPM who participated in the cartel meetings. A detailed analysis of such entries around the dates of the recorded meetings reveals them to contain highly accurate records of the issues discussed during those meetings.<sup>266</sup> The CMA concludes that other notebook and diary entries made during the Relevant Period are similarly accurate records of earlier meetings or discussions between individuals at SB, CPM and FPM (for which the CMA is not in possession of recorded material); and that they are a strong, credible

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<sup>265</sup> The CMA notes that FPM has made representations that the CMA has relied on '*limited, disparate and inconclusive contemporaneous evidence*': FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 1.10, 4.1, 4.11 and 4.18, URN S1363.

<sup>266</sup> See Annex B, which sets out notebook and diary entries alongside relevant excerpts from the transcripts of the four recordings. The analysis shows that the entries reflect the records of the discussions.

and reliable source of evidence of contact and discussions between SB, CPM and FPM throughout the Relevant Period.

- 4.10 Taken in the round, the CMA considers that the documentary evidence in its possession clearly establishes a consistent pattern of conduct throughout the Relevant Period.
- 4.11 The CMA has given particular weight to contemporaneous documentary and recorded evidence in reaching its decision in this case. Taking that evidence together, and considering it in conjunction with the witness evidence considered below, the CMA finds that the pattern of conduct observed at the recorded meetings is consistent with the operation of the Infringement throughout the Relevant Period.<sup>267</sup>

### ***Witness evidence***

- 4.12 The CMA is in possession of a large body of witness and interview evidence, including from:
- (a) certain key individuals who attended cartel meetings during the Relevant Period: [SB senior employee 1], [CPM senior employee 1], [CPM senior employee 3], [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3] (see also Chapter 2, Section E);
  - (b) employees and ex-employees of the Parties; and
  - (c) customers and competitors of the Parties.
- 4.13 FPM has made representations that witness evidence can be unreliable where it is given some time after the facts, and because it is subjective in nature; further arguing that '*relatively little weight*' should be placed on witness evidence because it '*inevitably tends to be self serving*', and '*only rises to the level of something capable of being evidence if a witness statement is served in chief on appeal and the parties have the chance to cross-examine the individuals concerned at trial*'.<sup>268</sup>
- 4.14 The CMA does not agree that witness evidence is not evidence unless and until it takes the form of a witness statement on an appeal and/or is the subject of cross-examination. The CMA has considered and taken account of

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<sup>267</sup> The CMA further notes [FPM senior employee 3's] comment in interview that discussions during the recorded meetings were '*fairly typical*' of people's contributions to the regular meetings held between SB, CPM and FPM. Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 44 to 45, URN S1546.

<sup>268</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 4.11 (see more generally paragraphs 4.10 to 4.12), URN S1363.



the witness evidence which is available to it alongside other sources of evidence.

- 4.15 The CMA acknowledges that the witness and interview evidence in its possession is subjective in nature, and to some extent inconsistent, but considers this to be expected given that:
- (a) individuals may have had, to a greater or lesser extent, an incentive to seek to minimise the CMA's view of their role in the conduct after it was discovered and subject to investigation;
  - (b) not all of the sales staff within SB, CPM and FPM were aware of the arrangement (for example, given the efforts of certain key individuals to ensure that the arrangement was kept secret); and
  - (c) events occurred several years before the dates of the interviews, so recollections may have diminished over time.
- 4.16 However, the CMA does not accept that it would be appropriate to exclude or ignore clearly relevant witness or interview evidence. Rather the CMA has assessed the evidence of witnesses in conjunction with the evidence of other witnesses and contemporaneous sources of evidence, including audio visual recordings and documents. The CMA has thus considered the extent to which the evidence is corroborated by and consistent with other evidence in assessing its reliability.
- 4.17 FPM has also made representations that the CMA has been selective in its reliance on the witness and interview evidence in its possession, disregarding that which is not helpful to its case, leading to a lack of objective impartiality.<sup>269</sup>
- 4.18 The CMA does not agree that its assessment of the witness evidence is selective and partial. As has been noted, the CMA's assessment of the witness evidence has been substantially informed by the objective documentary record. The CMA considers that the findings which it has made based on witness evidence are consistent with and corroborated by that record.

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<sup>269</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, see for example, paragraphs 1.10, 4.13, 4.16, 5.33, 5.39, 5.72, 5.73, and 5.93 to 5.97, URN S1363.

- 4.19 FPM has also made representations to the CMA that ‘*hybrid*’ settlement cases<sup>270</sup> raise matters of procedural unfairness in relation to any non-settling party, in particular in so far as the CMA relies on witness evidence from individuals who have made admissions and have, in return, been awarded a benefit that assists either their individual position or their employer’s position.<sup>271</sup> FPM suggests that such witness evidence ‘*should not be relied on at all, and should be treated with the utmost caution unless clearly and directly supported by a contemporaneous document*’.<sup>272</sup>
- 4.20 The CMA is mindful of the need for procedural fairness with respect to all parties. It does not accept that its hybrid settlement process gives rise to any procedural unfairness, or that witness evidence from individuals from settling parties should not be relied on, for the following reasons in particular:
- (a) the CMA’s standard terms of settlement include a requirement for the undertaking to cooperate with the CMA until the conclusion of the case (including in any appeal or Competition Disqualification Order proceedings), using ‘*best endeavours*’ to secure cooperation from current and previous employees by attending interviews and providing witness
  - (b) statements (if requested), giving a complete and truthful account, and not falsely implicating others;
  - (c) interviews carried out with [CPM senior employee 1], [CPM senior employee 3] and [CPM senior employee 4] after the issue of the draft Statement of Objections were carried out on a voluntary basis. Settlement with SBC and CPM was not conditional on any individual providing particular evidence or signing witness statements, and it was made clear to the individuals that the CMA would be free to rely on any evidence whether or not CPM ultimately decided to enter into settlement with the CMA;
  - (d) the CMA has considered all of the witness evidence in its possession,<sup>273</sup> not just that which emanates from the settling parties;

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<sup>270</sup> Those where, as in this case, some but not all parties under investigation admit the alleged infringement by way of a settlement with the CMA.

<sup>271</sup> For example, as regards any discount on any financial penalty imposed on an undertaking; or any Competition Disqualification Order or Undertaking. FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraphs 4.14 to 4.18, URN S1363. See also FPM’s representations on the CMA’s Draft Penalty Statement, dated 18 October 2019, paragraphs 2.23 to 2.26, URN S1628.

<sup>272</sup> FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraph 4.16, URN S1363.

<sup>273</sup> Along with all of the documentary evidence.

- (e) admissions made as part of the settlement process are made by undertakings - in this case, SBC and CPM - not individuals. Further, the CMA did not grant CDO immunity to any CPM officers or employees as part of the settlement process. The CMA does not enter into plea bargains.

## C. The origins of the arrangement

### **2005 to 2006 – market conditions**

4.21 The evidence indicates that, from around mid-2005 to 2006, there was a period of fierce competition and very low prices in the market for pre-cast concrete drainage products.<sup>274</sup>

4.22 This is reflected in a number of internal CPM and SB documents dating from this period.<sup>275</sup> For example:

- (a) the notes of an internal SB sales meeting in March 2006 state,

*'CARNAGE CARNAGE CARNAGE is the only way to describe the everyday market at present with everyone chasing everything and prices being slashed to all time lows.'*<sup>276</sup>

- (b) a commercial report from CPM dated 25 April 2006 states that,

*'With no effective leadership from the 4 main suppliers the market has developed into a dog eat dog situation with little regard for price ... Prices are under pressure on all fronts but we are trying to edge away from the ludicrous rates being quoted by some.'*<sup>277</sup>

4.23 Consistently with this:

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<sup>274</sup> See, for example, witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 8 and 9, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 17, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 12, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 13, URN S0456. Witness statement of [SB employee 1], dated 10 June 2016, paragraphs 10 to 22, URN 27066. Witness statement of [SB senior employee 2], dated 18 July 2016, paragraphs 40 to 41, URN 27124. Witness statement of [FPM employee 9], dated 4 March 2015, paragraph 7, URN 27078. Witness statement of [FPM employee 8], dated 18 June 2014, paragraph 29, URN 27081. Witness statement of [CPM employee 14], dated 20 October 2016, paragraphs 4 to 10, URN 27015.

<sup>275</sup> See, for example, URN 6362, pages 5 to 8; URN 6360, pages 5 to 7; URN 6358, pages 5 to 7; URN 3638; URN 2148; URN 3641; URN 7381; URN 3060; URN 3416; URN 3296; URN 13341; URN 3420.

<sup>276</sup> URN 3416.

<sup>277</sup> URN 3641.

- (a) [SB senior employee 1] has said that prices were driven down by as much as 30 to 35% in the course of a few months;<sup>278</sup> and SB made losses of around £1.25 million;<sup>279</sup>
- (b) [CPM senior employee 1], has said that CPM *'couldn't have sustained that low level of pricing for any period of time.'*<sup>280</sup>

4.24 FPM has stated that it does not recognise the characterisation of the origins of any arrangement as being in response to a period of fierce competition and falling prices.<sup>281</sup> It notes, in particular, that an analysis of Hepworth and FPM data from its Ellistown plant, for the period 2004 to 2006, shows that prices did not fall by the magnitude suggested by [SB senior employee 1].<sup>282</sup>

4.25 However, the CMA considers that there is sufficient clear and consistent evidence<sup>283</sup> to support its conclusion that mid-2005 to 2006 was a period of strong competition and low prices. Moreover, FPM's understanding of an Information Memorandum regarding its purchase of the Hepworth Concrete business (*'Hepworth'*)<sup>284</sup> in November 2005 is consistent with this conclusion,<sup>285</sup> in so far as FPM describes it as:

- (a) containing evidence of CPM attacking Hepworth's term deals;<sup>286</sup>
- (b) containing a consideration of *'price wars'* (which were thought to be due to *'excess capacity'*, *'failure to recover cost increases'* and *'plastic pipes reducing the concrete market'*);<sup>287</sup> and

<sup>278</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 131, URN 20224; transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 131, URN 27592.

<sup>279</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 136, URN 20224.

<sup>280</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 9, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 18, URN S0455.

<sup>281</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, section 2 (in particular paragraph 2.25), URN S1363.

<sup>282</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 2.25.3, URN S1363.

<sup>283</sup> As highlighted in this Chapter, and, in particular, in this Section C.

<sup>284</sup> FPM acquired the assets of Hepworth (and employees under TUPE). FPM states that before that time its ability to serve the wider GB market was restricted by the remoteness of its manufacturing plant in Northern Ireland. See FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 2.4 to 2.7, URN S1363.

<sup>285</sup> At the very least, FPM states that the memorandum indicates a market in which it was difficult to increase prices and profitability. See also: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 2.8 to 2.10, URN S1363.

<sup>286</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 2.25.2(a), URN S1363.

<sup>287</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 2.25.2(c), URN S1363.

- (c) showing that, although in May 2005 Hepworth reported ‘*improving prices*’, increases in costs ‘*had not been reflected in the same increases in selling prices, so impacting profitability*’.<sup>288</sup>

### ***The formation of the arrangement***

- 4.26 There is evidence that it was against the backdrop of strong competition that the arrangement between SB, CPM and FPM was put in place, with the objective of increasing prices.<sup>289</sup>
- 4.27 The witness evidence of [SB senior employee 1] and [CPM senior employee 1] is broadly consistent as regards the formation of the arrangement. They both recall that, in 2006, contact was made between certain individuals at SB, CPM and FPM,<sup>290</sup> with the express intention that SB, CPM and FPM should start talking to each other in order to address the deterioration in prices in the market.<sup>291</sup>
- 4.28 [SB senior employee 1] explained that during an initial meeting:

*‘there was a lot of, discussion around, well, the period that had happened, the bad, bad blood that had... had... had been spilt, a new era of trust, the*

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<sup>288</sup> FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraph 2.25.2(d) (see also paragraphs 2.8 to 2.9), URN S1363.

<sup>289</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 137 to 139, 142, 154, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 8 and 9, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 17 to 19, URN S0455. [CPM senior employee 1] also noted that the arrangement brought a benefit in terms of market stability and security for the business: witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 48, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 103, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 44 and 45, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 13, 59 and 60, URN S0456.

<sup>290</sup> [SB senior employee 1] recalls that either [CPM senior employee 1] or [FPM senior employee 1] called him to discuss the formation of the arrangement: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 137, URN 20224. However, [CPM senior employee 1] recalls that [SB senior employee 1] called him in this respect, noting that [SB senior employee 1] had first been contacted by [FPM senior employee 1]: witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 9, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 17, URN S0455. In interview, [FPM senior employee 1] recalled being contacted by either SB or CPM (possibly by [CPM senior employee 9] of CPM), and being invited to participate in meetings which were intended to address ‘*the deterioration of the concrete market*’; however, he did not remember when he was first contacted about such meetings: transcript of an interview with [FPM senior employee 1] held on 10 May 2019, pages 25 to 27, and 52 to 53, URN S1387. In interview, [FPM senior employee 2] recalled being invited to a meeting with his competitors by either [CPM senior employee 1] or [CPM senior employee 9] of CPM. However, he was unable to recall what the meeting was about, or when the meeting was held (although he said that it was held after FPM entered the English market): transcript of an interview with [FPM senior employee 2] held on 9 May 2019, pages 86 to 90, URN S1386.

<sup>291</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 137, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 9 and 10, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 17 to 18, URN S0455.

*ridiculousness of... of how quickly the situation had happened and deteriorated in the market-place, and a... and a will to, re-ignite discussions.*<sup>292</sup>

- 4.29 According to [SB senior employee 1], a minimum pricing arrangement was discussed at this initial meeting, and a fresh schedule of minimum prices for pipes and rings was implemented *'because of the massive decline in market prices.'*<sup>293</sup> He also said that there was a discussion about the approach to term deals around this time.<sup>294</sup>
- 4.30 The evidence of [CPM senior employee 1] is broadly consistent with that of [SB senior employee 1] as regards the matters discussed at this initial meeting.<sup>295</sup> [CPM senior employee 1] explained that it was agreed that there was a need *'to get some common sense prevailing in the market and that involved setting a minimum price level that we could at least break even with, which we did at that time.'*<sup>296</sup>
- 4.31 FPM has stated that it does not recognise the CMA's narrative as regards the origins and commencement of the arrangement.<sup>297</sup> It states that, following its purchase of Hepworth, it was motivated to meet SB and CPM in order to address the threat posed to the concrete market by suppliers of drainage products made from plastic, clay and steel.<sup>298</sup>
- 4.32 FPM has also stated that the CMA has failed to take account of relevant market conditions, in particular, witness evidence suggesting the existence of

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<sup>292</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 138 to 139, URN 20224. The references to *'re-igniting'* the discussions relate to the suggestion that there had been previous collusion between at least some of the parties.

<sup>293</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 139 and 142 to 143, URN 20224.

<sup>294</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 139, URN 20224. [CPM senior employee 3] also states that the term deal aspect of the arrangement was likely in place *'early doors, probably 2006, when the cartel started'*: witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 20, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 34, URN S0456.

<sup>295</sup> However, the CMA notes that [SB senior employee 1's] and [CPM senior employee 1's] evidence differs as regards the attendees at this initial meeting. [SB senior employee 1] said that he attended this meeting with [CPM senior employee 1], [CPM senior employee 2] and [FPM senior employee 1]; transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 138, URN 20224. However, [CPM senior employee 1] recalls that he attended this meeting with [SB senior employee 1] and [FPM senior employee 1] only: witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 10, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 20, URN S0455.

<sup>296</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 10, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 19, URN S0455.

<sup>297</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 2.20, URN S1363.

<sup>298</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 2.21 to 2.24.1, 6.7, URN S1363.

cartel arrangements before FPM ‘*entered the GB market*’,<sup>299</sup> to which it was not party.<sup>300</sup> In this regard, FPM has made representations that:

- (a) by November 2005, the market had already been competitively distorted;
- (b) the ‘*existence of previous cartel arrangements...tends to show that SB and CPM’s mindset, approach to, and recollection of the discussions/meetings with FPM had a different intention and objective than FPM*’,<sup>301</sup>
- (c) FPM could not have had a ‘*will to re-ignite*’ discussions, and that any ‘*bad blood*’ that existed in the market was a result of the relationship between SB and CPM.<sup>302</sup>

4.33 The CMA acknowledges that there is some evidence that the market may have been distorted prior to the Infringement. However, it is important to note that the CMA has, on prioritisation grounds, neither investigated, nor come to any conclusion on, the existence of any previous cartels in the market for pre-cast concrete drainage products.

4.34 There is consistent documentary and witness evidence showing that mid-2005 to 2006 was a period of strong competition irrespective of any prior distortion of the market. But even if normal competitive conditions had not applied at the start of the arrangement, it remains the case that FPM attended meetings with SB and CPM throughout the Relevant Period, during which the evidence<sup>303</sup> shows that the arrangement was discussed. This is the case regardless of FPM’s mindset or motivation for attending those meetings; and there is no evidence to suggest that it ceased its involvement in, or attempted

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<sup>299</sup> For completeness, the CMA notes that, in its own representations, FPM accepts that it competed within the GB market prior to November 2005, stating that, from its factory in Knockloughrim, constructed in 2001, ‘*it developed as a supplier into the pre cast concrete drainage market in Northern Ireland, Ireland and Scotland and, to a much lesser extent, the northern counties of England*’, albeit that its ‘*ability to serve the wider market in GB was restricted by the remoteness of its manufacturing plant (in Northern Ireland) and the high cost of shipping and transport of pre-cast products*’: FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraphs 2.3 to 2.4, URN S1363.

<sup>300</sup> FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraph 2.24.2 to 2.24.4, URN S1363.

<sup>301</sup> FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraph 2.24.2, URN S1363

<sup>302</sup> FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraphs 2.24.4 and 2.25.1, URN S1363, citing, *inter alia*, the witness statement of [FPM employee 8], dated 18 June 2014, paragraphs 28 to 29, URN 27081.

<sup>303</sup> As cited throughout this Chapter.

to publicly distance itself from, those discussions (see, for example, paragraphs 4.55, 4.59, 4.74, 4.148, 4.187, 4.269, 4.292, 4.294 and 4.317).

### **Early contact**

4.35 In interview, [SB senior employee 1] suggested that initial contact between SB, CPM and FPM took place in '*mid or slightly earlier than mid-2006*', but was unable to recall a precise start date.<sup>304</sup> [CPM senior employee 1] was similarly imprecise, stating that initial contact was made '*sometime in 2006, probably later in the year*'.<sup>305</sup>

4.36 However, there is documentary evidence that the lines of communication were open earlier than this.

4.37 Entries in [FPM senior employee 1's] diary show contact with SB and CPM from as early as October 2005,<sup>306</sup> and that by December 2005 [FPM senior employee 1] was, at the very least, beginning to think in terms of an arrangement to divide the market through the allocation of customers with competitor undertakings. For example:

(a) a diary entry dated 7 December 2005 states, '*Don't POACH each other's Business*';<sup>307</sup>

(b) a diary entry dated 11 December 2005 appears to record the tonnages and market shares of certain companies, including SB and CPM.<sup>308</sup>

4.38 The diaries of both [FPM senior employee 1] and [SB senior employee 1] record a meeting at the Novotel Hotel in Coventry on 16 December 2005 (one of the preferred locations for meetings between SB, CPM and FPM: see Annex A and paragraph 4.95).<sup>309</sup> There is also an entry in [FPM senior

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<sup>304</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 137, URN 20224.

<sup>305</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 10, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 18, URN S0455. FPM has drawn attention to the uncertainty in the witness evidence as to when the arrangement between SB, CPM and FPM actually commenced: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 2.26, URN S1363. The CMA acknowledges that the witness evidence as regards the origins of the arrangement is imprecise, but considers that this is to be expected given the passage of time.

<sup>306</sup> URN 1578 - 20051011, '*Stanton Bonna MD [SB senior employee 1]*'; URN 1578 - 20051110, '*6pm STAY @ Hilton Euston ROAD [CPM senior employee 8] + [CPM senior employee 9]*'; URN 1578 - 20051123, '*[CPM senior employee 9] 07802-797206*'; and URN 1578 - 20051206, '*R [SB senior employee 1] 12.00 Long EATON - Nova Hotel NG10 4EP*'.

<sup>307</sup> URN 1578 - 20051207.

<sup>308</sup> URN 1578 - 20051211. FPM has made representations that these diary entries are no more than [FPM senior employee 1's] '*internal musings*' on what FPM considered the market size would be for planning purposes: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 2.27, URN S1363.

<sup>309</sup> URN 1578 - 20051216, '*11.30 Meeting Coventry NOVOTEL CV6 6HL Hotel Jc3 M6*'; and URN 2880 - 20051216, '*11.30 Coventry Novotel*'.



employee 1's] diary on 17 December 2005 which sets out certain pricing and customer information, including in relation to SB and CPM.<sup>310</sup> The CMA is of the view that these notes record issues discussed during the meeting on 16 December 2005.

- 4.39 Following the meeting on 16 December 2005, internal SB minutes of a sales meeting on 22 December 2005 show a '*bullish*' approach within SB, which is notable given the difficult economic circumstances at that time:

**Price Increase** – *A letter will be leaving us shortly stating that prices will rise in January 2006. No percentage figure is quoted.*

**Selling net** – *The price increase letter will also state that as from the 16<sup>th</sup> January we will begin to sell on a nett basis, CPM already sell nett and Milton have recently also begun to.*

**A new price list** *will be issued today (22 December) and all are instructed to stick to this list WITHOUT EXCEPTION, any changes to this are to be agreed with [SB senior employee 1] first.*<sup>311</sup>

- 4.40 The CMA infers that SB was at the very least beginning to feel more confident in its ability to seek to maintain prices at desired levels, following the contact with its competitors at the meeting on 16 December 2005.
- 4.41 There is further documentary evidence dating from early to mid-2006 to suggest that individuals at SB, CPM and FPM were in regular contact by this time. For example:
- (a) an entry in the diary of [FPM senior employee 1] on 13 January 2006 indicates contact with [SB senior employee 1];<sup>312</sup>
  - (b) an entry in the diary of [FPM senior employee 1] on 17 February 2006 suggests that there was a meeting at the Novotel Hotel in Coventry (one of the preferred locations for meetings between SB, CPM and FPM);<sup>313</sup>

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<sup>310</sup> URN 1578 - 20051217.

<sup>311</sup> URN 3290.

<sup>312</sup> URN 1577 - 20060113, '[SB senior employee 1]...'.  
~~'11.30 - Novotel M6 JUN 3 CV6 6HL'~~

<sup>313</sup> URN 1577 - 20060217, '~~11.30 - Novotel M6 JUN 3 CV6 6HL~~'.

(c) there is evidence of meetings between some or all of SB, CPM and FPM on 2 May 2006,<sup>314</sup> 10 May 2006,<sup>315</sup> 12 June 2006, 22 June 2006 and 10 August 2006.<sup>316</sup>

4.42 In interview, [CPM senior employee 3] described his view of the early contact between SB, CPM and FPM, and the consequential implementation of the arrangement within CPM. He explained that, although he did not start attending the meetings between SB, CPM and FPM until *'the second half of 2007'*,<sup>317</sup> he *'first became aware that CPM was involved in a cartel with [SB] and FPM in 2006'*,<sup>318</sup> and that:

*'They told me what was being discussed and they fed back to me what I was meant to implement, in terms of prices, by CPM. I was given a set of prices and told not to go below them and to report back on how the market, that is our customers, reacted to the price increases. I recall, specifically, at some time in 2006, being given a minimum price list for core products to implement and it went from there.'*<sup>319</sup>

4.43 An internal CPM email dated 6 July 2006 is consistent with this explanation. It states:

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<sup>314</sup> URN 2881 – 20060506, '11.00 Coventry Novotel'; URN 1576 – 20060502, 'Coventry Novotel M6 Jnc3'; URN 1893, page 20 '[SB senior employee 1] down 6% to FP and Enstone... Ring [SB senior employee 1] @ Stanton... Ring [CPM senior employee 1] re Scotland'.

<sup>315</sup> URN 2881 – 20060510, '[2.30]pm Cov'; URN 1576, 20060510, '11 Meet [CPM senior employee 1]'; URN 1893, page 26 'Nova CV6 6HL...[CPM senior employee 2] [mobile phone number]' and notes including information relating to CPM.

<sup>316</sup> See Annex A. The CMA acknowledges that the evidence as regards the matters discussed at some of these meetings is imprecise (see FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 2.26, URN S1363), but considers that this is to be expected given the passage of time and the secret nature of cartel arrangements. The CMA also accepts that there may have been legitimate contact, for example in relation to cross supply, between FPM, CPM and SB during this time (see FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 2.12, URN S1363, citing the following witness evidence: witness statement of [FPM employee 16], dated 13 March 2015, paragraph 9, URN 27058; witness statement of [FPM employee 6], dated 1 July 2016, paragraphs 2 to 5, URN 27061; witness statement of [FPM employee 18], dated 9 September 2014, paragraph 24, URN 27088; witness statement of [FPM employee 21], dated 29 January 2016, paragraph 13, URN 27242). However, the CMA is not persuaded that cross supply arrangements would have required regular meetings between SB, CPM and FPM.

<sup>317</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 11, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 12 and 16, URN S0456.

<sup>318</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 9, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 12 to 15, and 25, URN S0456.

<sup>319</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 9, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 13, URN S0456.

*'Following the introduction of revised pricing lists, the new minimum prices shown should be adhered to at all times, and no prices quoted at less than minimum.*

*If for any reason you wish to go below the minimum price, then this must be agreed (and signed off) by [CPM senior employee 3] (for England and Wales), and/or [CPM senior employee 2] for Scotland, prior to any price being given to the customer.*

*Any instances of deviation from this instruction, will be treated as a disciplinary action.*<sup>320</sup>

- 4.44 [CPM senior employee 3] said that this might well have been the new price list that he was asked to implement after the first meeting of the cartel.<sup>321</sup>

### **Recorded meetings**

- 4.45 Comments made during the August 2012 meeting are consistent with the arrangement having been established in 2006, following a period of fierce competition on prices.
- 4.46 During a discussion in relation to the harmonisation of manhole prices, [CPM senior employee 3] replied, *'Please tell us we've been sat here 6 years.'*<sup>322</sup> This sentiment is echoed shortly afterwards by [FPM senior employee 1], who said, *'Gees we've been at it 6 years.'*<sup>323</sup>
- 4.47 In interview, [SB senior employee 1] said that he *'understood [[CPM senior employee 3]] to mean that the ... cartel started six years ago'*<sup>324</sup> and that [FPM senior employee 1] was referring to the fact that SB, CPM and FPM had *'been trying to get the prices up for six years, of the, operations of the cartel since 2006.'*<sup>325</sup>
- 4.48 The CMA also notes an exchange between [SB senior employee 1] and [CPM senior employee 3] during the August 2012 meeting,<sup>326</sup> in which [SB senior employee 1] said that following the *'[p]rice war in 2006, our prices have gone*

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<sup>320</sup> URN 6811.

<sup>321</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 9, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 66 to 67, URN S0456.

<sup>322</sup> Transcript of a record of the August 2012 meeting, page 259, URN 20203A.

<sup>323</sup> Transcript of a record of the August 2012 meeting, page 262, URN 20203A.

<sup>324</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 667, URN 20224.

<sup>325</sup> Transcript of interviews with [SB senior employee 1] held on 3 to 4 October 2016, pages 448 and 449, URN 27597.

<sup>326</sup> Transcript of a record of the August 2012 meeting, pages 238 to 239, URN 20203A.

*up by seventy four and a half per cent and our costs are like I explained to you gone up by something like twenty one or something'. When [CPM senior employee 3] asked 'What do you say when they say 'how did you do it?', [SB senior employee 1] replied 'How, yeah. Because you, you signed a non-collusion policy,' observing that, 'They knew full well how you do it. They'll still hang you out to dry if you get caught though.'* In relation to the conduct of the individuals at the meeting, [CPM senior employee 3] comments '*Honour amongst thieves and all that*'.

- 4.49 In interview, [SB senior employee 1] explained that during this exchange he was referring to '*justifying to your lords and masters in France why prices have gone up 74% and in cost only 21% ... when you're not supposed to be operating a cartel*',<sup>327</sup> noting the '*confirmation from [CPM senior employee 3's] perspective that people around the table were part of an illegal cartel*'.<sup>328</sup>

### **Changing market conditions**

- 4.50 Consistently with the formation of the arrangement in early to mid-2006, certain internal reports and meeting minutes show a change in market conditions from mid-2006. For example:
- (a) a CPM Board Report in respect of the Scottish market in August 2006 states that '*the price increases we have been introducing have generally been accepted without affecting the sales performance*'; noting that '*McCann's have been keeping to a certain price level in Scotland, however when a larger contact is out for pricing they tend to dip below this price level to ensure they obtain the business*';<sup>329</sup>
- (b) a CPM Board Report in respect of England and Wales in August 2006 states that:

*'By the end of August, the market appears to have stabilized around these price schedules. Still experiencing the inevitable "ducking and diving" on contracts but overall the rates seem to be holding. However, the market is still very sensitive and it would only take one or two competitors to break rank for prices to deteriorate. The merchants are still keen to create a level of uncertainty amongst manufacturers. We must all remain strong*

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<sup>327</sup> Transcript of interviews with [SB senior employee 1] held on 3 to 4 October 2016, page 418, URN 27597.

<sup>328</sup> Transcript of interviews with [SB senior employee 1] held on 3 to 4 October 2016, page 426, URN 27597.

<sup>329</sup> URN 5160.

*during this period and not give in to merchant pressure to unnecessarily reduce prices...*

*... Generally McCanns, Stantons and Miltons appear to be keeping firm on their price increases.*<sup>330</sup>

(c) a CPM trading report for October 2006 states that:

*'October was another busy month for CPM with volumes similar to September but the major difference being a better selling price achieved. The recent price increases were seen as the main contributing factor to the improved selling price.*

*McCanns, Stantons and CPM appear to be holding and trying to push rates forwards and upwards.*<sup>331</sup>

(d) minutes of an SB sales meeting in March 2007 reflect an ever-improving market, stating that, *'So far this year has been the complete opposite of last year; if anything we have too much work on and we are struggling to cope. Open market prices are definitely much higher than we have seen previously.'*<sup>332</sup>

## **Conclusion**

- 4.51 The CMA is of the view that SB, CPM and FPM were in regular contact with each other from the latter part of 2005, and that an initial meeting to discuss a coordinated approach on the market was held by SB, CPM and FPM in at least early to mid-2006, but possibly as early as 16 December 2005. Alongside this, the CMA notes the implementation of a *'minimum price list'* in accordance with the terms of the arrangement within CPM by 6 July 2006; and the evidence of changing market conditions from August 2006.
- 4.52 Therefore, taking account of the totality of the evidence highlighted in this Section C, and taking a conservative approach, the CMA concludes that the arrangement was put in place, and was in operation, by at least as early as 6 July 2006.

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<sup>330</sup> URN 1088. In his witness evidence, [CPM employee 11] of CPM explained that the reference to merchants being *'keen to create a level of certainty'* reflects that CPM was *'vulnerable'* to merchants sharing prices *'with other manufacturers in an effort to get the best price for their clients.'* Witness statement of [CPM employee 11], dated 24 March 2016, paragraph 10, URN 26965.

<sup>331</sup> URN 5152.

<sup>332</sup> URN 3522.

## D. Regular secret meetings – purpose, frequency and nature

4.53 There is evidence that regular cartel meetings between SB, CPM and FPM were held throughout the Relevant Period. A schedule of the dates, locations and attendees of certain meetings, together with supporting evidence (including expense claims, notebook and diary entries, confirmation of meeting room bookings, invoices and third party witness evidence), is set out in Annex A.

### ***Purpose of the meetings***

#### *Recorded meetings*

4.54 It is clear from the surveillance material as a whole that the purpose of the recorded meetings was to further the operation of the arrangement, and that all those present played a full role on behalf of the companies that they were representing. The surveillance material clearly shows concerted contact between SB, CPM and FPM as regards past actions, the monitoring of the coordinated approach, and the working out of similar plans for the future.

4.55 For example, statements made during the recorded meetings highlight that the objective of the arrangement was to increase prices and to maintain SB, CPM and FPM's position in the market. In particular:

- (a) during the November 2012 meeting, [FPM senior employee 1] and [CPM senior employee 1] highlight the need to '*regulate*' or '*police*' the arrangement in order to '*get the prices up ... across the board*', with [FPM senior employee 2] noting that, '*the English price continues to rise every year*', and [CPM senior employee 1] responding, '*because we, we are on the ball ... We have a certain amount of discipline there*'.<sup>333</sup> [FPM senior employee 1] goes on to say, '*if you take those term deals that you have and they're, they're manholes why do you not continue sticking the price up on those, and let us do the pipes on the spot market, and then that's*

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<sup>333</sup> Transcript of a record of the November 2012 meeting, pages 101 to 103, URN 20204A. In interview, [FPM senior employee 2] suggested that, during this conversation, he was talking about the nature of the merchant-led model in England and Scotland, and the price rises that result from inflation and salary increases, rather than any cooperation with competitors: transcript of an interview with [FPM senior employee 2] held on 9 May 2019, pages 67 to 69, URN S1386. However, the CMA is not persuaded by this assertion, and considers that the conversation is clearly concerned with the way in which CPM and FPM will cooperate and police the arrangement in Scotland. Indeed, shortly later [FPM senior employee 1] specifically asks: '*if an order comes in, and you're both priced at the same price, how do you, how, who gets it?*': transcript of a record of the November 2012 meeting, page 104 (and the conversation as it progresses in the following pages), URN 20204A.

*clean*’;<sup>334</sup> and shortly later [CPM senior employee 2] states, ‘*Let’s get the price up*’;<sup>335</sup>

- (b) during the January 2013 meeting, [CPM senior employee 1] explicitly makes the link between the arrangement in terms of raising prices and the reduction of competitors in the market:

*‘We are the people that have put our money where our mouth is and taken these other bastards out of the market that were cutting prices. And the reason that we sit around the table today with prices where they are, in a bloody depressed market is because we’ve taken a lot of these people out. And there’s common sense prevailing at last’*;<sup>336</sup>

- (c) during the January 2013 meeting, [FPM senior employee 1] comments on the success of the companies in the context of a discussion about the maintenance of the status quo and specified market shares:

*‘But guys, look at our, look at all our financial numbers, we’ve all had a good year. Everybody has had a good year financially and profit-wise. And that’s come about by all sitting here and be patient’*;<sup>337</sup> and

- (d) during the March 2013 meeting, [FPM senior employee 1] notes the importance of ‘*keeping our price*’.<sup>338</sup>

4.56 Discussions relating to examples of ‘*cheating*’ on the arrangement, or of target or ‘*aspirational*’ prices not having been achieved (because certain quotations were considered to be too low), highlight SB, CPM and FPM’s monitoring of the arrangement and desire to ensure that it operated effectively. Consistently with this, [CPM senior employee 1] has said that, throughout the Relevant Period, ‘*[t]he objectives of the meetings, in terms of stabilising and regulating the market, moving prices forward and policing what we had agreed to ensure there was no cheating or price-cutting, did not change*’.<sup>339</sup>

4.57 By way of specific example, in a handwritten letter to [CPM senior employee 1] dated 22 January 2013, [CPM senior employee 2] set out his concerns as regards FPM’s apparent failure to abide by the arrangement in Scotland.<sup>340</sup> In

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<sup>334</sup> Transcript of a record of the November 2012 meeting, page 103, URN 20204A.

<sup>335</sup> Transcript of a record of the November 2012 meeting, page 104, URN 20204A.

<sup>336</sup> Transcript of a record of the January 2013 meeting, page 122, URN 20205A. [S<].

<sup>337</sup> Transcript of a record of the January 2013 meeting, page 133, URN 20205A.

<sup>338</sup> Transcript of a record of the March 2013 meeting, page 45, URN 20206A.

<sup>339</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 39, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 90, URN S0455.

<sup>340</sup> URN 3611.

that letter, [CPM senior employee 2] noted that he was aware that ‘pigeon club’ meetings were *‘imperative for the good of the industry and all the parties’* (emphasis in original), and concluded by asking [CPM senior employee 1], ‘to clarify McCann’s position’ before he returned to any further meetings.

- 4.58 [CPM senior employee 2] did, in fact, attend the January 2013 meeting, but brought up his concerns, stating:

*‘[FPM senior employee 1], I didn’t want to come to this meeting. I, I did not want to come to the meeting, although I believe in the whole meeting, and it’s the best for industry and all the rest of it. As a point, I wrote to [CPM senior employee 1] saying, ‘There, I honestly believe we’re being attacked by McCanns in Scotland,’ right? You’ve got forty percent market share, what the hell is [FPM senior employee 5]<sup>341</sup> going in, cutting rates and all the rest of it.’<sup>342</sup>*

- 4.59 This statement and the resulting discussion show both an understanding of the nature of the arrangement on the part of all of the participants, and a desire to resolve these issues and ensure its effective operation. For example,

- (a) [FPM senior employee 1] said to [CPM senior employee 2], *‘I’m in the same agenda as yourself and the same page, I’m trying to move prices forward’* to which [CPM senior employee 2] replied, *‘I know you are, and I know the meeting is best for everybody’*;<sup>343</sup> and
- (b) [FPM senior employee 1] later said, *‘all I can do is try harder and harder’*, with [CPM senior employee 1] suggesting that they have another Scottish meeting to *‘get the bloody thing back on song.’*<sup>344</sup>

- 4.60 The CMA considers that a statement made by [FPM senior employee 3], at the end of the January 2013 meeting,<sup>345</sup> summarises well the way in which meetings were used to ensure that the arrangement was working effectively:

*‘I’m on the phone to [CPM senior employee 3] [redacted] and [SB senior employee 1] [redacted] every couple of days saying ‘we’ve been told this is your price; are you at it?’ I said to [FPM senior employee 4]<sup>346</sup> because we’d seen a few lost,*

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<sup>341</sup> [FPM senior employee 5], [redacted] at FPM.

<sup>342</sup> Transcript of a record of the January 2013 meeting, page 149, URN 20205A.

<sup>343</sup> Transcript of a record of the January 2013 meeting, page 150, URN 20205A.

<sup>344</sup> Transcript of a record of the January 2013 meeting, pages 153 and 154, URN 20205A.

<sup>345</sup> This statement was made during a discussion between [FPM senior employee 3], [FPM senior employee 1] and [FPM senior employee 2], when the representatives of SB and CPM had left.

<sup>346</sup> The CMA is of the view that this is a reference to [FPM senior employee 4], at FPM.



*we'd gone at minus fifty, which is five below the minimums, and lost it, so I knew they were way below ...*

*Way below the minimums. I've bought a few examples with me today just in case, but erm quite clearly they haven't been on the new prices, [FPM senior employee 1]. Because that's why I said to [CPM senior employee 1]: 'Are you going to from the 1<sup>st</sup> of February, are you going to be on the price?' So from Thursday, I'll start tracking again from Thursday and make sure they are on the, they are on the prices. No to be fair to [FPM senior employee 4] and the guys, they're ringing me fairly regular, and I ring [CPM senior employee 3] and er [SB senior employee 1] just to check on the rates. Because [SB senior employee 1] had taken, he'd knocked some surcharges off a term deal just as we're going for a price increase. So er he said he didn't know about it, but he's reprimanded the sales guy. But not a lot moves without [SB senior employee 1] knowing about it.'<sup>347</sup>*

#### *Other meetings throughout the Relevant Period*

4.61 Consistently with statements made during the recorded meetings, documentary and witness evidence shows that other meetings held during the Relevant Period<sup>348</sup> provided the opportunity for SB, CPM and FPM to monitor the arrangement and ensure that it was operating effectively on an ongoing basis.

**SB**

4.62 According to [SB senior employee 1]:

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<sup>347</sup> Transcript of a record of the January 2013 meeting, pages 289 to 290, URN 20205A. [FPM senior employee 3] has said that he does not '*recognise the conversation. I don't know if I was just trying to look impressive in front of [FPM senior employee 1]. I don't know, but certainly I did not phone [CPM senior employee 3] and [SB senior employee 1] every couple of days*': transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 272 (and see more generally pages 272 to 275), URN S1546. FPM has made representations that this is merely an exaggerated statement of [FPM senior employee 3] in the context of a conversation between [FPM senior employee 3] and his superiors and that [FPM senior employee 3] does not recognise this degree of contact in reality with [SB senior employee 1] and [CPM senior employee 3]. FPM also considers that this statement shows that none of the parties were effectively implementing any agreement: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.41.5, URN S1363. However, the CMA considers that [FPM senior employee 3's] statement provides a useful summary of the way in which the arrangement worked in practice (even if it contains an element of exaggeration), noting that his description is corroborated by other documentary and witness evidence that is cited throughout this Chapter 4. The CMA also finds it significant that both FPM and [FPM senior employee 3] have suggested that [FPM senior employee 3] might seek to impress his superiors by engaging in regular contact with competitors about prices, further noting that, during the recorded conversation, neither [FPM senior employee 1] nor [FPM senior employee 2] cautioned him against such contact.

<sup>348</sup> See Annex A.

*'The way the cartel would operate largely didn't change. The main decisions to be made, were, when to move the minimum prices forward ... And that was... that was made really as a round-the-table discussion. Some people around the table would be quite cautious about moving them forward too quickly, and some people would be more outright, saying, "Let's get these prices up quickly! We've got to improve return. We're still losing money on these products".'*<sup>349</sup>

4.63 Within SB, [SB senior employee 1] specifically asked for information from his sales staff prior to meetings between SB, CPM and FPM, with the intention of using this during discussions to *'encourage my competitors to keep the prices up and full well knowing they'd be challenging me on similar issues.'*<sup>350</sup> In support of this, the CMA notes that:<sup>351</sup>

(a) a minute of an SB sales meeting that took place on 12 October 2006 states, *'Discussion followed on the current price levels. We must keep feeding info back to [SB senior employee 1]. He feels he is not getting enough of this. We cannot do anything about this unless he knows'*;<sup>352</sup>

(b) an internal SB email dated 15 May 2012 from [SB employee 3] to [SB employee 2] and [SB employee 4] states, *'Can you feed any "dodgy" prices that you have encountered in the market over the last few weeks back to [SB senior employee 1] by the end of the week please'*.<sup>353</sup> In interview, [SB senior employee 1] explained that *'dodgy'* prices referred to *'[e]ither spot market prices slightly below or substantially below the minimums from our competitors in the market, or indeed any dodgy prices that they would have given to our sole term deals, or dodgy stock rates they'd have given to our stockists'*;<sup>354</sup>

(c) an internal SB report from [SB employee 4] headed *'Shared FPA information Nov 2012'* sets out information in relation to the status of

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<sup>349</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 170, URN 20224.

<sup>350</sup> Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 230, URN 27592. See also, witness statement of [SB senior employee 2], dated 18 July 2016, paragraph 49: *'[SB senior employee 1] would say at almost every sales meeting that the sales staff must tell him about prices in the market and certainly tell him before we lost a job and not after we had already lost a job so that may be he could do something about it'*, and paragraph 50, URN 27124.

<sup>351</sup> FPM states that the evidence cited in this and the following paragraph relates solely to the implementation of any agreement between SB and CPM (and not FPM): FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.4.1.4, URN S1363. However, the CMA considers that this evidence indicates that [SB senior employee 1] asked his sales staff for information in relation to *'low'* quotations in the market in general, and not in relation to any particular company.

<sup>352</sup> URN 3528, page 4.

<sup>353</sup> URN 2873.

<sup>354</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 747, URN 20224.

certain shared term deals, and records, *inter alia*, that CPM had not been applying their price increases properly in relation to the shared customer GRS.<sup>355</sup> In interview [SB senior employee 1] explained that he, *'would have taken this information to a cartel meeting to discuss shared deals with the other two'*,<sup>356</sup>

- (d) an internal SB email dated 12 March 2013 from [SB employee 4] to [SB senior employee 1] highlights the discounts on rates offered by CPM to Keyline Lowton, for the contractor, Barnfield.<sup>357</sup> In interview, [SB senior employee 1] explained that this email would have been prompted by his request for *'comments on any dodgy goings-on'* to be provided before the March 2013 meeting;<sup>358</sup> and that he placed the email in his *Boys spoils* file (see paragraphs 4.85 and 4.98), so that he could bring the matter up during the March 2013 meeting.<sup>359</sup>

4.64 [SB senior employee 1] further explained that meetings between SB, CPM and FPM were used to address the role and actions of sales staff:

*'occasionally it would be mentioned, this, this topic of ... how can you not bring [staff] into your confidence if you expect them to fulfil, the wishes of the three stroke four tenets of the, of the cartel. How can you not bring them into your confidence? And thereby actually...to have an avaricious salesperson, going out and hunting business, was actually what you didn't need.*

...

*at cartel meetings an excuse or a valid reason – not quite sure, in some cases, for me it would be a valid reason, 'Oh such and such a salesperson has done that, but they've done it on their own bat. They've taken that job, but they did it without permission'. And there were calls at the cartel, 'You need to bring that salesperson into line'.*<sup>360</sup>

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<sup>355</sup> URN 2843.

<sup>356</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 627, URN 20224.

<sup>357</sup> URN 0216, page 32.

<sup>358</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 589, URN 20224.

<sup>359</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 593 to 594, URN 20224.

<sup>360</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 301, URN 20224.

CPM

4.65 [CPM senior employee 1] has said that the purpose of the meetings was to *'keep a close eye on what our competitors were doing in the market'*.<sup>361</sup> He described the meetings as being *'vital'* in order to *'police'* the market - to *'make sure that nobody was stepping out of line'*,<sup>362</sup> and to *'ensure that we were on track in maintaining our market shares and making sure that people were not being too greedy by taking more than their share.'*<sup>363</sup> He said that *'[t]he objectives of the meetings, in terms of stabilising and regulating the market, moving prices forward and policing what we had agreed to ensure there was no cheating or price cutting, did not change between 2006-2013.'*<sup>364</sup>

4.66 He further explained that,

*'without any shadow of a doubt it would be raised [at a meeting] if somebody was cheating ...*

*You'd get that fed back from, from, er customers. They'd tell you what the prices were. They'd send you a copy of the quote ... that they'd actually quoted, and they'd swear blind they hadn't done that; and you'd say, "Look, what do you think to that then?"'*<sup>365</sup>

4.67 He also said that, *'[a]lthough we were also getting feedback from the market place, it was vital that we maintained the contact with competitors to ensure that we were maintaining our market share and that McCann and Stanton Bonna were not undermining us'*.<sup>366</sup> In interview, he noted that, *'it's better the devil you know, or you keep your friends close but you keep your enemies even closer'*.<sup>367</sup>

4.68 Consistently with this, [CPM senior employee 3] explained:

*'The purpose of the cartel meetings was for CPM, FPM and SB to keep prices moving forward and to discuss market share and term deals. It was also an opportunity for representatives of those three companies to air their*

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<sup>361</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 33, URN S1111.

<sup>362</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 37, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 80, URN S0455.

<sup>363</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 31, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 57, URN S0455.

<sup>364</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 39, URN S1111.

<sup>365</sup> Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 82 and 83, URN S0455.

<sup>366</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 33, URN S1111.

<sup>367</sup> Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 64, URN S0455.

*grievances and the chance to say, 'Look, we agreed this, you've done something else.'*

...

*The meetings continued after 2006 to keep the momentum going in terms of keeping prices moving forward and to make sure that one of the companies did not walk away from the cartel because, if they did, they could cause havoc and do something detrimental to what we had achieved over the years ... I would say everyone at the cartel meetings shared the objective in terms of keeping prices moving forward.*<sup>368</sup>

- 4.69 [CPM senior employee 3] said that he would take feedback about prices and term deals from his staff to the meetings between SB, CPM and FPM:

*'My sales team would sometimes come to me and tell me about what the competition were doing with customers and I would look at it and think 'Well, they shouldn't be doing that if they stuck to what was agreed at the cartel meeting'. I would then use this as proof during the meeting and say 'Look you have done this, you've done that; we said we were sticking there and you've reneged on it'.*<sup>369</sup>

*FPM*

- 4.70 [FPM senior employee 3] has acknowledged that meetings between SB, CPM and FPM would include, *'general talk around the table in terms of the market, the market development; um, what we're going to price in terms of general price discussions in the market'*.<sup>370</sup> He elaborated that meetings would include discussions on market share and *'general discussion about the price of a manhole, an aspiration or a -- er where the price in the market could be'*.<sup>371</sup>
- 4.71 As regards the monitoring of the arrangement, [FPM senior employee 3] has said that during meetings SB and CPM would raise issues such as *'how cheap [FPM's] prices were in the market, how aggressive we were in the market, going in to their customers ... [t]owards the end it became more, more frequent; early days not so much because it took us time to, to work our way*

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<sup>368</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 35 and 45, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 47 and 48, URN S0455.

<sup>369</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 41, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 57, URN S0456.

<sup>370</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 77, URN S1546.

<sup>371</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 80 to 82, URN S1546.

*in to those customers, so ... it was more general, general chat around the market conditions, the way the market was going*.<sup>372</sup>

- 4.72 FPM has made representations that its intention in attending the meetings differed from that of SB and CPM, stating that it:
- (a) saw the meetings as an opportunity for concrete manufacturers to bring together their expertise to persuade customers of the value of the concrete product as compared with plastic and other alternatives; to understand on an industry basis whether concrete products were competing effectively as against products made from other materials; and to make progress as regards innovation in the market;<sup>373</sup>
  - (b) did not perceive the information discussed to be commercially sensitive as it was based on CPSA or inaccurate data;<sup>374</sup>
  - (c) considered discussions at meetings to be a form of *'banter'*, *'posturing'* and *'jockeying'*, and neither intended to act upon, nor acted upon, the information discussed.<sup>375</sup>
- 4.73 In interview, [FPM senior employee 3] explained that FPM attended meetings in order to obtain an *'insight into [SB and CPM's] customers'*, which was used *'to attack their customers'*.<sup>376</sup> He emphasised that FPM's aim was to obtain an increased volume of business, and that the meetings were a quick and efficient way to extract information from competitors that could be used

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<sup>372</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 85, URN S1546.

<sup>373</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 2.21 to 2.24.1, 5.38, 5.45.1, 5.141 and 6.23, URN S1363. Transcript of an interview with [FPM senior employee 1] held on 10 May 2019, for example, page 30, 33, 35, 40, 41, 118, 121, 141, 199, and 208, URN S1387. See also: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 31, 35, 192, and 276 to 277, URN S1546.

<sup>374</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.37 to 5.38, 5.45.3, 5.140, 5.143 to 5.146, 5.164, 6.10.2, 6.20, URN S1363, citing the witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 37, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 121, URN S0455; witness statement of [CPM senior employee 3] dated 11 December 2018, paragraphs 9, 15 and 33, URN S1120. Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, for example, pages 36 and 40 to 41, URN S1546.

<sup>375</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.36, 5.37, 5.45.2, 5.141, 6.7, URN S1363. See also: transcript of an interview with [FPM senior employee 1] held on 10 May 2019, for example, pages 38, 55, 61, 77, 80, 95, 110 to 122, 132, 133, 137, 141, and 191 to 194, URN S1387. Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 37, 59, 61, 62, 64, 68, and 149, URN S1546.

<sup>376</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 35, URN S1546.

against them, as well as a means to feed FPM's competitors with false information.<sup>377</sup>

4.74 The CMA is not persuaded by these arguments. The CMA notes in particular that:

- (a) during the recorded meetings SB, CPM and FPM discussed explicitly plastic and/or clay alternatives and innovation only to a very limited extent.<sup>378</sup> By contrast, there were numerous and extensive discussions as regards prices, customers and market shares for the Products.<sup>379</sup> The CMA also notes that the appropriate forum for any legitimate discussion of industry wide issues would be at the CPSA meetings, where attendees were asked to sign a form confirming that there would be no discussion of subjects prohibited by the Competition Act (see Chapter 2, Section C);
- (b) discussions during the recorded meetings indicate that CPSA information was not sufficient for the parties' purposes, and that it was useful to have further, more detailed, discussions about each other's more up to date market share figures, in order to provide additional clarity and certainty (see also paragraphs 4.297 to 4.301).<sup>380</sup> The CMA further notes [FPM senior employee 3's] evidence that FPM disclosed accurate market share figures during meetings with SB and CPM.<sup>381</sup>
- (c) as regards FPM's representations that it considered discussions to amount to '*banter*', '*posturing*' or '*jockeying*':
  - (i) between them, [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3] attended cartel meetings throughout the Relevant Period. The CMA considers it unlikely that FPM would have engaged in detailed and specific discussions about prices and market shares, regularly and over such an extended period of time, if

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<sup>377</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 34 to 36, 40, 41, 46 to 49, 59 to 60, 64 to 70, 77, 82, 118, 123 to 125, 139, 154, 175, 211, 233 and 266, URN S1546. See also: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.142, URN S1363.

<sup>378</sup> For example, transcript of a record of the August 2012 meeting, pages 57 to 61, 203 to 206 and 265, URN 20203A; transcript of a record of the November 2012 meeting, pages 12, 131, 214 to 220, and 241, URN 20204A; transcript of a record of the January 2013 meeting, pages 128 to 129, 163 to 178, 234, 263 and 280, URN 20205A; transcript of a record of the March 2013 meeting, pages 25, 53 and 156, URN 20206A.

<sup>379</sup> The most significant discussions are highlighted in this Chapter 4.

<sup>380</sup> Transcript of a record of the August 2012 meeting, page 322, URN 20203A. Transcript of a record of the January 2013 meeting, pages 25 to 27 and 118, URN 20205A.

<sup>381</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 80 to 81, and 247 to 248, URN S1546.

the information discussed were not useful beyond 'banter', 'posturing' and 'jockeying';

- (ii) [FPM senior employee 1] acknowledged in interview that the market share information discussed was of some interest as '*you just want to know where you're at. Just like -- it's like a football team; you want to know what your score is ... Just being nosey, interested*'.<sup>382</sup> He was evasive when asked whether, at the time of the meetings, he thought SB and CPM were telling the truth, saying, '*I just wanted to know what the numbers were...I love to be able to know that we're beating the -- our competitors*';<sup>383</sup>
- (iii) [FPM senior employee 1] participated fully in market share discussions at the January 2013 meeting, going further than '*just being nosey*' by setting out the principles of the arrangement and how it ought to operate as follows:

*'McCann [market share figure] starts with a very good ... four. Stantons is with a very low two, and you're [CPM] with a high three ... I appreciate where you're coming from, but it's going to be very hard to get this to within a point or two ...*

*... It is worth everybody's while sitting round this table. I think what we've got to do is ensure that you [CPM] get near the thirty nine ... I don't have a serious problem with that, just take another one off [SB senior employee 1] ...*

*... is this not just a quirk of fate that you have dropped a percent or two just the same way as during the years we were. You can maybe find with your term deals or whatever this year that you've a backup...';<sup>384</sup>*

- (iv) there is no evidence to suggest that FPM expressed its purported intentions and motivations (as described in FPM's representations) to SB and CPM, or attempted to cease its involvement in, or to distance itself publicly from, any part of the discussions with SB and CPM. Rather, FPM engaged fully with such discussions (see, for example, paragraphs 4.55, 4.59, 4.148, 4.187, 4.269, 4.292, 4.294 and 4.317);

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<sup>382</sup> Transcript of an interview with [FPM senior employee 1] held on 10 May 2019, page 99, URN S1387.

<sup>383</sup> Transcript of an interview with [FPM senior employee 1] held on 10 May 2019, page 101, URN S1387.

<sup>384</sup> Transcript of a record of the January 2013 meeting, pages 120 to 122, URN 20205A.



- (v) when asked what '*posturing*' achieved for FPM as a business, [FPM senior employee 1] replied, '*that's up for me to decide*', and was otherwise evasive.<sup>385</sup> The CMA does not find his explanations in this respect convincing;
- (d) it is not an excuse to attend cartel meetings in order to obtain an insight into, and seek to win, a competitor's customers,<sup>386</sup> or to disseminate false information.<sup>387</sup>

### **Timing, attendance and roles**

4.75 Consistently with the evidence set out in Annex A, there is witness and interview evidence that meetings between SB, CPM and FPM were held on a regular basis:

- (a) [SB senior employee 1] explained that meetings between SB, CPM and FPM were held '*[r]oughly every month. Sometimes, it went as long as six weeks*';<sup>388</sup>
- (b) [CPM senior employee 1] said that, '*[i]nitially, the meetings took place about every month but, as things settled down, they took place every couple of months just to make sure that everything was as it should be in terms of our understandings with each other*';<sup>389</sup>
- (c) [CPM senior employee 3] said that meetings were held '*roughly every six or eight weeks*';<sup>390</sup>
- (d) [FPM senior employee 3] said that (from the point at which he started attending, in around 2009) meetings were held '*[b]imonthly, probably, maybe quarterly. To be honest, it's a long time ago; I can't remember*

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<sup>385</sup> Transcript of an interview with [FPM senior employee 1] held on 10 May 2019, for example, page 113 (see also pages 139 to 141), URN S1387.

<sup>386</sup> The CMA notes that a company is likely to compete more vigorously if it does not have any knowledge of its competitors' commercial and/or pricing strategies.

<sup>387</sup> See Chapter 5, Section E (Agreements between undertakings and concerted practices) and Section F (Object of preventing, restricting or distorting competition).

<sup>388</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 203, URN 20224; see also transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 358, URN 27598; Annex A.

<sup>389</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 34, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 65, URN S0455.

<sup>390</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 36, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 48 to 49, URN S0456.

*exactly. They were certainly frequent, I'm not saying there was a couple; they were ... fairly frequent.*<sup>391</sup>

- 4.76 SB was represented at meetings by [SB senior employee 1]; CPM was represented by (a combination of) [CPM senior employee 1], [CPM senior employee 2], and [CPM senior employee 3]<sup>392</sup> [CPM];<sup>393</sup> FPM was represented by (various combinations of) [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3]<sup>394</sup> [FPM].<sup>395</sup>
- 4.77 According to [SB senior employee 1], [CPM senior employee 1] was *'the lead player for CPM'*, who *'spoke on behalf of CPM'*, and tended to be concerned with *'key issues'*; by contrast [CPM senior employee 3] handled *'day to day skirmishes'* along with *'to an extent, [CPM senior employee 2] in Scotland'*.<sup>396</sup> He further noted that [FPM senior employee 1] was [CPM senior employee

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<sup>391</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 32, URN S1546.

<sup>392</sup> [CPM senior employee 3] said that he did not start attending the meetings between SB, CPM and FPM until *'the second half of 2007'*: witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 11, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 12 and 16, URN S0456. See also: witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 11, URN S1111; and transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 160, URN 20224.

<sup>393</sup> CPM was also represented by [CPM senior employee 4], on one occasion, at the November 2012 meeting, which was held primarily to discuss the Scottish market. See transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 34, URN S1546. [SB senior employee 1] noted that he had very little contact with [CPM senior employee 4] as he was only involved in meetings which concerned the Scottish market, and SB did not have any merchants in Scotland: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 162, URN 20224.

<sup>394</sup> [FPM senior employee 3] said that he did not start attending the meetings until around early 2009. Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 29 to 30, URN S1546. However, [CPM senior employee 3] and [CPM senior employee 1] recall that [FPM senior employee 3] started attending meetings in 2007: witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 11, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 23, URN S0455; witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 11, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 17, URN S0456. [SB senior employee 1] cannot recall when he started attending meetings: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 163 to 164, URN 20224.

<sup>395</sup> Transcripts of the recorded meetings. See also: witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 11, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 21 to 23, and 68, URN S0455; witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 9 to 11 and 37, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 50 to 51, URN S0456; transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 33 to 34, URN S1546; transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 207 to 209, URN 20224. An SB employee named [SB senior employee 2] was sent in [SB senior employee 1's] place to a meeting of SB, CPM and FPM in January 2009, which [SB senior employee 1] could not attend. See: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 208 to 219, and 279, URN 20224; and witness statement of [SB senior employee 2], dated 18 July 2016, paragraphs 76 to 87, URN 27124 (which refers to [SB senior employee 2's] attendance at two 'CPSA' meetings, one with [SB senior employee 1] and one without). The CMA notes that, according to [SB senior employee 2], the participants at the meeting he attended without [SB senior employee 1] *'had their own list of current and future jobs with them'* and gave an indication as to how competitive or interested they were in trying to win particular business (albeit that [SB senior employee 2] did not feel he learnt anything new from the meeting): see witness statement of [SB senior employee 2], dated 18 July 2016, paragraphs 81 to 82 and 84, URN 27124.

<sup>396</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 156, URN 20224.

1's] *'equivalent'* [§<].<sup>397</sup>

4.78 Similarly, [CPM senior employee 1] explained that he, [SB senior employee 1] and [FPM senior employee 1] attended the meetings because they were the *'decision makers and set the strategy'*; whilst [FPM senior employee 3], [FPM senior employee 2], [CPM senior employee 3] and [CPM senior employee 2] attended because they were *'instrumental in implementing what was agreed, for example in terms of prices, and for policing what happened in the market'*.<sup>398</sup> [CPM senior employee 1] said that, in his view, [FPM senior employee 1] would *'mainly'* take the lead at the meetings, but that he and [SB senior employee 1] would contribute where they considered that things were not right from their perspective: there was *'no elected chairman or anything like that. It was a case that if someone had got something they wanted to get off their chest then they would make it known they weren't happy and they weren't going to put up with it any longer'*.<sup>399</sup>

4.79 According to [CPM senior employee 3]:

- (a) [FPM senior employee 1] and [FPM senior employee 2] attended the meetings in a similar capacity to [CPM senior employee 1] and [CPM senior employee 2] - [§<];<sup>400</sup>
- (b) [FPM senior employee 1] and [CPM senior employee 1] would usually take the lead in meetings and were *'the two more powerful characters'* who *'kept things in check, maintaining discipline during the meetings'*;<sup>401</sup>
- (c) [FPM senior employee 2] attended the meetings to support [FPM senior employee 3] in relation to the day to day issues discussed;<sup>402</sup>

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<sup>397</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 156, URN 20224.

<sup>398</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 35, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 68 to 69, URN S0455.

<sup>399</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 36, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 20 and 69, URN S0455.

<sup>400</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 14, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 19, URN S0456.

<sup>401</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 14 and 38, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 19, 20 and 51, URN S0456.

<sup>402</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 14, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 20, URN S0456.

(d) he and [FPM senior employee 3] attended because they were *'the boys from the shop floor who implemented what was agreed during the meetings.'*<sup>403</sup>

4.80 [FPM senior employee 1] said that in meetings between SB, CPM and FPM, he took the lead on behalf of FPM *'because [§<]. I suppose, generally, people look to me to take the lead. Er but, you know, everyone can speak for themselves.'*<sup>404</sup> In interview, [FPM senior employee 3] said that he attended the meetings in order to *'observe'* and *'listen'*, to obtain an insight into SB and CPM's customers, and to provide false information, noting that he was the person in FPM who knew about customers throughout the whole of the UK market.<sup>405</sup> He stated that there was no *'lead figure'* at the meetings, but that all attendees contributed to discussions, and that discussions during the recorded meetings were *'fairly typical'* of people's contributions.<sup>406</sup>

4.81 [SB senior employee 1] recalls that [CPM senior employee 1] attended around 95% to 100% of the meetings, with [CPM senior employee 2] attending around 90% and [CPM senior employee 3] 95% to 100% - *'virtually every meeting.'*<sup>407</sup> He recalls [FPM senior employee 1] attending 95% to 100% of the meetings; with [FPM senior employee 2] attending 90% to 95% of the meetings, and [FPM senior employee 3] attending 95% to 100% of the meetings.<sup>408</sup> Both [CPM senior employee 1] and [CPM senior employee 3] said that people missed meetings very rarely.<sup>409</sup> [FPM senior employee 3] said that [FPM senior employee 1] attended all the meetings; [FPM senior employee 2] *'attended some meetings, not always as frequent'*; [CPM senior employee 1], [CPM senior employee 2] and [CPM senior employee 3] attended the meetings, but *'sometimes there was three of them, sometimes*

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<sup>403</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 38 (and paragraph 14), URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 51 (see also page 19), URN S0456.

<sup>404</sup> Transcript of an interview with [FPM senior employee 1] held on 10 May 2019, page 31, URN S1387.

<sup>405</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 40, 41, 64 and 65, URN S1546.

<sup>406</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 44 to 45, URN S1546.

<sup>407</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 159 to 160, URN 20224.

<sup>408</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 162 to 163, URN 20224.

<sup>409</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 11, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 68, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 37, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 50, URN S0456.

*two of them ... there was normally a representative'; and 'it would be very rare that [SB senior employee 1] [[redacted]] – [SB senior employee 1] wasn't there.'*<sup>410</sup>

4.82 Meetings tended to be held in the Midlands,<sup>411</sup> [redacted].<sup>412</sup>

4.83 [SB senior employee 1] notes, however, that [redacted];<sup>413</sup> and that meetings were kept secret from the CPSA.<sup>414</sup> [CPM senior employee 1] also confirmed that the CPSA did not know about the meetings between SB, CPM and FPM.<sup>415</sup>

### **Preparation by attendees**

4.84 Documents recovered from individuals [redacted] show that the participants went to the meetings well prepared, and that they took a structured and rigorous approach to the ongoing operation and monitoring of the arrangement.

4.85 [SB senior employee 1's] '*Boys Spoils*' file,<sup>416</sup> which was compiled to assist him during meetings, included: a spreadsheet containing tonnage figures and percentage market share going back to 2010; details of quotations from other parties which he wanted to challenge (for example, a quotation from CPM to Keyline Lowton for a contractor Barnfield<sup>417</sup>); a list of term deals denoting which customers belonged to which company;<sup>418</sup> a copy of the 2013 price list, annotated with other parties' sample prices;<sup>419</sup> and a full written sales quotation from FPM to a customer with the annotation '*FYI*'.<sup>420</sup>

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<sup>410</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 33 and 34, URN S1546.

<sup>411</sup> See Annex A. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 34, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 65, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 36, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 49 to 50, URN S0456.

<sup>412</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 189, URN 20224. [redacted].

<sup>413</sup> Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 176, URN 27592. See also: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 180, URN 20224.

<sup>414</sup> Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, pages 383 to 384, URN 27592.

<sup>415</sup> Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 78, URN S0455.

<sup>416</sup> URN 0216.

<sup>417</sup> URN 0216, page 32. In interview, [SB senior employee 1] explained that he asked sales staff to provide him with instances of CPM and FPM quoting in a manner which was contrary to the arrangement, to assist him in '*making the cartel more effective*': transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 589 to 590, URN 20224.

<sup>418</sup> URN 0216, pages 3 to 9.

<sup>419</sup> URN 0216, page 50.

<sup>420</sup> URN 0216, page 77. Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 428 and 593 to 594, URN 20224;

- 4.86 A pack of documents [redacted] from [CPM senior employee 2] [redacted] included a page headed ‘*Meeting Notes*’, setting out nine points for discussion in relation to prices (including FPM’s prices in particular), as well as CPM’s output tonnage report for August 2012.<sup>421</sup>
- 4.87 Documents [redacted] from [CPM senior employee 1] [redacted] included documents showing market shares and tonnage output, including rows for ‘*Stantons*’, ‘*McCanns*’ and ‘*CPM*’,<sup>422</sup> and term deal lists denoting which customers belonged to which company, along with a handwritten note including the statements ‘*SB £60 manholes*’, ‘*Burdens North flag an increase*’, ‘*[CPM senior employee 3] do not fix prices for six months make it three month rolling*’, and ‘*Speak to [FPM senior employee 3]*’.<sup>423</sup> [CPM senior employee 1] explained that:
- ‘[b]efore the meetings, I would make sure that we had our volume figures ready for discussion, because I know that if McCann or Stanton Bonna tabled their figures then we had got to be able to table our figures (although I must admit I did not always put forward accurate figures for CPM on volumes). I would also take to meetings any evidence obtained from customers or from my sales staff about either McCann or Stanton Bonna quoting low prices.’*<sup>424</sup>
- 4.88 A pack of documents [redacted] from [CPM senior employee 3] [redacted] included: a number of pre-formatted spreadsheets designed to accommodate market share data for all CPSA members (the spreadsheets included the statement, ‘*Not recorded using CPSA returns*’);<sup>425</sup> handwritten notes containing market share and tonnage information for SB, CPM and FPM;<sup>426</sup> various price lists, containing handwritten records of SB’s and FPM’s prices;<sup>427</sup> and term deal lists denoting which term deals belonged to which company.<sup>428</sup>
- 4.89 [CPM senior employee 3] explained that these documents were not necessarily prepared specifically for the March 2013 meeting, and that they

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<sup>421</sup> URN 0204.

<sup>422</sup> URN 0588.

<sup>423</sup> URN 0462.

<sup>424</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 37, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 82, URN S0455.

<sup>425</sup> URN 0250; URN 0254; URN 0255; URN 0258; URN 0275; URN 0276; URN 0346. Further documents relating to market shares and customer allocation were found in [CPM senior employee 3’s] office, for example: URN 3860; URN 3892; URN 3901; URN 5170; URN 5678.

<sup>426</sup> URN 0309; URN 0314; URN 0350

<sup>427</sup> URN 0408.

<sup>428</sup> URN 0226; URN 0227

would have been used and updated at previous meetings as well.<sup>429</sup> He further explained that he *'brought along notes about prices, term deals and queries about the open market. For example, if I had a quote from FPM which showed they had done something, I would bring it along and they would also bring along CPM quotes too'*.<sup>430</sup>

- 4.90 Documents [X] from [FPM senior employee 3] [X] included: a CPSA output tonnage report for FPM for January 2013, annotated with figures for SB and CPM;<sup>431</sup> a price list dated 27 November 2012 containing hand-written price increases;<sup>432</sup> a notebook containing price increases that match those recorded in the price list dated 27 November 2012;<sup>433</sup> and a pack of term deal documents which included a term deal list recording which customer had term deals with which company, and term deal documents relating to certain shared term deal customers (containing handwritten annotations in relation to particular prices).<sup>434</sup> In interview, [FPM senior employee 3] said that he did not have these documents on him specifically for the purposes of the March 2013 meeting, but that he carried them with him as his *'office is on the road'*.<sup>435</sup> However, he acknowledged that he knew that the subject of prices, term deals and market shares would arise at that meeting.<sup>436</sup>
- 4.91 Documents [X] from [FPM senior employee 2] [X] included papers containing market share information on a monthly basis from January 2012 to October 2012, with figures for CPM, SB and FPM.<sup>437</sup>
- 4.92 Documents [X] from [FPM senior employee 1] [X] included documents containing pricing information.<sup>438</sup>

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<sup>429</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 40, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 54 to 55, URN S0456.

<sup>430</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 40, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 55, URN S0456.

<sup>431</sup> URN 0176.

<sup>432</sup> URN 0164.

<sup>433</sup> URN 0142, page 76.

<sup>434</sup> See URNs 0648 to 0676.

<sup>435</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 74 to 78, URN S1546.

<sup>436</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 77, URN S1546. He also said that he did very little preparation for the meetings, and that the only thing that he would have looked at in advance was the value of the tonnage: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 83 to 84, URN S1546.

<sup>437</sup> URN 0186, page 36.

<sup>438</sup> URN 0190 and URN 0191. FPM has made representations that the documents recovered from the individuals attending the meetings on behalf of FPM consist merely of market reports and price lists, showing that FPM's approach to the meetings was one aimed at *'posturing'* and understanding the overall market performance of concrete over plastic: FPM's response to the CMA's Statement of Objections, dated 22 February 2019,

4.93 During its searches, the OFT also recovered a number of documents belonging to [CPM senior employee 4], including a document headed '*Pigeon Club info*'<sup>439</sup> containing information in relation to contracts and future pricing intentions;<sup>440</sup> two notes headed '*Issues for Meeting*' setting out a number of points for discussion in relation to prices (including FPM's prices in particular);<sup>441</sup> and a note headed '*Agenda for Tuesdays meeting*' containing 9 points for discussion in relation to prices (including FPM's prices in particular); and a number of further documents containing pricing information.<sup>442</sup>

### **Maintaining secrecy**

4.94 The evidence indicates that participants knew that the meetings were against the law, and that they were therefore conducted in secret.<sup>443</sup>

4.95 Meetings took place in hotel meeting rooms, rather than at the participants' offices;<sup>444</sup> and there is evidence that on occasion hotel staff were given specific instructions not to label such meeting rooms as being in use by SB, CPM and FPM, in order to ensure secrecy.<sup>445</sup> [SB senior employee 1] has explained that hotels were '*convenient venues, and there was an element of, disguise that that venue afforded.*'<sup>446</sup> For example, the Novotel Hotel, Coventry was used because it was '*quite a quiet hotel; a bit of a backwater*' which was significant for the purposes '*of avoiding meetings in busy areas*

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paragraphs 5.47 and 5.48, URN S1363. However, taking account of the clear focus of arrangement and meetings on pricing and market shares, and noting the full participation of FPM participants in the recorded meetings along with the detailed notes that they made of discussions, the CMA is not persuaded by these representations.

<sup>439</sup> URN 1144.

<sup>440</sup> URN 1144 pages 1 to 4

<sup>441</sup> URN 1144 pages 7 and 8.

<sup>442</sup> URN 1145.

<sup>443</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 152 ('*on occasions, the subject [of illegality] came up. And the...need for, not shouting too loud or, the...need for secrecy*'), and page 155 ('*it was just taken as read by people's actions and comments that it was illegal...keeping quiet, trying to not have discussions outside in foyers, in vision...*'), URN 20224. See also, transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 177, URN 27592; witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 40 to 45, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 70 to 77, URN S0455; witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 39 and 49, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 52 to 54, URN S0456.

<sup>444</sup> See Annex A. In interview, [FPM senior employee 3] confirmed that the meetings were generally held at the Novotel Coventry and the Fieldhead, Leicester: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 85 to 87, URN S1546.

<sup>445</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 206 (see also pages 152, 155, 194, 779, and 800 to 803), URN 20224; and transcript of interviews with [SB senior employee 1] held on 10 and 11 May 2016, page 325, URN 27592. Witness statement of [Hotel employee 1], dated 26 January 2016 (in particular, paragraphs 21, 27, 33 and 48), URN 27114; witness statement of [Hotel employee 2] dated 29 August 2012, URN 27111; witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 34 and 40, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 65 to 66, URN S0455.

<sup>446</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 206, URN 20224.



*where you might be seen by other people ... Anyone who was involved with the construction industry.*<sup>447</sup>

- 4.96 FPM has made representations that it did not seek to conduct these meetings in secret. It has said that the meetings referred to in Annex A which are attributed to FPM were held at the Fieldhead Hotel simply because it was regularly used for FPM business (being only 3 to 4 miles from FPM's Ellistown factory), and that meetings were booked and paid for using FPM corporate credit cards with no attempt to hide them from the rest of the FPM business.<sup>448</sup> However, given that the meetings were deliberately conducted separately from the industry association (the CPSA), sometimes in unmarked meeting rooms, and noting the subject matter of the discussions, the CMA does not accept that FPM did not regard the meetings as being secret.
- 4.97 Both [CPM senior employee 1] and [CPM senior employee 3] said that they considered it important to keep the arrangement secret from people within CPM to as great an extent as possible.<sup>449</sup> [CPM senior employee 3] has said that, *'because it was a cartel meeting, I wouldn't go back and openly discuss it with anybody anyway. You know, I wouldn't discuss it with my external sales team or the internal sales team, you know. It was kept secret, for obvious reasons, I would say. It was a cartel.'*<sup>450</sup> He also stated that, although he would discuss prices, term deals and market shares by telephone with [SB senior employee 1] or [FPM senior employee 3], he would not put things in email *'because it was a secret cartel so why would you put it in writing.'*<sup>451</sup>

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<sup>447</sup> See transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 239 to 240, URN 20224. [SB senior employee 1] also explained that participants would generally change the subject of discussion whenever a member of the waiting staff came into the room with refreshments.

<sup>448</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.46, URN S1363, citing the witness statement of [FPM senior employee 6], dated 10 March 2014, paragraph 10, URN 27069. See also: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 86 to 87, URN S1546.

<sup>449</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 40 to 41, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 70 to 72, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 39, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 52 to 53, 64 and 74, URN S0456.

<sup>450</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 39, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 52, URN S0456.

<sup>451</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 43, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 71 and 72, URN S0456. The CMA further notes that, within SB, [SB senior employee 1] sought to ensure that the arrangement between SB, CPM and FPM was not discussed in open sales meetings or recorded in the minutes of such meetings: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 288 to 289, URN 20224.

- 4.98 [SB senior employee 1] referred to the meetings in his diary and notes as 'Boys', the 'boys club' and, occasionally, 'comedy club'.<sup>452</sup> He also compiled a 'Boys Spoils' file<sup>453</sup> to assist him during meetings, so named because he referred to the meetings as 'boys' meetings', and because of the 'spoils' of the arrangement (that is, the maintenance of 'a status quo' and 'moving prices forward').<sup>454</sup> When asked in interview why he didn't write 'cartel meetings' in his diary, [SB senior employee 1] replied '*[b]ecause I knew that, what we were doing was, illegal.*'<sup>455</sup>
- 4.99 Other participants referred to the 'pigeon club'.<sup>456</sup> However, references to the 'pigeon club' (or cartel meetings) were minimised. For example, in response to an email from [CPM senior employee 4] suggesting that a fuel surcharge should be discussed at 'the next Pigeon Club meeting', [CPM senior employee 2] states: '*[CPM senior employee 4] please no more correspondence referring to the p/club especillywhen its in black ok thanks.*'<sup>457</sup>
- 4.100 The CMA notes that the majority of witnesses from SB, CPM and FPM who provided statements to the CMA did not recognise the expression 'pigeon club' or understand what it meant. However, a few witnesses were aware of its meaning. Most notably, [CPM employee 11], [X], explained that the 'pigeon club' was:
- 'a commonly referred to term amongst staff and it is almost part of folklore. As I understand it, it refers to a group of high up people in the industry, [X], getting together and discussing business and, in particular, that it was about fixing prices and saying things like "you stay away from this job and I'll stay away from that job."*<sup>458</sup>

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<sup>452</sup> See, transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 148, URN 20224; and Annex A.

<sup>453</sup> URN 0216. This file was recovered from [SB senior employee 1] [X] in the meeting room of the Novotel Hotel, Coventry on 12 March 2013.

<sup>454</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 427 to 429 (see also page 779), URN 20224.

<sup>455</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 151, URN 20224.

<sup>456</sup> See transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 148, URN 20224. [CPM senior employee 4's] 'Pigeon Club' file, URNs 1143 to 1145. URN 8624; URN 8625; URN 8626; URN 8628, URN 8630; URN 8631; URN 8632; URN 9598; URN 9656; URN 9689.

<sup>457</sup> URN 9616.

<sup>458</sup> Witness statement of [CPM employee 11], dated 8 May 2014, paragraph 25, URN 26963.

## E. The tenets of the arrangement

4.101 The evidence outlined above and discussed further in the remainder of this Chapter 4 indicates that there were three key aspects of the arrangement between SB, CPM and FPM (in interview, [SB senior employee 1] referred to the '*main tenets of the cartel*'<sup>459</sup>):

- (a) an agreement to fix or coordinate prices in the spot market, including by the agreement of price lists, with the aim of increasing prices;<sup>460</sup>
- (b) an agreement in relation to certain fixed price agreements (namely, term deals and stock deals), which involved the allocation of customers (including by bid rigging) and a coordinated approach to pricing;<sup>461</sup> and
- (c) an agreement to maintain specified market shares.<sup>462</sup>

4.102 The three aspects of the arrangement were not dependent on each other,<sup>463</sup> and are examined separately below. However, they also worked together as part of a single, cohesive arrangement which was intended to increase prices and to maintain SB, CPM and FPM's respective shares of the market.<sup>464</sup> To use the terminology of [SB senior employee 1], these '*corner stones*' of the arrangement worked together to ensure the '*status quo*' and to '*move prices*

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<sup>459</sup> See, for example, transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 281, 282, 293, and 511 URN 20224.

<sup>460</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 281, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 14 to 19, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 24, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 15, 18 and 19, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 21 to 22, URN S0456.

<sup>461</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 281 to 282, 503, and page 609 (see more generally pages 609 to 612), URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 20 to 26, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 24 and 25, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 16, and 20 to 30, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 22 and 23, URN S0456.

<sup>462</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 293, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 28 to 32, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 55 to 60, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 17, 31 to 34, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 23, URN S0456.

<sup>463</sup> For example, the CMA notes that the arrangement in relation to fixed price agreements came into existence after the arrangement in relation to price lists for spot market work. See, for example, transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 281 to 282, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 20, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 38, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 20, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 35, URN S0456.

<sup>464</sup> The CMA has considered this further in Chapter 5, Section G – Single and continuous infringement.

forward' (that is, to increase prices).<sup>465</sup>

## F. Pricing

4.103 The first aspect of the arrangement concerned the agreement of price lists for spot market (or open market) work, with the aim of increasing prices. This also facilitated the other tenets of the arrangement in relation to fixed price agreements and the maintenance of specified market shares.

### ***The compilation of price lists***

4.104 Price lists were revised regularly (every six months to a year), taking account of raw material cost increases (see also paragraph 2.4).<sup>466</sup>

4.105 [CPM senior employee 1] has explained that:

*'minimum prices were determined by reference to product costing and what prices needed to be at to make a profit. All three companies [SB, CPM and FPM] had very similar equipment and paid more or less the same for raw materials, so we knew roughly what the product was costing. On this basis, we would agree a minimum rate for the 1200mm diameter ring for example.'*<sup>467</sup>

4.106 Consistently with this, [SB senior employee 1] described the way in which price lists were compiled, as follows:

*'it would have been done as a joint effort around the table of saying, "Given the market prices, what's a realistic price to head for on 1200 manhole ring?" ... And there would have been a ... a discussion around, say, £45 ... So, somebody would have written that down, probably issued copies, and then we would have made our own lists from that original copy.'*<sup>468</sup>

4.107 [SB senior employee 1] confirmed that price lists such as the SB price list effective from 14 January 2013 and found in his *Boys spoils* file, would have been agreed at a meeting held between SB, CPM and FPM, or in exceptional

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<sup>465</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 429, URN 20224.

<sup>466</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2011, pages 655 to 656, URN 20224. See also: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.54 and in particular, paragraph 5.54.2, URN S1363, citing the witness statement of [FPM employee 6], dated 25 March 2014, paragraph 24, URN 27060; draft witness statement of [FPM senior employee 4], paragraph 29, URN 27378; and transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 20 to 24, and 27 to 28, URN S1546.

<sup>467</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 15, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 30, URN S0455.

<sup>468</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 147, URN 20224.

circumstances, could have been agreed in a 'round robin phone call'.<sup>469</sup> [CPM senior employee 3] also said that prices were obtained and agreed either around the table or by way of a phone call.<sup>470</sup>

### **'Aspirational' or 'target' prices**

4.108 Although list prices were agreed and were stated to be '*minimums*', spot market quotations were almost always given at a percentage below the agreed level. For example:

(a) [SB senior employee 1] said that the prices were '*never the real minimums, they were always aspiration minimums. And at the meeting, people would say... challenge each other, right, the three of us are going ... to wait... this time we're going to agree, we're strictly going to abide by the minimums, it would never happen, it would never happen. Always people would be going below the minimums. The extent to which they were going below minimums would be determining the competitiveness of the market, but ... very rarely would you ever secure an open market order to place at the minimums, or certainly anywhere above the minimums. Generally speaking, an order to place in a normal market place would go anything five to seven and a half below the minimums and in terrible times would go 15% below the minimums. So there were minimums, but ... in reality there was no such thing as minimums in open market work*';<sup>471</sup>

(b) [CPM senior employee 1] said that, '*[t]he minimums should have been cast in stone, but invariably, they were disregarded*',<sup>472</sup> later elaborating that, '*[a]lthough the minimum prices were the target, a lot of discounting*

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<sup>469</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 665 to 666, URN 20224; URN 0216, page 50.

<sup>470</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 18, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 23 to 25, URN S0456.

<sup>471</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 672, URN 20224. For further similar descriptions of '*aspirational*' prices see also transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 673, 681, 694, 695, 720 and 723, URN 20224; and transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 262, URN 27592. [SB senior employee 1] also noted that, within SB, sales staff were not always happy with the arrangement, that its principles were not always followed, and that it was '*commonplace*' for sales staff to price below the price list: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 360 and 500 to 502, URN 20224; transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 90, URN 27598.

<sup>472</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 18, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 30, URN S0455.

*took place which meant that 90% of the time prices in the market were below minimums*;<sup>473</sup>

- (c) [CPM senior employee 3] said that there was *'a big element of ducking and diving around what was agreed'*;<sup>474</sup> and when describing the implementation of new price lists within CPM, he noted that, *'usually the first month everybody was very wary of it ... Then after the first month it just fell apart. So, you know, the other eleven months of the year it was back to normal'*;<sup>475</sup>
- (d) [FPM senior employee 3] acknowledged that SB, CPM and FPM discussed *'forward pricing'*<sup>476</sup> and *'aspirational'* prices (for example, *'where a 1200 manhole generally should be and where, where people felt that the prices would be'*<sup>477</sup>); but he said that the list prices discussed were not the prices actually charged, and that there was no agreement between SB, CPM and FPM that they would be;<sup>478</sup>
- (e) FPM has stated that it only ever considered its own price list to contain *'guideline prices'*, or *'guideline selling prices,'* which were used as a starting point for any negotiation with a customer;<sup>479</sup> that normal business practice prevailed, with FPM sales staff frequently discounting from the price lists with significant degrees of variation, and often in excess of any defined limits;<sup>480</sup> and that witness evidence shows that FPM staff had a degree of autonomy that made the implementation of a *'minimum price list'* impossible to sustain in reality.<sup>481</sup>

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<sup>473</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 19, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 108 to 109, URN S0455.

<sup>474</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 15, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 21, URN S0456.

<sup>475</sup> Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 68 and 69, URN S0456.

<sup>476</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 132 to 133, and 154, URN S1546.

<sup>477</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 114, URN S1546.

<sup>478</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 19 to 20, 82 to 83, 110 to 155, and 260 and 261, URN S1546.

<sup>479</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.31.1, URN S1363.

<sup>480</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.10 and 6.10.1 URN S1363.

<sup>481</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.11, 5.31, and 5.66, URN S1363, which refers to the following witness evidence: witness statement of [FPM senior employee 5], dated 26 October 2016, paragraph 37, URN 27057; witness statement of [FPM employee 7], dated 20 December 2015, paragraph 2, URN 27063; witness statement of [FPM employee 8], dated 18 June 2014, paragraph 3, URN 27081; draft witness statement of [FPM senior employee 4], paragraph 19, URN 27378; witness statement of [FPM employee 4], dated 16 January 2016, paragraph 8, URN 27075; witness statement of [FPM employee 5],

- 4.109 The CMA acknowledges that, given the way that the market operated (and specifically that actual prices were individually negotiated), list prices in the spot market were not the actual prices paid by customers.<sup>482</sup> However, the evidence in relation to price negotiations within each of SB, CPM and FPM (as described in paragraphs 4.112 to 4.126) indicates that there was a ‘*control*’ in place which sought to limit a sales person’s autonomous flexibility in pricing, with list prices (which had been discussed by SB, CPM and FPM) acting as ‘*targets*’. Thus, the CMA considers that any divergence in actual prices charged to customers was an accepted part of the arrangement, which did not undermine the objective of establishing an agreed set of target prices.
- 4.110 The fact that SB, CPM and FPM would challenge each other as regards quotations that were thought to have been submitted too far below the agreed list prices further indicates that the arrangement as regards spot market price lists was understood and meaningful.<sup>483</sup>
- 4.111 The following paragraphs set out in more detail the approach within SB, CPM and FPM in this respect.

#### *Price negotiations - SB*

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dated 3 May 2015, paragraph 11, URN 27056; witness statement of [FPM employee 3], dated 9 September 2014, paragraph 15, URN 27086; witness statement of [FPM employee 6], dated 25 March 2014, paragraph 22, URN 27060; witness statement of [SB employee 1], dated 10 June 2016, paragraph 67, URN 27066; witness statement of [FPM employee 2], dated 21 January 2015, paragraph 14, URN 27068; [redacted]; witness statement of [FPM employee 9], dated 4 March 2015, paragraph 7, URN 27078. FPM further notes that evidence from FPM employees shows that there was no awareness of any breaches of competition law being carried out by FPM: FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraph 5.5, URN S1363, which refers to the following witness evidence: witness statement of [FPM employee 16], dated 13 March 2015, URN 27058; witness statement of [FPM employee 22], dated 20 August 2014, URN 27059; witness statement of [FPM employee 6], dated 25 March 2014, URN 27060; witness statement of [FPM senior employee 8], dated 8 August 2014, URN 27064; witness statement of [FPM employee 1], dated 19 May 2016, URN 27169; witness statement of [FPM senior employee 7], dated 3 April 2014, URN 27253; witness statement of [FPM employee 2], dated 21 January 2015, URN 27068; witness statement of [FPM senior employee 6], dated 10 March 2014, URN 27069; witness statement of [FPM employee 15], dated 15 September 2014, URN 27070; witness statement of [FPM employee 19], dated 3 April 2014, URN 27072; witness statement of [FPM employee 20], dated 19 March 2014, URN 27073; witness statement of [FPM senior employee 9], dated 7 April 2014, URN 27074; witness statement of [FPM employee 23], dated 21 August 2014, URN 27087; witness statement of [FPM employee 18], dated 9 September 2014, URN 27088; witness statement of [FPM employee 14], 10 June 2014, URN 27089; witness statement of [FPM employee 11], dated 23 November 2014, URN 27090; witness statement of [FPM employee 21], dated 29 January 2016, URN 27242; witness statement of [FPM employee 17], dated 5 June 2016, URN 27244; witness statement of [FPM employee 10], dated 14 February 2014, URN 27077; witness statement of [FPM employee 9], dated 4 March 2015, URN 27078; witness statement of [FPM employee 24], dated 13 August 2014, URN 27076; witness statement of [SB employee 1], dated 10 June 2016, URN 27066.

<sup>482</sup> See also: FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraphs 5.8 and 5.31, URN S1363; and transcript of an interview with [FPM senior employee 3] held on 30 August 2019, for example, pages 82, 111 to 113, 117 to 119, 144, 148 to 155, 260 and 261, URN S1546.

<sup>483</sup> Incidents of SB, CPM and FPM challenging each other as regards quotations that were put in below agreed prices can be seen throughout the recorded meetings. See also: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 723, URN 20224; URN 9598; URN 9660; URN 13210; URN 13071; URN 13072; URN 8629; URN 0204, page 8 points 2, 3, 7 and 9; URN 1144 pages 1 and 7; URN 1145, page 1.

4.112 Within SB, [SB senior employee 1] gave effect to the arrangement by distributing a price list to SB's internal and external sales teams (and their management),<sup>484</sup> along with the instruction: *"Make sure that you don't go below these. Make sure you keep me informed of anybody else going below them."*<sup>485</sup>

4.113 Sales staff would highlight instances where CPM or FPM had provided quotations which were significantly below the agreed prices so that [SB senior employee 1] could check on that job with the company who had submitted the *'ludicrous price'* in question.<sup>486</sup>

4.114 [SB senior employee 1] has also said that:

*'If somebody said to me, "We need to establish whether CPM or McCann were pricing that job", I would quite often say, "Don't worry, I'm going to a meeting soon."*<sup>487</sup>

#### *Price negotiations - CPM*

4.115 Within CPM, sales staff were instructed to provide quotations by reference to the agreed spot market price, with discounts above a certain amount being referred to senior management, including [CPM senior employee 2], [CPM senior employee 1], [CPM senior employee 3] and (for Scotland) [CPM senior employee 4].<sup>488</sup>

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<sup>484</sup> In interview, [SB senior employee 1] explained that within SB, *'the mechanics and the operation of the cartel was via the sales force'* (transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 221, URN 20224); and he referred to his sales people as carrying out the *'footwork'* of the arrangement (transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 218 to 219, URN 20224). The CMA notes that it was not necessarily the case that SB's sales staff fully understood or were aware of the arrangement between SB, CPM and FPM.

<sup>485</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 220 to 221 (see also pages 297 to 299), URN 20224. Witness statement of [SB senior employee 2], dated 18 July 2016, paragraphs 44 to 46, URN 27124.

<sup>486</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 219, URN 20224.

<sup>487</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 266, URN 20224.

<sup>488</sup> See, for example, witness statement of [CPM employee 4], dated 27 June 2016, paragraphs 10, 12 and 16, URN 26968. Witness statement of [CPM employee 3], dated 25 November 2016, paragraphs 14, 15, 23, 24 and 28 to 31, URN 26981. Witness statement of [CPM employee 1], dated 4 October 2014, paragraphs 6 to 10, URN 27002. Witness statement of [CPM employee 5], dated 29 July 2014, paragraphs 8 to 12, URN 26974. Witness statement of [CPM employee 2], dated 11 September 2014, paragraphs 6 and 7, URN 26978. Witness statement of [CPM employee 6], dated 6 June 2014, paragraphs 11, 12 and 17, URN 26980. Witness statement of [CPM employee 7], dated 29 March 2016, paragraph 21, URN 26988. Witness statement of [CPM employee 8], dated 22 June 2016, paragraphs 2, 5 and 6, URN 26990. Witness statement of [CPM employee 9], dated 26 November 2014, paragraphs 14 to 15, URN 27013. Witness statement of [CPM employee 10], dated 28 February 2014, paragraphs 19 to 30, URN 26985. Witness statement of [CPM employee 10], dated 20 July 2016, paragraph 3, URN 26986. See also: CPM's response dated 3 March to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 5, URN S0110. The CMA notes that it was not necessarily the case that CPM's sales staff fully understood or were aware of the arrangement between SB, CPM and FPM.



4.116 [CPM senior employee 1] has explained that sales staff within CPM were told that the '*minimum price*' in the CPM price list<sup>489</sup> was, '*the lowest price that they should quote a customer. They were given the instruction that if they wanted to go below the minimum price they should refer to either [CPM senior employee 3], [CPM senior employee 2] or myself.*'<sup>490</sup>

4.117 Internal CPM documents reflect this approach. For example:

- (a) an email headed '*FROM [CPM SENIOR EMPLOYEE 2]*' dated 6 July 2006<sup>491</sup> contains instructions for sales staff to adhere to the price list, stating that new prices '*should be adhered to at all times, and no prices quoted at less than minimum*'. The email further states that quotations below the minimum price:

*'must be agreed (and signed off) by [CPM senior employee 3] (for England and Wales) and/or [CPM senior employee 2] for Scotland, prior to any price being given to the customer.*

*Any instances of deviation from this instruction, will be treated as a disciplinary action';*

- (b) an email dated 16 June 2011 from [CPM senior employee 4] states:

*'All, please find attached the New Area price lists that are applicable from the 1<sup>st</sup> July 2011. Can I ask you all to quote the minimum price for all spot market contracts from that date. It is vitally important that you ask the customer for feedback on our rates and refer any deviations that we hear of from our competition';*<sup>492</sup>

- (c) a CPM pricing document in relation to Scotland includes the statement: '*All stockists to include the new Burdens Branches will be priced at Min.*

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<sup>489</sup> See, for example, URN 0408.

<sup>490</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 17, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 28 (see also pages 92 to 95), URN S0455. In interview, [CPM senior employee 1] explained that a decision by senior management to price below minimums, '*depended on what type of job it was. If it was a job on our doorstep and you could save on the haulage, then obviously you could, er, dip that price to the limit by probably another 5%; but you were eating into any profit margin by doing that*'; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 29 (see also page 95), URN S0455. See also: witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 47, URN S1120; and transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 66 to 69, URN S0456, in relation to the implementation of the price list in CPM.

<sup>491</sup> URN 6811.

<sup>492</sup> URN 1192. The CMA is of the view that this email is reflective of the arrangement, albeit that it may have appeared to sales staff to be '*normal business practice*' to refer back instances where a competitor was more competitive on price (see for example, witness statement of [CPM employee 3], dated 25 November 2016, paragraph 20, URN 26981).

*Any deviation from this must be authorised by [CPM senior employee 4]';<sup>493</sup>*

(d) an email from [CPM senior employee 2] dated 24 July 2012 states:

*'all jobs on otp stage should be quoted at min rates. if it is our customer or merchant then we can offer upto 5%off the min rates..we must take this stand in order to push up prices in Scotland*

*,NO DEVIATION ON THE ABOVE INSTRUCTION is allowed if we are losing the job or need a special price then i should be contacted before any order is lost';<sup>494</sup>*

(e) an email from [CPM senior employee 3] to his England and Wales staff on 8 January 2013, states that, *'It is important that whilst we monitor this new [price] increase there is to be NO movement unless referred to [CPM senior employee 6] or myself, also any feedback from the market with regard to our competitors prices would be appreciated'*.<sup>495</sup> The CMA notes that on 9 January 2013, [CPM senior employee 2] forwarded this email to [CPM senior employee 4] telling him to implement the price increase in Scotland. When [CPM senior employee 4] queried whether [CPM senior employee 2] had confirmation that FPM had applied the increase, [CPM senior employee 2] replied: *'[CPM senior employee 4] not sure so I will speak to [CPM senior employee 3] t if he es not in the know then I will speak to [FPM senior employee 3] myself today then get back to you.'*<sup>496</sup>

4.118 Thus, list prices were, in the words of [CPM senior employee 1], a *'target'*,<sup>497</sup> which, in conjunction with instructions to sales staff, were used to *'control the level of pricing'*.<sup>498</sup> That is: *'if you put a minimum price in invariably that is the, the target price, that's the price they go to automatically, and so we had to make sure, er, wherever possible that [sales staff] stuck to that minimum.'*<sup>499</sup>

4.119 Moreover, there is evidence that CPM sales staff took such instructions seriously. For example, when asked about the email dated 6 July 2006 which

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<sup>493</sup> URN 1389.

<sup>494</sup> URN 7785.

<sup>495</sup> URN 9633.

<sup>496</sup> The CMA considers that '[><]' is a reference to [FPM senior employee 3].

<sup>497</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 19, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 35, 95 and 108, URN S0455.

<sup>498</sup> Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 35 and 95, URN S0455. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 14, URN S1111.

<sup>499</sup> Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 95, URN S0455.

is referred to in paragraph 4.117(a), [CPM employee 2] said that, *'they were pretty strict about not going below the minimum price;*<sup>500</sup> and [CPM employee 3] said that he thought the instructions in this email were *'quite harsh'*, but that he, *'adhered to the policy'*.<sup>501</sup>

4.120 In relation to email dated 24 July 2012 which is referred to in paragraph 4.117(d), [CPM employee 3] said that, *'I understood that this approach was being taken in order to keep prices up in Scotland ... I just did as I was instructed to do. I cannot recall any specific instances of any deviations from these instructions'*.<sup>502</sup>

4.121 In his witness evidence, [CPM employee 1] of CPM explained that,

*'for the larger orders over £100,000 that I had to refer to [CPM senior employee 6], [CPM senior employee 7], or [CPM senior employee 3], I would ask how they would like me to price it and they would generally talk to [CPM senior employee 5] or [CPM senior employee 1]. [CPM senior employee 6] or [CPM senior employee 7] or [CPM senior employee 3] would often just give me a price for the job but on several occasions they would say words to the effect of "leave it with me, I'll have a word with [CPM senior employee 1] to see how he wants to play it because I know he'll want to speak to [SB senior employee 1] or [FPM senior employee 2] or [FPM senior employee 1]". The next day they would come back and say either "Yeah, we can go for that one" or else "Back off", that is, don't price the job competitively. They would instruct me where to price it.'*<sup>503</sup>

4.122 He further said that:

*'I knew that the senior personnel from CPM, McCann and Stanton Bonna met at hotels periodically throughout the year, at least quarterly. These meetings definitely had an impact on CPM's business decisions, so far as I could tell.*

...

*After the meetings we tended to find that there would be an instruction of some sort, more often than not about pricing. Although the price list only changed once or twice a year, we wouldn't get a written instruction following the meetings but we would get a verbal instruction to the effect of "we should*

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<sup>500</sup> Witness statement of [CPM employee 2], dated 17 May 2016, paragraph 5, URN 27173.

<sup>501</sup> Witness statement of [CPM employee 3], dated 25 November 2016, paragraph 23, URN 26981.

<sup>502</sup> Witness statement of [CPM employee 3], dated 25 November 2016, paragraph 24, URN 26981.

<sup>503</sup> Witness statement of [CPM employee 1], dated 4 October 2014, paragraph 8, URN 27002.

*be able to get a bit more for e.g. 1200mm manholes because we're looking to get the price up a bit".*<sup>504</sup>

4.123 The CMA further notes [CPM employee 8's] (sales person at CPM) statement that, *'I was never told to price uncompetitively. However, having the minimum pricing structure meant that on some occasions it felt like we were not gunning for a particular job.*'<sup>505</sup>

#### *Price negotiations - FPM*

4.124 Within FPM, sales staff were instructed to provide quotations by reference to the agreed spot market price lists, with discounts above a certain amount being referred to senior management, including [FPM senior employee 2], and [FPM senior employee 3].<sup>506</sup>

4.125 The CMA accepts that FPM's sales staff may not have been aware of the arrangement between SB, CPM and FPM, since cartel arrangements are typically kept secret; and some of FPM's sales staff may have felt that they were able to act autonomously.<sup>507</sup> In this respect, the CMA notes [FPM senior employee 3's] interview evidence that the existence of meetings between SB, CPM and FPM was not conveyed to sales staff within FPM;<sup>508</sup> and sales staff sometimes breached the instruction to refer back to senior management.<sup>509</sup> This is also reflected in comments made by [FPM senior employee 3] during the recorded meetings. For example:

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<sup>504</sup> See witness statement of [CPM employee 1], dated 4 October 2014, paragraphs 17 and 22 (see also paragraphs 18 to 21, 24 and 25), URN 27002.

<sup>505</sup> See witness statement of [CPM employee 8], dated 22 June 2016, paragraph 6, URN 26990.

<sup>506</sup> See, for example, witness statement of [FPM senior employee 5], dated 26 October 2016, paragraphs 36 and 37, URN 27057. Witness statement of [FPM employee 4], dated 16 January 2016, paragraph 8, URN 27075. Witness statement of [FPM employee 5], dated 3 May 2015, paragraphs 10 and 11, URN 27056. Witness statement of [FPM employee 3], dated 9 September 2014, paragraphs 10, 11, 15 to 17, URN 27086. Witness statement of [FPM employee 6], dated 25 March 2014, paragraphs 22, 23 and 26, URN 27060. [X].

<sup>507</sup> See, for example, witness statement of [FPM senior employee 5], dated 26 October 2016, paragraph 37, URN 27057.

<sup>508</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 88 to 92, URN S1546.

<sup>509</sup> In interview, [FPM senior employee 3] said that the level at which sales staff had to refer discounts back to him was *'breached on a regular basis'* but explained that *'[c]ontrol was a percentage off the pricelist. So, typically, dependent on who the person was, we'd have a price list; it would either be [X] per cent off, [X] per cent off, [X] per cent off. Some of the sales guys might take an order [X] per cent off, but it was a good credit line, good customer, great volume, the right products that we've got in stock, and they'd make the decision and take it. But they would ring me generally and say, "Look, just so when you see it come through, we've taken the order and these are the prices I've done it at"':* transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 19 to 20, URN S1546.

- (a) during the November 2012 meeting, he said: *'every time I say to [FPM senior employee 5]<sup>510</sup> "minimum price, nothing less" he'll always phone me to say "there's a job here";<sup>511</sup> and*
- (b) during the January 2013 meeting, he said: *'[sales staff] were all coming back, I met with them last week, they were all querying me, do I know what I'm doing? ... because clearly we're not competitive.'<sup>512</sup>*

4.126 Nevertheless, the CMA considers that the evidence referenced in paragraphs 4.124 and 4.125, as well as that cited by FPM in its representations,<sup>513</sup> indicates that instructions were given to FPM sales staff which were in line with discussions held at cartel meetings, and which imposed constraints on sales staff in so far as they had only limited *authority* to discount from price lists autonomously. That is: price negotiations took place within a framework, which was set by reference to price lists that had been discussed by SB, CPM and FPM, and FPM staff typically confirmed that they were authorised to provide discounts of between [x] to [x] percent below the FPM list price before referring back to senior management. Although this framework may have been breached from time to time, the CMA is not persuaded that it was meaningless. Indeed, the CMA notes [FPM senior employee 3's] acknowledgement, in interview, that the *'aspirational'* list prices which were discussed by SB, CPM and FPM acted as *'a target to achieve in the market'*.<sup>514</sup>

### **Coordination and monitoring of price increases**

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<sup>510</sup> [FPM senior employee 5], [x], FPM.

<sup>511</sup> Transcript of a record of the November 2012 meeting, page 89, URN 20204A.

<sup>512</sup> Transcript of a record of the January 2013 meeting, page 135, URN 20205A. FPM has stated that this comment shows that FPM was not following any *'alleged'* principles discussed in the meetings: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.41.1, URN S1363. [FPM senior employee 3] has said that his comment refers to the fact that his sales staff were losing work because FPM was *'flat out on production'* at this time, explaining he did not want to reveal this to his competitors, and noting that *'[i]t doesn't hurt to plead a bit of poverty at the meeting'*: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 267 to 268, URN S1546.

<sup>513</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.11, URN S1363, citing witness statement of [FPM senior employee 5], dated 26 October 2016, paragraph 37, URN 27057; witness statement of [FPM employee 7], dated 20 December 2015, paragraph 2, URN 27063; witness statement of [FPM employee 8], dated 18 June 2014, paragraph 3, URN 27081; draft witness statement of [FPM senior employee 4], paragraph 19, URN 27378; witness statement of [FPM employee 4], dated 16 January 2016, paragraph 8, URN 27075; witness statement of [FPM employee 5], dated 3 May 2015, paragraph 11, URN 27056; witness statement of [FPM employee 3], dated 9 September 2014, paragraph 15, URN 27086; witness statement of [FPM employee 6], dated 25 March 2014, paragraph 22, URN 27060; witness statement of [SB employee 1], dated 10 June 2016, paragraph 67, URN 27066; witness statement of [FPM employee 2], dated 21 January 2015, paragraph 14, URN 27068; [x]; witness statement of [FPM employee 9], dated 4 March 2015, paragraph 7, URN 27078.

<sup>514</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 150, URN S1546.

- 4.127 [SB senior employee 1] has explained that SB, CPM and FPM coordinated the timing of their price increases, with revised prices being adopted by SB, CPM and FPM usually within the space of one or two weeks.<sup>515</sup> [SB senior employee 1] explained that SB, CPM and FPM discussed the phasing of their price increases, specifically: '*[w]hen are we going to go, who's going to go first, and an order*',<sup>516</sup> and that this phasing was designed to disguise the collusion,<sup>517</sup> noting, however, that people were sometimes tardy in putting their prices up '*and that was a bone of contention obviously at the cartel discussions*'.<sup>518</sup>
- 4.128 There is clear evidence emanating from the recorded meetings that SB, CPM and FPM exchanged pricing information in order to ensure that previously agreed price increases were reflected in their price lists.
- 4.129 For example, during the January 2013 meeting, [SB senior employee 1], [FPM senior employee 3] and [CPM senior employee 3] discussed '*sample prices*'<sup>519</sup> in some detail, comparing and confirming their new spot prices for various pipe diameters.<sup>520</sup>
- 4.130 By way of specific example:
- (a) prices for 450 mm pipe were called out, with [CPM senior employee 3] indicating a price of 23.85 (i.e. £23.85 per meter), [FPM senior employee 3] indicating a price of 24.35 and [SB senior employee 1] indicating a price of 24.03;
  - (b) prices for 675 mm pipe were called out, with [CPM senior employee 3] indicating a price of 67.85 (i.e. £67.85 per meter); [FPM senior employee 3] indicating 67.14; and [SB senior employee 1] indicating 67.18.<sup>521</sup>

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<sup>515</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2011, pages 657 to 659, URN 20224. According to [SB senior employee 1], as regards any differences of opinion in relation to the timing of price increases, '*[t]here would be a basis of compromise, generally. Or in some cases, people would be that dogmatic that there would be no compromise, and people would perhaps reluctantly acquiesce to that ... vision*'. Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 171, URN 20224.

<sup>516</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 658, URN 20224.

<sup>517</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 658, URN 20224.

<sup>518</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 658, URN 20224.

<sup>519</sup> Transcript of a record of the January 2013 meeting, page 214 URN 20205A.

<sup>520</sup> Transcript of a record of the January 2013 meeting, for example pages 213 to 224, URN 20205A. At the beginning of this discussion, [SB senior employee 1] asked, '*Are we all on the same prices now? Because I know there was a bit of shenanigans going on about the fact that I might have got my percentages wrong*' and confirms that his prices are '*as of the 14<sup>th</sup> of Jan, because my 8<sup>th</sup> of Jan's were wrong*'.

<sup>521</sup> Transcript of a record of the January 2013 meeting pages 215 to 216, URN 20205A.

- 4.131 The prices indicated by [FPM senior employee 3] and [SB senior employee 1] for these products (and other products discussed) were annotated by hand in CPM price lists found on [CPM senior employee 3] [~~✗~~];<sup>522</sup> and the prices indicated by [CPM senior employee 3] and [FPM senior employee 3] for these products (and other products discussed) were annotated by hand in the SB price list found in [SB senior employee 1's] 'Boys Spoils' file.<sup>523</sup>
- 4.132 According to [SB senior employee 1], the participants '*were checking that there was no alarming disparity between the prices*' which would '*mean one of us would have an advantage potentially in spot market business.*'<sup>524</sup> He further explained that although '*very few contracts were actually secured at the minimums*' an '*alarming disparity*' between prices would have '*had an impact*'.<sup>525</sup>
- 4.133 [CPM senior employee 3] has said that the prices agreed by SB, CPM and FPM, '*would not have been exactly the same but they would not have been more than a pound or two out from each other.*'<sup>526</sup>

### **Maintaining secrecy**

- 4.134 Price checks were also used to ensure that prices were not exactly the same, in order to keep the arrangement secret from customers. In the words of [SB senior employee 1], '*it was worthwhile just checking a few selected prices just to see that everybody was, not equal, but there or thereabouts the same price*';<sup>527</sup> and, '*[i]t would be wrong to have all the prices exactly the same ... Because of the wish to keep the operation of the cartel secret from customers.*'<sup>528</sup>
- 4.135 In a later interview, he further elaborates:

*'There were at times ... where we actually sat down and compared each other's minimum list price to make sure that both they weren't spot on exactly*

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<sup>522</sup> URN 0408. At one point during the January 2013 pricing discussion, [CPM senior employee 3] states, '*Hang on, let me just write this down*': transcript of a record of the January 2013 meeting, page 215, URN 20205A. See also: witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 18, URN S1120; and transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 24 to 25, URN S0456. Within URN 0408, price lists for other years (going back to September 2010) are also annotated with other party's prices.

<sup>523</sup> URN 0216, page 50.

<sup>524</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 694, URN 20224.

<sup>525</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 694, URN 20224.

<sup>526</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 19, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 24, URN S0456.

<sup>527</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 673, URN 20224.

<sup>528</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 696, URN 20224.

*the same but also that one wasn't dramatically cheaper or more expensive than the other twos ... if my minimum price was 48.40 for a product, CPMs and McCanns would be within 20/30p of that.*<sup>529</sup>

4.136 This approach is reflected during the January 2013 meeting by:

- (a) [FPM senior employee 3's] observation (following comments from [SB senior employee 1] and [CPM senior employee 3] that their prices for 1500 mm ring were too cheap as compared with FPM's price) that, *'[i]t doesn't hurt to have a little bit of ups and downs'*<sup>530</sup> (that is, for there to be slight differences between each company's prices); and
- (b) [CPM senior employee 3's] comment, in relation to sample prices for 675 mm pipe, that, *'you're a bit close, you two'*.<sup>531</sup>

4.137 There also is evidence that SB, CPM and FPM discussed how to account for the fact that they were able to increase prices, seeking to mask their collusion by telling customers that they were simply passing on the increased cost of their own raw materials,<sup>532</sup> and/or by manipulating the figures for their various costs.<sup>533</sup> In interview, [SB senior employee 1] said that he would on many occasions justify price increases to customers using *'artificially fudged indices'* which *'assisted the smoke screen of your actual product cost'*.<sup>534</sup>

4.138 [SB senior employee 1] has also explained that the price lists were useful to sales staff for the purpose of providing a cover price: *'[a] price whereby which we'd be pricing [a job] with the aspiration of losing it'*.<sup>535</sup> In his own words, price lists meant that sales staff *'would know where was good ground to be to not cause a problem for other people'*.<sup>536</sup> This was important for the operation of the arrangement insofar as it concerned the maintenance of specified market shares. In particular, price lists were used to inform quotations and provide cover prices:

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<sup>529</sup> Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, pages 96 to 97 (see also page 222), URN 27592.

<sup>530</sup> Transcript of a record of the January 2013 meeting page 219 URN 20205A.

<sup>531</sup> Transcript of a record of the January 2013 meeting, page 216, URN 20205A. In interview, [SB senior employee 1] explained that [CPM senior employee 3] meant that such prices would look *'suspicious'* because they were *'too close'*: transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 255, URN 27598.

<sup>532</sup> See for example, transcript of a record of the August 2012 meeting, pages 111 to 112, URN 20203A.

<sup>533</sup> Transcript of a record of the January 2013 meeting, page 199 to 202, URN 20205A.

<sup>534</sup> See also: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 810 to 811 (and more generally pages 806 to 812), URN 20224.

<sup>535</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 695, URN 20224.

<sup>536</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 694, URN 20224.



- (a) as part of a 'no poaching' arrangement in relation to term deals (see paragraphs 4.156, 4.157 and 4.173); and
- (b) in order to enable SB, CPM and FPM to win or lose spot market work, in the event that they had not achieved their agreed market shares (see paragraphs 4.277 to 4.283).

### **Specific examples**

4.139 The CMA sets out below a number of examples of contact between SB, CPM and FPM as regards spot market prices.

4.140 Entries in the diary of [FPM senior employee 2],<sup>537</sup> and the notebooks of [FPM senior employee 1]<sup>538</sup> and [SB senior employee 1]<sup>539</sup> in February 2011,<sup>540</sup> all contain references to increasing the spot market prices for:

- (a) 300 mm to 600 mm pipe by 5%;
- (b) 675 mm to 2400 mm pipe by 7.5%;
- (c) 900 mm to 1200 mm manholes by 5%; and
- (d) manholes greater than 1350 mm by 7.5%.

4.141 These entries further indicate an intention to introduce these price increases in March 2011.<sup>541</sup> Given the similar content of these entries and the dates around which they were made, the CMA is of the view that SB, CPM and FPM discussed the coordination of this spot market pricing strategy, most probably at a meeting held on 15 February 2011.<sup>542</sup>

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<sup>537</sup> URN 1877 - 20110215.

<sup>538</sup> URN 1571, page 35.

<sup>539</sup> URN 2877, page 16.

<sup>540</sup> [FPM senior employee 2's] diary entry and [SB senior employee 1's] notebook entry are both dated 15 February 2011. As regards the date of the entry on page 35 of [FPM senior employee 1's] notebook, see URN 1571, pages 34 to 37. Page 34 is headed '10/2/2011', and the CMA is of the view that pages 34 and 35 of URN 1571 contain a note made on that date (and most probably further notes made shortly after that date); and that the reference to '4/3/11' at the top of page 35 is a reference to the date on which the percentage price increases which follow were intended to be implemented by FPM. In reaching this conclusion the CMA notes that page 36 of URN 1571 contains notes dated '17/2/2011'; and page 37 of URN 1571 contains notes dated '25/2/11', indicating that the notes on page 35 were made before 17 February 2011. The CMA further notes that this reading of the entry on page 35 is consistent with the note contained in [FPM senior employee 2's] diary: see URN 1877 – 20110215, which sets out the same percentage price increases as in page 35 of URN 1571, and then to the right of those figures states '1<sup>st</sup> March, FP 4 March, CPM 15'.

<sup>541</sup> See URN 1877 – 20110215: '1<sup>st</sup> March, FP 4 March, CPM 15'; URN 2877, page 16: '1<sup>st</sup> March 7<sup>th</sup> March'; URN 1571, page 35 '4/3/2011', and footnote 540.

<sup>542</sup> See Annex A. See also: footnote 540.

4.142 Entries in the diary of [FPM senior employee 2] on 23 March 2011<sup>543</sup> and the notebook of [SB senior employee 1]<sup>544</sup> (between entries dated 22 March 2011 and 11 April 2011<sup>545</sup>) include a note of charges for part loads of £120 and a minimum load amount of 23 tonnes. In interview, [SB senior employee 1] explained that part loads had '*only recently*' formed part of discussions, and that SB, CPM and FPM aimed to, '*get uniform, on part load charges between the three of us. Because before then, salespeople were regularly challenged and beaten down on their part load charges.*'<sup>546</sup> Given the similar content of these entries, and the dates around which they were made, the CMA is of the view that SB, CPM and FPM discussed these prices, most probably at a meeting held on 23 March 2011.<sup>547</sup>

4.143 On or around 6 November 2012, [FPM senior employee 2], [FPM senior employee 1], [FPM senior employee 3], [SB senior employee 1], [CPM senior employee 2] and [CPM senior employee 3] made notes recording price increases on the spot market, to take effect from 1 January 2013. Those notes are summarised in the table below.

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<sup>543</sup> URN 1877 - 20110323.

<sup>544</sup> URN 2877, page 38 (see the last two figures: '23.00 and £120').

<sup>545</sup> URN 2877, pages 37 to 38.

<sup>546</sup> Transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 278 to 279, URN 27598.

<sup>547</sup> See Annex A. FPM has noted that there is no '*specific discussion of the figures from [[SB senior employee 1's]] diary in the relevant section of the interview, and as a result (and [[SB senior employee 1's]] general level of inconsistency), FPM does not consider the CMA can be satisfied that references to these figures is in the same context*': FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.62.1, URN S1363. However, the CMA is not persuaded by FPM's arguments in this respect, in particular given the similarities between the various entries, and the totality of the evidence as a whole.

Product	FPM ([FPM senior employee 2]) <sup>548</sup>	FPM ([FPM senior employee 3]) <sup>549</sup>	FPM (Document found on [FPM senior employee 3]) <sup>550</sup>	FPM ([FPM senior employee 1]) <sup>551</sup>	CPM ([CPM senior employee 3]) <sup>552</sup>	CPM ([CPM senior employee 2]) <sup>553</sup>	SB ([SB senior employee 1]) <sup>554</sup>
Manholes up to 1500	+5%	+5%	+5%	5%	+5%	+5%	5%
Manholes 1800 +	+7.5%	+7.5%	+7.5%	7½%	+7½%	+7½%	Up 7½
Pipes up to 600	+2.5%	+2.5%	+2.5%	+2.5%	+2½%	+2½%	2½%
Pipes 750+		No increase	No increase	+0%			
Steps	6.50	£6.50	+ £6.50	6.50	£6.50ea	6.50	6.50
Perfs	5.00	£5.00	+ £5.00	5.00	£5=ea	£5	5.00
Part loads	+15.00	+£15	+£15	£15	Up to 10T £190= 11T TO 24T £165=	£190 £165	Up to 10 £190 11-24 £165
Non step	No change			£8.00			
Gullies	5%	+5%	+ 5%		+5%	+5%	+5%
Seating	5%	+5%	+ 5%			+5%	
HIC	5%	Review CPM	See new list		+5%	+5%	+5%
E/B	No change				Leave		
Wide wall	5%	+5%	+5%		+5%	+5%	+5% (Perfect)
Caissons		Review CPM	Review		Propose revised prices		

<sup>548</sup> URN 1547 - 20121106.

<sup>549</sup> URN 0142, page 76. The notebook entry on URN 0142, page 76 is undated but (i) falls between an entry on URN 0142, page 74 dated '1/11' and an entry on URN 0142, page 80 dated '14/11' - see URN 0142, pages 74 to 80; (ii) includes the statements '2013 price increase' and 'from 1/1/13'; and (iii) is consistent with the other notes set out in this table taken around this time.

<sup>551</sup> URN 0194, page 19 (notebook entry dated 6 November 2012).

<sup>552</sup> URN 0262, page 1 (notebook entry undated, but including the statement 'From Jan '13' and consistent with the other notes set out in this table taken around this time).

<sup>553</sup> URN 1210 (note undated, but consistent with the other notes set out in this table taken around this time).

<sup>554</sup> URN 0224, page 24 (notebook entry undated, but consistent with the other notes set out in this table taken around this time).

4.144 Given the similar content of these notes and the dates around which they were made, the CMA considers that this information was discussed, and the percentage price increases agreed, by SB, CPM and FPM, most probably at a meeting on 6 November 2012.<sup>555</sup>

4.145 Price lists for SB, CPM and FPM indicate that price increases of around these amounts were indeed reflected in each party's price lists from January 2013.<sup>556</sup> By way of specific example, the list price:

(a) for 450 mm pipe increased by around 2.5% as follows:

(i) from £23.44 in 2012<sup>557</sup> to £24.03 in 2013,<sup>558</sup> for SB;

(ii) from £23.30 in 2012<sup>559</sup> to £23.85 in 2013,<sup>560</sup> for CPM;

(iii) from £23.76 in 2012<sup>561</sup> to £24.35 in 2013,<sup>562</sup> for FPM;

(b) for 450 x 900 gullies increased by around 5% as follows:

(i) from £40.20 in 2012<sup>563</sup> to £42.21 in 2013,<sup>564</sup> for SB;

(ii) from £39.90 in 2012<sup>565</sup> to £41.90 in 2013,<sup>566</sup> for CPM; and

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<sup>555</sup> See Annex A.

<sup>556</sup> URN 0216, page 50 and URN 13205 (for SB); URN 0408 (for CPM); URN 0165, URN 0913 (for FPM).

<sup>557</sup> URN 2863.

<sup>558</sup> URN 0216 page 50; URN 13205.

<sup>559</sup> URN 0408, page 9. This example relates to the prices set out in the column headed '*MINIMUM*' in the CPM price list.

<sup>560</sup> URN 0408, page 3. This example relates to the prices set out in the column headed '*MINIMUM*' in the CPM price list.

<sup>561</sup> URN 0164, page 1; URN 0932. This example relates to the prices in the column headed '-10' in the FPM price list.

<sup>562</sup> URN 0165, page 1; URN 0913. This example relates to the prices in the column headed '-10' in the FPM price list.

<sup>563</sup> URN 2863.

<sup>564</sup> URN 0216 page 50; URN 13205.

<sup>565</sup> URN 0408, page 8. This example relates to the prices in the column headed '*MINIMUM*' in the CPM price list.

<sup>566</sup> URN 0408, page 2. This example relates to the prices in the column headed '*MINIMUM*' in the CPM price list.

(iii) from £40.32 in 2012<sup>567</sup> to £42.34 in 2013,<sup>568</sup> for FPM.

4.146 As described in paragraphs 4.128 to 4.131, there is evidence that the price increases agreed on or around 6 November 2012 were explicitly discussed, checked and recorded by SB, CPM and FPM at the January 2013 meeting.

4.147 There are also instances of these prices being discussed at the November 2012 meeting. For example, [FPM senior employee 3] said,

*'These current England spot market rates are going up 1<sup>st</sup> January ... There's been percentages between, five, seven and a half percent ...*

*And if you speak to [CPM senior employee 3] ... He's got all of the, the new rates. And if, if with the new prices that are going on, I, I think if we could stabilise the first quarter on those, and let's see how we've managed to move, how our average price moves forward. If we review that end of sort of March, early April, based on the new England price list with the increases on'.<sup>569</sup>*

4.148 Scottish spot market prices were also discussed during the November 2012 meeting. For example:

(a) [FPM senior employee 1] asked *'what's the spot market price per manhole then?'* to which [CPM senior employee 1] replied, *'[Inaud] seventy pound sixty [Inaud]'*; [FPM senior employee 3] responded, *'it should be seventy pound thirty eight'*; and [SB senior employee 1] agreed, *'Correct. Same as the English price. And I take the bit you're saying [FPM senior employee 1] it should be even more than the English price?'* [FPM senior employee 2] then stated, *'Well if we can get to the English price that would be a big big start'*, to which [CPM senior employee 2] said, *'No I agree with you'*; [FPM senior employee 3] said, *'the English prices are going up aren't they we've agreed?'*; and [FPM senior employee 2] responded, *'well the Scottish ones should be going up the same'<sup>570</sup>*

(b) [CPM senior employee 1] said, *'what about spot markets, [Inaud] I mean we're getting seventy odd pound in England and Wales spot market. Do*

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<sup>567</sup> URN 0164, page 3; URN 0932. This example relates to the prices in the column headed '-10' in the FPM price list.

<sup>568</sup> URN 0165 page 3; URN 0913. This example relates to the prices in the column headed '-10' in the FPM price list.

<sup>569</sup> Transcript of a record of the November 2012 meeting, pages 120 to 121, URN 20204A.

<sup>570</sup> Transcript of a record of the November 2012 meeting, page 67 URN 20204A. In interview, [FPM senior employee 3] said that his reference to *'we've agreed'* is to an agreement within FPM that English prices are going up: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 147 to 148, URN S1546.

*you think that ought to be seventy five, seventy six in Scotland?'*; to which [CPM senior employee 4] replied, *'I don't see any reason why not. It's just the two of us, why not. Who else is making manholes ... Stick the price up as a new min'*. [FPM senior employee 1] went on to query: *'How do we get discipline between our two selves and the spot market and we don't have to ring about together'*, in relation to which [FPM senior employee 3] said *'I think we could talk major projects ahead. I, I don't think we should have too much contact'*, and [FPM senior employee 1] and [FPM senior employee 2] agreed, *'no'*;<sup>571</sup>

- (c) [FPM senior employee 2] asked, *'the new manhole rate is going to be seventy plus five percent, what's that'*, and [FPM senior employee 1] confirmed, *'So it's seventy three pound eighty on the spot market okay'*, to which [CPM senior employee 2] responded, *'Yeah'*.<sup>572</sup>

4.149 The CMA notes that FPM has made representations that there is no evidence of any effect on spot market prices during the Relevant Period, and has carried out its own pricing analysis, which it argues shows (in summary) that:

- (a) FPM did not adhere to its spot market price list during the Relevant Period, and that there was a large variation between FPM's spot market price list and end prices actually charged to customers (including in relation to examples set out in this Section F<sup>573</sup>);
- (b) there was no effect on prices or discounts, according to an analysis of prices and discounts during and after the Relevant Period;
- (c) there was no effect on FPM's margins, which were similar during and after the Relevant Period.<sup>574</sup>

4.150 In addition, FPM has analysed the available data to assess the amount of business lost to competitors in the market, and other evidence, which it argues shows the degree of competition in the market.<sup>575</sup>

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<sup>571</sup> Transcript of a record of the November 2012 meeting, pages 88 to 89, URN 20204A.

<sup>572</sup> Transcript of a record of the November 2012 meeting, page 128, URN 20204A.

<sup>573</sup> See, for example, FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.58 to 5.64, URN S1363

<sup>574</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.12 to 5.29, 5.66.3 and 6.10.1 and 6.10.3 URN S1363.

<sup>575</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.54.4 and Annex 4, URN S1363, citing URN 9148, URN 9119, URN 9324, URN 29061 to URN 29066, URN 29072, URN 29077, URN 29106, URN 9190; URN 9208; URN 29079; URN 0263; URN 0265; URN 0282; URN 0291; URN 0298; URN 0306; URN 0307; URN 0319; URN 0324; URN 0325; URN 0327; URN 0328; URN 0348; URN 0358; URN 0359; URN 3614; URN 7794; URN 28989; URN 29088; URN 29114; URN 29117; URN 7701; URN 7703; URN

4.151 The CMA notes that an analysis of the effects of an arrangement is not required for an object infringement (see Chapter 5, Section F (Object of preventing, restricting or distorting competition)). However, even if FPM's analysis were correct, it is not known whether prices in the market or margins may have been lower in the absence of the arrangement. Nor does the analysis consider the prices charged by SB or CPM.

## **G. Fixed price agreements**

4.152 The second aspect of the arrangement involved agreements in relation to certain fixed price agreements, specifically term deals and stock deals.

4.153 There is documentary and witness evidence that the arrangement in relation to fixed price agreements was in place by at least 2007 (see paragraphs 4.205, 4.216, 4.218 and 4.263).<sup>576</sup> The CMA acknowledges that the evidence as regards the origins of the arrangement in relation to fixed price agreements is imprecise, but considers that this is to be expected given the passage of time and the secret nature of cartel arrangements.

### ***Term deals***

4.154 There is evidence which indicates that SB, CPM and FPM put in place an arrangement in relation to term deals under which they:

- (a) agreed that they should not take or poach each other's term deal customers (see paragraphs 4.156 to 4.202);<sup>577</sup>
- (b) agreed that they should not set up any new term deals (see paragraphs 4.203 to 4.208);<sup>578</sup>

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28890; URN 29019; URN 29111; URN 23755; URN 23882; URN 24238; URN 24243; URN 24508; URN 24618; URN 24741.

<sup>576</sup> See transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 281 to 282, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 20, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 38, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 20, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 35, URN S0456.

<sup>577</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 281, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 20, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 38, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 20, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 22, URN S0456.

<sup>578</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 281 to 282, and 489 to 492, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 21, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 38 to 40, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 25,

(c) agreed that they should coordinate price increases for shared term deals (see paragraphs 4.209 to 4.239);<sup>579</sup> and

(d) used '*term deal lists*' denoting which company had term deals with which customers, to enable and monitor compliance with (a) to (c) (see paragraphs 4.240 to 4.248).<sup>580</sup>

4.155 This enabled SB, CPM and FPM to increase or maximise term deal rates. It was also an important part of the third aspect of the arrangement, under which SB, CPM and FPM sought to maintain specified market shares (see paragraphs 4.274 to 4.294). The term deal arrangement sought to ensure that the distribution of term deals between the undertakings remained the same, and was used in conjunction with a '*balancing mechanism*' in the spot market, in order to give effect to one of the '*cornerstones of the cartel*', namely the maintenance of the '*status quo*'.<sup>581</sup>

### *The no poaching arrangement*

4.156 SB, CPM and FPM operated the arrangement not to poach each other's term deal customers by agreeing not to undercut each other's prices. This was achieved by quoting at around the prices set out in the spot market price list.<sup>582</sup>

4.157 [CPM senior employee 3] explains:

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URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 32 to 33, URN S0456.

<sup>579</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 503, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 23, URN S1111. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 23, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 32, URN S0456.

<sup>580</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 143, 515 to 516 and 527, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 22, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 37 to 39, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 20 to 22, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 27 to 29, URN S0456.

<sup>581</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 370 and 611, URN 20224. See also witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 32, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 62, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 33, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 45, URN S0456.

<sup>582</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 531 to 532, URN 20224. Witness statement of [CPM senior employee 3] dated 11 December 2018, paragraph 22, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 29 to 30, URN S0456. Witness statement of [FPM employee 1], dated 19 May 2016, paragraphs 10 to 12, URN 27169. Such quotations would, on occasion, include a reasonable percentage on top of the spot market list price, in order to provide an element of '*safety*'; but most term deals rates were lower than the minimum spot market prices in any event: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 531 to 532,



*'if a contractor who had a term deal with one of the others approached us for a price ... we agreed that we would price to stay away from the business. We did this either by pricing around the spot market minimum prices so as not to win the business. Each manufacturer knew that the existing term deal with a competitor would be priced anything between 10% and 20% below the spot market minimum prices and therefore you knew that if you submitted prices at the spot market minimum level you would not be upsetting anyone. Other times, I simply just phoned up the competitor whose term deal it was and explained that one of their term deal customers wanted me to price a new term deal for them and then asked the competitor at what level I should pitch CPM's prices.'*<sup>583</sup>

4.158 [CPM senior employee 3] said that he would usually ring [FPM senior employee 3] at FPM and [SB senior employee 1] at SB in this regard; and he confirmed that this arrangement was reciprocal.<sup>584</sup>

4.159 [SB senior employee 1] also said that meetings between SB, CPM and FPM would, on occasion, cover the award of contracts to named customers, in order to ensure that the no-poaching arrangement was adhered to.<sup>585</sup>

#### *The approach within SB*

4.160 Within SB, [SB senior employee 1] made it clear that sales teams were not to pursue *'term deals that aren't ours'*, or to enter into any new term deals *'[b]ecause none of our competitors are doing it'*.<sup>586</sup> He explained that:

*'on significant numbers of times, both internal and external people would spot a low price, in the marketplace. Now, remembering that generally term deals would be lower prices than the spot market minimums – if they spotted a*

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URN 20224. See also, for example, witness statement of [FPM employee 3], dated 9 September 2014, paragraph 8, URN 27086.

<sup>583</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 22, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 28 to 29, URN S0456.

<sup>584</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 22, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 29 to 30, URN S0456.

<sup>585</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 379, URN 20224, where he gives the A453 and A46 contracts as examples. [SB senior employee 1] further explained that SB, CPM and FPM would, on occasion, contact each other at the *'order to place'* stage of any tender process to ask for *'a steer'* in relation to particular term deal rates, so that they would not cause each other *'trouble'*: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 540, URN 20224. [SB senior employee 1] clarified that prices submitted at the tender stage of any tender process would not be discussed at cartel meetings: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 540 to 541 and 716 to 717, URN 20224.

<sup>586</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 221 (see also page 493), URN 20224.

*price, they would come into my office and say, '[SB senior employee 1], can you just check on your list – is that a term deal of CPM?' Because if it was a term deal at CPM, then they knew they couldn't fight for it. And if it was a term deal at CPM, that would explain the prices that CPM are being given, as being below the minimums.'*<sup>587</sup>

4.161 This is reflected in certain of SB's internal documents. For example:

(a) the minutes of an SB sales meeting on 12 February 2008 state, '*Maintain current business, not taking competitors deals/stockists*';<sup>588</sup>

(b) an email from [SB senior employee 1] to [SB employee 2] dated 10 October 2011, regarding the customer I.C. Buying, states, '*check and confirm they have def not got an existing deal with anyone*'.<sup>589</sup>

4.162 It is also reflected in the witness evidence of SB sales staff. For example, although [SB senior employee 2] said that [SB senior employee 1's] instruction '*not to go for any of [SB's] competitors' term deals*' '*did not have to be anything sinister*',<sup>590</sup> and could have had a rational, commercial explanation,<sup>591</sup> he nevertheless notes that '*based on what [SB senior employee 1] said, I had an impression and expectation that the competitors would not be going after our term deals*'<sup>592</sup>

4.163 Moreover, [SB employee 1] has said of his time at SB that:

*'When I joined Stanton Bonna there were a number of term deals already set up in my area. I cannot recall the exact conversation that I had with [SB senior employee 1] in relation to term deals but he said to me something to the effect of "we don't touch each other's term deals". I took this to mean that Stanton Bonna didn't target the term deals of other manufacturers and vice versa. There was an unwritten rule. I assume this was common knowledge within the external sales team ...*

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<sup>587</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 283 (see also page 513 to 515), URN 20224.

<sup>588</sup> URN 3513.

<sup>589</sup> URN 10775.

<sup>590</sup> Witness statement of [SB senior employee 2], dated 18 July 2016, paragraph 52, URN 27124.

<sup>591</sup> Witness statement of [SB senior employee 2], dated 18 July 2016, paragraphs 53 to 55, URN 27124.

<sup>592</sup> Witness statement of [SB senior employee 2], dated 18 July 2016, paragraph 52, URN 27124.

*I cannot recall ever setting up a term deal whilst at Stanton Bonna. If I had, in the first instance it would have to be have been sanctioned by [SB senior employee 1].*<sup>593</sup>

#### *The approach within CPM*

4.164 [CPM senior employee 3] has explained that, within CPM, sales staff were given clear instructions not to poach competitors' term deals:

*'I would have sales meetings where I would discuss term deals and tell the staff things such as, 'Look, we've got enough of the cheaper work at the minute and we don't want any more.'*<sup>594</sup>

4.165 Internal CPM documents reflect this approach. For example:

(a) the minutes of a CPM sales meeting on 13 June 2007 record the instruction, *'Term deals – do not approach deals with current competition'*;<sup>595</sup>

(b) the minutes of a CPM sales meeting on 5 March 2008 state:

*'We are not actively looking to chase competitor term deals as the rates we would have to do are too competitive for us to compete against given all the increases we have had this year.*

*All term deals to be referred to [CPM senior employee 6]/[CPM senior employee 3] before pricing.*

*For any new deals look to fix for 6 months only.*<sup>596</sup>

4.166 In his witness evidence, [CPM employee 1] of CPM explains that CPM did not tend to price to win other parties' term deal customers, noting that, where a customer was *'affiliated to a McCanns or Stantons we would say "we can't match that, thanks for the information, we've had a look but don't feel we can be competitive on this occasion and must decline to quote.'*<sup>597</sup>

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<sup>593</sup> Witness statement of [SB employee 1], dated 10 June 2016, paragraphs 33 to 34, URN 27066.

<sup>594</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 47, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 65 to 66, URN S0456.

<sup>595</sup> URN 6039.

<sup>596</sup> URN 5780 page 2.

<sup>597</sup> Witness statement of [CPM employee 1], dated 4 October 2014, paragraph 13 (see also paragraphs 11 and 12), URN 27002.

*The approach within FPM*

4.167 As well as the evidence highlighted in paragraphs 4.179 to 4.191, there is some witness evidence that is consistent with the operation of the no-poaching arrangement within FPM. For example, [FPM employee 13], [X], has said that:

*'McCanns had a number of term deals, and both CPM and Stanton Bonna had their own term deals and we did not target or chase their business. I was told by [FPM senior employee 3] and [FPM senior employee 4] where I should concentrate my efforts and it was very clear to me that each company had its own term deals. No one said why we should not target other companies' term deals but it was clear that customers were either a McCanns account or a CPM or Stanton Bonna account.*

...

*When I came to McCanns I thought I could do a lot of business with Keyline ... as they were a large company focusing on civil engineering and ground workers. However, this was a big "no" from [FPM senior employee 4] as they were a Stanton Bonna account.<sup>598</sup>*

4.168 Although [FPM employee 1] of FPM has said that there was 'no instruction' not to target any term deal customer of a competitor, he goes on to say:

*'although our general approach was to quote Spot market rates to them ...*

*When giving these Spot market rates I was aware that I would be about 15 – 20% higher than term deal rates ...*

*This strategy avoided tit for tat retaliation from competitors pricing one of FP McCann's term deals lower with the net effect of driving down the price of term deal contracts.<sup>599</sup>*

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<sup>598</sup> Witness statement of [FPM employee 13], dated 20 August 2014, paragraphs 7 and 11 (and see also paragraphs 8 to 10) URN 27079. FPM has made representations that [X]. FPM has also said that that the instructions given to him referenced FPM's justified commercial policy of [X]; that many of the assertions in his witness evidence are speculative at best; and that FPM did in fact supply Keyline during the period of [FPM employee 13's] employment: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.33.1, URN S1363. Nevertheless, the CMA notes that [FPM employee 13's] witness evidence is consistent with other documentary and witness evidence, and considers that it remains useful in providing context.

<sup>599</sup> Witness statement of [FPM employee 1], dated 19 May 2016, paragraphs 10 to 12, URN 27169.

4.169 [FPM employee 12], [§<],<sup>600</sup> has said that:

*'From day one of working at McCann it was made clear to me that there were certain customers that we could not deal with. I was told that we had our own customers and that we should not go after the customers of CPM Group or the customers of Stanton Bonna. It was a rigid instruction and it applied throughout the time I worked at McCann. I was told it on occasions by both [FPM senior employee 3] and [FPM senior employee 1] and it was also I believe made clear to all of the sales staff. When discussing potential customers with some of the sales staff, such as [FPM employee 2] and a person called [FPM employee 1] whose surname I cannot recall, they would tell me that we could not touch a particular customer because it was a CPM or a Stanton Bonna customer. The basic line was that it was a CPM or Stanton Bonna customer and we don't go around upsetting each other and it was my understanding that neither CPM nor Stanton Bonna would be going after our customers.*

...

*There were certain contractors who had framework or term or fixed price agreements with one of the manufacturers and my understanding was that these were set in stone and that McCann, CPM and Stanton Bonna would not go after each other's contractors ...*

*... It was a sort of gentlemen's agreement between the three companies. No-one ever said the phrase gentlemen's agreement to me but that was how I understood it.<sup>601</sup>*

4.170 FPM has stated that the CMA has not considered, and has therefore mischaracterised, the relevant market context as regards term deals. FPM has, in particular:

(a) highlighted witness evidence showing that certain FPM sales staff were not prevented from targeting competitors' term deal customers, but that FPM's legitimate and justified commercial strategy was to [§<];<sup>602</sup>

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<sup>600</sup> FPM has made representations that [§<]. FPM further states that [FPM employee 12's] evidence, to a large extent, reflects a normal commercial approach, noting also that some of his assertions are mere assumptions, [§<]: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.33.2, URN S1363. See also: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 262, URN S1546. Nevertheless, the CMA notes that [FPM employee 12's] witness evidence is consistent with other documentary and witness evidence, and considers that it provides useful context.

<sup>601</sup> Witness statement of [FPM employee 12] dated 24 January 2016, paragraphs 4, 6 and 8, URN 27080.

<sup>602</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.33.3, URN S1363, citing the witness statement of [FPM employee 1], dated 19 May 2016, paragraph 10 URN 27169;

(b) stated that it:

(i) would not wish to negotiate term deal agreements [redacted];

(ii) would not wish to agree term (or stock) deals [redacted];<sup>603</sup>

(c) highlighted the incumbency advantage that a supplier with a term deal enjoys, and the close nature of the supplier / customer relationship), which lessens the degree of customer switching.<sup>604</sup>

4.171 [FPM senior employee 3] has said that there was no 'agreement' between SB, CPM and FPM as regards the poaching of a competitor's customers, but that '*[f]rom a commercial point of view, there was no way was I ever going to go to a Stanton Bonna customer and expect to win the business ... our business is relationship driven*'.<sup>605</sup> He further elaborated that, '*there was an understanding [within the construction industry] ... going back many years*

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witness statement of [FPM employee 2], dated 21 January 2015, paragraphs 16, 20 and 35, URN 27068; witness statement of [FPM employee 11], dated 23 November 2014, paragraphs 4, 6 and 7, URN 27090; witness statement of [FPM employee 18], dated 9 September 2014, paragraph 8, URN 27088; witness statement of [FPM employee 15], dated 15 September 2014, paragraph 4, URN 27070; witness statement of [FPM employee 15], dated 23 May 2016, paragraph 16, URN 27071.

<sup>603</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.69.6, URN S1363.

<sup>604</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.70 to 5.75, URN S1363, citing the witness statement of [AD Bly employee 1], dated 12 July 2016, paragraph 2, URN 27041; witness statement of [FPM employee 5], dated 3 May 2015, paragraph 27, URN 27056; witness statement of [FPM senior employee 5], dated 26 October 2016, paragraph 34, URN 27057; draft witness statement of [FPM senior employee 4], paragraphs 22 to 23, URN 27378; witness statement of [SB employee 1], dated 10 June 2016, paragraphs 56 and 57, URN 27066; witness statement of [FPM employee 7], dated 20 December 2015, paragraph 6, URN 27063; draft witness statement of [JJ Mullins employee], paragraph 6, URN 27445; draft witness statement of [UGS employee], paragraph 12, URN 27461; witness statement of [Rudridge employee], dated 16 May 2017, paragraph 13, URN 29128; witness statement of [PDM employee], dated 5 August 2016, paragraphs 22, 24 and 31, URN 29141; witness statement of [Keyline employee 3], dated 16 August 2016, paragraphs 24 to 26, URN 29133; witness statement of [Keyline employee 4] dated 13 November 2015, paragraph 8, URN 29138; witness statement of [Keyline employee 2], dated 14 March 2017, paragraph 14, URN 29189; witness statement of [Laing O'Rourke employee], dated 20 December 2016, paragraphs 11 to 12, URN 27025; witness statement of [Tamdown employee 1], dated 11 May 2016, paragraphs 11 and 18, URN 27043; witness statement of [MPS employee], dated 5 December 2016, paragraphs 39 and 43, URN 27102; witness statement of [Breheny employee] dated 12 December 2016, paragraph 7, URN 27053; witness statement of [Burdens employee 1], dated 14 November 2016, paragraph 50, URN 27103; witness statement of [Keyline employee 1], dated 25 May 2016, paragraphs 27, URN 27611; draft witness statement of [Scott Parnell employee 1], paragraphs 9, 17 and 19, URN 27463; witness statement of [O'Halloran & O'Brian employee], dated 2 March 2017, paragraph 4, URN 27399; witness statement of [Mulholland employee 1], dated 22 April 2016, paragraphs 16 and 19, URN 27038; witness statement of [Murraywood employee 1], dated 16 August 2016, paragraphs 3 and 7, URN 27047; URN 24297; URN 24618; witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 27, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 36, URN S0456; witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 19, URN S1111.

<sup>605</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 156 (see also pages 159, 161, 182 to 183), URN S1546.

*ago, and if somebody had a fixed-price agreement, you generally stay away because commercially you're never going to get it'.<sup>606</sup>*

4.172 The CMA has considered these representations, but is of the view that they do not negate the contact and discussions between SB, CPM and FPM as regards the poaching or allocation of customers (as shown in the evidence below), or render them meaningless. The CMA further notes that there is contemporaneous evidence of FPM's specific engagement with this aspect of the arrangement, for example, as set out in paragraphs 4.179 to 4.191 and 4.199(a)(iii).<sup>607</sup>

#### *Maintaining secrecy*

4.173 According to [SB senior employee 1], it was acknowledged that if a customer with an existing term deal asked for an alternative quotation from another party, a refusal by that party to provide such a quotation would raise suspicions of collusion,<sup>608</sup> and that in such circumstances an alternative quotation (or cover price) should *always* be given (for example, at a price at least 5% to 6% above the minimums).<sup>609</sup>

4.174 This is reflected in a discussion about the provision of alternative quotations during the March 2013 meeting, in which [FPM senior employee 3] said that he had told his sales staff: *'we will price every enquiry that comes to us, including our competitor's term deals. I would expect though for a competitor's term deal, you speak to myself or [FPM senior employee 4]<sup>610</sup> before we price it'.<sup>611</sup>*

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<sup>606</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 157 (see also pages 171 to 175), URN S1546. He noted, however, that it was nevertheless possible to use new products to build new relationships with competitors' term deal customers, and that there are some examples of term deals changing hands during the Relevant Period: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 158 to 159, 166, 171 to 172, 182 and 183, URN S1546.

<sup>607</sup> See also Chapter 5, Section F, (Object of preventing, restricting or distorting competition).

<sup>608</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 556 to 557, URN 20224.

<sup>609</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 557 to 558, URN 20224.

<sup>610</sup> The CMA is of the view that this is a reference to [FPM senior employee 4].

<sup>611</sup> Transcript of a record of the March 2013 meeting, page 29 URN 20206A. In interview, [FPM senior employee 3] said that he did not recall saying that he would expect people to speak to him or [FPM senior employee 4], noting that *'If I could win work, I would win work...'*: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 264, URN S1546. The CMA has considered [FPM senior employee 3's] statement during the March 2013 meeting in the light of the context in which it was made (that is, during a discussion on the provision of alternative quotations), and considers that it is consistent with the principles of the no poaching arrangement, and the aim of keeping knowledge of that arrangement away from customers. The CMA further considers that SB and CPM would have understood it as such.

4.175 The need to provide cover prices to disguise the arrangement was also brought up during the March 2013 meeting, with [SB senior employee 1] drawing attention to an instance where both CPM and FPM had failed to provide a quotation for one of SB's term deal customers.<sup>612</sup> In interview [SB senior employee 1] said that the refusal to provide a quotation was *'tantamount to showing that there was a cartel to the customer.'*<sup>613</sup> In raising this issue, [SB senior employee 1] sought to highlight the importance of providing alternative quotations (rather than refusing to provide a quotation) in order more effectively to mask the existence of the arrangement.

#### *Monitoring the no poaching arrangement*

4.176 There is evidence that term deals would (infrequently) change hands during the Relevant Period.<sup>614</sup>

4.177 However, instances of *'cheating'* on the no poaching arrangement were brought up at meetings between SB, CPM and FPM (see, for example, paragraphs 4.193 to 4.196), as well as outside such meetings *'[i]f there was a more immediate need to react'*.<sup>615</sup>

4.178 The CMA notes that, in interview, [FPM senior employee 3] acknowledged that he would (*'occasionally, but very rarely'*) get a phone call from [SB senior employee 1] or [CPM senior employee 3] to say, *'just "Are you pricing...?" "Have you, er been in to see our term deal?" generally. Generally, quite a bit of accusation in terms of us and sales guys sniffing around their customers again with a -- they're quite defensive towards their own customers.'*<sup>616</sup> [FPM senior employee 3's] interview evidence does not suggest that he sought to end, or distance himself unequivocally from, such discussions.<sup>617</sup> Instead he

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<sup>612</sup> Transcript of a record of the March 2013 meeting, pages 27 to 30, URN 20206A.

<sup>613</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 556, URN 20224. See also: transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, pages 493 to 494, URN 27598.

<sup>614</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 158 to 159, 166, 171 to 172, 182 and 183, URN S1546: [FPM senior employee 3] points to the examples of Breheny, CJL, Bentley's and BAM. FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.33.3(c), URN S1363, citing the witness statement of [FPM employee 11], dated 23 November 2014, paragraphs 6 and 7, URN 27090. Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 520, URN 20224: [SB senior employee 1] said that term deals would sometimes change hands for legitimate reasons, if, for example, a customer was not happy about quality, availability, delivery, safety or service; setting out his understanding that: *'[i]f there was no attempt to limit, you know, somebody and ... maroon them without products. If the... the sole driver for the contractor was purely to get a lower price. That wasn't a valid reason within the cartel for him to change horses.'*

<sup>615</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 489 to 492, URN 20224.

<sup>616</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 79, URN S1546.

<sup>617</sup> See Chapter 5, Section E (Agreements between undertakings and concerted practices).



*'used to say, "Well it's products that you don't -- you don't manufacture". So, I was able to deflect.'*<sup>618</sup>

### *Specific examples*

- 4.179 An email from [FPM employee 12] of FPM to [FPM senior employee 3], dated 28 November 2011, regarding Welsh Water (a CPM term deal customer<sup>619</sup>), states, *'Are sales staff allowed to aggressively price for these jobs? I understand we have a no poaching of business agreement.'*<sup>620</sup>
- 4.180 [FPM senior employee 3] replied to [FPM employee 12] as follows: *'the Welsh Water term deal is with Burdens/CPM, the rates from last view were very cheap and wouldn't attract us. where I see us progressing is on bases/headwalls and other value added products.'*<sup>621</sup>
- 4.181 FPM has made representations that [FPM senior employee 3's] email reply is consistent with FPM's rational business strategy of [§<].<sup>622</sup>
- 4.182 In interview, [FPM senior employee 3] characterised [FPM employee 12's] email as *'total nonsense'*, saying that there was never any *'no poaching of business agreement'*, and that [§<].<sup>623</sup>
- 4.183 Nevertheless, the CMA considers it significant that, when asked about a *'no poaching of business agreement'*, [FPM senior employee 3] neither queried this reference, nor sought to deny the existence of any such agreement.
- 4.184 The no poaching arrangement was referred to on numerous occasions during the recorded meetings.
- 4.185 During the November 2012 meeting, [FPM senior employee 3] revealed that he provided a high quotation against a CPM term deal so as not to win that business, stating:

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<sup>618</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 79, URN S1546. The CMA notes that, in interview, [FPM senior employee 3] said that he does not recall a no poaching of term deals agreement being in place: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 157, URN S1546.

<sup>619</sup> See URN 0226.

<sup>620</sup> URN 9917.

<sup>621</sup> URN 9917.

<sup>622</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.33.2 (d), URN S1363.

<sup>623</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 262 to 263, URN S1546.

*'Telling you I'm in at ninety six quid, I've been at [inaudible] at hundred and six quid, just two and a half percent above the minimums because I know it's your term deal'.<sup>624</sup>*

4.186 FPM has made representations that this comment was simply made in the context of FPM's general commercial approach to term deals: that is, term deals were priced below spot market rates, and where an existing client relationship existed, FPM did not always have the incentive to price low.<sup>625</sup> [FPM senior employee 3] provided a different explanation, saying:

*'[w]hy would I tell [[CPM senior employee 2]] that I'm, I'm going to go and attack his customer, because then he'd have a defence mechanism to go in. I'd rather do it as a bit of stealth ...*

...

*It's [CPM's] term deal and I don't want [[CPM senior employee 2]] to think I'm going to be going in around the backdoor and trying to steal his work ...*

...

*I'm leading [[CPM senior employee 2]] down the garden path a little bit'.<sup>626</sup>*

4.187 However, CMA is not persuaded by these representations, noting that [FPM senior employee 3's] comment was made during a discussion about coordinating the parties' approach to pricing and maintaining 'discipline', in which FPM played a full part.<sup>627</sup> For example:

(a) slightly earlier in the conversation, [CPM senior employee 4] says, *'we've got a range of term deal prices, which are, they're not brilliant but they're consistent'*, to which [FPM senior employee 1] replies, *'but they're there and we need to keep nudging them up'*;<sup>628</sup>

(b) a short time later in the conversation, [FPM senior employee 3] said, *'there's three people [in FPM] price Scotland, myself, [FPM senior employee 5] and [FPM employee 4], and every time I say to [FPM senior employee 5] "minimum price, nothing less" he'll always phone me to say "there's a job here", to which [CPM senior employee 1] replied, 'Well I*

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<sup>624</sup> Transcript of a record of the November 2012 meeting, page 90, URN 20204A.

<sup>625</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.102, URN S1363.

<sup>626</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 161 to 163, URN S1546.

<sup>627</sup> Transcript of a record of the November 2012 meeting, pages 87 to 92, URN 20204A.

<sup>628</sup> Transcript of a record of the November 2012 meeting, page 88, URN 20204A.

*think we've got some discipline into that since [CPM employee 3's] been pricing [Inaud] and you were on holiday in August ... I kept a track on that and he came back, when I rang him at least three times just to check ... what he was quoting ... never went off the list. Never'. [FPM senior employee 2] said, '[w]e have to be prepared to walk away ... too many times we're as much guilty, we back down and say "ok we'll match that rate." ... we shouldn't even have to do it [make a phone call to CPM]. We should just be, we should just be big enough to say tear on ... we're big enough to win and lose some orders',<sup>629</sup>*

- (c) during this discussion, [FPM senior employee 3] suggests a way to ensure that customers in Scotland do not play the parties off against each other so that prices are maintained or increased, saying, '*Keep a note of everything you win and lose. Ahead of the meeting speak to me ...*';<sup>630</sup>
- (d) when [FPM senior employee 2] points out that there is no need to do this in England, [FPM senior employee 1] responds:

*'We don't have to. We've got to get discipline [Inaud] ...*

*... The one thing we've got to get here is trust and that is the most important thing, and the only way we can, and to be quite honest the most embarrassing thing, from our perspective is to be caught out, so we don't want to come and be caught out ... I think we should be starting off now from now it's sticking to our guns and seeing how it works out ...*

*... but what we have got to do in Scotland is get discipline and [Inaud], and like unless there's a simpler way of nominating contractors or whatever ...'*<sup>631</sup>

- 4.188 During the November 2012 meeting, [FPM senior employee 3] mentioned that [Breheny employee] of Breheny felt under pressure to switch supply from FPM to CPM because of quality problems. In response, [FPM senior employee 1] commented that, '*the easiest way to sort them out is for them to quote a lot lot dearer*';<sup>632</sup> that is: for CPM to provide a significantly higher quotation than FPM, thereby allowing FPM to retain its customer.

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<sup>629</sup> Transcript of a record of the November 2012 meeting, pages 89 to 91, URN 20204A.

<sup>630</sup> Transcript of a record of the November 2012 meeting, pages 90 to 91, URN 20204A.

<sup>631</sup> Transcript of a record of the November 2012 meeting, pages 91 to 92, URN 20204A.

<sup>632</sup> Transcript of a record of the November 2012 meeting, page 22 URN 20204A.

4.189 Witness evidence from [Breheny employee] of Breheny is consistent with approaches such as this having been taken. He states:

*'I recall possibly about 4 years ago meeting with [CPM senior employee 3] to discuss CPM's Perfect Manhole System. We have had regular quality issues, mainly around the seals, with FP McCann's Easi Base system ... I believe I told [CPM senior employee 3] that if CPM were able to come back with prices on pipes that were as good as FP McCann's then we would switch our term deal supply to CPM ... I recall the prices between CPM and FP McCann's manhole systems were not much different, but CPM's prices on pipes were not good enough, so therefore I stayed with FP McCann ... It did surprise me that when I gave [CPM senior employee 3] the opportunity to quote for our business, CPM never got anywhere close to FP McCann's prices'.<sup>633</sup>*

4.190 FPM has made representations that it disagrees with the way that this example of 'no poaching' has been characterised by the CMA, noting that:

- (a) the conversation took place during a period of the meeting where only FPM individuals were in the room, and the conversation also reflects that CPM would price competitively to this customer: *'they [CPM] always seem to be sneaking in'*;<sup>634</sup>
- (b) there is evidence that FPM envisaged pricing unilaterally in respect of Breheny in any event: [FPM senior employee 3] says, *'We won't say anything then, we might as well just do it and then once we've done it and we've got it in place, we'll tell them'*;
- (c) elsewhere in his witness evidence, [Breheny employee] says that he had a good relationship with FPM and would negotiate with FPM successfully to bring prices down; and
- (d) FPM's term deal with Breheny was, for historic reasons, very low, and so it is understandable that CPM was unable to *'get anywhere close to FPM's prices'*.<sup>635</sup>

4.191 The CMA acknowledges FPM's representations, but nevertheless considers that the discussion is indicative of FPM's general understanding of the

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<sup>633</sup> Witness statement of [Breheny employee] dated 12 December 2016, paragraph 8, URN 27053.

<sup>634</sup> Indeed, in interview, [FPM senior employee 3] said that, although he and [FPM senior employee 1] may have discussed the idea of CPM quoting higher, in fact, Breheny did move to CPM in this instance: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 168 to 177, URN S1546.

<sup>635</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.103, URN S1363, citing the witness statement of [Breheny employee] dated 12 December 2016, paragraphs 4 to 8, URN 27053, and transcript of a record of the November 2012 meeting, page 22, URN 20204A.

arrangement (that is, one in which a coordinated approach could be used to solve an issue arising in relation to a term deal customer); and that the witness evidence of [Breheny employee] in this respect provides useful context.

4.192 During the January 2013 meeting, [CPM senior employee 1] asked [SB senior employee 1], *'would it be right for you or McCanns to give up their term deal work to us? ... I don't think so'*.<sup>636</sup>

4.193 An incident concerning a SB term deal customer who had a contract near the CPM works at Leek (the *'Leek Contract'*) highlights the possible consequences of a party acting against the terms of the no-poaching arrangement.

4.194 During the January 2013 meeting, [SB senior employee 1] referred to the fact that CPM had won the Leek Contract, saying, *'term deal: took it ... You fucking did take it'*, to which [CPM senior employee 1] responded, *'We agreed, because it was on our doorstep. We can roll the pipes down the hill and we gave you a mark-up'*.<sup>637</sup>

4.195 [CPM senior employee 1] explained that CPM took the Leek Contract, as well as a Nottingham trams job (by cutting rates), in retaliation for SB winning an Anglian Water job at CPM's expense - as *'a shot across his bows not to mess with us'*.<sup>638</sup> [CPM senior employee 1] said in interview that, *'if [another party had] taken any of our term deals I'd have took two of them. That was the understanding – you know, the, the bully in the, the playground scenario, "You hit me, and I'll hit you harder back" sort of scenario'*.<sup>639</sup> He reiterated this rationale later in interview when describing the benefit of the arrangement to CPM, saying, *'[t]he market was stable. Erm, there was an understanding you know, "You", er, "dump on my patch, and I'll dump on your patch; take it or leave it"*.<sup>640</sup>

4.196 This incident also shows that parties might seek to redress the balance where jobs were taken against the terms of the arrangement. [SB senior employee 1]

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<sup>636</sup> Transcript of a record of the January 2013 meeting, page 124, URN 20205A.

<sup>637</sup> Transcript of a record of the January 2013 meeting, pages 236 to 237, URN 20205A. See also: witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 38, URN S1111.

<sup>638</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 38, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 83 to 85, URN S0455.

<sup>639</sup> Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 39 to 40, URN S0455.

<sup>640</sup> Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 103 to 104, URN S0455.

explained that when CPM took the Leek contract, he, *'went absolutely furious at [CPM senior employee 1] at the time and um [CPM senior employee 1's] um mitigation to this was to say "look it makes more sense to me to have supplied it anyway, because we're next to it" ... what I'll do is so that you're not lost out on this, I'll give you 5% on the job ... And give you that as a discount to a lump sum off the stock I'm selling to you in to your yard [SB senior employee 1]'*.<sup>641</sup>

4.197 During the March 2013 meeting, [CPM senior employee 1] said: *'we don't go near any of your term deals, we don't go near any of their [indicating McCanns] term deals ... Or try and take them away,'*<sup>642</sup> and *'I wouldn't expect them to give up any term deals'*.<sup>643</sup>

4.198 The contract for the A453 is a significant example of the no poaching agreement in operation.<sup>644</sup> The A453 was very close to SB's factory, and in the ordinary course of events it would have made commercial sense for SB to try to supply the contract.

4.199 However, there is evidence that the participants considered the contractor on the job, Laing O'Rourke, to be a term deal customer of CPM, and that, as a consequence the job would fall to be undertaken by CPM. For example:

(a) during the January 2013 meeting:

(i) [SB senior employee 1] said, *'[t]he A453, on my doorstep admittedly, but it's your term deal'*;<sup>645</sup>

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<sup>641</sup> Transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 336 (and more generally, pages 334 to 346), URN 27598. [SB senior employee 1] went on to say that, in this instance, CPM did not in fact provide SB with the 5% discount, and this remained a bone of contention between the two parties. Nevertheless, the CMA is of the view that this incident is indicative of the way in which the arrangement was intended to work, and shows that the parties would follow up any incidents of cheating.

<sup>642</sup> Transcript of a record of the March 2013 meeting, page 27 URN 20206A.

<sup>643</sup> Transcript of a record of the March 2013 meeting, page 38 URN 20206A.

<sup>644</sup> FPM has noted that this particular example does not involve any conduct by FPM, since FPM would have considered it too *'onerous'* to sign up to Laing O'Rourke's contractual terms, and Laing O'Rourke did not consider FPM's products suitable, in this instance: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.105 to 5.107, URN S1363, citing the witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 38, URN S1111; witness statement of [FPM employee 1], dated 19 May 2016, paragraph 15, URN 27169; and witness statement of [Laing O'Rourke employee], dated 20 December 2016, paragraph 34, URN 27025. The CMA acknowledges this representation. Nevertheless, the CMA notes that comments made by individuals from FPM at the recorded meetings (as set out in the following paragraph) reflect their engagement with, and a common understanding as regards, this aspect of the arrangement; and there was no attempt by such individuals to distance themselves from this conversation or conduct.

<sup>645</sup> Transcript of a record of January 2013 meeting, page 170, URN 20205A.

(ii) [CPM senior employee 1] said that, *'the A453 is our term deal [FPM senior employee 1], so I wouldn't expect anybody to go anywhere near it, even though people are sort of erm... Er very tempted'*,<sup>646</sup>

(iii) [CPM senior employee 1] said that, *'[t]he A453 is our term deal'*, to which [SB senior employee 1] replied *'I can roll the pipes out of my stock room'*, and [FPM senior employee 1] replied, *'But let's sort out who's getting it. I'm sure there'll be another job.'*<sup>647</sup>

(b) during the March 2013 meeting:

(i) [CPM senior employee 1] made it very clear that he expected the A453 contract to be won by CPM as Laing O'Rourke was CPM's term deal, stating:

*'We don't need to sit down and discuss anything because it's our term deal ...'*<sup>648</sup>

*Laing O'Rourke is our term deal right? And if it goes to Stanton Bonna there will be world war three, I can fucking guarantee that because, I'm not having it'*,<sup>649</sup>

(ii) [SB senior employee 1] told [CPM senior employee 3] that: *'it's your job. I'll keep off it. But there is going to be one hell of a stink because they want, they definitely want, because of the locality'*,<sup>650</sup>

(iii) [SB senior employee 1] also alluded to providing a cover price for the contractor Laing O'Rourke (which was insisting that SB provide a quotation<sup>651</sup>), stating:

*'what do you want me to do guys? ... I'll just stop where I am and say "look, I've, I've given my best price I can't move". "But it's on your doorstep [SB senior employee 1]". "Well I'm not interested"'*,<sup>652</sup>

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<sup>646</sup> Transcript of a record of January 2013 meeting, page 236, URN 20205A.

<sup>647</sup> Transcript of a record of January 2013 meeting, page 238, URN 20205A.

<sup>648</sup> Transcript of a record of the March 2013 meeting, page 24, URN 20206A.

<sup>649</sup> Transcript of a record of the March 2013 meeting, page 26, URN 20206A.

<sup>650</sup> Transcript of a record of the March 2013 meeting, page 25, URN 20206A. See also: [SB senior employee 1's] comments on page 24 (*'we need to sit down and decide what we are going to do because seriously we need to, I'll do whatever you want'*); page 170 (*'look I will do what you want me to do'*); page 176 (*'it's your deal'*); and page 182 (*'[CPM senior employee 3], [CPM senior employee 3], I'll do what you tell me to do'*).

<sup>651</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, Pages 519 to 520, URN 20224.

<sup>652</sup> Transcript of a record of the March 2013 meeting, page 173, URN 20206A.

*'he's told me he needs me to be below seventy for him to recommend us and I'll just say "well no I can't move, I think we've already priced it too cheap to be quite honest with you [Laing O'Rourke employee]";'*<sup>653</sup>

- (iv) [FPM senior employee 3] confirmed his understanding of the arrangement as regards the A453 contract, providing reassurance that he had not submitted quotations for this work:

*'And be it your term deal, the last thing I wanted to do is spend half a day filling out ... Questionnaires, returns for what is looking like I'm not going to get any work out of it ... I haven't put any prices in ... I basically said to them ... "We don't take contractor, we don't pay contractor rebates, and I'm not prepared to sign your standard terms and conditions" ... And I'm like, it's your term deal, what is the point of me spending half a day.'*<sup>654</sup>

4.200 For completeness, the CMA notes that Laing O'Rourke was of the view that it did not have a term deal in place with CPM, having instead a preferred supplier agreement.<sup>655</sup>

4.201 However, [SB senior employee 1] explained that despite this, *'[t]he tenets of the cartel were this list of term deals ... Whether I disagree or agree with it or have suspicions it's not a true term deal, I would still be breaking the rules of the cartel and World War 3, 4 would start if I took the job.'*<sup>656</sup>

4.202 [SB senior employee 1] also said that, in order to keep his bosses happy, he sought to try and supply a proportion of the A453 job via CPM.<sup>657</sup> He explained, *'I didn't want to unduly upset CPM with their Laing O'Rourke term deal but I did want to supply some products to the site.'*<sup>658</sup> However, he noted,

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<sup>653</sup> Transcript of a record of the March 2013 meeting, page 179, URN 20206A. The reference to '[Laing O'Rourke employee]' is to [Laing O'Rourke employee] of Laing O'Rourke.

<sup>654</sup> Transcript of a record of the March 2013 meeting, pages 103 to 104, URN 20206A.

<sup>655</sup> Witness statement of [Laing O'Rourke employee], dated 20 December 2016, paragraphs 19 and 39, URN 27025; transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 139, URN 27598.

<sup>656</sup> Transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, pages 147 and 148, URN 27598.

<sup>657</sup> Transcript of interviews with [SB senior employee 1] on 3 to 4 October 2016, pages 539 to 548, URN 27597; see also transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, pages 144 to 148, URN 27598; and transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 546 to 547, URN 20224.

<sup>658</sup> Transcript of interviews with [SB senior employee 1] on 3 to 4 October 2016, page 545, URN 27597.



in this respect, that [CPM senior employee 1] *'got very, very aggressive with me in the March meeting. We're doing it all. It's gonna be CPM.'*<sup>659</sup>

### *New term deals*

4.203 In interview, [SB senior employee 1] explained that the arrangement not to enter into any new term deals was intended to ensure that there was sufficient open market work to act as a mechanism for balancing each party's market share in order to maintain the status quo.<sup>660</sup>

4.204 This aspect of the arrangement was of further benefit as it enabled the parties to maximise the amount of work obtained on the spot market, which was more attractive than term deal work, given that term deals were priced substantially below spot market work.<sup>661</sup> In this regard, the CMA notes that:

(a) in the March 2013 meeting, [CPM senior employee 3] referred to term deal work as *'cheapy crap stuff'* and noted that [SB senior employee 1] referred to spot market work as *'proper prime stuff'*,<sup>662</sup>

(b) [CPM senior employee 3] has explained that term deals were, *'the cheaper end of the market. We aimed to have a healthy basket of work, so it was better not to have that basket full of term deals and to also have some spot market business which is better priced work, then some depot stocking business and finally term deals. Term deal prices could be anything up to 20% plus off the spot market minimum prices'*,<sup>663</sup>

(c) [CPM senior employee 1] has explained that:

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<sup>659</sup> Transcript of interviews with [SB senior employee 1] on 3 to 4 October 2016, page 546, URN 27597. The CMA notes that, according to [Laing O'Rourke employee] of Laing O'Rourke, [SB senior employee 1] ultimately submitted lower prices than CPM for the contract, *'which put [SB] in the 'box seat' to win the job.'* However, [SB senior employee 1] was the only person at SB who knew of these prices, and they did not stand [><]. As a result, the contract was ultimately awarded to CPM. See witness statement of [Laing O'Rourke employee], dated 20 December 2016, paragraphs 41 to 50, URN 27025.

<sup>660</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 650, URN 20224.

<sup>661</sup> [><]. SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 61, URN S0107. FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 4.5.4, URN S0106. Witness statement of [CPM employee 12], dated 13 May 2017, paragraph 12, URN 27172. Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 740, URN 20224.

<sup>662</sup> Transcript of a record of the March 2013 meeting, page 39, URN 20206A.

<sup>663</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 25, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 33, URN S0456.

*'we did not want to set up the entire market on a term deal basis because it would have meant there would be less open market work where we could get some decent prices, as opposed to the term deal prices'.<sup>664</sup>*

4.205 The arrangement not to enter into any new term deals is reflected in certain documentary evidence:

- (a) an entry in [FPM senior employee 2's] notebook on 16 October 2006 includes the statement, *'No New Term Deal From'*,<sup>665</sup>
- (b) an entry in [FPM senior employee 2's] diary on 26 January 2007 states, *'No more term Deals'*,<sup>666</sup>
- (c) the minutes of an SB sales meeting on 6 March 2007 state, *'[SB senior employee 1]<sup>667</sup> discussed the term deal situation ... No new deals to be put in place without his knowledge'.<sup>668</sup>* In interview, [SB senior employee 1] confirmed that this referred to the *'embargo on striking new term deals'*, and that the agreement not to enter into any more term deals must therefore have been in place by this date;<sup>669</sup>
- (d) the notes of an SB sales meeting on 14 August 2007 record that [SB senior employee 1] *'reminded the meeting – **NO MORE TERM DEALS** and all current Term Deals need to be coded and updated'.<sup>670</sup>* In interview, [SB senior employee 1] said that this reflected his *'frustration that, some of our term deals keep coming out of the woodwork, and that [SB] should keep [its] marketing database up, up to speed with the names of [its] term deals',<sup>671</sup>*
- (e) the minutes of a CPM sales meeting on 19 January 2010 state: *'We are happy with our number of term deals so we are not actively looking for new ones. Deals to be fixed for a maximum of 6 months';<sup>672</sup>*

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<sup>664</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 21, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 40 to 41, URN S0455.

<sup>665</sup> URN 1892, page 3.

<sup>666</sup> URN 1883 - 20070126.

<sup>667</sup> [SB senior employee 1].

<sup>668</sup> URN 3522.

<sup>669</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 619, URN 20224.

<sup>670</sup> URN 3518.

<sup>671</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 624 to 625, URN 20224.

<sup>672</sup> URN 6027.

- (f) [CPM senior employee 4] refers to the agreement not to set up any new term deals at the November 2012 meeting, stating, *'we are not creating any new term deals'*; and both [FPM senior employee 2] and [FPM senior employee 1] agree, *'no'*;<sup>673</sup> and
- (g) an email from [SB employee 2] to [SB senior employee 1] and [SB employee 5], dated 12 March 2013, states that, *'fpm are doing dodgy fpas for contractors but there is no paper trail. That way if they are caught out there is no proof.'*<sup>674</sup> In interview, [SB senior employee 1] explained that the phrase *'dodgy fpas'* referred to *'[f]orming new FPAs ... because there's a rule, certainly by the date of this writing, that, a rule that's probably five years old now, that no new FPAs should be struck with open market contractors.'*<sup>675</sup>

4.206 The CMA also notes the witness evidence of [SB senior employee 2] of SB, who said that he recalled *'the instruction to sales staff from [[SB senior employee 1]] that we should not be setting up any more term deals ... the impression I got from [SB senior employee 1] was that the competitors would also not be setting up any new term deals by responses to questions about why can't we set up any new term deals such as "we are not doing any and they will not be doing any either."*<sup>676</sup>

4.207 Notwithstanding this arrangement, SB, CPM and FPM would, on occasion, set up new term deals.<sup>677</sup> Indeed, FPM has stated that there is evidence that a series of new term deals was set up during the Relevant Period, such that FPM was not party to an arrangement with SB and CPM in this respect.<sup>678</sup>

4.208 Nevertheless, the CMA considers that the evidence points to there having been discussions, and an arrangement, between SB, CPM and FPM as regards the setting up of new term deals. Indeed, [SB senior employee 1]

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<sup>673</sup> Transcript of a record of the November 2012 meeting, page 114, URN 20204A.

<sup>674</sup> URN 0216, page 34 of the *'Boys spoils'* file.

<sup>675</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 599, URN 20224.

<sup>676</sup> Witness statement of [SB senior employee 2], dated 18 July 2016, paragraphs, 56, URN 27124.

<sup>677</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 511, URN 20224.

<sup>678</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.88 to 5.99 and 6.17, URN S1363, citing the witness statement of [FPM senior employee 5], dated 26 October 2016, paragraphs 24 and 28, URN 27057; witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 25, URN S1120; witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 22, URN S1111; draft witness statement of [Burdens employee 2], paragraphs 17 and 29, URN 27401; witness statement of [FPM employee 2], dated 12 January 2015, paragraphs 20 and 35, URN 27068; witness statement of [K Rouse employee 1], dated 17 January 2017, paragraph 19, URN 27024; witness statement of [MPS employee], dated 5 December 2016, paragraph 22, URN 27102; witness statement of [Central Civil Supplies employee] dated 22 February 2016, paragraph 10, URN 27106; witness statement of [JN Bentley employee], dated 17 August 2016, paragraph 13, URN 27026; witness statement of [Skanska employee], dated 12 July 2016, paragraphs 19 to 26, URN 27048; URN 0291; URN 28850; URN 7703; URN 0348; and URN 24238.

described the setting up of new term deals as being *'deceitful from the company's perspective, because they were breaking one of the cornerstones of the ... cartel'*,<sup>679</sup> and [CPM senior employee 3] explained that if the parties did come across new term deals, *'we sat round the table, we'd sort of, you know, have it out with each other.'*<sup>680</sup>

### Shared term deals

4.209 There is evidence that SB, CPM and FPM coordinated their approach to the pricing of shared term deals:

- (a) [SB senior employee 1] explained in interview that the renewal dates of shared term deals were generally the same, and that, further to a *'discussion around a table'* SB, CPM and FPM (as relevant), *'would agree a percentage uplift of around the same order, not necessarily exactly the same, but around the same order ... based on general discussions about how much the market has gone up, what would be justifiable in the market place as increases on that basis'*.<sup>681</sup> He said that shared term deals were discussed on a case by case basis as *'[s]ome would stand a higher increase than others'*; but *'there may well have been at times when people couldn't even be bothered to discuss it'* and SB, CPM and FPM would, *'just go for a 4% increase on all shared term deals'*.<sup>682</sup>
- (b) [CPM senior employee 1] has said that SB, CPM and FPM (as relevant) discussed the pricing of shared term deals, so that in discussions with shared term deal customers they were, *'singing off the same song sheet in the negotiations with the customer, so they could not play us off one against the other, which is what customers always tried to do'*.<sup>683</sup>
- (c) [CPM senior employee 3] has explained that:

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<sup>679</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 511 to 512, URN 20224.

<sup>680</sup> Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 33, URN S0456.

<sup>681</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 503, URN 20224.

<sup>682</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 507, URN 20224. FPM has made representations that it does not consider [SB senior employee 1's] statement as regards *'[going] for a 4% increase'* to be accurate, and has submitted pricing information showing that FPM's price increases on shared term deals varied, stating that FPM therefore acted unilaterally: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.108 to 5.109, URN S1363. The CMA notes that an analysis of actual prices and the examination of the effects of an arrangement is not required for an object infringement (see Chapter 5, Section F (Object of preventing, restricting or distorting competition)).

<sup>683</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 23, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 45 to 46, URN S0455.

*'[w]hen [shared term deals] came up for renewal we used to speak to SB and/or FPM first of all to agree the price increase, so that they would apply the same price increase as CPM to that shared term deal';*<sup>684</sup>

(d) [FPM senior employee 3] has said that, in terms of shared term deals *'there would have been discussions about a global percentage. I don't think there was ever a, a, a specific this customer, that customer, discussion. There was always an aspirational price ... it was in the environment of the meeting when there was a, a shared discussion on -- aspiration of price'*.<sup>685</sup>

4.210 [SB senior employee 1] recalls that discussions in relation to shared term deals would generally take place in October/November for end of year renewals, or in March for April renewals.<sup>686</sup> On occasion, however, SB, CPM and FPM would be late in discussing these price increases, leading to a delay in their implementation.<sup>687</sup>

4.211 FPM has made representations that there is evidence that shared term deal negotiations were competitive, and that the CMA's description of the shared term deal arrangement does not reflect the way that the market worked in reality, given that, for example, shared term deals were subject to negotiation and some shared term deals were lost during the Relevant Period.<sup>688</sup>

4.212 However, the CMA does not consider that FPM's representations undermine the evidence cited in paragraphs 4.209 to 4.239 as regards the contact (and the arrangement) between SB, CPM and FPM in this respect.

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<sup>684</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 23, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 30 (see also page 32), URN S0456.

<sup>685</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 214 to 215 (and also 216 to 217), URN S1546.

<sup>686</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 505, URN 20224.

<sup>687</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 505, URN 20224.

<sup>688</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.76 to 5.78 and 5.108, URN S1363, citing the witness statement of [FPM senior employee 5], dated 26 October 2016, paragraphs 30 and 31, URN 27057; and witness statement of [FPM employee 15], dated 23 May 2016, paragraph 10, URN 27071.

*Specific examples*

- 4.213 The CMA has set out below some specific examples of the arrangement in respect of shared term deals in operation, including the sharing of pricing information on a bi-lateral basis in relation to particular term deal customers.
- 4.214 Although the CMA acknowledges that, on occasion, SB, CPM and FPM might have obtained information about each other's pricing strategies from their shared customers (rather than from each other),<sup>689</sup> the CMA nevertheless considers that the evidence set out below indicates that throughout the Relevant Period, SB, CPM and FPM discussed, and agreed, their pricing strategies for shared term deal customers amongst themselves.
- 4.215 In particular, handwritten annotations in a number of term deal documents (see the examples set out in paragraphs 4.221 to 4.235) are indicative of a systematic exchange of pricing information, and a well understood approach to setting a joint pricing strategy - such annotations having been made in relation to the same (reference) products, for a number of different customers, over the course of a number of years. These annotations also reflect the approach to shared term deals discussed during the November 2012 meeting (see paragraph 4.237), and are consistent with witness evidence in relation to discussions about shared term deals (see paragraph 4.209).
- 4.216 The following entries in [FPM senior employee 2's] diary refer to contact between FPM and SB in respect of their shared term deal customer Paul John Construction Limited:
- (a) on 22 May 2007: '*Paul John Deal have we put Price in*';<sup>690</sup>
- (b) on 1 June 2007: '*Ring [SB senior employee 1] re Paul John Prices*';<sup>691</sup>
- (c) on 4 June 2007:
- 'Ring [SB senior employee 1] re Paul John*
- |              |              |
|--------------|--------------|
| <i>300 –</i> | <i>10.70</i> |
| <i>450 –</i> | <i>15.39</i> |
| <i>600</i>   | <i>24.72</i> |
| <i>900</i>   | <i>59.04</i> |
| <i>1200</i>  | <i>98.16</i> |

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<sup>689</sup> See for example, URN 1687.

<sup>690</sup> URN 1883 - 20070522.

<sup>691</sup> URN 1883 - 20070601.

1200 44.85 46 Steps 5.00';<sup>692</sup>

(d) on 18 June 2007:

*'[SB senior employee 1] – Paul John T/Deal – saying holding Rate to end of year – we might go back with lower rate to end of 07 moving to proposed Deal Jan 08 ...*

*John Paul \* told FP Price No good we are going to go back and hold price at 42/m ...*

*Include 5% Stanton Paul John*

*1200 @ 44.85*

*300 @ 10.70*

*600 24.80*

*900 59.04.*<sup>693</sup>

4.217 FPM has made representations that FPM had, at this time (2007), just commenced the upgrade of its Ellistown plant, and bought supplies of pipes from other suppliers. FPM states that, *'[a]s a result references to supplies from Stanton Bonna are likely to be in relation to these cross-supply purchases'*.<sup>694</sup> However, FPM has not provided any evidence in this respect, and given the content of these entries and the dates on which they were made, the CMA considers that these prices were discussed by FPM and SB, most probably at meetings on 22 May 2007 and/or 18 June 2007,<sup>695</sup> and that SB and FPM had an agreed pricing strategy for their respective term deals with this customer.

4.218 A CPM document, dated 28 August 2007,<sup>696</sup> relating to a term deal covering the period 1 December 2007 to 30 November 2008 for Laing O'Rourke,<sup>697</sup> has been annotated by hand with a number of prices, and also contains the following handwritten annotation:

*'22/07*

*McCanns -CURRENT*

*STEEL INCREASES TO BE ADDED TO LISTED RATES*

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<sup>692</sup> URN 1883 - 20070604.

<sup>693</sup> URN 1883 - 20070618.

<sup>694</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.110 to 5.111, URN S1363.

<sup>695</sup> See Annex A. Indeed, the entry of 18 June 2007 (URN 1883 - 20070618) appears to be a note of those discussions

<sup>696</sup> URN 4163.

<sup>697</sup> The CMA notes that according to the 2008 term deal list (see, for example, URN 1293), Laing O'Rourke was a term deal customer of both CPM and FPM.

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*30/7 Spk to [FPM senior employee 3] before pricing 825 mm pipe & above increasing 1800mm's upwards.'*

4.219 The CMA is of the view that '[FPM senior employee 3]' is a reference to [FPM senior employee 3], and that CPM and FPM discussed their pricing strategy for this shared term deal customer.

4.220 A number of CPM documents concerning term deals with the end customer Rapidgrid<sup>698</sup> (to be supplied through Burdens/Cardiff), include handwritten annotations indicating contact between CPM and FPM in relation to their pricing strategy for this customer. For example:

(a) a document dated 7 January 2008 includes the handwritten annotation '*McCanns – spk to [FPM senior employee 3]<sup>699</sup> Friday*';<sup>700</sup>

(b) a document dated 27 June 2008 includes the handwritten annotations:

*'McCanns holding rates for 12 mths. Spk to [FPM senior employee 3]*

*Burdens – keep using existing rates until further notice.*

*McCanns have sent a letter out to all Term deals stating an increase will be required*';<sup>701</sup>

(c) a document dated 11 August 2008 includes the handwritten annotation, '*McCanns – 'Leave'*'.<sup>702</sup>

4.221 Both:

(a) an FPM sales quotation, dated 7 March 2011 and valid until 31 December 2012,<sup>703</sup> for the customer Paul John Construction;<sup>704</sup> and

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<sup>698</sup> The CMA notes that according to the 2008 term deal list (see, for example, URN 1293), Rapidgrid was a term deal customer of CPM, FPM and Milton Pipes.

<sup>699</sup> The CMA is of the view that this is a reference to [FPM senior employee 3].

<sup>700</sup> URN 5361, page 7

<sup>701</sup> URN 5361, page 3.

<sup>702</sup> URN 5032.

<sup>703</sup> URN 0670. The CMA notes that another FPM sales quotation for the same customer and same period is also annotated by hand with prices for SB: see URN 0043.

<sup>704</sup> The CMA notes that according to the 2010 term deal list (see, for example, URN 4992), Paul John Construction was a term deal customer of both SB and FPM.



- (b) an SB fixed price agreement for the same customer covering the period 1 July 2012 to 31 December 2012,<sup>705</sup>

have been annotated by hand with prices for certain products. The handwritten annotations relate to prices for the same products in both documents, namely: 300 mm pipe, 1200 mm pipe, 1200 mm ring, and 1200 mm cover slabs.

4.222 When these two documents are compared, it can be seen that certain handwritten prices in the FPM sales quotation were in fact SB's prices for the supply of those products to Paul John Construction under its fixed price agreement;<sup>706</sup> and certain handwritten prices in the SB fixed price agreement were the prices for those products as set out in the FPM sales quotation. In addition, the FPM sales quotation and the SB fixed price agreement include the handwritten annotations '6%' and '+6%' respectively. Accordingly, the CMA is of the view that SB and FPM discussed their pricing strategy (i.e. a 6% price increase), by reference to these specific prices, for this shared term deal customer.<sup>707</sup>

4.223 Both:

- (a) an FPM sales quotation, dated 2 February 2012 and valid until 31 December 2012,<sup>708</sup> for the customer Fitzgerald Contractors;<sup>709</sup> and
- (b) an SB fixed price agreement for the same customer covering the period 1 March 2012 to 31 December 2012,<sup>710</sup>

have been annotated by hand with prices for certain products. The handwritten annotations relate to prices for the same products in both documents, namely: 300 mm pipe, 1200 mm pipe, 1200 mm ring, and 1200

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<sup>705</sup> URN 2845.

<sup>706</sup> FPM notes in its representations that there are some inconsistencies between the figures written in the FPM and SB documentation, highlighting that for 1200 mm pipe the SB price is '148.04' whereas the FPM note is '148.84'; and that for 1200 mm cover slabs, the SB price is '63.00' whereas the FPM note is '63.34': FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.112, URN S1363. Nevertheless, the CMA considers that the similarities between the two documents are sufficient to infer that SB and FPM discussed these prices.

<sup>707</sup> FPM has stated that FPM data shows that the 2013 prices to Paul John Construction were in fact only 5% higher than 2012 prices, and that FPM therefore acted unilaterally as regards this customer: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.113 and 5.114, URN S1363. However, the CMA notes that an analysis of actual prices and the examination of the effects of an arrangement is not required for an object infringement (see Chapter 5, Section F (Object of preventing, restricting or distorting competition)).

<sup>708</sup> URN 0655.

<sup>709</sup> The CMA notes that according to the 2010 term deal list (see, for example, URN 4992), Fitzgerald Contractors was a term deal customer of both CPM and SB.

<sup>710</sup> URN 2848.

mm cover slabs. Both documents also contain handwritten annotations in relation to plastic encapsulated double steps.

4.224 When these two documents are compared, it can be seen that the handwritten prices in the FPM sales quotation are in fact SB's prices for the supply of those products to Fitzgerald Contractors under its fixed price agreement; and the handwritten prices in the SB fixed price agreement are the prices for those products as set out in the FPM sales quotation. Moreover, the FPM sales quotation and the SB fixed price agreement include the handwritten annotations '+5% all' and '1<sup>st</sup> Jan +5%' respectively. Accordingly, the CMA is of the view that SB and FPM discussed their pricing strategy (i.e. a 5% price increase) by reference to these specific prices, for this shared term deal customer.

4.225 Both:

- (a) an FPM sales quotation, dated 27 March 2012 and valid until 31 July 2012,<sup>711</sup> for the customer JJ Mullins Civil Engineering;<sup>712</sup> and
- (b) an SB fixed price agreement for the same customer covering the period 1 January 2012 to 31 March 2013,<sup>713</sup>

have been annotated by hand with prices for certain products. The handwritten annotations relate to prices for the same products in both documents, namely: 300 mm pipe, 1200 mm pipe, 1200 mm ring, and 1200 mm cover slabs.

4.226 When these two documents are compared, it can be seen that the handwritten prices in the FPM sales quotation are in fact SB's prices for the supply of those products to JJ Mullins Civil Engineering under its fixed price agreement; and the handwritten prices in the SB fixed price agreement are the prices for those products as set out in the FPM sales quotation.

4.227 Moreover, the FPM sales quotation also contains the handwritten annotation:

*'+6% m+S*

*+3% pipe*

*S - Higher Pipe*

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<sup>711</sup> URN 0658.

<sup>712</sup> The CMA notes that according to the 2010 term deal list (see, for example, URN 4992), JJ Mullins Civil Engineering was a term deal customer of both SB and FPM

<sup>713</sup> URN 2837.

*Lower m/hole'*

4.228 Similarly, the SB fixed price agreement contains the handwritten annotation '+6% Mans +3% Pipe'.

4.229 Accordingly, the CMA is of the view that SB and FPM discussed their pricing strategy (i.e. a 6% price increase for manholes, and a 3% price increase for pipes), by reference to these specific prices, for this shared term deal customer.<sup>714</sup>

4.230 An FPM sales quotation, dated 1 May 2012 and valid until 31 July 2012,<sup>715</sup> for the customer Gallagher,<sup>716</sup> contains the following handwritten annotations:

*'+5% Mcc*

*10% S*

*5% C'.*

4.231 The same FPM sales quotation is also annotated with SB's and CPM's prices in relation to 1200 mm manhole rings and 1200 mm cover slabs. By way of example, next to the FPM price of '63.00' in the column for the 1200 mm manhole ring there is the handwritten annotation:

<i>'S</i>	<i>C</i>
<i>60.89</i>	<i>63.59'.</i>

4.232 An SB fixed price agreement for Gallagher covering the period 1 April 2012 to 31 December 2012 is similarly annotated with CPM's and FPM's prices for the same products.<sup>717</sup> These prices are consistent with those found on the FPM sales quotation. By way of example, next to the SB price of '60.89' in the column for the 1200 mm manhole ring there is the handwritten annotation:

<i>'M</i>	<i>C</i>	
<i>63.00</i>	<i>63.59</i>	<i>+5%'.</i>

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<sup>714</sup> FPM has stated that this term deal appears to have expired on 31 March 2013, with minimal sales since, and that FPM therefore acted unilaterally as regards this customer: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.115 and 5.116 URN S1363. However, the CMA notes that the examination of the effects of an arrangement is not required for an object infringement (see Chapter 5, Section F (Object of preventing, restricting or distorting competition)).

<sup>715</sup> URN 0657.

<sup>716</sup> The CMA notes that according to the 2010 term deal list (see, for example, URN 4992), Gallagher was a term deal customer of SB, FPM and Milton Pipes.

<sup>717</sup> URN 2833.

4.233 The CMA is therefore of the view that SB, CPM and FPM discussed their pricing strategy, by reference to these specific prices, for this shared term deal customer.

4.234 Both:

- (a) an FPM sales quotation dated 1 February 2012 and valid until 31 December 2012<sup>718</sup> in relation to the customer RH Irving Construction Ltd;<sup>719</sup> and
- (b) an SB fixed price agreement covering the period 1 November 2011 to 31 March 2013 in relation to the same customer,<sup>720</sup>

have been annotated by hand with prices for certain products. The handwritten annotations relate to prices for the same products in both documents, namely: 300 mm pipe, 1200 mm ring, and 1200 mm cover slabs.

4.235 When these two documents are compared, it can be seen that the handwritten prices in the FPM sales quotation are in fact SB's prices for the supply of those products to RH Irving Construction under its fixed price agreement; and the handwritten prices in the SB fixed price agreement are the prices for those products as set out in the FPM sales quotation. Moreover, the FPM sales quotation is annotated, '+2%' whilst the SB fixed price agreement is annotated, '+7.5% Mc +2?'. Accordingly, the CMA is of the view that SB and FPM discussed this pricing strategy, by reference to these specific prices, for this term deal customer.<sup>721</sup>

4.236 There is evidence that a meeting of SB, CPM and FPM was held on 6 November 2012.<sup>722</sup> Entries dated around this time in the diary of [FPM senior employee 2]<sup>723</sup> and notebook of [FPM senior employee 3]<sup>724</sup> make reference to a 5% price increase for term deals. The CMA considers that this pricing

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<sup>718</sup> URN 0672.

<sup>719</sup> The CMA notes that according to the 2010 term deal list (see, for example, URN 4992), RH Irving Construction Limited was a term deal customer of both SB and FPM.

<sup>720</sup> URN 2839.

<sup>721</sup> FPM has stated that FPM data shows that the term deal prices for this customer remained the same in both 2012 and 2013 with no price change enacted, and that FPM therefore acted unilaterally: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.117 and 5.118, URN S1363. However, the CMA notes that an analysis of actual prices and the examination of the effects of an arrangement is not required for an object infringement (see Chapter 5, Section F (Object of preventing, restricting or distorting competition)).

<sup>722</sup> See Annex A.

<sup>723</sup> URN 1547 – 20121106

<sup>724</sup> URN 0142, page 76 (entry falling between entries dated 1 November 2011 and 14 November 2011 - see: URN 0142, pages 74 to 80).

strategy was discussed by SB, CPM and FPM, including at the meeting on 6 November 2012.

4.237 Consistently with this, the CMA notes that, during the November 2012 meeting, [FPM senior employee 3] referred to this pricing strategy when summarising the approach taken to agreeing price increases for shared term deals as follows:

*'All of our England term deals are going up at least five percent. All of our, all of the shared ones ... we've agreed a minimum of five across all of those and all of ours have gone out, all the sales guys I met with them last week...*

*... what we did was we sat down and went through the all the shared ones, me [SB senior employee 1] and [CPM senior employee 3] and agreed who was going on what'.<sup>725</sup>*

4.238 The pack of term deal documents found on [FPM senior employee 3] [~~3~~] is consistent with such discussions having taken place, and the implementation of this arrangement.<sup>726</sup> This pack of documents includes a term deal list with ticks by certain shared term deal customers, along with term deal documents for certain of those customers. Some of those term deal documents contain handwritten annotations which suggest that the relevant parties discussed their pricing strategies (often a percentage price increase of at least 5%), on occasion by reference to specific prices.<sup>727</sup> The CMA notes in particular that the FPM sales quotations discussed in paragraphs 4.221 to 4.235 were included in this pack of term deal documents.<sup>728</sup>

4.239 In interview, [FPM senior employee 3] confirmed that he had *'given [[SB senior employee 1] and [CPM senior employee 3]] some information on, er, where the price was going on term deals'<sup>729</sup>* and that there had been a *'general discussion about shared term deals going up 5%'.<sup>730</sup>* [FPM senior

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<sup>725</sup> Transcript of a record of the November 2012 meeting, page 125, URN 20204A.

<sup>726</sup> See URNs 0648 to 0676.

<sup>727</sup> In interview, [FPM senior employee 3] said that these annotated documents would reflect negotiations by his sales people, but he could not recall precisely why these documents had been annotated, due to the passage of time: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 193 to 200, URN S1546.

<sup>728</sup> FPM has stated that its review of these term deal documents shows no correlation in actual price increases between 2012 and 2013, and that FPM therefore acted unilaterally in respect of these customers: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.119 to 5.121, URN S1363. However, the CMA notes that an analysis of actual prices and the examination of the effects of an arrangement is not required for an object infringement (see Chapter 5, Section F (Object of preventing, restricting or distorting competition)).

<sup>729</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 203, URN S1546.

<sup>730</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 203, URN S1546.

employee 3] noted, however, that this would have been an ‘*aspirational*’ price, that there was no ‘*agreement*’ on actual prices, that he could not dictate actual prices to his sales people, and that he ‘*then went away and we did what we needed to do.*’<sup>731</sup>

### *Term deal lists*

- 4.240 In order to enable SB, CPM and FPM to comply with the term deal arrangement, a master list of each company’s term deal customers was produced, so that they were aware of the company to which each specified customer belonged.
- 4.241 FPM has stated that [FPM senior employee 3] compiled a list of customers, including term deals, in the early 2000s, when he joined Hepworth. FPM has explained that, being new to the sector, he compiled this list (from publicly available market intelligence, including information from customers), in order to understand the market and customer relationships. FPM states that the compilation of such lists is common practice and that the list was not compiled for the purposes of any arrangement between SB, CPM FPM.<sup>732</sup>
- 4.242 However, there is also evidence that a term deal list was compiled in 2008 (in the words of [SB senior employee 1], ‘*as a result of a combined discussion at a meeting*’);<sup>733</sup> and that this 2008 term deal list was updated by [FPM senior employee 3] in 2010.<sup>734</sup>

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<sup>731</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 202 to 209, URN S1546.

<sup>732</sup> FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraphs 5.84 and 5.86, URN S1363, citing the witness statement of [FPM senior employee 5], dated 26 October 2016, paragraph 33, URN 27057; witness statement of [FPM employee 1], dated 19 May 2016, paragraph 5, URN 27169; witness statement of [SB employee 1], dated 10 June 2016, paragraph 59, URN 27066; and witness statement of [FPM employee 15], dated 23 May 2016, paragraph 10, URN 27071.

<sup>733</sup> There is some discrepancy in the witness and interview evidence as regards the author of the 2008 term deal list. [SB senior employee 1] recalls that it was [FPM senior employee 3] of FPM who compiled the 2008 term deal list: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 143 (see more generally pages 521 to 531), URN 20224; and transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 247, URN 27592. However, [FPM senior employee 3] has said that he does not know where the 2008 term deal list originated, and that he was handed a copy of that list by either [FPM senior employee 1] or [FPM senior employee 2] in 2009: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 186 to 190, URN S1546. [CPM senior employee 1] recalls that [Milton Pipes senior employee] of Milton Pipes compiled this list: witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 22, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 37, URN S0455. [CPM senior employee 3] was unable to recall who put together the 2008 term deal list: witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 20, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 27 to 28, URN S0456.

<sup>734</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 186 to 188, URN S1546. Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 143, 521, 523 and 531, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 22, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 37, URN

4.243 In March 2013, [CPM senior employee 1], [CPM senior employee 3], [CPM senior employee 2], [FPM senior employee 1], [FPM senior employee 3] and [SB senior employee 1] were all found to be in possession of the 2008 and 2010 term deal lists.<sup>735</sup> These lists contained information in relation to almost 400 customers. Term deal lists denoting which customers had term deals with which company were also found in the electronic folders of [FPM employee 1] and [FPM employee 2], during the OFT's searches in March 2013.<sup>736</sup>

4.244 In interview, [SB senior employee 1] explained how the term deal lists were used to ensure compliance with the term deal arrangement:

*'sometimes at the meetings, you'd be challenged with a low price by one of the competitors and whether they'd forgotten to look or were mistaken or whatever you would go to the list and say well it's my term deal. Why are you asking me? That's my business. It's my term deal. On other occasions you would go to the meeting, to an extent with your tail between your legs a bit saying, if it was brought up against you saying ah yeah that is a term deal of mine but I've omitted to put it on the list [pause] and thirdly you'd be challenged with a low price. You'd either... you'd either look at the list or not say anything about it being an existing term deal and you'd have to own up to giving up...giving out those low prices.'*<sup>737</sup>

4.245 [CPM senior employee 3] explained that the purpose of the term deal lists was *'to alert us if a contractor who had a term deal with one of the others*

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S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 20, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 27, URN S0456.

<sup>735</sup> These documents were found on the individuals in question, or in their vehicles or offices. See URN 0462 pages 3 to 8; URN 0227; URN 0226; URN 4992; URN 0648; URN 9915; URN 0216, pages 3 to 9; URN 1293; URN 1585. [FPM senior employee 3] has said that SB and CPM would likely have received copies of these lists from the CPSA marketing committee, for the purposes of identifying customers to whom the new 'Pipe Lifter' product could be marketed: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 188 to 191, URN S1546. However, the CMA notes that it is not necessary to know the details of a competitor's term deals in order to identify customers to whom a new product can be marketed. Moreover, [FPM senior employee 3's] evidence in this respect is not corroborated by the evidence of [SB senior employee 1], [CPM senior employee 1] and [CPM senior employee 3], none of whom mention the CPSA marketing committee in this context. Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 143 and 521 to 531, URN 20224. Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 247, URN 27592. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 22, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 37 to 39, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 20, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 27 to 28, URN S0456.

<sup>736</sup> URN 9796; URN 9810. FPM has said that this does not support the implementation of the no poaching arrangement, as these lists were created on the basis of publicly available information and were used to reference customer relationships manufacturers had in the market. FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.33.4, URN S1363. The CMA is not persuaded by this argument, noting that if the information was publicly available there was no need for the parties to compile and discuss a joint list.

<sup>737</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 515 to 516, URN 20224.

*approached us for a price. In such circumstances, we agreed that we would price to stay away from the business.*<sup>738</sup>

4.246 Similarly, according to [CPM senior employee 1], term deal lists were compiled so that people knew which jobs they could provide quotations for under the terms of the arrangement, and to enable parties to deal with instances of ‘*cheating*’ on the arrangement, including for example the setting up of new term deals.<sup>739</sup>

4.247 [FPM senior employee 3] has said that, in his view, the purpose of the term deal list was two-fold: first, to identify all the term deals in the market, and thereby to provide information about the size of the market; and second, to identify the customers to which the new ‘*Pipe Lifter*’ safety system could be sold.<sup>740</sup> As regards the second purpose, the CMA notes that:

(a) it is not necessary to know the details of a competitor’s term deals in order to identify customers to whom a new product can be marketed;

(b) [FPM senior employee 3] was unable to provide a convincing explanation for the annotations contained on the term deal list contained in a pack of documents found on him [§<] (see paragraph 4.238) – for example, the CMA is not persuaded that the ticks by customer names were his ‘*share of who’s going to go and knock on the door for the Pipe Lifter discussion*’;<sup>741</sup>

(c) his evidence is not supported by that of [SB senior employee 1], [CPM senior employee 1] or [CPM senior employee 3], who did not mention the marketing of the Pipe Lifter safety system when asked about the term deal list.

4.248 [SB senior employee 1] noted that the term deal list ‘*was one of the very few documents that emanated directly out of the cartel meeting, I perceived that to be a risky document and essential to keep it secret*’.<sup>742</sup> [CPM senior employee

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<sup>738</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 22, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 28, URN S0456.

<sup>739</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 22, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 37 to 39, URN S0455.

<sup>740</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 188 to 193, URN S1546.

<sup>741</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 194, URN S1546.

<sup>742</sup> Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 246, URN 27592.



3] said that term deal lists were not shared with sales teams in CPM *'because it was a secret list obtained at a cartel meeting'*.<sup>743</sup>

#### *Customer perception of the term deal arrangement*

4.249 The CMA notes that evidence from certain customers<sup>744</sup> is consistent with there being an arrangement in place between SB, CPM and FPM in relation to term deals.

4.250 An email dated 11 February 2011 from [Keyline employee 1] at Keyline concerning an order for products for Tough Construction at the *'order to place'* stage of a tender process, sets out Keyline's concerns that the builders' merchant PDM (through FPM), had provided a quotation which was 19% lower than that of CPM (through Keyline). [Keyline employee 1] goes on to write:

*'When I spoke to [CPM senior employee 4] he advised that PDM have a term deal with FP McCann for Tough and that he would be unable to price to these levels for this customer. When I asked why he said they have a agreement with FP McCann that they won't attack each others term deals ... I asked how can we win this business together he said we cant I wont go against McCann's you can source elsewhere. I said that isn't very productive to which he interrupted me and said look I don't have all day to argue about this'*.<sup>745</sup>

4.251 [Burdens employee 1] said, in an email to [CPM senior employee 3] concerning the contractor, K Rouse, that, *'the problem I have is they don't have a term deal currently in place and at present no one is willing to give him one due this sworn oath you guys seem to have'*.<sup>746</sup> In his witness evidence, [Burdens employee 1] explains:

*'I said this because at the time it was rumoured that the guys working for the manufacturers colluded amongst themselves not to agree to any new term deals. This impression was fairly widespread, in particular amongst the sales*

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<sup>743</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 47, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 70, URN S0456.

<sup>744</sup> FPM has stated that the CMA has been selective in its use of witness evidence in relation to the term deal arrangement: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.96, URN S1363. However, the CMA is of the view that the witness evidence cited provides important context and remains useful.

<sup>745</sup> URN 1312. In his witness evidence, [Keyline employee 1] states that he cannot remember this incident but that, *'it would have occurred as I don't write things that have not happened'*. See witness statement of [Keyline employee 1], dated 25 May 2016, paragraphs 36 to 49, URN 27611.

<sup>746</sup> URN 9704.

*team in our depot and we would make banter about it ourselves and with the sales reps, who would just laugh it off ...*

*The impact of this behaviour by the manufacturers was not immediately felt by us as a merchant, but more by the contractor who would not be able to bid competitively for work and therefore might lose out on securing a job ...*

*If the manufacturers were colluding to place work with contractors then the impact may have been that certain contractors did not always secure the work, which meant we would also lose out on a sale if they were our customer.*

*In reality when manufacturers increased prices, it had very little effect on us, as our margin tracks the price increases. The price increase is passed onto the contractor, who might then pass it onto the end customer if they can.<sup>747</sup>*

4.252 [K Rouse employee 1] at K Rouse has said that:

*'When I first started with K Rouse in 2008, I recall having meetings with representatives from CPM, FP McCann and Stanton Bonna in an attempt to secure a Term Deal, but I was unsuccessful. I was told by each manufacturer that they were no longer issuing Term Deals. In addition I have also tried to negotiate a Term Deal at regular intervals since those first meetings, again without success.*

*I thought that it was strange that no manufacturers were willing to give us a Term Deal because soon after I started at K Rouse we won a considerable amount of highways work, including the M1 widening project, junctions 26-27 in Derbyshire in 2008 where we would be buying a lot of drainage products. I had thought that they would be fighting over us, but in the end I had to purchase the products on the Spot Market'.<sup>748</sup>*

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<sup>747</sup> Witness statement of [Burdens employee 1], dated 14 November 2016, paragraphs 48, 49, 51 and 57 to 58, URN 27103. FPM has noted that [Burdens employee 1] was [§<]; and that his statements are not consistent with other witness statements from Burdens (for example, draft witness statement of [Burdens employee 2], paragraphs 17 and 19, URN 27401). FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.96.2, URN S1363. However, the CMA is of the view that the witness evidence cited provides important context and remains useful.

<sup>748</sup> Witness statement of [K Rouse employee 1], dated 17 January 2017, paragraphs 16 and 17 (and also 20), URN 27024. FPM has noted that [K Rouse employee 1] was [§<]. FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.96.3, URN S1363. FPM also notes that [K Rouse employee 1] goes on to describe how FPM and CPM competed even in the absence of a formal term deal being agreed, offering an 'unofficial deal' which consisted of a list of handwritten prices on a piece of paper. FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.96.3, URN S1363, citing witness statement of [K Rouse employee 1], dated 17 January 2017, paragraph 19, URN 27024. However, the CMA notes that [K Rouse employee 1] stated that these prices were 'not particularly competitive and I recall falling out with [FPM employee 2] when I attempted to look elsewhere for better prices.'

4.253 [Tamdown employee 1] at Tamdown Group Limited has said that:

*'When I have disputed term deal prices with Stanton Bonna I have on occasions looked for prices from other suppliers normally via other merchants and on one occasion tried to get a price from CPM, only to be told that they were not entering into new term deal arrangements and this would have meant that I would have to purchase goods using the Spot Market, which ... is not suitable to the company.'*<sup>749</sup>

### **Stock deals**

4.254 SB, CPM and FPM also put in place a stock deal arrangement, which (in the words of [SB senior employee 1]) was similar to, but '*somewhat looser*' and '*less formalised*' than, the term deal arrangement.<sup>750</sup>

4.255 There is evidence that under the stock deal arrangement SB, CPM and FPM:

- (a) agreed that they should not poach each other's stockists.<sup>751</sup> Where a company knew that a merchant was stocked by another manufacturer, that company would '*keep away*' by pricing high, or providing a reason for not being able to supply;<sup>752</sup> and
- (b) discussed and agreed stock deal price increases for shared stockists.<sup>753</sup> The '*uplift*' for shared stockists would sometimes be discussed in separate meetings between [SB senior employee 1], [CPM senior employee 3] and [FPM senior employee 3], as the [S<].<sup>754</sup> In relation to prices increases for

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<sup>749</sup> Witness statement of [Tamdown employee 1], dated 11 May 2016, paragraph 18, URN 27043. FPM has noted its recollection that Tamdown never asked FPM to submit rates for a term deal. FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.96.5, URN S1363.

<sup>750</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 609 and 610 (see more generally pages 609 to 612), URN 20224.

<sup>751</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 609 (see more generally pages 609 to 612), 669 and 718, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 25, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 48, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 26 to 29, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 36, 39, 40, URN S0456.

<sup>752</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 719, URN 20224.

<sup>753</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 669 and 718, URN 20224. Increases to these prices were influenced by the existing merchant stockist rate: see transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 177, URN 27598. See also: witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 26 to 28, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 37 and 38, URN S0456; witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 25, URN S1111; and transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 49, URN S0455.

<sup>754</sup> Transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, pages 170 to 171, URN 27598.

certain shared stockists which were discussed at the January 2013 meeting,<sup>755</sup> [SB senior employee 1] explained that:

*'[CPM senior employee 3], myself and [FPM senior employee 3]... Just the three of us agreed a increase. I say just the three of us agreed the increase. It would have been discussed at one of these more attended meetings an aspirational percentage increase that we were going to go for.'*<sup>756</sup> ...

*We would definitely have had a meeting to discuss ... individual merchant stock uplifts where we shared... We would definitely have had a meeting. I can't remember when that meeting was and I don't know where it was, but we would have had that meeting because we had it annually. You had to, to sit down and discuss shared deals.'*<sup>757</sup>

4.256 [CPM senior employee 1] has explained that:

*'CPM, McCann and Stanton Bonna would not take each other's depots that they supplied stock into. The reason for this was that it would affect the volume of work that each company could pick up ... there were also shared depots whom two of the companies would supply with stock, and we would discuss and agree price increases to these customers. Again, this was to avoid them playing us off against each other in negotiations'*.<sup>758</sup>

4.257 [CPM senior employee 3] has explained the principles of the stock deal arrangement as follows, noting, however, that it was difficult to maintain:

*'We also had a similar understanding with FPM and SB not to poach each others' stockist deals and to agree price increases for shared stockists. Stockist deals tended to be negotiated annually so we first discussed and agreed with FPM and SB the percentage price increases to apply. The merchants tried to play us off against each other and were always quick to tell you what the competition was doing in terms of prices but if we all stuck to our guns and did what we had agreed to do then we would know if the merchants were pulling a fast one...*

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<sup>755</sup> Transcript of a record of the January 2013 meeting, pages 179 to 186, URN 20205A.

<sup>756</sup> Transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, pages 176 to 177, URN 27598.

<sup>757</sup> Transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 178, URN 27598.

<sup>758</sup> Witness statement of [CPM senior employee 1] dated 10 December 2018, paragraph 25, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 46 to 51, URN S0455.

*... national stockists might wish to change their existing supplier if they were not satisfied with the quality of the products supplied to them but if we did not have term deals in a region which the national stockist wished to supply then we were unlikely to wish to supply them. Moreover, national stockists argued that they had a national price so if CPM could not meet that price then they could switch to stocking another manufacturer. For these reasons, the no-poaching agreement was more difficult to maintain with national stockists'.<sup>759</sup>*

4.258 The CMA also notes [FPM senior employee 3's] observations that: prices for stockists were discussed '*[b]ecause there's a meeting, there's a relationship. It -- it's drifted into discussions about the stockists, the merchants',<sup>760</sup> and '[a]spirations of price, the stockists generally ... they were -- that was part of the discussion.'*<sup>761</sup>

4.259 As well as enabling SB, CPM and FPM to increase/maximise rates to stockists, the stock deal arrangement was an important part of the third aspect of the arrangement, under which SB, CPM and FPM sought to maintain specified market shares (see paragraph 4.284). Similar to the term deal arrangement, the stock deal arrangement sought to ensure that the distribution of stock deals amongst SB, CPM and FPM remained the same.

4.260 FPM has made representations that the CMA has not given sufficient consideration to the evidence of how stock deals functioned in the market, noting that the price negotiated on a stock deal was a national price for the merchant rather than a price for specific merchant outlets, and that stock deals did move between manufacturers during the Relevant Period.<sup>762</sup>

4.261 However, the CMA does not consider that FPM's representations in this regard undermine the evidence cited in paragraphs 4.254 to 4.273 and 4.284 to 4.294 as regards the contact and arrangement between SB, CPM and FPM.

### *Specific examples*

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<sup>759</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 26 to 28, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 36 to 41, URN S0456.

<sup>760</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 226, URN S1546. Having acknowledged this, [FPM senior employee 3] sets out his view that such discussions were of no effect because '*where the stockists choose to put their stock is very much down to them as well.*' Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 226, URN S1546.

<sup>761</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 234, URN S1546.

<sup>762</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.79 to 5.82, URN S1363, citing the witness statement of [MPS employee], dated 5 December 2016, paragraphs 22, 30, 31, 33 and 36, URN 27102. See also: transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 8, URN S0455.

- 4.262 The CMA has set out below a number of examples of contact between SB, CPM and FPM as regards the stock deal arrangement.
- 4.263 Entries in [FPM senior employee 2's] notebook on and around 15 November 2006 contain pricing information in relation to a number of customers, including a pricing strategy for the shared stockists Keyline and Travis Perkins:

*'No to weekly payment*

*Stanton/CPM*

*5/6% increase*

*1 April*

...

*Keyline/T.P Why End of April*

↓ *3 month notice for price increase*

*Stanton/CPM 5-6% increase 1 April*

...↓

*Both said no to weekly payment'*

*current rates @47 until spot market move Forward.*<sup>763</sup>

- 4.264 Given the content of these entries and the dates around which they were made, the CMA is of the view that SB, CPM and FPM discussed this pricing information, most probably at a meeting held on 15 November 2006.<sup>764</sup>
- 4.265 An entry in [FPM senior employee 2's] diary dated 4 August 2008 states, in relation to the shared stockist Burrells: *'Burrells Stanton 10% 1<sup>st</sup> September /1<sup>st</sup> October 55.80 CPM to go next.*<sup>765</sup> Given the content of this entry and the date on which it was made, the CMA is of the view that SB, CPM and FPM

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<sup>763</sup> URN 1892, pages 10 and 11.

<sup>764</sup> See Annex A. FPM has made representations that these notebook extracts are not supported by any other corroborating evidence; that its recollection is that FPM made a unilateral decision to implement weekly payments with the customer to mitigate its credit risk; that the customer appears to have fed the information back to SB and CPM; and that FPM acted unilaterally in relation to the customer: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.122 to 5.125, URN S1363. Nevertheless, having regard to the totality of the evidence as regards the way in which the arrangement operated, and noting the evidence of a meeting on 15 November 2006, the CMA is of the view that SB, CPM and FPM most likely discussed this pricing information.

<sup>765</sup> URN 1882 - 20080804.

discussed this pricing strategy, most probably at a meeting on 5 August 2008.<sup>766</sup>

4.266 An entry in [FPM senior employee 2's] diary on 21 February 2009<sup>767</sup> records a number of pricing strategies, and the CMA is of the view that these were discussed by SB, CPM and FPM. In particular, this entry sets out the joint approach of SB, CPM and FPM in relation to the shared stockist Grafton Construction:

*'Grafton BuildBase*

*St. 55.37 with 5% from 1 Feb Fuck off*

*(1<sup>st</sup> April Buildbase)*

...

*CPM 57.65 Net 1<sup>st</sup> March (max 3% rebate)*

*agreed 19 Feb*

...

*FP 54.85 – going to 58 1<sup>st</sup> June.'*

4.267 An entry in [FPM senior employee 1's] notebook on or around 6 December 2011<sup>768</sup> includes pricing information in relation to certain products<sup>769</sup> for Burdens/North, Burdens/Wales and West, and Grafton, with the comment '*all increases by 1 March 2012*'. The figures in this entry are consistent with:

- (a) figures contained in an entry in [FPM senior employee 2's] diary on 6 December 2011, which similarly comments '*All by 1<sup>st</sup> March*';<sup>770</sup> and
- (b) figures in [CPM senior employee 3's] spreadsheet headed '*Depot Stock Rates*,' which also contains the handwritten query '*All in place by 1<sup>st</sup> March 2012?*'.<sup>771</sup>

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<sup>766</sup> See Annex A.

<sup>767</sup> URN 1881 - 20090221.

<sup>768</sup> URN 1570, pages 37 and 38

<sup>769</sup> Specifically, 1200 mm chamber, 1200 mm cover, D/steps and No steps.

<sup>770</sup> URN 1877 – 20111206.

<sup>771</sup> URN 4989.

- 4.268 The CMA is of the view that these rates were discussed by CPM and FPM, most probably at a meeting held on 6 December 2011.<sup>772</sup>
- 4.269 Harmonising and increasing depot prices for stockists was also discussed on numerous occasions during the August 2012 meeting. For example:
- (a) [FPM senior employee 2] asked whether they should *'take the opportunity to get the market price up?'* and [FPM senior employee 3] responded that, *'[s]ixty quid is the minimum we said we would, we would go to.'*<sup>773</sup> In interview, [SB senior employee 1] recalled that there was, *'an aspiration to get a minimum level of 60 quid stock'* and that, *'[t]here's always a common theme to get prices up, always a common theme to try and set a minimum target for that';*<sup>774</sup>
  - (b) [FPM senior employee 1] said that, *'we've got to set out our strategy, of where we're going for next year; we've got to set it out now. And get it early on.'*<sup>775</sup> He suggested that they should look for about a 5% increase, to which [SB senior employee 1] and [CPM senior employee 3] agreed stating *'I think you're right'* and *'You can't be overly greedy can you'*, respectively.<sup>776</sup> [SB senior employee 1] explained in interview that this discussion was about *'[g]etting an agreed price going forward. [FPM senior employee 1] was always, you know, wanting to drive price forward to [g]et our act together and ... stick to it.'*<sup>777</sup> He explained his understanding that, at the August 2012 meeting, [FPM senior employee 1] was suggesting that they should target a 5% price increase, but checking whether anybody else thought they could get more;<sup>778</sup>
  - (c) [FPM senior employee 1] said, *'But you like know with this idea of manholes, like gees. The price for a manhole where as to TP, Keyline,*

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<sup>772</sup> See Annex A. FPM has made representations that it is not clear what all of the figures in the notebook and diary entries refer to, and that there is limited significance in the *'1 March'* date as it is common practice in the industry for stock prices to customers to change in the first three months of the calendar year (so this date does not appear to be commercially sensitive): FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.126 to 5.127, URN S1363. The CMA is not persuaded by FPM's arguments in this respect, in particular, given the similarities between the figures in the various entries. See also: Chapter 5, Section E (Agreements between undertakings and concerted practices) and Section F (Object of preventing, restricting or distorting competition)).

<sup>773</sup> Transcript of a record of the August 2012 meeting, page 85, URN20203A.

<sup>774</sup> Transcript of interviews with [SB senior employee 1] held on 3 to 4 October 2016, page 144, URN 27597. SB, CPM and FPM used 1200 mm manholes as a benchmark product for the purposes of discussions about the way in which prices for manholes should move going forward: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 667, URN 20224.

<sup>775</sup> Transcript of a record of the August 2012 meeting page 100, URN 20203A.

<sup>776</sup> Transcript of a record of the August 2012 meeting page 100, URN 20203A.

<sup>777</sup> Transcript of interviews with [SB senior employee 1] held on 3 to 4 October 2016, pages 184 to 185, URN 27597.

<sup>778</sup> Transcript of interviews with [SB senior employee 1] held on 3 to 4 October 2016, page 190, URN 27597.



*Fraser, Rudridge or... There shouldn't be any more than a pound of it.*<sup>779</sup>

The participants went on to discuss the timing of the increase in manhole stock rates;<sup>780</sup>

(d) [FPM senior employee 1] said, *'let's look forward to next year, we want to harmonise ... the manhole rates for next year so ... that we are all going to be sitting around the same price.'*<sup>781</sup> He further said, *'You know what I'm trying to do is work back where we can all end up at the same price.'*<sup>782</sup>

4.270 There is evidence that a meeting of SB, CPM and FPM was held on 8 October 2012.<sup>783</sup> Notes made by [FPM senior employee 3]<sup>784</sup> and [CPM senior employee 3]<sup>785</sup> record current stock rates and pricing intentions as regards Burdens, Grafton, Keyline, St Gobain, Burrells, Rudridge, JDP, EH Smith and MPS. As the order and content of these notes match to a large extent, the CMA is of the view that these prices were discussed and agreed, most probably at the meeting on 8 October 2012.

4.271 There is evidence that a meeting of SB, CPM and FPM was held on 6 November 2012.<sup>786</sup> Entries dated on or made around this time in the diary of [FPM senior employee 2]<sup>787</sup> and the notebooks of [FPM senior employee 1],<sup>788</sup> and [FPM senior employee 3]<sup>789</sup> make reference to 5% price increases for stockists and/or a minimum stock price of £61.50. The CMA considers that this information was discussed by SB, CPM and FPM at the meeting on 6 November 2012.

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<sup>779</sup> Transcript of a record of the August 2012 meeting, page 103, URN 20203A. In interview, [SB senior employee 1] explained that in his view, *'the point he's making is there shouldn't be any more than the pound difference between the stock rates into those four builders' merchants'*: see transcript of interviews with [SB senior employee 1] held on 3 to 4 October 2016, page 199, URN 27597.

<sup>780</sup> Transcript of a record of the August 2012 meeting, pages 103 to 107, URN 20203A.

<sup>781</sup> Transcript of a record of the August 2012 meeting, page 259, URN 20203A.

<sup>782</sup> Transcript of a record of the August 2012 meeting, page 262, URN 20203A. [SB senior employee 1] confirmed in interview that [FPM senior employee 1] was seeking to harmonise 1200 manhole rates (which were used as a benchmark for how prices were moving) at around the aspirational £60 minimum target for stock prices for merchants: Transcript of interviews with [SB senior employee 1] held on 3 to 4 October 2016, pages 440 to 443, and 667 URN 27597.

<sup>783</sup> See Annex A.

<sup>784</sup> URN 0142, page 60. This notebook entry is undated, but appears between an entry on URN 0142, page 56 dated 2 October 2012 and an entry on URN 0142, page 62 dated 17 October 2012 – see URN 0142, pages 56 to 62.

<sup>785</sup> URN 4821.

<sup>786</sup> See Annex A.

<sup>787</sup> URN 1547 – 20121106.

<sup>788</sup> URN 0194, page 19 (notebook entry dated 6 November 2012).

<sup>789</sup> URN 0142, page 76. This notebook entry is undated, but falls between an entry on URN 0142, page 74 dated '1/11' and an entry on URN 0142, page 80 dated '14/11' - see URN 0142, pages 74 to 80.

4.272 Consistently with this, the CMA also notes that at the November 2012 meeting, [FPM senior employee 1] asked, '*[w]here do you see then the depot stock should be at?*', to which [FPM senior employee 3] replied, '*we've agreed a minimum depot stock price of sixty one fifty, to sixty two pound [FPM senior employee 1], absolute minimum ... so your Scott Parnell's your MPS's they're all going to go to sixty one fifty, sixty two minimum, that's net net after rebate*'.<sup>790</sup>

4.273 During the March 2013 meeting, [CPM senior employee 3] said, '*all our rates on Grafton should be similar*'.<sup>791</sup> In interview, [SB senior employee 1] explained that Grafton was a shared stockist between SB, CPM and FPM, and therefore, under the arrangement, the parties' rates to that customer should be similar, in order '*to avoid branches that you already stock at moving to somebody else ... or vice a versa*'.<sup>792</sup>

## H. Maintaining market shares

4.274 The third aspect of the arrangement between SB, CPM and FPM concerned an agreement to maintain specified market shares throughout the Relevant Period.<sup>793</sup>

4.275 From 2010, following a series of acquisitions by CPM and FPM, the agreed figures for market shares in Great Britain settled (with some minor variations)

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<sup>790</sup> Transcript of a record of the November 2012 meeting, page 130, URN 20204A. [FPM senior employee 3] said in interview that these were '*aspirational*' prices, and were unlikely to be the actual prices charged: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 223, URN S1546. He also noted that although '*aspirational*' prices were discussed by SB, CPM and FPM, this information would also be disclosed by the merchants, who '*would actually tell you. They would say, "Look, if you guys come at £61.50. I'll agree the same with Stanton Bonna. Got parity, then our depots have the choice who they want to buy for" ... the merchants would lead you down that -- that route of, almost being an equal price*': transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 224 to 225, URN S1546.

<sup>791</sup> Transcript of a record of the March 2013 meeting, page 54, URN 20206A.

<sup>792</sup> Transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 561, URN 27598.

<sup>793</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 369 to 376, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 28 to 32, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 55 to 63, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraphs 17 and 31 to 34, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2019, page 23, URN S0456.

at around: 39% for CPM;<sup>794</sup> 40% for FPM;<sup>795</sup> and 21% for SB.<sup>796</sup> It is these (settled and most recent) figures that are discussed in detail during the recorded meetings, and which tend to be reflected the documentary evidence (which is more extensive during this later part of the Relevant Period), as well as in the witness evidence.

4.276 There were two key elements to this aspect of the arrangement: the division of the market through the allocation of customers; and the ongoing monitoring of market shares by way of the regular and systematic exchange of tonnage and market share figures.

### **Customer allocation**

4.277 The agreed split in market shares was achieved by the allocation of customers amongst SB, CPM and FPM through the agreement in relation to term deals discussed in paragraphs 4.154 to 4.253 in conjunction with a '*balancing mechanism*' in the spot market. That is: if the market share figures in practice showed a disparity with the agreed market shares, the position would be '*re-balanced*' by the under-represented company offering more competitive prices on the spot market.<sup>797</sup>

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<sup>794</sup> From April 2010, the agreed market share figure for CPM included a share of around 6% to 8% for Milton Pipes, which the shareholders of CPM acquired in April 2010. Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 373, 461 to 462 and 469, URN 20224. CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), questions 1 and 8, URN S0110.

<sup>795</sup> FPM has made representations that its market share during the Relevant Period fluctuated reflecting competition in the market. It has provided detail as regards market shares during the period 2005 to 2010, during which time a number of additional companies were competing in the market (for example, as at November 2005: Hepworth (with an estimated market share of 22%), Shap (with an estimated market share of 4%), Hughes (with an estimated market share of 6%), Milton Pipes (with an estimated market share of 6%), Ennstone (with an estimated market share of 22%), SB (with an estimated market share of 20%), CPM with an estimated market share of 16%), and a '*tail of other companies in the market*'): FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.136, URN S1363. FPM's market share analysis (based on its own CPSA returns), shows that FPM had a market share fluctuating around 40% from 2010.

<sup>796</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 369 to 376, 461 to 469, URN 20224. In interview, [SB senior employee 1] explained that, '*there was a tacit agreement that if [a Party] bought somebody they kept their market share*': transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 213, URN 27592. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraphs 28 and 29, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 57 to 63, URN S0455. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 33, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 43 to 45, URN S0456. See also: SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Schedule 2 (paragraph 141), URN S0107; CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), questions 1 and 8, URN S0110; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 7.3 and Annex 10(a), URN S0106.

<sup>797</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 370 to 371, URN 20224. Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 33, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 46, URN S0456.

4.278 In the words of [SB senior employee 1]:

*'Fixed price agreements were held by various companies and they obviously held onto those. If a company's fixed price agreement / term deal was not busy as opposed to other people's being busy, that would naturally mean that [your] market share may dip, so the balancing mechanism to hopefully correct that would be a source in the spot market business ... A greater share in the spot market business ... That pool would be available to balance off that disparity from a target, an aspiration of a status quo market share to what you were actually achieving.'*<sup>798</sup>

4.279 [SB senior employee 1] further explained that spot market 're-balancing' involved:

*'a comment at a meeting, a monthly meeting, for a period unknown in the future. We are light or yes, you are light at work in terms of your share. Why don't you be more competitive in terms of where the minimum level is to take a higher proportion of the spot market work? Or more likely there would be a bold statement by one of the companies saying, "Look, I'm way behind where I should be. I am going to be very competitive and take my share to correct this of spot market work.'*<sup>799</sup>

4.280 When asked what he meant by being 'more competitive in terms of where the minimum level is', [SB senior employee 1] explained:

*'A lot of jobs you would secure would be very rarely taken at minimums. They would also be below minimums, usually below minimums. So more competitive would be perhaps 10 or even 15 per cent off minimums.'*<sup>800</sup>

4.281 In a later interview, [SB senior employee 1] further elaborated on the way that the customer allocation arrangement operated in practice, stating that, 'if it was at a point in time where say CPM were so short of work and it really was a job I was desperately interested in, but the greater purpose was served by letting CPM much to the annoyance of my sales people I'd keep them back and let CPM take it.'<sup>801</sup> Similarly, he said that, 'when our market share was considerably, well rising a little above the 21% or going into 22's, 23's ... I would be a little more circumspect in taking spot market work.'<sup>802</sup> He also

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<sup>798</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 370 to 371, URN 20224.

<sup>799</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 371, URN 20224.

<sup>800</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 371, URN 20224.

<sup>801</sup> Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 267, URN 27592.

<sup>802</sup> Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 261, URN 27592.

noted that, *'[i]f you'd done something... some heinous crime and taken the job that you weren't supposed to you would probably give something up.'*<sup>803</sup>

4.282 [CPM senior employee 1] has explained that,

*'the spot market would play a part in balancing the market shares as CPM would just go out and drop its prices to win some business and increase market share. Similarly, if McCann dropped below 40% to say 38%, then they would be able to go out and cut prices and take a few jobs on the spot market, perhaps in their area, to increase market share. It was common knowledge that we could do this'*.<sup>804</sup>

4.283 [CPM senior employee 3] similarly explained that if CPM did not achieve its agreed market share:

*'[CPM senior employee 1] would get quite vocal saying that CPM would go out into the spot market work and take what we wanted.'*<sup>805</sup>

4.284 This customer allocation arrangement was further supported by the stock deal arrangement described in paragraphs 4.254 to 4.273. The no poaching element of the stock deal arrangement was part of what [SB senior employee 1] referred to as the *'generalised message around the ... basis of the cartel, which is one of status quo with increasing prices.'*<sup>806</sup> Similarly, he explained that the agreement to align price increases to stockists enabled SB, CPM and FPM to maintain the status quo in the market, as it would *'encourage the merchant not to switch manufacturers.'*<sup>807</sup>

### *Specific examples*

4.285 Paragraphs 4.154 to 4.273 set out evidence that SB, CPM and FPM sought to ensure that the distribution of term deal and stock deal customers within the market remained the same. The CMA has set out below a number of further

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<sup>803</sup> Transcript of interviews with [SB senior employee 1] held on 10 to 11 May 2016, page 361, URN 27592. The CMA notes that [SB senior employee 1] discussed the maintenance of market shares with his sales people (although not in great detail): Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 378 to 379, URN 20224. See also: witness statement of [SB senior employee 2] dated 18 July 2016, paragraphs 61 to 62, URN 27124.

<sup>804</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 32, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 62, URN S0455.

<sup>805</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 33, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 45, URN S0456.

<sup>806</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 611, URN 20224.

<sup>807</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 718, URN 20224.

examples of contact between SB, CPM and FPM as regards customer allocation.

4.286 An entry in [FPM senior employee 2's] diary on 20 May 2009 states:

'A1-M1 Dishforth CPM ] | Gatwick Airport  
Kier Power St Stanton ] old Jo  
A46 - FP ]'<sup>808</sup>

4.287 The CMA is of the view that this entry reflects an agreement to allocate jobs for the A1/M1, Kier Power Station, and the A46 amongst CPM, SB and FPM respectively; and that the allocation of those jobs was discussed during a meeting of SB, CPM and FPM held on 20 May 2009.<sup>809</sup>

4.288 In interview, [SB senior employee 1] confirmed that *'there was a basic agreement to say that I would let them take the A46 as long as they let me take this power station job to do with Kier.'*<sup>810</sup> Indeed, he referred to this job allocation during the January 2013 meeting, stating that he was *'forced into doing'* the Kier power station job, whilst FPM *'had the A46'*.<sup>811</sup> When asked about this during interview, he explained that, *'it was a discussion I had with [FPM senior employee 3], saying, "Look, I'd like to take the Kier job." And [FPM senior employee 3] quickly said, "All right, you can do the Kier job as long as we do the A46.'*"<sup>812</sup> [SB senior employee 1] explained that in bidding for the A46 job, he put in prices that he, *'knew would not win it.'*<sup>813</sup>

4.289 An entry in [FPM senior employee 2's] diary dated 23 June 2009 contains a list of 17 jobs, with the names of either SB, FPM or CPM noted against certain of them.<sup>814</sup> The CMA is of the view that this is a record of the allocation of

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<sup>808</sup> URN 1881 - 20090520.

<sup>809</sup> See Annex A. FPM has made representations that this diary note, which was made 10 years ago, is likely to refer to jobs already won by market sector participants under their term deal arrangements with certain customers. As a result, FPM does not consider this to be evidence of any form of *'market share agreement'*: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.148 to 5.150, URN S1363. However, the CMA is not persuaded by this representation, given the evidence set out in the following paragraph, including statements made during the January 2013 meeting.

<sup>810</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 631, URN 20224.

<sup>811</sup> Transcript of a record of the January 2013 meeting, page 234, URN 20205A.

<sup>812</sup> Transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 307, URN 27598.

<sup>813</sup> Transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, page 308, URN 27598.

<sup>814</sup> URN 1881 - 20090623.

these jobs, which was most probably discussed at a meeting held on that date.<sup>815</sup>

4.290 During the November 2012 meeting, [CPM senior employee 4] reflected the agreement not to poach each other's stockists when he expressed his dissatisfaction that FPM were, on more than one occasion, providing low quotations for the customer Keyline, stating: *'And that is embarrassing because they're our stockist ... And you know, that's just not right, so you've got to stop that, that's got to stop.'*<sup>816</sup> [FPM senior employee 3] responds: *'I'll speak to [FPM senior employee 5]<sup>817</sup> on that, I'll speak to him.'*<sup>818</sup>

4.291 The CMA notes that less than two hours after the November 2012 meeting, [CPM senior employee 4] wrote to [CPM employee 3], stating:

*[CPM employee 3], following meetings I have agreed a few things on price increases ... McCann are pricing min to all their stockists going forward and we will do same. I raised the point of them quoting keyline and have asked them to quote above min. We can monitor progress as we go.'*<sup>819</sup>

4.292 Market shares were also discussed during the November 2012 meeting, with [FPM senior employee 1] confirming that he was *'quite happy'* with FPM's market share, but querying *'if an order comes in and you're both priced at the same price, how do you, how, who gets it?'*<sup>820</sup> [CPM senior employee 4] then

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<sup>815</sup> See Annex A. FPM has made representations that the CMA's conclusion in this respect is based solely reading of a diary extract without any corroborating evidence; that a number of entries contain a '?' next to them suggesting that there is no certainty to the winner of these jobs in any event; and that this diary entry (from over 10 years ago) most likely refers to market intelligence from FPM's own sales teams (following customer feedback) and does not contain competitively sensitive information. As a result, FPM does not consider this to be evidence of any form of *'market share agreement'*: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.151 to 5.155, URN S1363. However, the CMA is not persuaded by this representation, in particular noting that the diary entry is consistent with other documentary and witness evidence in relation to the operation of the arrangement between SB, CPM and FPM.

<sup>816</sup> Transcript of a record of the November 2012 meeting, pages 92 to 93, URN 20204A.

<sup>817</sup> The CMA is of the view that this is a reference to [redacted] [FPM senior employee 5]. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 43, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 99, URN S0455.

<sup>818</sup> Transcript of a record of the November 2012 meeting, page 93, URN 20204A. [FPM senior employee 3] has said that he did not, in fact, speak to his sales person, [FPM senior employee 5], about this issue, noting that, in general, [FPM senior employee 5] acted very autonomously: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 231 to 232, URN S1546. FPM has made representations that [FPM senior employee 3] did not act upon this statement, and if he did, FPM quoted to Keyline in any event. FPM has also stated that this is an example of FPM *'posturing'* during meetings, while acting unilaterally on the market and continuing to win orders. As a result, FPM does not consider that this is evidence of any form of *'market share agreement'*: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.156 to 5.159, URN S1363. The CMA has considered these representations as part of its consideration of the arrangement in its legal and economic context, and notes in particular that the examination of the effects of an arrangement is not required for an object infringement (see Chapter 5, Section F (Object of preventing, restricting or distorting competition)).

<sup>819</sup> URN 15809.

<sup>820</sup> Transcript of a record of the November 2012 meeting, page 104, URN 20204A.

summarised the link between a coordinated approach on term deals and prices, and the maintenance of market shares: *'just set the term deals up, set the the the market rates up and the merchants rates up ... and the likelihood is you're going to get the same market share. The likelihood.'*<sup>821</sup>

4.293 During the January 2013 meeting:

- (a) [CPM senior employee 1] said that *'if we don't get our market share we will discuss it at these meetings, but we reserve the right to go out and top it up, and you guys have exactly the same. If our term deals pick up a lot of work and we're over the thirty nine percent, then we'll back off spot markets'*;<sup>822</sup>
- (b) there was a discussion concerning rates (and rebates) to builders' merchants and stock prices for shared builders' merchants (specifically Wolesely and Burdens).<sup>823</sup> In interview, [SB senior employee 1] explained that the discussion related to the arrangement under which SB, CPM and FPM would price to shared stockists so as *'to encourage them not to swap branches'* (as well as *'to get the prices up, to increase the prices'*).<sup>824</sup>

4.294 During the March 2013 meeting:

- (a) [CPM senior employee 1] said that he would be criticised at the next CPM Board meeting because of a dip in CPM's market share, to which [FPM senior employee 1] responded: *'but surely [CPM senior employee 3] we can identify two or three jobs to redress that situation'*;<sup>825</sup>

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<sup>821</sup> Transcript of a record of the November 2012 meeting, page 104, URN 20204A.

<sup>822</sup> Transcript of a record of the January 2013 meeting, page 130 to 131, URN 20205A.

<sup>823</sup> Transcript of a record of the January 2013 meeting, pages 186 to 190, URN 20205A.

<sup>824</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 769, URN 20224. FPM has made representations that [SB senior employee 1's] explanation does not properly reflect the way in which the market operates. FPM has stated that it sells stock deals to merchants, who then sell this stock on to end customers. A merchant will decide which branch receives the stock under a nationwide stock deal: beyond the pricing negotiation (which is a national price for the merchant rather than a price negotiated with specific merchant outlets), the manufacturer has little influence on the allocation of the bought stock. FPM has therefore queried how the parties could enable a manufacturer to *'enable 'swapping of branches' in order to increase prices'*: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.79 and 5.160 to 5.162, URN S1363. The CMA acknowledges this representation, but notes [SB senior employee 1's] explanation that this information was shared, *'to ensure that we encourage builders' merchants where we stock a specific Burdens branch or Wolsley branch whilst putting up the rates to encourage them not to, so that our rates are equitable to encourage them not to swap branches'*. The CMA further notes that the examination of the effects of an arrangement is not required for an object infringement (see Chapter 5, Section F (Object of preventing, restricting or distorting competition)).

<sup>825</sup> Transcript of a record of the March 2013 meeting, pages 40 to 41, URN 20206A.



- (b) [CPM senior employee 1] said that: *'I'm quite happy if we agree jobs, because you know, it is pointless cutting the bloody price, we should be sticking out, as we've always said, get a better price'*.<sup>826</sup> When [SB senior employee 1] highlighted his concerns about the legality of naming jobs,<sup>827</sup> [CPM senior employee 1] said, *'We'll flag up the jobs ... just verbally'*,<sup>828</sup> to which [SB senior employee 1] replied, *'I don't mind you flagging up one or two ... just verbally I don't mind, I don't mind that'*.<sup>829</sup> [FPM senior employee 1] said that, *'[inaudible] can identify the jobs certainly do our best to, to, to address the situation. You know it doesn't benefit any of us, we're all [inaudible] prices, we're all minus five off or whatever, it's about keeping our price'*,<sup>830</sup>
- (c) during a discussion about *'levelling up'* market shares, identifying certain schemes and quoting merchants, [FPM senior employee 3] said, *'I've got my sales guys in tomorrow, We'll talk to them again'*.<sup>831</sup>

### **Exchange of market share information**

4.295 Market shares were monitored by SB, CPM and FPM throughout the Relevant Period through the regular and systematic exchange of tonnage and market share figures.

4.296 According to [SB senior employee 1], individuals would bring their previous month's sales figures (total tonnage for manholes and slabs, pipes and fittings<sup>832</sup>) to the regular meetings held by SB, CPM and FPM.<sup>833</sup> Those figures, divided by the totals, provided a rough calculation of the parties'

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<sup>826</sup> Transcript of a record of the March 2013 meeting, page 41, URN 20206A.

<sup>827</sup> Transcript of a record of the March 2013 meeting, page 42 (*'I am just so paranoid about you know being told, following, you've got to understand my position. Well no you haven't. I'll tell you my position; our group has been caught; they say they're not going to get caught with their hands in the till in Germany with sleeper price fixing, which could go group-wide and we've been absolutely roasted "you will not discuss with your competition" so I am paranoid about naming jobs...What we're doing at the moment, is we're just protecting our own customers and spot market...'*) and page 43 (*'you know, it's, it's anybody's business. We're not naming work. And you know, if we were to get caught, naming jobs is the worst thing you can do'*), URN 20206A.

<sup>828</sup> Transcript of a record of the March 2013 meeting, page 43, URN 20206A.

<sup>829</sup> Transcript of a record of the March 2013 meeting, page 43, URN 20206A.

<sup>830</sup> Transcript of a record of the March 2013 meeting, page 45, URN 20206A. The CMA notes that, in interview, [FPM senior employee 1] said that, although he could not recall this conversation, he was *'sure he promised him something that's ours'* albeit that he was *'misleading'* CPM: transcript of an interview with [FPM senior employee 1] held on 10 May 2019, page 148, URN S1387.

<sup>831</sup> Transcript of a record of the March 2013 meeting, pages 48 to 50, URN 20206A.

<sup>832</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 385, URN 20224.

<sup>833</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 381, URN 20224.

respective market shares.<sup>834</sup> If no meeting took place, monthly figures would be shared by telephone.<sup>835</sup>

4.297 Although SB, CPM and FPM tended to exchange tonnage and market share information in relation to the products which were the subject of CPSA reports, [SB senior employee 1] noted that the information circulated by the CPSA was not '*sufficient*' for the parties' purposes, as the CPSA figures were given only as an amalgamation, with no breakdown by company (see also paragraphs 2.56 to 2.57); this meant that, '*you would be able to discern your market share of the total market, but not have any idea of anybody else's market share.*'<sup>836</sup>

4.298 [SB senior employee 1] also noted that the CPSA figures were provided in arrears, so there was a time delay in receiving that information (see also paragraph 2.57).<sup>837</sup> He explained that more detailed and timely market share information needed to be exchanged, '*[b]ecause you wanted to know as a company where you stood against your competitors to take whatever action you felt was necessary or to just reassure you that you weren't being... you were getting your fair share.*'<sup>838</sup>

4.299 Consistently with this,

(a) [CPM senior employee 1] has said that '*the discussions on volumes ... were important because it was real-time information about what was happening in the market, whereas the figures from the Concrete Pipeline Systems Association ('CPSA') did not come out until three months later which was far too late*';<sup>839</sup>

(b) [CPM senior employee 3] has said that, '*[w]e wanted this [tonnage] information quicker [than the CPSA information was provided], so, monthly, at the cartel meetings we sat round the table exchanging our*

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<sup>834</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 381, URN 20224. See also: witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 31, URN S1120; transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 42, URN S0456.

<sup>835</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 381 to 382, URN 20224.

<sup>836</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 386 to 387, URN 20224.

<sup>837</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, pages 386 to 387, URN 20224.

<sup>838</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 387, URN 20224.

<sup>839</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 31, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 56 and 57, URN S0455.

*tonnage information with FPM and SB so we could see what the size of the market was but, more importantly, to see what people's share was';<sup>840</sup>*

4.300 [FPM senior employee 3] has similarly acknowledged that meetings between SB, CPM and FPM enabled FPM to obtain a breakdown of market share information that was not available from the CPSA; as well as to more easily obtain information about the overall size of the market that was available from the CPSA.<sup>841</sup>

4.301 [FPM senior employee 1] has said that although he could have got information about the size of the total market from the CPSA:

*'I might have to wait a month or two, but, sure, what's the -- like, what's the big issue? All I want to know was what's -- how are we doing against plastics; how's the market, it's improving ... I didn't realise it was against the law. Okay, [redacted] I didn't realise that talking and -- or telling lies and blabbering and talking was against the law...'<sup>842</sup>*

...

*... 'I didn't realise at the time that this was confidential, but, obviously I do now. But, you know, as far as I was concerned, I didn't think I was doing anything wrong ... I did not realise probably at that time that they should not have a discussion or banter about where we're at in the markets'.<sup>843</sup>*

4.302 [FPM senior employee 3] has said that the market share information disclosed by FPM during meetings with SB and CPM was accurate,<sup>844</sup> saying that he 'couldn't see the point of having a discussion on market size if you weren't prepared to put accurate numbers in.'<sup>845</sup>

4.303 However, [SB senior employee 1] has said that his own reporting of market shares to CPM and FPM was not always wholly accurate, and that when SB's figures looked 'scarily high' for the month he would, 'perhaps knock them down a quarter, half, three quarters of a per cent just to avoid any backlash at

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<sup>840</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 31, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 43, URN S0456.

<sup>841</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 249 and 258 (and, more generally, pages 247 to 258), URN S1546.

<sup>842</sup> Transcript of an interview with [FPM senior employee 1] held on 10 May 2019, pages 92 to 93, URN S1387.

<sup>843</sup> Transcript of an interview with [FPM senior employee 1] held on 10 May 2019, page 104, URN S1387.

<sup>844</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 80 to 81, and 247 to 248, URN S1546.

<sup>845</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 248, URN S1546.

the meetings.’<sup>846</sup> Similarly, [CPM senior employee 1] said that he, ‘*fudged [CPM’s] figures*’ on occasions when his market share figures were too high;<sup>847</sup> and [CPM senior employee 3] noted that, ‘*there was some deceitfulness at the cartel meetings as not everyone told the truth about their tonnage figures.*’<sup>848</sup>

4.304 Nevertheless, the CMA does not consider that this undermined the ability of SB, CPM and FPM to monitor the market share arrangement, noting in particular that the figures were broadly accurate, and they considered it worthwhile to exchange market share information throughout the Relevant Period.<sup>849</sup>

### *Specific examples*

4.305 The CMA has set out below a number of further examples of the exchange of market share information between SB, CPM and FPM.

4.306 An entry in [FPM senior employee 2’s] diary on 24 June 2008 records in detail the market share figures for a number of companies, including SB, CPM, and FPM (as well as three additional companies, namely, Ennstone (*EN*), Hughes, and Milton Pipes (*M*)), and in relation to a number of different products:

*‘10.00 Nova*

*J A.J.*

*92055 77193*

<i>St</i>	<i>26</i>		<i>28.5</i>	<i>18.4</i>	<i>19.3</i>	<i>18.9</i>
<i>CPM</i>	<i>18.9</i>	<i>20.4</i>		<i>28</i>	<i>30.4</i>	<i>29</i>
<i>EN</i>	<i>24.3</i>	<i>19.4</i>		<i>17.6</i>	<i>13.9</i>	<i>15.9</i>
<i>Mc</i>	<i>26.7</i>	<i>28.9</i>	<i>27.7</i>	<i>18.3</i>	<i>18.7</i>	<i>18.5</i>
<i>Hughes</i>	<i>3.7</i>	<i>4.5</i>	<i>4.1</i>	<i>8.7</i>	<i>8.9</i>	<i>8.8</i>
<i>M</i>	<i>-</i>	<i>-</i>	<i>-</i>	<i>8.7</i>	<i>8.7</i>	<i>8.7</i> <sup>850</sup>

<sup>846</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 389, URN 20224. See also: transcript of interviews with [SB senior employee 1] held on 3 to 4 October 2016, page 611, URN 27597.

<sup>847</sup> Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 80, URN S0455. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 37, URN S1111.

<sup>848</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 33, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 43, URN S0456.

<sup>849</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 34, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, pages 45 to 47, URN S0456.

<sup>850</sup> URN 1882 - 20080624. The CMA notes that these figures are broadly consistent with the overall market share figures for 2008 set out in SB’s, CPM’s and FPM’s responses to the CMA’s information requests: SB’s response

4.307 Given the content of this diary entry and the date on which it was made, the CMA is of the view that SB, CPM and FPM exchanged and discussed this market share information, most probably at a meeting held on 24 June 2008 at the Novotel Hotel, Coventry.<sup>851</sup>

4.308 An entry in [FPM senior employee 1's] notebook<sup>852</sup> between entries dated 21 April 2009 and 23 April 2009<sup>853</sup> apparently records the following tonnage figures for SB, CPM and FPM:

'FP	200 + 30 = 230
MILTON	45    30
CPM	310   175
SB	145 <u>1.1,5</u>
	590 <sup>854</sup>

4.309 The CMA is of the view that this information was exchanged and discussed by SB, CPM and FPM, most probably at a meeting on 21 April 2009.<sup>855</sup>

4.310 There is evidence of the rigorous, regular and detailed recording of discussions of tonnages and market share figures from 2011.<sup>856</sup> For example, the CMA considers that such information was discussed at meetings of SB, CPM and FPM held on 18 January 2011,<sup>857</sup> 11 May 2011,<sup>858</sup> 16 August

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dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraph 141, URN S0107; CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), questions 1 and 8, URN S0110; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 7.3 and Annex 10(a), URN S0106.

<sup>851</sup> See Annex A.

<sup>852</sup> URN 1573, page 24.

<sup>853</sup> URN 1573, pages 22 to 24.

<sup>854</sup> FPM has made representations that this notebook entry does not appear to be accurate on the basis that '*590' seems a large amount of tonnage production for a part year period*' and that it cannot therefore be viewed as commercially sensitive; and that these figures were not considered by FPM to be commercially confidential, as the information would have been seen in the context of the wider concrete pipe industry, and general market conditions. The CMA has addressed FPM's representations as regards commercially confidential information as part of its specific consideration of the arrangement in its legal and economic context (see Chapter 5, Section F (Object of preventing, restricting or distorting competition)).

<sup>855</sup> See Annex A.

<sup>856</sup> See for example, URN 0276, URN 0350, URN 1223, URN 0309, URN 0206 (page 5).

<sup>857</sup> See Annex A and URN 1571, page 30 (between entries dated 17 January and 18 January: see URN 1571, pages 29 to 31).

<sup>858</sup> See Annex A and URN 1571, page 52 (between entries dated 4 May 2011 and 12 May 2011: see URN 1571, pages 51 to 53). The tonnage figures recorded for January to April match those found in other documents such as URN 0276, 0346, 0350 and 1223.

2011,<sup>859</sup> 26 September 2011,<sup>860</sup> 6 December 2011,<sup>861</sup> 4 April 2012,<sup>862</sup> 29 August 2012,<sup>863</sup> 8 October 2012.<sup>864</sup>

- 4.311 Market share information was discussed in detail during the August 2012 meeting, with participants well prepared to share output tonnage figures for July 2012. The conversation was initiated by [CPM senior employee 3], who began by stating: *'These volumes then, we've all got the volumes, you've got them all, have you.'*<sup>865</sup> [CPM senior employee 3] revealed that CPM had sold 15,860 tonnes and Milton Pipes 2,518 tonnes in July 2012;<sup>866</sup> [FPM senior employee 3] revealed that McCann had sold 18,804 tonnes;<sup>867</sup> and [SB senior employee 1] said that SB had sold 10,827 tonnes.<sup>868</sup>
- 4.312 This data was dissected further to work out the percentage market share for each of the companies: [CPM senior employee 3] said that the figures worked out at 22.55% for SB, 39.1% for FPM, 33.04% for CPM and 5.24% for Milton Pipes.<sup>869</sup>
- 4.313 In response to further queries from [FPM senior employee 1], [FPM senior employee 3] was able to respond immediately that the year to date figures were 40.69% for McCann, 37.82% for CPM and Milton Pipes, and 21.49% for

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<sup>859</sup> See Annex A; URN 1877-20110816: certain tonnage and market share figures match those written down by [CPM senior employee 2] in URN 1223.

<sup>860</sup> See Annex A and URN 1570, page 18 (between entries dated 22 September 2011 and 27 September 2011: see URN 1570, pages 16 to 18); URN 1877-20110926.

<sup>861</sup> See Annex A and URN 1570, pages 37 to 39; these figures, recorded by [FPM senior employee 1], appear to be a record of the monthly and year to date tonnage and market share figures for SB, FPM and CPM for October 2011. The figures exactly match those recorded by [CPM senior employee 3] for October 2011 in URN 0309. They are also consistent with the figures recorded by [FPM senior employee 2] in URN 1877-20111206. In interview, [FPM senior employee 2] said that he would have got this information from *'the CPSA or ... from the, the guys from CPM and Stanton that were at the CPSA'*. He acknowledged that the CPSA did not circulate disaggregated figures, but said that he did not regard the numbers as being *'secretive'* and that he was not aware of CPSA rules on not circulating disaggregated numbers at that time: *'I wasn't aware of the, the rules and regulations at that time. If something was sitting on a desk and read it, I read it. Erm, if I wasn't meant to, er ... or if someone from Stanton Bonna or CPM gave it to me, that was, that's, you know, the likelihood where it came from but I, I don't know, I don't, I can't be certain'*: transcript of an interview with [FPM senior employee 2] held on 9 May 2019, pages 174 to 181, URN S1386.

<sup>862</sup> See Annex A and URN 1570, page 48. The CMA is of the view that, although dated '4/03/12' this entry was intended to be dated '4/04/12' as previous entries in this book are dated '26/3/2012' and '29/3/2012'. Moreover, the tonnage figures recorded relate to February and March, and they are consistent with tonnage figures recorded for these months in other documents, see for example URN 0173 and URN 3620.

<sup>863</sup> See Annex A and URN 0194, page 10 – the figures recorded are consistent with the transcript of a record of the August 2012 meeting, pages 134 to 135, URN 20203A.

<sup>864</sup> See Annex A and URN 0142, page 60 (undated, but recorded between entries dated 2 October 2012 and 17 October 2012: see URN 0142 pages 56 to 62); URN 4821 (undated; the CMA notes that this record is consistent with the record in URN 0142, page 60).

<sup>865</sup> Transcript of a record of the August 2012 meeting, page 134, URN 20203A.

<sup>866</sup> Transcript of a record of the August 2012 meeting, page 135, URN 20203A.

<sup>867</sup> Transcript of a record of the August 2012 meeting, page 135, URN 20203A.

<sup>868</sup> Transcript of a record of the August 2012 meeting, page 135, URN 20203A.

<sup>869</sup> Transcript of a record of the August 2012 meeting, page 136, URN 20203A.

SB;<sup>870</sup> and that the market to date figure of 312,288 tonnes was ‘*down from [347,100] which is [34,800]*’.<sup>871</sup>

4.314 Early on in the January 2013 meeting (before the representatives from FPM arrived), [SB senior employee 1] asked if the group was going to ‘*finally put to rest ... the market share discussion today*’, with [CPM senior employee 1] stating that, ‘*we’re not going to sit round the table unless we get our market share, what’s the point*’.<sup>872</sup>

4.315 The participants then went on to discuss their market shares in some detail. In particular, as regards FPM’s market share, [SB senior employee 1] recalled that [FPM senior employee 1], ‘*once said in a meeting “as long as it starts with a four I’ll be happy”*’.<sup>873</sup> The group then expressed its unhappiness with FPM, its 2012 results and its apparent wish for a greater market share. [SB senior employee 1] said, ‘*They’re rolling in cash ... I find it a little frustrating ... about wanting 42, 43 percent market share*’, to which [CPM senior employee 1] responded, ‘*He ain’t getting it*’.<sup>874</sup>

4.316 When the representatives from FPM<sup>875</sup> joined the January 2013 meeting, market shares were discussed more extensively. [CPM senior employee 1] indicated to the group that market share was high on his list of priorities by saying he wanted to, ‘*kick off 2013 so everybody knows exactly where we stand in terms of market share*’, to which end he had, ‘*dug out these stats*’ to prove why CPM should maintain a market share of 39%.<sup>876</sup> The CMA notes that a document headed ‘*UK MARKET 1998*’ was found in [SB senior employee 1’s] *Boys spoils* file.<sup>877</sup> The CMA is of the view that [CPM senior employee 1] was referring to this document in order to make his case that CPM was entitled to a 39% market share based on past acquisitions by CPM since 1998, while McCann could claim 40% and SB 21%.<sup>878</sup>

4.317 As regards the detailed discussion, the CMA notes in particular:

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<sup>870</sup> Transcript of a record of the August 2012 meeting, page 137, URN 20203A.

<sup>871</sup> Transcript of a record of the August 2012 meeting, page 138, URN 20203A.

<sup>872</sup> Transcript of a record of the January 2013 meeting, pages 31 to 32 URN 20205A.

<sup>873</sup> Transcript of a record of the January 2013 meeting, page 36 URN 20205A.

<sup>874</sup> Transcript of a record of the January 2013 meeting, page 45, URN 20205A.

<sup>875</sup> [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3].

<sup>876</sup> Transcript of a record of the January 2013 meeting page 117, URN 20205A.

<sup>877</sup> URN 0216, page 53; URN 0258.

<sup>878</sup> Transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 435, URN 20224. Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 30, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 59 to 63, URN S0455.

- (a) [CPM senior employee 1's] question to [FPM senior employee 1], '*So are you happy at forty percent?*', to which [FPM senior employee 1] replies, '*If it starts with a four, I'm not making any issue*',<sup>879</sup>
- (b) [FPM senior employee 2's] observation that, '*we always managed to ... thirty nine or thirty eight point eight*',<sup>880</sup>
- (c) [CPM senior employee 1's] comment that, '*I'm not going to sit round the table if we're only getting thirty seven percent, it's a waste of time for us;*' and [FPM senior employee 1's] response, '*It is worth, it's worth everybody's while sitting round this table. I think what we've got to do is ensure that you get near the thirty nine*',<sup>881</sup>
- (d) [CPM senior employee 1's] comment, '*But all I'm saying is, to kick this 2013 off, this is the, I accept we're going to be down some months and up other months, but on the whole what we are looking at is thirty nine percent, forty and twenty one*',<sup>882</sup>
- (e) [CPM senior employee 1's] comment, '*If you were down in the market wouldn't you expect us to stand clear and let us top up your market share?*' and [FPM senior employee 1's] response, '*I would expect you to come here first, [CPM senior employee 1]*',<sup>883</sup>
- (f) [CPM senior employee 1's] comment that his, '*rightful market share going forward*' is 39% and that, '*[h]ow we get there we can decide at these meetings*', [CPM senior employee 3's] response: '*I think the main thing is we just talk to each other*', and [FPM senior employee 3's] suggestion that, '*I think if a job is twenty K or over we should be having a discussion*'.<sup>884</sup>

4.318 Each percentage of market share was significant, as was highlighted by [CPM senior employee 1's] comment: '*Well, let's put it in perspective [FPM senior employee 1], another two percent is ten thousand six hundred tonnes and one point four million to us*', to which [FPM senior employee 2] responds, '*but you*

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<sup>879</sup> Transcript of a record of the January 2013 meeting, page 121 URN 20205A.

<sup>880</sup> Transcript of a record of the January 2013 meeting, page 121 URN 20205A.

<sup>881</sup> Transcript of a record of the January 2013 meeting, pages 121 to 122, URN 20205A.

<sup>882</sup> Transcript of a record of the January 2013 meeting, page 127 URN 20205A.

<sup>883</sup> Transcript of a record of the January 2013 meeting, page 130 URN 20205A.

<sup>884</sup> Transcript of a record of the January 2013 meeting, page 135, URN 20205A.



*can swing that the other way and say for the previous three years that was the same for ourselves.*<sup>885</sup>

4.319 The importance of each percentage of market share was reiterated by [CPM senior employee 1], who has explained that:

*'At CPM, for example, we were due to have 39% share of the market. If we dropped 1% off that, it was equivalent to losing £750,000 of turnover. If we lost a lot of market share, then it was possible the company may not survive.'*<sup>886</sup>

4.320 [CPM senior employee 3] has similarly explained that, [X] *thought it was very important to maintain our market share. I do not know how much each percentage point of the market was worth, but there was a lot of money involved and for every percentage point lost, CPM would lose money.*<sup>887</sup>

4.321 During the March 2013 meeting [SB senior employee 1] introduced the issue of market shares, stating, *'What about the market share? Did we actually talk about the numbers, what the numbers were for February?'*. [CPM senior employee 2] then gives a figure of *'forty two thousand tons ... against forty five and a half,'* with [SB senior employee 1] giving a figure of 42,284, and [CPM senior employee 2] noting that the market was *'down five and a half per cent'*.<sup>888</sup>

4.322 FPM has stated that there is evidence pointing to an absence of any agreement to maintain market shares in practice, noting, [X] that market shares were unstable over the Relevant Period.<sup>889</sup>

4.323 The examination of the effects of an arrangement is not required for an object infringement,<sup>890</sup> however, the CMA notes FPM's representations that:

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<sup>885</sup> Transcript of a record of the January 2013 meeting, pages 120 to 121, URN 20205A. See also: transcript of interviews with [SB senior employee 1] held on 2 to 4 November 2016, pages 77 to 78, URN 27598.

<sup>886</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 28, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 55 to 56, URN S0455.

<sup>887</sup> Witness statement of [CPM senior employee 3], dated 11 December 2018, paragraph 32, URN S1120. Transcript of an interview with [CPM senior employee 3] held on 11 September 2018, page 45, URN S0456.

<sup>888</sup> Transcript of a record of the March 2013 meeting, pages 61 to 62, URN 20206A.

<sup>889</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.39 (citing the witness statement of [FPM employee 2], dated 12 January 2015, paragraph 4, URN 27068; witness statement of [FPM employee 15], dated 15 September 2014, paragraph 11, URN 27070; witness statement of [FPM senior employee 5], dated 26 October 2016, paragraph 6, URN 27057, and URN 29058) and paragraph 5.136, URN S1363.

<sup>890</sup> Chapter 5, Section F (Object of preventing, restricting or distorting competition).

(a) [redacted];<sup>891</sup> and

(b) consistently with the evidence set out in this Decision:

- (i) FPM's market share analysis (based on its own CPSA returns), shows that FPM had a market share fluctuating around 40% from 2010; and
- (ii) SB's market share was estimated at 20% as early as 2005, suggesting that SB's market share remained broadly consistent throughout the Relevant Period (having not made any acquisitions during that time).<sup>892</sup>

4.324 The CMA further notes that, although [FPM senior employee 3] has said that he did not believe that it was possible for SB, CPM and FPM to deliberately influence market share figures,<sup>893</sup> he acknowledged that:

*'there was aspirations and numbers that each [SB, CPM and FPM] had in their mind from the acquisitions they'd made. Was there an agreement that they had to have that number? I don't believe so. There was always talk about -- [FPM senior employee 1's] words to me, "As long as it begins with a 4, I'm happy"'*.<sup>894</sup>

4.325 Later in interview, he said that he thought that the purpose of the market share discussions was probably to check that each company was getting its aspirational market share.<sup>895</sup>

4.326 The CMA considers that evidence from the recorded meetings between SB, CPM and FPM, along with contemporaneous documentary evidence and witness evidence (as set out above), indicates that there was contact between SB, CPM and FPM in order to ensure and monitor implementation of the arrangement in relation to market shares (with individuals from FPM making full and accurate notes of such contact), and that individuals from FPM played

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<sup>891</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.39.1(d), URN S1363: [redacted].

<sup>892</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.136, URN S1363. See also: SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, schedule 2, URN S0107.

<sup>893</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 250 to 251, URN S1546: *'You cannot influence the market share number, because two elements of the market are out of your control. Term deal, whoever wins the work, and stock. Stockists can change to move tomorrow. The spot market's such a small part of the market.'*

<sup>894</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 254, URN S1546.

<sup>895</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, page 257 (see also, more generally, pages 246 to 260), URN S1546.

a full role in this aspect of the recorded meetings (see, for example, paragraphs 4.58 to 4.59, 4.286 to 4.290, 4.294, 4.306 to 4.318).

## **I. The end of the arrangement**

4.327 The arrangement was brought to an end on 13 March 2013, when the OFT carried out inspections at the business premises of SB, CPM and FPM.

4.328 The CMA therefore finds that the arrangement was in place by at least as early as 6 July 2006 and continued until 13 March 2013, when the OFT inspections took place.

## 5. LEGAL ASSESSMENT

### A. Introduction

- 5.1 This Chapter sets out the CMA's legal assessment of the conduct set out in Chapter 4, in the light of the factual background set out in Chapters 2 and 3. The key legal principles, including references to the relevant case law and primary and secondary legislation, are also included in this Chapter.
- 5.2 The CMA has assessed the evidence in this case by reference to the civil standard of proof, namely whether it is sufficient to establish, on the balance of probabilities, that an infringement occurred.<sup>896</sup>
- 5.3 The CMA has considered the totality of the evidence in its possession in the round, taking all the relevant factors into proper consideration. The CMA finds that the evidence shows that SB, CPM and FPM were party to the arrangement throughout the Relevant Period, and that the evidence is sufficient to establish on the balance of probabilities that an infringement occurred.

### B. Key provisions of UK and EU competition rules

- 5.4 The CMA's findings are made by reference to the following provisions of the UK and EU competition rules:
- (a) the Chapter I prohibition<sup>897</sup> prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. This prohibition applies unless an applicable exclusion is satisfied or the agreements in question are exempt in accordance with the provisions of the Competition Act. References to the UK are to the whole or part of the UK;<sup>898</sup>
  - (b) Article 101 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between EU Member States and which have as their object or effect

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<sup>896</sup> *Tesco Stores Limited and Others v OFT* [2012] CAT 31, paragraph 88.

<sup>897</sup> Section 2 of the Competition Act.

<sup>898</sup> Section 2(1) and (7) of the Competition Act.

the prevention, restriction or distortion of competition within the EU, unless they are exempt in accordance with Article 101(3).

- 5.5 Under EU law, the CMA, when applying the Chapter I prohibition to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101 which may affect trade between Member States within the meaning of that provision, must also apply Article 101 to such agreements, decisions or concerted practices.<sup>899</sup>
- 5.6 For the reasons set out below, the CMA finds that SB, CPM and FPM have infringed the Chapter I prohibition and Article 101.

## C. Evidence

- 5.7 The CMA considers that there is a significant body of evidence to support its conclusions in this case, including:
- (a) in relation to the most recent period of the cartel, evidence from the recorded meetings;
  - (b) for all periods of the cartel, contemporaneous documentary evidence (including emails, diary and notebook entries, annotated term deal lists / customer allocation lists, price lists, and notes of internal sales meetings), which is consistent with statements made during the recorded meetings; and
  - (c) witness and interview evidence that corroborates and supplements the documentary evidence in respect of the material aspects of the conduct.
- 5.8 As discussed in paragraph 4.7, the documentary evidence is more limited during the early part of the Relevant Period. However, it is well-established that the existence of an anti-competitive agreement or concerted practice can be inferred from a number of coincidences and indicia which, taken together

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<sup>899</sup> Article 3(1) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (the '*Modernisation Regulation*'). In addition, section 60 of the Competition Act provides that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to UK competition law should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law. Further, the CMA (i) must act (so far as it is compatible with the provisions of Part I of the Competition Act) with a view to securing that there is no inconsistency with the principles laid down by the Treaty on the Functioning of the European Union, the Court of Justice of the European Union and the General Court of the European Union (together, the '*European Courts*') and any relevant decision of the European Courts; and (ii) must have regard to any relevant decision or statement of the European Commission.

may, in the absence of another plausible explanation, constitute evidence of an infringement.<sup>900</sup> The General Court of the European Union has held that:

*'as anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted.'*<sup>901</sup>

## D. Undertakings

### **Legal principles**

- 5.9 For the purposes of the Chapter I prohibition and Article 101, the term *'undertaking'* covers *'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'*.<sup>902</sup>
- 5.10 An entity is engaged in *'economic activity'* where it conducts any activity *'of an industrial or commercial nature by offering goods and services on the market'*.<sup>903</sup>
- 5.11 The term *'undertaking'* also designates an economic unit, even if in law that unit consists of several natural or legal persons.<sup>904</sup>

### **Application to the Infringement**

- 5.12 During the Relevant Period, SB, CPM and FPM were engaged in an economic activity, including the supply of pre-cast concrete drainage products (see Chapter 2, Section B).
- 5.13 The CMA therefore concludes that SB, CPM and FPM constitute undertakings for the purposes of the Chapter I prohibition and Article 101. As discussed in Section L (Attribution of liability), Bonna Sabla and Consolis are considered to

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<sup>900</sup> Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P etc., EU:C:2004:6, paragraphs 55 to 57.

<sup>901</sup> Judgment of 27 September 2006, *Dresdner Bank and Others v Commission*, T-44/02 P etc. EU:T:2006:271, paragraph 64.

<sup>902</sup> Judgment of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.

<sup>903</sup> Judgment of 16 June 1987, *Commission v Italian Republic*, C-118/85, EU:C:1987:283, paragraph 7.

<sup>904</sup> Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55 and the case law cited.

form part of the same undertaking as, and to be jointly and severally liable for the conduct of, SB.

## E. Agreements between undertakings and concerted practices

### *Legal principles*

5.14 The Chapter I prohibition and Article 101 apply to agreements between undertakings and to concerted practices.<sup>905</sup>

5.15 It is not necessary to distinguish between agreements and concerted practices for the purposes of finding an infringement, or to characterise conduct as exclusively either an agreement, a concerted practice or a decision by an association of undertakings.<sup>906</sup> The CMA's finding of an infringement will not be affected by the precise form taken by each of the elements making up the overall agreement or concerted practice. As explained by the Court of Justice of the European Union:

*'it is settled case-law that, although Article [101] distinguishes between 'concerted practice', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibitions 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'.*<sup>907</sup>

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<sup>905</sup> Section 2(1) of the Competition Act and Article 101(1). Section 2(5) of the Competition Act provides that a provision of Part I which is expressed to apply to, or in relation to, an agreement, is to be read as applying equally to, or in relation to, a concerted practice.

<sup>906</sup> *Argos, Littlewoods and JJB*, 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 to 132; and also European Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.371 – Roofing Felt) (OJ 1991 L 232/15) (*'Commission Decision in Roofing Felt'*), in which the conduct of the undertakings was found to be an agreement as well as a decision of an association.

<sup>907</sup> Judgment of 11 September 2014, *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 63 and the case law cited. See also: 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; Judgment of 20 April 1999, *LVM v Commission* 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.'*

## Agreements

- 5.16 The Chapter I prohibition and Article 101 are intended to catch a wide range of agreements, including oral agreements and '*gentlemen's agreements*'.<sup>908</sup> 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.<sup>909</sup>
- 5.17 An agreement may consist of either an isolated act or a series of acts or a course of continuous conduct.<sup>910</sup> 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*'.<sup>911</sup>
- 5.18 Although it is necessary to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the CMA is not required to establish a joint intention to pursue an anti-competitive aim.<sup>912</sup>

## Concerted practices

- 5.19 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.<sup>913</sup>
- 5.20 In some cases the concepts of '*agreements*' and '*concerted practices*' may overlap. Indeed, it may not even be possible to draw such a distinction, as an infringement may present simultaneously the characteristics of each form of

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<sup>908</sup> Judgment of 15 July 1970, *ACF Chemiefarma v Commission* C-41/69, EU:C:1970:71, paragraphs 106 to 114.

<sup>909</sup> *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24, paragraph 658; Judgment of 26 October 2000, *Bayer AG v Commission*, T-41/96, EU:T:2000:242, paragraph 71; European Commission Decision of 9 December 1998, *Greek Ferries*, Case IV/34466, paragraph 141 (upheld on appeal).

<sup>910</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni* C-49/92 P, EU:C:1999:356, paragraph 81.

<sup>911</sup> 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*, C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 96 and 97) and Judgment of 17 December 1991, *Hercules Chemicals v Commission*, T-7/89, EU:T:1991:75, paragraph 256.

<sup>912</sup> 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*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610).

<sup>913</sup> Judgment of 4 June 2009, *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, EU:C:2009:343, paragraph 23. See also: Judgment of 8 July 1991, *Commission v Anic Partecipazioni*, C-49/92, EU:C:1999:356, paragraph 131; and *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(ii).



prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other.<sup>914</sup>

- 5.21 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 an agreement or a concerted practice.<sup>915</sup>
- 5.22 For present purposes, the following material points arise from the case law on the concept of a concerted practice:
- (a) a concerted practice is ‘*a form of coordination between undertakings which without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.*’<sup>916</sup> The Court of Justice of the European Union 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*’.<sup>917</sup>
  - (b) the concept of a concerted practice must be understood in the light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the choice of the persons and undertakings to which it makes offers or sells;<sup>918</sup>
  - (c) the requirement of independence for economic operators precludes ‘*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

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<sup>914</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 81.

<sup>915</sup> *Argos, Littlewoods and JJB*, paragraph 22.

<sup>916</sup> Judgment of 14 July 1972, *ICI v Commission* C-48/69, EU:C:1972:70, paragraph 64. See also: Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 26 and *JJB Sports plc v OFT* [2004] CAT 17, paragraphs 151 to 153.

<sup>917</sup> Judgment of 14 July 1972, *ICI v Commission*, C-48/69, EU:C:1972:70, paragraph 65. See also: *JJB Sports plc v OFT* [2004] CAT 17, paragraph 151.

<sup>918</sup> Judgment of 16 December 1975, *Suiker Unie and Others v Commission*, C-40 to C-48, C-50, C-54 to C-56, C-111, C-113 and C-114 to 73, EU:C:1975:174, paragraph 173. See also: *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(iv).

competitor,<sup>919</sup> thereby creating conditions of competition which do not correspond to the normal conditions of the market in question;<sup>920</sup>

- (d) 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.<sup>921</sup>

### *Presumption that information will be taken into account*

- 5.23 Where an undertaking participating in a concerted practice remains active on the market, there is a presumption that it will take account of information exchanged with its competitors when determining its own conduct on the market.<sup>922</sup> The burden is on the parties concerned to adduce evidence to rebut this presumption.<sup>923</sup>

### *Reduction in uncertainty*

- 5.24 The EU Courts have emphasised that, in a properly functioning competitive market, competitors should not know how their competitors are likely to behave, and that a reduction in that uncertainty is a key part of the concept of

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<sup>919</sup> Judgment of 16 December 1975, *Suiker Unie and Others v Commission*, C-40 to C-48, C-50, C-54 to C-56, C-111, C-113 and C-114 to 73, EU:C:1975:174, paragraph 174. See also: Judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 33; and *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, 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 (*Suiker Unie*, paragraph 174).

<sup>920</sup> Judgment of 14 July 1981, *Züchner v Bayerische Vereinsbank*, C-172/80, EU:C:1981:178, paragraph 14; Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 117; and Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 33.

<sup>921</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 118 and 124. See also: *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(ix) and case law cited and paragraph 206(xi).

<sup>922</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 121; Judgment of 8 July 1999, *Hüls AG v Commission of the European Communities*, C-199/92 P, EU:C:1999:358, paragraph 162; Judgment of 11 March 1999, *Thyssen Stahl AG v Commission of the European Communities*, T-141/94, EU:T:1999:48, paragraph 403; Judgment of 15 March 2000, *Cimenteries CBR SA and Others v Commission of the European Communities*, T-25/95, EU:T:2000:77, paragraphs 1865 and 1910; and Judgment of 5 December 2013, *Solvay SA v European Commission*, C-455/11 P, EU:C:2013:796, paragraph 40. See also: *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(x) (followed in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, paragraph 103(x)). Judgment of 4 June 2009, *T-Mobile Netherlands BV and Others v NMa*, C-8/08, EU:C:2009:343, paragraphs 58 to 59, the ECJ held that this presumption of a causal connection applies even where the concerted action was the result of a meeting held by the participating undertakings on a single occasion.

<sup>923</sup> Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph 127.

a concerted practice.<sup>924</sup> In that regard in establishing the existence of a concerted practice, it is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, significantly reduced uncertainty as to the conduct to expect of the other on the market.<sup>925</sup>

5.25 In particular, the Court of Justice of the European Union held in *Dole* that ‘*the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.*’<sup>926</sup> In that case, the parties had not exchanged actual prices, but information regarding price setting factors, price trends and/or indications of quotation prices. According to the Court of Justice of the European Union, this ‘*made it possible to reduce uncertainty for each of the participants as to the foreseeable conduct of competitors ... and therefore gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article [101] EC.*’<sup>927</sup>

5.26 An infringement can even occur where competitors disclose and discuss information which is publicly available or capable of being obtained from other sources such as trade publications. In *Aalborg Portland* the Court had put forward that ‘*even though the information thus exchanged was in the public domain or related to historical and purely statistical prices, its exchange infringes Article [101(1)] of the Treaty where it underpins another anti-competitive arrangement.*’<sup>928</sup> In *Dole* it was found that ‘*even if information about various topics discussed could be obtained from other sources, ... the competitors’ views about them, exchanged in bilateral discussions, could not.*’<sup>929</sup>

5.27 The General Court of the European Union has held, in *British Sugar*, that by exchanging information about the prices which they intended to adopt, undertakings not only pursue the aim of eliminating in advance uncertainty about the future conduct of their competitors but also could not fail to take into account, directly or indirectly, the information obtained in the course of

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<sup>924</sup> Judgment of 15 March 2000, *Cimenteries CBR SA and Others v Commission of the European Communities*, T-25/95, EU:T:2000:77, paragraphs 1849 and 1852.

<sup>925</sup> Judgment of 17 December 1991, *BASF v European Commission*, T-4/89, EU:T:1991:73, paragraph 242.

<sup>926</sup> Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph 21.

<sup>927</sup> Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph 134.

<sup>928</sup> Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, joined cases C-204/00P, EU:C:2004:6, paragraphs 281-282

<sup>929</sup> Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph 295.

meetings in order to determine the policy which they intended to pursue on the market.<sup>930</sup> In particular, the General Court of the European Union stated:

*'First, even if British Sugar did first notify its customers ... of the prices which it intended to charge, that fact does not imply that, at that time, those prices constituted objective market data that were readily accessible ... Second, the organisation of the disputed meetings allowed the participants to become aware of that information more simply, rapidly and directly than they would from the market ... Third ... the systematic participation of the applicant undertakings in the meetings in question allowed them to create a climate of mutual certainty as to their future pricing policies.'*<sup>931</sup>

### *Participation and implementation*

5.28 It is settled case law that it is sufficient that the party concerned participated in meetings in which anti-competitive arrangements were concluded without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. This is because a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery.<sup>932</sup> In order for the party to cease its participation, and to rebut the presumption that its participation in the meeting was unlawful, it must distance itself firmly and unequivocally from the results of the meeting in such a way that the other participants are aware that it no longer supports the objectives of the agreement or concerted practice in question.<sup>933</sup>

5.29 The Court of Justice of the European Union has confirmed that, where participation in meetings with an anti-competitive nature is established, in order to distance itself from an unlawful agreement, it is for the undertaking concerned to advance evidence that its participation was without any anti-

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<sup>930</sup> Judgment of 12 July 2001, *Tate & Lyle and Others v Commission*, T-202/98 etc., EU:T:2001:185, paragraphs 60 to 68.

<sup>931</sup> Judgment of 12 July 2001, *Tate & Lyle and Others v Commission*, T-202/98 etc., EU:T:2001:185, paragraph 60.

<sup>932</sup> Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, EU:C:2004:6, paragraph 84.

<sup>933</sup> Judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 142 and 143; Judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 31; Judgment 30 May 2013, *Quinn Barlo v Commission*, C-70/12P, EU:C:2013:351, paragraph 29; Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, EU:C:2004:6, paragraphs 82-84; Judgment of 15 July 2015, *Westfälische Drahtindustrie v Commission*, T-393/10, EU:T:2015:515, paragraph 194; Judgment of 12 July 2018, *Sumitomo and JPS v Commission*, T-450/14, EU:T:2018:455, paragraph 101; Judgment of 17 September 2015, *Total Marketing Services v Commission*, C-634/13 P, EU:C:2015:614, paragraphs 20 to 23.

competitive intention, having indicated to the other participants that its intention was different from theirs and for the other participants to understand such different intention.<sup>934</sup>

- 5.30 As the General Court of the European Union confirmed in *Sumitomo*, it is the understanding which the *other* members of a cartel have of the intention of the undertaking concerned which is of critical importance when assessing whether it sought to distance itself from the unlawful agreement.<sup>935</sup>
- 5.31 Parties cannot avoid liability for an infringement by arguing that they played only a limited part in setting up an agreement or concerted practice, that they were not (or were not always) fully committed to the agreement or concerted practice, that they had no intention of abiding by an agreement, that the agreement or concerted practice was never implemented or put into effect by them, or that they in fact behaved aggressively on the market.<sup>936</sup>
- 5.32 The fact that a party comes to recognise that in practice it can ‘cheat’ on the agreement or concerted practice at certain times does not preclude the finding of an infringement. As the General Court of the European Union has held in *Dole*, ‘even if a participant in collusive conduct may seek to exploit it for its own ends, or even cheat, that does not however diminish its liability in respect of its participation in that conduct. According to settled case law, an undertaking which, despite a cartel with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.’<sup>937</sup>

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<sup>934</sup> Judgment of 19 March 2009, *Archer Daniels Midland Co v Commission*, C-510/06 P, EU:C:2009:166, paragraphs 119–120.

<sup>935</sup> Judgment of 12 July 2018, *Sumitomo and JPS v Commission*, T-450/14, EU:T:2018:455, paragraph 62 and the case law cited.

<sup>936</sup> *Roofing Felt Cartel* OJ 1986 L232/15 [86], upheld on appeal in Judgment of 11 July 1986, *SC Belasco v Commission*, C-246/86, EU:C:1989:301. Judgment of 1 February 1978, *Miller v Commission*, C-19/77, EU:C:1978:19, paragraph 7. Judgment of 21 February 1984, *Hasselblad v Commission*, C-86/82, EU:C:1984:65, paragraph 46. Judgment of 11 January 1990, *Sandoz v Commission*, C-277/87, EU:C:1990:6 (‘Sandoz’), paragraph 3. Judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 251. Judgment of 4 June 2009, *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, EU:C:2009:343, paragraph 42. Judgment of 15 March 2000, *Cimenteries CBR v Commission*, T-25/95, EU:T:2000:77 (‘Cimenteries’), paragraphs 1389 and 2557 (this judgment was upheld on liability (although the fine was reduced) by the CJEU in Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P etc., EU:C:2004:6); and Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 79 and 80; Judgment of 15 July 1970, *ACF Chemiefarma NV v Commission*, C-41-69, EU:C:1970:71, paragraph 156. Case COMP/C.37.750/B2, *French Beer*, paragraph 64. See also: Judgment of 3 March 2011, *Siemens v Commission*, T-110/07, EU:T:2011:68, paragraphs 209–210.

<sup>937</sup> Judgment of 14 March 2013, *Dole Food Company and Dole Germany v Commission*, T-588/08, EU:T:2013:130, paragraph 484. See also: Judgment of 13 July 2011, *Polimeri Europa v Commission*, T-59/07, EU:T:2011:361, paragraph 307 and the case law cited.

## ***Application to the Infringement***

- 5.33 On the basis of the facts and evidence set out in Chapter 4, the CMA finds that there was a concurrence of wills between SB, CPM and FPM (for the purposes of the Chapter I prohibition and Article 101) sufficient to amount to an agreement in relation to the supply of the Products to customers in Great Britain.<sup>938</sup>
- 5.34 As set out in Chapter 4, Section C, the evidence shows that an arrangement was put in place by at least as early as 6 July 2006, whereby SB, CPM and FPM agreed not to compete with each other so as to increase prices, and to maintain their respective market shares.
- 5.35 SB, CPM and FPM cooperated in accordance with the arrangement throughout the Relevant Period. Specifically, the evidence shows a common understanding between SB, CPM and FPM that they would:
- (a) fix or coordinate prices for the Products, including by the agreement of price lists for spot market work, which reduced uncertainty as regards the pricing to be adopted by SB, CPM and FPM, with the aim of increasing prices (see Chapter 4, Section F);
  - (b) divide the market by allocating customers between them, (including through bid rigging), and maintain specified market shares, (see Chapter 4, Sections G to H); and
  - (c) regularly and systematically share pricing, tonnage and market share information in order to ensure that the arrangement was being adhered to (see Chapter 4).
- 5.36 The arrangement between SB, CPM and FPM was deliberate and organised, and took place over a significant period of time by way of regular meetings and bilateral communications concerning specific products or customers (see Chapter 4 and Annex A).
- 5.37 In the alternative to the CMA's finding of an agreement, the CMA finds that SB, CPM and FPM participated in a concerted practice in which they knowingly substituted practical cooperation for the risks of competition.
- 5.38 The CMA is of the view that the contact between SB, CPM and FPM throughout the Relevant Period created conditions which did not correspond

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<sup>938</sup> As discussed in Section L (Attribution of liability), Bonna Sabla and Consolis are considered to form part of the same undertaking as, and to be jointly and severally liable for the conduct of, SB.

to the normal conditions of competition in the market, reducing uncertainty about future conduct.

*Presumption that information exchanged was taken into account*

- 5.39 As noted in paragraph 5.23, there is a presumption that information exchanged by SB, CPM and FPM was taken into account.
- 5.40 In this respect, the evidence indicates that the discussions held, and information exchanged, by SB, CPM and FPM was, on an ongoing basis, useful and of practical value to the parties. The CMA notes in particular that:
- (a) the meetings and arrangement between SB, CPM and FPM took place over a significant period of time (that is, over six years); and
  - (b) SB, CPM and FPM would challenge each other as regards quotations that were perceived to have been put in too far below the agreed prices,<sup>939</sup> and take action where agreed market shares did not appear to have been maintained (see, for example, paragraphs 4.281 to 4.283 and 4.290 to 4.294).

*Reduction in uncertainty*

- 5.41 The CMA is of the view that discussions about spot market prices, fixed price agreements and market shares provided SB, CPM and FPM with an opportunity to confirm or improve their understanding of each other's position, strategies and future conduct, reducing strategic uncertainty.<sup>940</sup>
- 5.42 This is the case notwithstanding that pricing discussions did not necessarily relate to actual prices (see, for example, paragraph 4.108); and the reporting of market shares may not always have been wholly accurate (see, for example, paragraph 4.303).<sup>941</sup> The information exchanged provided the parties with an indication (at the very least) of the development of prices and market trends, thereby reducing uncertainty as to the operation of, and the

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<sup>939</sup> Incidents of SB, CPM and FPM challenging each other as regards quotations that were put in below agreed minimum prices can be seen throughout the recorded meetings. See also: transcript of interviews with [SB senior employee 1] held on 5 to 11 February 2015, page 723, URN 20224; URN 9598; URN 9660; URN 13210; URN 13071; URN 13072; URN 8629; URN 0204, page 8 points 2, 3, 7 and 9; URN 1144 pages 1 and 7; URN 1145, page 1.

<sup>940</sup> Judgment of 12 July 2001, *Tate & Lyle and Others v Commission*, T-202/98 etc., EU:T:2001:185, paragraph 60. See also: the Commission's guidelines on the applicability of Article 101 to horizontal co-operation agreements, OJ (2011) C11/1, paragraph 92.

<sup>941</sup> The CMA notes that FPM has made representations that the information exchanged at meetings '*was not of a nature that was sufficient to actually or potentially reduce uncertainty as regards the pricing to be adopted by FPM or the sale of its products to new or existing customers,*' for example, because that information was already in the public domain, was not an indication of actual pricing, or was not accurate: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 6.10.2, URN S1363.

parties' future conduct on, the market, and highlighting that there would be less downward pressure on prices than might otherwise have been expected.

- 5.43 This was also the case even where the information discussed may already have been known by customers and could, therefore, in principle already be gathered on the market. There is a value in discussing such information, and the views of competitors as regards that information are not available publicly.
- 5.44 Moreover, as noted in paragraphs 4.74(b) and 4.297 to 4.301, the evidence indicates that CPSA information in relation to market shares was not sufficient for the parties' purposes. Detailed discussions between SB, CPM and FPM enabled the parties to find out about each other's more up to date market share figures more simply, rapidly and directly, providing additional clarity and certainty.
- 5.45 Further, although agreed minimum spot market prices have been described (for example, by [SB senior employee 1] and [FPM senior employee 3]) as '*aspirational*' in nature, they nevertheless acted as a '*target*' such that the price lists and targeting of those prices were sufficient to reduce uncertainty as regards the pricing to be adopted by SB, CPM and FPM (see paragraphs 4.108 to 4.126), so restricting competition. The CMA considers that, notwithstanding deviation from agreed prices, the agreement of price lists is capable of significantly restricting competition; and to the extent that there was any scope for (restricted) competition on prices, this was further constrained by the agreement in relation to the maintenance of market shares.

### *Participation and implementation*

- 5.46 Having regard to the principles set out in paragraphs 5.28 to 5.29, there is no evidence to suggest that SB, CPM or FPM expressed any reservations or objections to their collaboration during the Relevant Period, or sought to publicly distance themselves from the arrangement.
- 5.47 FPM has made representations that it considered discussions at meetings to be a form of '*banter*', '*posturing*' and '*jockeying*', and neither intended to act upon, nor acted upon, the information discussed.<sup>942</sup> [FPM senior employee 3] has said that he attended meetings in order obtain information about FPM's

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<sup>942</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.36 to 5.38, 5.45.2, 5.141 and 6.7, URN S1363. FPM has also made representations that its '*conduct in not implementing anything discussed shows that their 'reservations' with the meetings were in fact symptomatic of the fact that no agreement or understanding had been reached by FPM with the other Parties*': FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 6.13, URN S1363.



competitors and use it against them, as well as to feed them false information.<sup>943</sup>

- 5.48 However, non-implementation would need to be to the point of disrupting the cartel, and to distance the participant from the cartel, for it to be a relevant defence.<sup>944</sup> In the present case, there is no evidence to suggest that FPM manifestly opposed discussions in such a way that the other participants were aware that it did not support their objectives.<sup>945</sup>
- 5.49 Rather, the CMA notes that when issues arose under the arrangement, participants at cartel meetings from each of SB, CPM and FPM actively engaged with discussions in order to seek to resolve them (see, for example, paragraphs 4.55, 4.59, 4.148, 4.187, 4.269, 4.292, 4.294 and 4.317).
- 5.50 Indeed, even when [SB senior employee 1] explicitly drew attention to the illegality of naming jobs during the March 2013 meeting, this did not prevent him from agreeing to [CPM senior employee 1's] suggestion that they flag up jobs '*just verbally*', whilst the other participants expressed no reservations at all as regards their actions (see paragraph 4.294(b)).
- 5.51 Further, the transcripts of the recorded meetings show that all those attending took an active role in sharing and soliciting information, and that they were not passive recipients of such information. For example, documents [X] from individuals attending meetings on behalf of SB, CPM and FPM were annotated with information as regards their competitors (see paragraphs 4.84 to 4.93 and 4.238), and accurate notes were made of those meetings (see Annex B, in particular). In addition, the CMA notes that, in phone calls with individuals from CPM, [FPM senior employee 3] did not seek to distance himself from discussions, but instead claimed to have '*deflected*' the conversation (see paragraph 4.178)
- 5.52 The evidence set out in Chapter 4 reveals instances where SB, CPM or FPM were considered not to have been acting in accordance with the arrangement (for example, by submitting quotations that were too low). However, in accordance with the principles set out in paragraphs 5.31 and 5.32, different levels of participation or implementation from time to time do not prevent there

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<sup>943</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, for example, pages 34 to 36, 40, 41, 46 to 49, 59 to 60, 64 to 70, 77, 82, 118, 123 to 125, 139, 154, 175, 211, 233 and 266, URN S1546.

<sup>944</sup> Tacitly approving of an unlawful arrangement constitutes a passive mode of participation in an infringement. If other cartel participants believe that the supposedly non-implementing party is still participating (because it has not distanced itself) then the participation in meetings still furthers the purposes of the cartel. See Judgment of 3 March 2011, *Siemens v Commission*, T-110/07, EU:T:2011:68, paragraphs 209 to 210.

<sup>945</sup> At the very least, therefore, FPM's participation in meetings would have encouraged the cartel conduct by SB and CPM.

from having been a concerted practice and common understanding; and the finding of an infringement is not precluded by the fact that a party comes to recognise that it may '*cheat*' on the agreement or concerted practice. A cartel member who disregards what is agreed for its own ends is still liable for the infringement.

- 5.53 But in any event, the evidence shows that SB, CPM and FPM would take steps to ensure that the arrangement was adhered to in the event that a party was perceived to be '*cheating*' on the arrangement, for example by challenging each other when target prices were not achieved because certain quotations were considered to be too low (see, for example, paragraphs 4.56 to 4.69, 4.110 to 4.114, 4.127, 4.177, 4.193 to 4.196, 4.244 to 4.246).
- 5.54 Indeed, the importance of adhering to the agreement or concerted practice was a common theme during the recorded meetings: SB, CPM and FPM were keen to ensure that the arrangement was implemented so as to meet their dual aims of ensuring the status quo and increasing prices (see, in particular, paragraphs 4.54 to 4.60).

### *Conclusion*

- 5.55 The CMA is of the view that the evidence above demonstrates an agreement or concerted practice between SB, CPM and FPM.
- 5.56 The CMA considers that, having attended meetings throughout the Relevant Period, each of SB, CPM and FPM must have:
- (a) realised why they were providing each other with their pricing and market share information;
  - (b) realised that the disclosure of any such information would have been of practical use and value;
  - (c) expected or hoped that the information discussed would be used or relied upon.
- 5.57 Throughout the Relevant Period, SB, CPM and FPM did not determine their conduct on the market independently of each other. Instead, they expressed their joint intention to conduct themselves on the market in a specific way, and had a shared understanding of how they would behave in relation to particular customers. Through their regular contacts, they reduced uncertainty as to their intended conduct on the market, and knowingly substituted practical cooperation as regards pricing, the allocation of customers and the ongoing maintenance of their market shares, for the risks of competition.

## F. Object of preventing, restricting or distorting competition

### *Legal principles*

- 5.58 The Chapter I prohibition and Article 101 prohibit agreements or concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition.
- 5.59 The Court of Justice of the European Union has held that agreements and concerted practices that have the object of preventing, restricting or distorting competition 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.<sup>946</sup>
- 5.60 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.<sup>947</sup> 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.<sup>948</sup>
- 5.61 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

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<sup>946</sup> Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 35 and the case law cited. This has been affirmed in Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50 and Judgment of 11 September 2014, *MasterCard Inc and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 185. The Court of Justice of the European Union said that it is apparent from the case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraphs 49 and 57; Judgment of 11 September 2014, *MasterCard and Others v Commission* C-382/12 P, EU:C:2014:2201, paragraph 184). It went on to state that that case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50; Judgment of 11 September 2014, *MasterCard and Others v Commission* C-382/12 P, EU:C:2014:2201, paragraph 185).

<sup>947</sup> Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 36 and Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53. See also: Judgment of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58; Judgment of 20 September 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.

<sup>948</sup> Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53; and Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 36.

the Chapter I prohibition and Article 101, even if the agreement or concerted practice had other objectives.<sup>949</sup>

5.62 The fact that an agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.<sup>950</sup> Anti-competitive subjective intentions on the part of the parties can be taken into account if they are relevant, but they are not a necessary factor for a finding that the object of the conduct was anti-competitive.<sup>951</sup>

5.63 For the purposes of establishing an infringement, there is no need to take account of the actual effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.<sup>952</sup> In this respect, the Court of Justice of the European Union has characterised as the '*essential legal criterion*' for a finding of anti-competitive object that the coordination between undertakings '*reveals in itself a sufficient degree of harm to competition*' such that there is no need to examine its effects.<sup>953</sup>

#### *Price fixing*

5.64 The Chapter I prohibition and Article 101 apply to agreements or concerted practices which '*directly or indirectly fix purchase or selling prices or any other trading conditions*'.<sup>954</sup>

5.65 Agreements or concerted practices which fix prices have as their object the prevention, restriction or distortion of competition.<sup>955</sup> It is firmly established in

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<sup>949</sup> 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.

<sup>950</sup> Judgment of 20 September 2008, *Competition Authority v Beef Industry Development Society and Barry Brothers* C-209/07, EU:C:2008:643, paragraph 21. See also: Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraph 70.

<sup>951</sup> Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others* C-32/11, EU:C:2013:160, paragraph 37. Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraph 54. Judgment of 28 March 1984, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission*, C-29/83 and C-30/83, EU:C:1984:130, paragraphs 25 and 26.

<sup>952</sup> Judgment of 13 July 1966, *Consten and Grundig v Commission*, C-56/64 and C-58/64, EU:C:1966:41, page 342. See also: Judgment of 22 December 2016 in Case E-3/16, *Ski Taxi SA, Follo Taxi SA and Ski Follo Taxidrif AS v The Norwegian Government, represented by the Competition Authority* [2016] EFTA Ct., paragraph 61; Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, paragraph 58. *Cityhook Limited v OFT* [2007] CAT 18, paragraph 269. Judgment of 8 July 1999, *Hüls AG v Commission of the European Communities*, C-199/92 P, EU:C:1999:358, paragraph 164.

<sup>953</sup> Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49 and 57; and Judgment of 20 November 2016, *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 26.

<sup>954</sup> Article 101(1)(a); section 2(2)(a) of the Competition Act.

<sup>955</sup> Judgment of 30 January 1985, *Bureau national interprofessionnel du cognac v Guy Clair*, C-123/83, EU:C:1985:33, paragraph 22; and Judgment of 19 April 1988, *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, Case 27/87, EU:C:1988:183, paragraph 15. See also: Judgment of 10 March 1992, *Montedipe SpA v Commission*, T-14/89, EU:T:1992:36, paragraphs 246 and 265; and Judgment of 6 April 1995, *Tréfilunion v Commission*, T-148/89, EU:T:1995:68, paragraphs 101 and 109.

EU law that horizontal price-fixing by cartels may be considered so likely to have negative effects, in particular on the price, quantity, or quality of the goods and services, that it may be considered redundant to prove that they have actual effects on the market.<sup>956</sup>

- 5.66 There are many ways in which prices can be fixed. Price fixing may involve fixing either the price itself or the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move. Price fixing may also take the form of an agreement to restrict or dampen price competition (including, for example, by an agreement to adhere to published price lists, or not to quote a price without consulting competitors, or not to charge less than any other price in the market), and an agreement may restrict price competition even if it does not entirely eliminate it (for example, competition may remain in the ability to grant discounts or special deals on published list prices).<sup>957</sup> It is no defence that a participant in a cartel sometimes does not respect the agreed price increases.<sup>958</sup>
- 5.67 The European Commission has previously found that pre-pricing communications discussing factors relevant for setting future prices have the object of reducing uncertainty as to the conduct of the parties with regard to the prices to be set by them, and that such communications concerned the fixing of prices.<sup>959</sup> This will also include an arrangement not to quote a price without consulting potential competitors.<sup>960</sup>

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<sup>956</sup> Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51; see also Judgment of 30 January 1985, *BNIC v Clair*, C-123/83, EU:C:1985:33, paragraph 22; Judgment of 10 March 1992, *Montedipe v Commission*, T-14/89, EU:T:1992:36, paragraph 265; Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph 115; and Commission Decision of 15 October 2008, COMP/39188, *Bananas*, paragraph 284 and the case law cited.

<sup>957</sup> See OFT's Guidance on Agreements and Concerted Practices (OFT401, December 2004), adopted by the CMA Board ('*Guidance on Agreements and Concerted Practices*'), paragraphs 3.5 and 3.6. In OFT401, references to 'agreement(s)' is said to include decisions by associations of undertakings and concerted practices.

<sup>958</sup> Judgment of 14 May 1998, *Cascades v Commission*, T-308/94, EU:T:1998:90, paragraph 230; see also Judgment of 24 March 2011, *Comap v Commission*, T-377/06, EU:T:2011:108, paragraph 99; Case, T-587/08 *Fresh Del Monte v Commission* EU:T:2013:219, paragraph 459.

<sup>959</sup> European Commission Decision of 15 October 2008, *Bananas*, Case COMP/39.188, upheld in Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, and Judgment of 24 June 2015, *Fresh Del Monte Produce v Commission* and *Commission v Fresh Del Monte Produce*, C-293/13 P, EU:C:2015:416. In addition, the European Commission Notice: *Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements*, OJ C 11/1, 14 January 2011 (the '*Horizontal Cooperation Agreements Guidelines*') notes that "private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities", paragraph 74.

<sup>960</sup> European Commission Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694.

## Market sharing

- 5.68 The Chapter I prohibition and Article 101 apply to agreements or concerted practices which ‘*share markets or sources of supply*’.<sup>961</sup>
- 5.69 The Court of Justice of the European Union has held that market-sharing agreements constitute particularly serious breaches of the competition rules and that such agreements have, in themselves, an object restrictive of competition.<sup>962</sup> It has also been held that such an object cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned.<sup>963</sup>
- 5.70 Businesses may agree to share markets in a number of different ways. The European Commission and the EU Courts have found market sharing through the allocation of customers on the basis of existing commercial relationships to be a restriction of competition by object.<sup>964</sup> For example, in the *Pre-Insulated Pipes* case, a market sharing agreement by suppliers to respect each other’s ‘*existing*’ customer relationships was found by the European Commission to restrict competition by its very nature.<sup>965</sup> For each supply contract, the existing supplier would inform other participants in the arrangement of the price they intended to quote, and the other suppliers would provide quotations at higher prices to ensure the maintenance of the existing customer relationship. The mechanism whereby participants would provide quotations at elevated prices so as to avoid drawing customers away from agreed supply relationships is a common method of market sharing by customer allocation.<sup>966</sup>

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<sup>961</sup> Article 101(1)(c); and section 2(2)(c) of the Competition Act.

<sup>962</sup> Judgment of 20 November 2016, *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 28 and the case law cited.

<sup>963</sup> Judgment of 20 November 2016, *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 28 and the case law cited.

<sup>964</sup> European Commission Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.064 – *Cast iron and steel rolls*) [1984] 11 CMLR 694; European Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.371 – *Roofing Felt*) (OJ 1991 L 232/15), and European Commission Decision 2002/759/EC of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (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).

<sup>965</sup> European Commission Decision 1999/60/EC of 21 October 1998 relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/35.691/E-4 – *Pre-Insulated Pipe Cartel*) (OJ 1999 L 24/1). See also: European Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.37.533 – *Choline Chloride*) (OJ 2005 L 190/22).

<sup>966</sup> European Commission Decision 2005/566/EC of 9 December 2004 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No C.37.533 – *Choline Chloride*) (OJ 2005 L 190/22).

5.71 It is also well established that such a mechanism amounts to an infringement of the Chapter I prohibition. For example, in *West Midland Roofing Contractors*<sup>967</sup> and in *Design, construction and fit out services*<sup>968</sup>, the OFT and the CMA, respectively, concluded that cover pricing (also referred to as collusive tendering or bid-rigging) amounted to an infringement of the Chapter I prohibition. The OFT and CMA have described cover pricing and cover bidding 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.

#### *The sharing of competitively sensitive information*

5.72 The European Courts and the European Commission have 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.<sup>969</sup> The UK courts have also held that such agreements or concerted practices restrict competition by object and the Competition Appeal Tribunal has stated that *'[t]he European Courts have emphasised that one key aspect of the concept of a concerted practice is that in a properly functioning competitive market, competitors should not know how their competitors are likely to behave'*.<sup>970</sup>

5.73 The Court of Justice of the European Union has held that the exchange of information between competitors is liable to be incompatible with Article 101 (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.<sup>971</sup> In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and

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<sup>967</sup> *West Midland Roofing Contractors*, OFT decision of 17 March 2004. See also: *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4; and *Galvanised Steel Tanks*, CMA Decision of 19 December 2016, upheld by the Competition Appeal Tribunal: *Balmoral Tanks Limited and Balmoral Group Holdings Limited v Competition and Markets Authority* [2017] CAT 23.

<sup>968</sup> *Design, construction and fit out services*, CMA Decision of 16 April 2019.

<sup>969</sup> See for example: Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraphs 113 to 127; Judgment of 4 June 2009, *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, EU:C:2009:343. See also: *Horizontal Cooperation Agreements Guidelines*; and *Article 101(3) Guidelines*, paragraph 72 to 74.

<sup>970</sup> *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 39 (upheld on appeal, see: *Balmoral Tanks Limited v CMA* [2019] EWCA Civ 162).

<sup>971</sup> Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph 121; Judgment of 2 October 2003, *Thyssen Stahl v Commission*, C-194/99 P, EU:C:2003:527, paragraph 81; Judgment of 4 June 2009, *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, EU:C:2009:343, paragraph 35.

details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anti-competitive object.<sup>972</sup>

- 5.74 The Competition Appeal Tribunal has noted that *'[t]he strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all'*<sup>973</sup> and has previously held that *'[t]he fact of having attended a private meeting at which prices were discussed and pricing intentions disclosed, even unilaterally, is in itself a breach of the Chapter I prohibition, which strictly precludes any direct or indirect contact between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions'*.<sup>974</sup>
- 5.75 In Advocate General Kokott's Opinion in *Dole*, she stated that, in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between the information exchanged and prices. It is *'sufficient for a finding of anti-competitive object that information is exchanged between competitors about factors relevant to their respective pricing policy or – more generally – to their conduct on the market.'*<sup>975</sup> She went on to note that, *'market signals, market trends and/or indications as to the intended development of banana prices could be inferred from the quotation prices exchanged by the parties.'*<sup>976</sup>
- 5.76 As set out in paragraphs 5.26 and 5.27, an infringement can even occur where competitors disclose and discuss information which is publicly available or capable of being obtained from other sources such as trade publications.

### ***Application to the Infringement***

- 5.77 The CMA finds that the Infringement took the form of an agreement or concerted practice between SB, CPM and FPM that amounted to price fixing or price coordination, including by way of agreed price lists for spot market work; market sharing through the allocation of customers, including by bid

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<sup>972</sup> Judgment of 19 March 2015, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, EU:C:2015:184, paragraph 122; Judgment of 4 June 2009, *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, EU:C:2009:343, paragraph 41.

<sup>973</sup> *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 41.

<sup>974</sup> *JJB Sports v Office of Fair Trading* [2004] CAT 17, paragraph 873.

<sup>975</sup> Advocate General Kokott's Opinion of 11 December 2014, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, ECLI:EU:C:2014:2437, paragraph 113.

<sup>976</sup> Advocate General Kokott's Opinion of 11 December 2014, *Dole Food Co. v Commission (Bananas)*, C-286/13 P, ECLI:EU:C:2014:2437, paragraph 116.



rigging; and the regular and systematic exchange of competitively sensitive information.

5.78 In light of the legal principles outlined above, and having considered the content and objectives of the agreement or concerted practice, and when viewed in the legal and economic context of which it formed part, the CMA finds that such conduct was, by its very nature, harmful to the proper functioning of normal competition and therefore had the object of preventing, restricting or distorting competition.<sup>977</sup>

#### *Content and objectives of the agreement or concerted practice*

5.79 As set out at paragraph 5.35, the content of the agreement or concerted practice that formed the basis of the Infringement was a common understanding to coordinate SB, CPM and FPM's commercial behaviour by way of:

- (a) an agreement to fix or coordinate prices, including by the agreement of price lists for spot market work, which reduced uncertainty as regards the pricing to be adopted by SB, CPM and FPM, with the aim of increasing prices;
- (b) an agreement to share the market, including through the allocation of customers (including by bid rigging) and an agreement to maintain specified market shares; and
- (c) the regular and systematic exchange of competitively sensitive information.

5.80 The arrangement between SB, CPM and FPM was organised and deliberate, and took place over a significant period of time (see Chapter 4 and Annex A).

5.81 The CMA finds that the overall objective of the agreement or concerted practice was to restrict competition on price and thus to increase pricing levels for the supply of the Products, and to maintain market positions.

5.82 In this respect, the information exchanged was useful and of practical value to SB, CPM and FPM on an ongoing basis. This is the case notwithstanding that the agreed spot market prices were '*targets*', with instructions to sales staff intended to keep divergences from the list price within certain bounds, and

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<sup>977</sup> As discussed in Section L (Attribution of liability), Bonna Sabla and Consolis are considered to form part of the same undertaking as, and to be jointly and severally liable for the conduct of, SB.

that the reporting of market shares was not always wholly accurate. The information exchanged:

- (a) provided the parties with an indication (at the very least) of market trends and the development of prices, thereby reducing uncertainty as to the operation of, and the parties' future conduct on, the market, and highlighting that there would be less downward pressure on prices than might otherwise have been expected; and
- (b) was used to set a framework within which sales staff at SB, CPM and FPM would operate (see, for example, paragraphs 4.108 to 4.126).

Moreover, SB, CPM and FPM would monitor each other's conduct on the market and take steps to ensure that the arrangement was adhered to (see paragraph 5.53).

- 5.83 Although not a necessary factor for a finding that the object of the conduct was anti-competitive, the CMA considers that the evidence also shows that the parties' subjective intentions in coordinating their behaviour was to restrict competition, in order to increase prices and maintain the status quo (see, for example, paragraphs 4.26 to 4.30, 4.55 to 4.59, 4.62, 4.98, 4.102, 4.155, 4.203, 4.269, 4.278, 4.284, 4.293(b), 4.294(b)).
- 5.84 FPM has made representations that its motivations for attending meetings were legitimate, seeing discussions with SB and CPM as an opportunity to bring together expertise, innovate, and better understand the industry and the workings of the market.<sup>978</sup> It has also made representations that evidence suggests that there may have been cartel arrangements in place prior to the Relevant Period, to which FPM was not a party, and that it therefore had a different intention and objective than SB and CPM in attending meetings.<sup>979</sup> [FPM senior employee 3] has said that he attended meetings in order obtain information about FPM's competitors and use it against them, as well as to feed them false information.<sup>980</sup>
- 5.85 As set out in paragraphs 4.34 and 4.74 the CMA is not persuaded by these representations. But, in any event, having regard to the principles set out in paragraphs 5.58 to 5.76 (and in particular paragraph 5.62), the CMA is of the

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<sup>978</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 2.21 to 2.24.1, 5.38, 5.45.1, and 6.23, URN S1363.

<sup>979</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 2.24 to 2.25.1, URN S1363.

<sup>980</sup> Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, for example, pages 34 to 36, 40, 41, 46 to 49, 59 to 60, 64 to 70, 77, 82, 118, 123 to 125, 139, 154, 175, 211, 233 and 266, URN S1546.

view that these considerations do not carry weight for the purposes of assessing the ‘*object*’ of the agreement or concerted practice.

- 5.86 The CMA notes, in particular, that an agreement which pursues other legitimate objectives, and the existence of legitimate reasons for parties to have contact with each other, does not prevent the contact or arrangement from also including an additional or separate element with an anti-competitive object, or preclude it from being regarded as having a competitively restrictive object.
- 5.87 As noted in the Competition Appeal Tribunal’s judgment in *Balmoral*, ‘*It is because executives meeting together for a legitimate industry purpose must be firmly discouraged from giving into any temptation they may face to slip into illegitimate discussion of prices that the case law defines the concept of concerted practice so broadly*’.<sup>981</sup>

#### *Market context of the agreement or concerted practice*

- 5.88 In assessing whether the agreement or concerted practice that formed the basis of the Infringement had the object of preventing, restricting or distorting competition, the CMA has had regard to its actual context, including the Products affected by the Infringement, the conditions of the functioning and structure of the market, and the relevant legal and economic context.
- 5.89 During the Relevant Period, SB, CPM and FPM competed in the supply of the Products to customers in Great Britain. As set out in Chapter 2, Section A, the Products were typically supplied by the parties through a number of key routes to market: via builders’ merchants or direct from the manufacturer, through the spot market or fixed price agreements.
- 5.90 The CMA has taken account of the way in which the market for the supply of the Products worked,<sup>982</sup> including that:
- (a) prices were influenced by a number of factors (see paragraph 2.4);
  - (b) spot market list prices were not the actual prices paid by customers, and discounts were typically offered to, and individually negotiated with, customers (see paragraphs 4.108 to 4.126);

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<sup>981</sup> *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 84.

<sup>982</sup> FPM has made representations that the CMA has misunderstood the way in which the market for the Products worked, both in relation to the spot market and fixed price agreements: FPM’s response to the CMA’s Statement of Objections, dated 22 February 2019, paragraphs 5.8, 5.54 to 5.56, 5.69 to 5.82, URN S1363.

- (c) there was a large degree of transparency in the market, for example, with customers providing suppliers with sight of their competitors' prices and the availability of market share information from the CPSA;<sup>983</sup> and the information exchanged may not always have been wholly accurate (see, for example, paragraph 4.303);<sup>984</sup>
- (d) a supplier with a term deal may enjoy an incumbency advantage, which could lessen the degree of customer switching;<sup>985</sup>
- (e) suppliers may have chosen not to enter into new term deals or stock deals for legitimate commercial reasons (see, for example, paragraph 4.170).

5.91 As regards the supply of the Products, the CMA notes that price was a key parameter of competition between SB, CPM and FPM during the Relevant Period.<sup>986</sup> It was customary for customers to negotiate with, and/or seek bids or quotations from more than one of, the parties before concluding a supply agreement. Against this background:

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<sup>983</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.38, 5.55, 5.66.2 5.143, 5.145, 6.20, 6.23, and Annex 3, URN S1363, citing the witness statement of [FPM senior employee 5], dated 26 October 2016, paragraph 46, URN 27057; witness statement of [FPM employee 5], dated 3 May 2015, paragraph 18, 19, 25 and 46; , URN 27056; draft witness statement of [FPM senior employee 4], paragraph 20, URN 27378; witness statement of [FPM employee 8], dated 18 June 2014, paragraph 16, URN 27081; witness statement of [FPM employee 6], dated 25 March 2014, paragraph 40, URN 27060; witness statement of [FPM employee 2], dated 21 January 2015, paragraphs 18 and 19, URN 27068; witness statement of [FPM employee 11], dated 23 November 2014, paragraph 5, URN 27090; witness statement of [FPM employee 15], dated 15 September 2014, paragraph 5 URN 27070; witness statement of [FPM employee 16], dated 13 March 2015, paragraph 9, URN 27058; witness statement of [FPM employee 6], dated 1 July 2016, paragraphs 2 to 5, URN 27061; witness statement of [FPM employee 18], dated 9 September 2014, paragraph 24, URN 27088; witness statement of [FPM employee 21], dated 29 January 2016, paragraph 13, URN 27242; witness statement of [K Rouse employee 1], dated 17 January 2017, paragraph 25, URN 27024; witness statement of [MPS employee], dated 5 December 2016, paragraph 47, URN 27102; witness statement of [Mulholland employee 1], dated 22 April 2016, paragraph 2, URN 27038; witness statement of [AD Bly employee 2], dated 20 December 2016, paragraph 6, URN 27042; witness statement of [AR Hendricks employee 1], dated 24 April 2016, paragraph 16, URN 27431; witness statement of [Wolseley employee 1], dated 25 November 2016, paragraphs 25 to 29, URN 29179; witness statement of [CPM senior employee 1] dated 10 December 2018, paragraph 15, URN S1111; URN 9324; URN 7794; URN 29079; URN 7703; URN 29019; URN 29052; URN 29053; [http://www.buildbase.co.uk/pages/priceincreases\\_latestmanincreases.html](http://www.buildbase.co.uk/pages/priceincreases_latestmanincreases.html), and <http://www.pdmltd.co.uk/price-increases/>.

<sup>984</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.37 to 5.38, 5.45.3, 5.144, 5.146, 6.23 and 6.28, URN S1363, citing the witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 37, URN S1111; transcript of an interview with [CPM senior employee 1] held on 11 September 2018, page 80, URN S0455; witness statement of [CPM senior employee 3] dated 11 December 2018, paragraphs 9, 15 and 33, URN S1120, witness statement of [FPM employee 8], dated 18 June 2014, paragraphs 28 to 29, URN 27081.

<sup>985</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.70 to 5.75, URN S1363, and the witness evidence cited therein. See also: transcript of an interview with [FPM senior employee 3] held on 30 August 2019, pages 156 to 161, 182 to 183, URN S1546.

<sup>986</sup> See also: European Commission Decision of 19 July 2016, *Trucks*, Case AT.39824, paragraphs 81 and 82.

- (a) there is evidence that, SB, CPM and FPM discussed both past prices and future pricing intentions throughout the Relevant Period (see, for example, Chapter 4, Sections D to H);
- (b) there is no evidence to suggest that any of the parties thought or indicated that there was no point in exchanging pricing information because they could not make use of it;
- (c) the individuals participating in the cartel meetings on behalf of SB, CPM and FPM were in a position to influence the prices quoted by sales teams, including by giving sales staff express authority to provide discounts autonomously only up to a certain limit (see paragraphs 4.108 to 4.126).

5.92 As regards transparency in the market, even if SB, CPM and FPM were able to obtain pricing information from customers (for example, during commercial negotiations), this does not necessarily mean that the information obtained at the cartel meetings was readily accessible and, hence, not commercially sensitive. Cartel meetings provided an opportunity for SB, CPM and FPM to confirm or improve their understanding of each other's prices and market shares directly from each other, to gain a better understanding of what prices they might charge in the future. As the General Court of the European Union has confirmed, even if the information discussed could be obtained from other sources, the competitors' views about them conveyed added value that would not be readily available in other ways.<sup>987</sup>

5.93 By way of further example, and as noted in paragraphs 4.74(b) and 4.297 to 4.301, the evidence indicates that CPSA information in relation to market shares was not sufficient for the parties' purposes, and that they found it useful to have further, more detailed discussions about each other's more up to date market share figures, in order to provide additional clarity and certainty.

5.94 As regards the accuracy of the information disclosed, the General Court of the European Union has stated that, *'the fact remains that the very disclosure of that type of information on future prices, whether correct or inaccurate, is capable of influencing the conduct of undertakings on the market. In that regard, it has been held that, even on the assumption that it is proved that certain participants in the cartel succeeded in misleading other participants by*

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<sup>987</sup> Judgment of 14 March 2013, *Dole Food Company and Dole Germany v Commission*, T-588/08, EU:T:2013:130, paragraph 295

*sending incorrect information and in using the cartel to their advantage, by not complying with it, the infringement is not eliminated by that simple fact.*<sup>988</sup>

5.95 As regards fixed price agreements, whilst the CMA understands that there may have been an incumbency advantage in being a term deal supplier, and that a number of factors encouraged manufacture and customer loyalty, this does not provide an excuse for suppliers themselves to remove the opportunity for customers to shop around and seek competitive bids or quotations. The CMA also notes that, despite the fact that term deal work was priced lower than spot market work, it was nevertheless worth competing for such customers. [CPM senior employee 1] explains:

*'although term deal prices were generally diabolical and we did not want to saddle ourselves with more low priced work, it also protected some of our better priced term deal work. There were also some major contractors who would provide CPM with good volumes through the term deals, albeit at not a particularly good profit-margins, but they were a fixed outlet and it meant that we had certain volumes for a year if our term deal customers were getting contracts'*<sup>989</sup>

5.96 As regards competitive constraints from products made from other materials, the CMA is of the view that suppliers of pre-cast concrete drainage products face a strong competitive constraint from other suppliers of pre-cast concrete drainage products, but a much weaker competitive constraint from suppliers of drainage products made from other materials, such as plastic (see Chapter 3, and in particular paragraphs 3.51 to 3.54).

5.97 Within its legal and economic context, the CMA therefore finds that the common understanding reached between SB, CPM and FPM reduced uncertainty regarding their intended conduct as it enabled them to set their commercial strategy knowing how their rivals were likely to behave in the market.

5.98 Thus, SB, CPM and FPM's conduct created conditions of competition which did not correspond to the normal conditions of the market. They knowingly

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<sup>988</sup> Judgment of 15 December 2016, *Koninklijke Philips NV v Commission*, T-762/14, EU:T:2016:738, paragraph 91.

<sup>989</sup> Witness statement of [CPM senior employee 1], dated 10 December 2018, paragraph 20, URN S1111. Transcript of an interview with [CPM senior employee 1] held on 11 September 2018, pages 37 to 38, URN S0455. The CMA notes that this is consistent with statements made by FPM, that, in general term deals are provided to customers [X]: FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraphs 5.69.5 and 5.69.6, URN S1363.

substituted practical cooperation for the risks of competition, and as a result, customers did not benefit from competition between them.

### *No evidence of effect*

- 5.99 FPM has made representations that there is no evidence that the arrangement had any effect on the market.<sup>990</sup> It has stated that it competed vigorously in the market, and was subject to considerable competitive pressure, with customers frequently playing the manufacturers off one another.<sup>991</sup> It has also noted that there is evidence that some term deals and stock deals were lost during the Relevant Period (see paragraphs 4.176, 4.211 and 4.260).
- 5.100 Having regard to the principles set out in paragraphs 5.58 to 5.76 (and, in particular, paragraph 5.63), it is clear that if an agreement or concerted practice has as its object the prevention, restriction or distortion of competition, it is not necessary to prove that the agreement or concerted practice would have had any anti-competitive effects for the purposes of establishing an infringement of the Chapter I prohibition and of Article 101.
- 5.101 Moreover, the CMA does not consider that FPM has demonstrated that there was no effect on the market as a result of the arrangement. In particular, even if FPM's analysis of any effect on spot market prices during the Relevant Period were correct, it is not known whether prices in the market or margins may have been lower in the absence of the arrangement. Nor does the analysis consider the prices charged by SB or CPM. Further, it is not known whether the market shares of SB, CPM and FPM would have been different in the absence of the arrangement.
- 5.102 As noted in paragraphs 5.40 to 5.45 there is evidence that the discussions held, and information exchanged, between SB, CPM and FPM were, on an ongoing basis, useful and of practical value in the context of determining their strategy in relation to price competition, providing an indication of the parties' likely future conduct, market trends and the development of prices, thereby reducing uncertainty as to the operation of, and the parties' future conduct on, the market. Furthermore, the agreement or concerted practice meant that SB,

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<sup>990</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, sections 5 and 6, and in particular, paragraphs 5.7 to 5.29, 5.31 to 5.38, 5.41, 5.54, 5.66, 5.88 to 5.99, 5.136, 6.10, 6.11, 6.24, Annex 3 and Annex 4, URN S1363, and the evidence cited therein.

<sup>991</sup> FPM's response to the CMA's Statement of Objections, dated 22 February 2019, for example, paragraphs 5.31, 5.54 and 5.66.1, URN S1363, and the evidence cited therein.

CPM and FPM were aware that there would be less downward pressure on prices than would otherwise be expected absent the coordination.

### *Conclusion on the object of preventing, restricting or distorting competition*

5.103 For the reasons set out above, and in line with the principles set out in paragraphs 5.58 to 5.76, the CMA considers that, having regard to its content, objectives and legal and economic context, the agreement or concerted practice had the object of preventing, restricting or distorting competition.

5.104 It follows that, for the purposes of establishing an infringement of the Chapter I prohibition and Article 101 in the present case, there is no need for the CMA to show that the agreement or concerted practice had an anti-competitive effect.

## **G. Single and continuous infringement**

### ***Legal principles***

5.105 Where two or more undertakings engage in a series of anti-competitive actions in pursuit of a common objective or objectives, it is not necessary to divide the conduct by treating it as consisting of a number of separate infringements where there is sufficient consensus to adhere to a plan in pursuit of a single economic aim.<sup>992</sup>

5.106 Nor is the characterisation of a complex cartel as a single and continuous infringement affected by the possibility that one or more elements of a series of actions, or of a continuous course of conduct, could individually and in themselves constitute infringements.<sup>993</sup>

5.107 The General Court of the European Union has stated that:

*‘a complex cartel may properly be viewed as a single continuing cartel for the time frame in which it existed...Indeed, in a complex cartel of long duration, where the various concerted practices followed and agreements concluded form part of a series of efforts made by the undertakings in pursuit of a*

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<sup>992</sup> Judgment of 24 October 1991, *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:56, paragraph 126.

<sup>993</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 111 to 114. See also: European Commission Decision of 10 December 2003, *Organic peroxides*, Case COMP/E-2/37.857, paragraph 308.



*common objective of preventing or distorting competition, the Commission is entitled to find that they constitute a single continuous infringement.*<sup>994</sup>

5.108 The concept of a single continuous infringement has recently been characterised by Advocate General Wahl as a procedural rule which is designed to achieve efficiency and to alleviate the enforcement burden on a competition authority which would otherwise have to find and prove numerous distinct agreements; that is: the underlying rationale is *'to ensure effective enforcement in cases where infringements are composed of a complex of anti-competitive practices that can take different forms and even evolve over time'*.<sup>995</sup>

5.109 The General Court of the European Union has stated that, *'three conditions must be met in order to establish participation in a single and continuous infringement, namely the existence of an overall plan pursuing a common objective, the intentional contribution of the undertaking to that plan, and its awareness (proved or presumed) of the offending conduct of the other participants.'*<sup>996</sup>

#### *Overall plan pursuing a common objective*

5.110 An overall plan pursuing a common anti-competitive objective may comprise a series of agreements or concerted practices, or both,<sup>997</sup> which share an identical object that distorts competition.<sup>998</sup> Various actions can fall within the framework of a single and continuous infringement provided the characterisation is *"supported by objective and consistent indicia showing that an overall plan exists"*.<sup>999</sup>

5.111 Several criteria have been identified in the case-law as relevant for assessing whether there is a single and continuous infringement over time, namely: the identical nature (or diversity) of the objectives of the practices at issue; the identical nature or substitutability of the goods or services concerned; the undertakings which participated in the infringement; and the detailed rules for

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<sup>994</sup> Judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 130.

<sup>995</sup> See Advocate General Wahl's Opinion of 20 October 2016, *Intel v Commission*, C-413/14 P, EU:C:2016:788, paragraphs 180 to 182.

<sup>996</sup> Judgment of 16 June 2011, *Team Relocations and Others v Commission*, T-204/08 and T-212/08, EU:T:2011:286, paragraphs 32 and 37.

<sup>997</sup> Judgment of 24 October 1991, *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:56, paragraph 127.

<sup>998</sup> Judgment of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41.

<sup>999</sup> Judgment of 17 May 2013, *Trellborg Industrie v Commission*, T-147/09 and 148/09, EU:T:2013:259, paragraph 61.

its implementation.<sup>1000</sup> Whether the natural persons involved on behalf of the undertakings and the geographical scope of the practices are identical are also factors which may be taken into consideration.<sup>1001</sup>

### *Intention and awareness*

5.112 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'*.<sup>1002</sup> This is distinct from the parties' subjective intention which, as set out in paragraph 5.62, it is not necessary to establish.

5.113 An overall plan pursuing a common anti-competitive objective may comprise a series of agreements or concerted practices, or both,<sup>1003</sup> which share an identical object that distorts competition.<sup>1004</sup>

5.114 An undertaking participating in a single continuous infringement may be held responsible for the conduct of other undertakings throughout the period of its participation in that infringement.<sup>1005</sup>

5.115 Agreements 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.<sup>1006</sup>

5.116 The parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement or concerted practice which is manifestly anti-

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<sup>1000</sup> Judgment of 17 May 2013, *Trellborg Industrie v Commission*, T-147/09 and 148/09, EU:T:2013:259, paragraph 60.

<sup>1001</sup> Judgment of 17 May 2013, *Trellborg Industrie v Commission*, T-147/09 and 148/09, EU:T:2013:259, paragraph 60.

<sup>1002</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 87. See also: Judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, EU:C:2004:6, paragraph 83.

<sup>1003</sup> Judgment of 24 October 1991, *Rhône-Poulenc v Commission*, T-1/89, ECLI:EU:T:1991:56, paragraph 127.

<sup>1004</sup> Judgment of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41.

<sup>1005</sup> Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 83 and 203.

<sup>1006</sup> Judgment of 20 March 2002, *LR AF 1998 A/S v Commission*, T-23/99, EU:T:2002:75, paragraphs 106-109.

competitive does not relieve that party of responsibility for it.<sup>1007</sup> The liability of an undertaking for an infringement is not affected by the fact that it did not take part in all aspects of an anti-competitive scheme, or that it played only a minor role in the aspects in which it did participate.<sup>1008</sup> Advocate General Vesterdorf's Opinion in *Rhône-Poulenc* explains the underlying rationale as follows:<sup>1009</sup>

*'If one considers how the alleged cartel probably worked in practice, it is plain to see that it can be extraordinarily difficult to determine in detail the degree of involvement of each party. Who had the idea of taking this or that initiative? Who sought to persuade those others who were perhaps less enthusiastic? Who came to the meetings best prepared? And so on. It is self-evident that where there are no admissions on the part of the participating undertakings, it is often not possible to unravel all those threads in an administrative procedure in which most of the evidence is based on written documents... [Therefore] some relaxation of the requirements of proof must be regarded as unobjectionable. Otherwise, in many cases the Commission would in all likelihood have to abandon prosecution from the outset in cases where there is unquestionably an unlawful cartel but where it is not possible to adduce detailed proof of each party's involvement in the cartel's activities. Such a result would in practice rob Article [101] of much of its effectiveness.'*

5.117 The fact that a party may come to recognise that in practice it can 'cheat' on the agreement or concerted practice at certain times does not preclude a finding that there was a single continuous infringement.<sup>1010</sup>

### ***Application to the Infringement***

#### *An overall plan pursuing a common objective*

5.118 The CMA finds that the conduct of SB, CPM and FPM constitutes a number of anti-competitive contacts in pursuit of a common objective.

5.119 The arrangement between SB, CPM and FPM comprised three key inter-related aspects: (i) the agreement of price lists in the spot market; (ii) an

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<sup>1007</sup> For example: Judgment of 6 April 1995, *Trefileurope Sales v Commission*, T-141/89, EU:T:1995:62, paragraphs 60 and 85.

<sup>1008</sup> Judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 132.

<sup>1009</sup> Advocate General Vesterdorf's Opinion of 24 October 1991, *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:38, page II-951

<sup>1010</sup> Commission Decision of 15 October 2008 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/39188 – *Bananas*, paragraph 324 (citing Judgment of 14 May 1998, *Cascades v Commission*, T-308/94, EU:T:1998:90, paragraph 230) and Judgment of 19 March 2009, *Archer Daniels Midland Co v Commission*, C-510/06 P, EU:C:2009:166, paragraph 189.

agreement in relation to certain fixed price agreements (term deals and stock deals), which involved the allocation of customers (including by bid rigging) and a coordinated approach to pricing; and (iii) an agreement to maintain specified market shares.

- 5.120 As noted in paragraph 4.102, the three aspects of the arrangement were not dependent on each other. However, the different aspects of the arrangement contributed to and formed part of a common plan, the objective of which remained the same throughout the whole of the Relevant Period: to avoid competition on price and thereby increase price levels for the supply of the Products; and to divide the market for the supply of the Products through the allocation of customers, with the aim of eliminating or reducing competition between SB, CPM and FPM and reducing customer choice.
- 5.121 The same undertakings participated in the arrangement throughout the Relevant Period; and the same individual representatives of those undertakings were active in agreeing and implementing the arrangement on behalf of the undertakings for which they worked. The objectives of the practices engaged in by the parties contributed to the common objective of the overall arrangement.
- 5.122 As set out in Section C of this Chapter, the CMA is of the view that the evidence base – and in particular the contemporaneous documentary evidence – is strong and credible evidence of anti-competitive contact between, and a continuous course of conduct by, SB, CPM and FPM, throughout the Relevant Period.

#### *Intention and awareness*

- 5.123 Each of SB, CPM and FPM contributed by its own conduct to this overall objective and was aware of the conduct planned or put into effect by the others in pursuit of the same objective (see Chapter 4, and paragraphs 5.77 to 5.104).
- 5.124 Having regard to the significant duration of the Relevant Period, the CMA is of the view that SB, CPM and FPM must have realised why they were discussing and disclosing pricing and market sharing information; would have known that such information was of practical use and value; and would have expected or hoped that such information would have been relied upon by the other parties (see paragraphs 5.39 to 5.43).

### *Other relevant considerations*

- 5.125 Having regard to the principles set out in paragraphs 5.115 and 5.116, the CMA considers there to have been a single continuous infringement, notwithstanding that there may have been occasions on which one of the parties sought to circumvent the agreement or concerted practice. The CMA specifically notes that there was contact between SB, CPM and FPM throughout the Relevant Period in order to monitor implementation, to sort out instances of ‘*cheating*’ on the arrangement, or to challenge each other when target or ‘*aspirational*’ prices were not achieved because certain quotations were considered to be too low (see paragraphs 4.56 to 4.69, 4.110 to 4.114, 4.127, 4.177, 4.193 to 4.196, 4.244 to 4.246).
- 5.126 The CMA therefore finds that SB, CPM and FPM participated in a single, continuous infringement lasting from at least as early as 6 July 2006 to 13 March 2013.<sup>1011</sup>

## **H. Appreciable restriction of competition**

### ***Legal principles***

- 5.127 An agreement or concerted practice will not infringe Article 101 or the Chapter I prohibition if its impact on competition is not appreciable.<sup>1012</sup>
- 5.128 However, the Court of Justice of the European Union has held that an agreement which has the object of preventing, restricting or distorting competition constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction of competition.<sup>1013</sup> The CMA considers that, pursuant to section 60(2) of the Competition Act,<sup>1014</sup> this principle also applies when assessing appreciability under the Chapter I prohibition.

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<sup>1011</sup> As discussed in Section L (Attribution of liability), SB forms part of the same undertaking as Bonna Sabla and Consolis, which the CMA finds jointly and severally liable for the infringing conduct of SB.

<sup>1012</sup> Judgment of 9 July 1969, *Völk v Vervaecke*, C-5/69, EU:C:1969:35. See also: *North Midland Construction plc v OFT* [2011] CAT 14, paragraphs 45 and 52ff; and Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 16.

<sup>1013</sup> Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, paragraph 37; and Notice on Agreements of Minor Importance at paragraphs 2 and 13.

<sup>1014</sup> Section 60(2) of the Competition Act provides that, when determining a question in relation to the application of Part I of the Competition 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 CJ in respect of any corresponding question arising in EU law.

## ***Application to the Infringement***

5.129 As set out in paragraph 5.103, the CMA has concluded that the agreement or concerted practice between SB, CPM and FPM had the object of preventing, restricting or distorting competition by fixing or coordinating prices; and sharing the market for the Products through the allocation of customers, bid-rigging and the exchange of competitively sensitive information.

5.130 Therefore, the CMA has concluded that the agreement or concerted practice constitutes, by its nature, an appreciable restriction of competition.

## **I. Effect on trade within the UK**

### ***Legal principles***

5.131 The Chapter I prohibition applies to agreements and concerted practices which '*...may affect trade within the United Kingdom*'.<sup>1015</sup>

5.132 The Competition Appeal Tribunal 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.<sup>1016</sup>

### ***Application to the Infringement***

5.133 The CMA considers that, by its very nature, an agreement or concerted practice between competitors to fix or coordinate prices, share markets and exchange competitively sensitive information in relation to the supply of the Products is likely to affect trade within the UK.

5.134 The CMA also notes that:

- (a) the Infringement was operated from and implemented throughout Great Britain – a significant share of the UK market;<sup>1017</sup>

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<sup>1015</sup> By virtue of section 2(1)(a) of the Competition Act. For the purposes of the Chapter I prohibition, the United Kingdom includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.

<sup>1016</sup> *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, paragraphs 459 and 460 and the case law cited. The Competition Appeal Tribunal considered this point also in *North Midland Construction plc v. OFT* [2011] CAT 14, paragraphs 48 to 51 and 62 but considered that it was '*not necessary [...] to reach a conclusion*'.

<sup>1017</sup> Estimations provided by FPM indicated that total annual sales of the Products in Northern Ireland amounted to between £7,278,776 and £9,573,721 for each year from 2010 to 2013 (data was not available for previous

- (b) during the Relevant Period, SB, CPM and FPM had a very strong position in the relevant market. In particular:
- (i) SB, CPM and FPM were the leading suppliers of the Products in Great Britain (with FPM also holding a significant share of the market in Northern Ireland<sup>1018</sup>): from 2006 to 2010 they accounted for over half of the relevant market, and by 2010, they accounted for approximately 92% of that market;<sup>1019</sup>
  - (ii) SB, CPM and FPM supplied a number of large and well known customers in Great Britain (see paragraphs 2.29, 2.40, and 2.45); and
- (c) the Parties were substantial undertakings, with a combined annual turnover in the relevant market exceeding 40 million euros throughout the Relevant Period.<sup>1020</sup>

5.135 The CMA therefore finds that the requirement, within the meaning of the Chapter I prohibition, that an agreement or concerted practice may have an effect on trade within the UK, is satisfied in this case.

## **J. Effect on trade between EU Member States**

### ***Legal principles***

5.136 Article 101 applies to agreements and concerted practices which may affect trade between EU Member States. Such an effect on trade must be appreciable.<sup>1021</sup>

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years). Based on this information the CMA notes that sales of the Products in Great Britain, where the Infringement was carried out, typically represented over 80% of the combined UK market (that is, including Northern Ireland sales) from 2010 to 2013 and that, in the absence of available evidence, it is reasonable to conclude that this proportion would be similar for the remainder of the Relevant Period (being 2006 to 2009). See FPM's response dated 25 May 2018 to the CMA's information request dated 10 May 2018, question 3, URN S0120.

<sup>1018</sup> FPM estimated that its market share for the supply of the Products in Northern Ireland was between 29% and 42% from 2010 to 2013 (data was not available for previous years): see FPM's response dated 25 May 2018 to the CMA's information request dated 10 May 2018, question 3, URN S0120.

<sup>1019</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, schedule 2, URN S0107; CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 8, URN S0110; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 7.3, URN S0106; FPM's response to the CMA's Statement of Objections, dated 22 February 2019, paragraph 5.136, URN S1363.

<sup>1020</sup> SB's response dated 30 May 2018 to the CMA's information request dated 10 May 2018, URN S0118. CPM's response dated 25 May 2018 to the CMA's information request dated 10 May 2018, URN S0119. FPM's response dated 25 May 2018 to the CMA's information request dated 10 May 2018, Annex 1, URN S0120.

<sup>1021</sup> Judgment of 25 November 1971, *Béguelin Import v GL Import Export*, C-22/71, EU:C:1971:113, paragraph 16.

- 5.137 For the purposes of assessing whether an agreement, decision or concerted practice may affect trade between EU Member States the CMA follows the approach set out in the European Commission's published guidance (the '*Effect on Trade Guidelines*').<sup>1022</sup>
- 5.138 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.<sup>1023</sup> In order that trade may be affected by an agreement, '*it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that [the] agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*'.<sup>1024</sup> As set out in the Effect on Trade Guidelines, '*...it is not required that the agreement or practice will actually have or has had an effect on trade between Member States. It is sufficient that the agreement or practice is 'capable' of having such an effect*'.<sup>1025</sup>
- 5.139 There can be an effect on trade between Member States where parts only of those states are affected.<sup>1026</sup>
- 5.140 According to settled case law, the concept of 'trade' covers agreements or practices that affect the competitive structure of the market.<sup>1027</sup> The concept of trade is not limited to traditional exchanges of goods and services across borders but is a wider concept, covering all cross-border activity including establishment (that is, a supplier in one Member State establishing itself in another).
- 5.141 The EU Courts have held in a number of cases that agreements extending over the whole territory of an EU Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis by hindering the economic penetration which the Treaty on the Functioning of the European Union (and its predecessors) is designed to bring about, and as

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<sup>1022</sup> European Commission *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)* (the '*Effect on Trade Guidelines*').

<sup>1023</sup> Judgment of 30 June 1966, *Société Technique Minière v Maschinenbau Ulm*, C-56/65, EU:C:1966:38.

<sup>1024</sup> Judgment of 30 June 1966, *Société Technique Minière v Maschinenbau Ulm*, C-56/65, EU:C:1966:38, page 249.

<sup>1025</sup> Effect on Trade Guidelines, paragraph 26, which cites: Judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraph 170; and Judgment of 1 February 1978, *Miller v Commission*, C-19/77, EU:C:1978:19, paragraph 15.

<sup>1026</sup> Effect on Trade Guidelines, paragraph 21.

<sup>1027</sup> Effect on Trade Guidelines, paragraph 20.



such affect trade between Member States.<sup>1028</sup> However, this presumption does not apply to agreements covering only part of a Member State.

5.142 In qualitative terms the assessment of agreements covering only part of a Member State is approached in the same way as in the case of agreements covering the whole of a Member State.<sup>1029</sup> In the application of the effect on trade criterion three elements must be addressed:

(a) the concept of '*trade between Member States*';

(b) the notion of '*may affect*'; and

(c) the concept of '*appreciability*'.<sup>1030</sup>

5.143 The analysis of steps (a) and (b) above is the same whether or not the agreement was implemented in whole or part of a Member State. It is in the assessment of appreciability that the two categories must be distinguished. When an agreement forecloses access to a regional market, then for trade to be appreciably affected, the volume of sales must be significant in proportion to the overall volume of sales of the products concerned in the Member State in question.<sup>1031</sup> It is not necessary to establish that there was an appreciable effect on trade between Member States, rather there will be a breach of the law where the arrangements in question are capable of having that effect.<sup>1032</sup>

### ***Application to the Infringement***

5.144 The CMA finds that the Infringement may give rise to an effect on trade between Member States to an appreciable extent. The CMA is therefore under a duty to apply Article 101 to the Infringement.

5.145 With respect to the concept of '*trade between Member States*' the CMA notes that there are international aspects to the supply of the Products. During the Relevant Period, FPM supplied the Products to customers in the Republic of

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<sup>1028</sup> Effect on Trade Guidelines, paragraph 78.

<sup>1029</sup> Effect on Trade Guidelines, paragraph 89.

<sup>1030</sup> Effect on Trade Guidelines, paragraph 18.

<sup>1031</sup> Effect on Trade Guidelines, paragraph 90.

<sup>1032</sup> Judgment of 8 September 2010, *Deltafina v Commission*, T-29/05, EU:T:2010:355, paragraph 169-171, and case law cited; Judgment of 12 June 2014, *Intel Corporation v Commission*, T-286/09, EU:T:2014:547, paragraphs 316-320.

Ireland; and there was at least some competition from a number of non-UK businesses, including the Republic of Ireland and the Netherlands.<sup>1033</sup>

5.146 With regard to the notion of '*may affect*', the CMA is of the view that it is possible to foresee with a sufficient degree of certainty that the Infringement may have had an influence, direct or indirect, actual or potential on the pattern of trade between Member States, in particular since it may have had an impact on cross-border trading activity for the Products between at least two Member States and may have had the effect of reinforcing the national partitioning of markets by frustrating entry by competitors from other Member States.

5.147 As regards '*appreciability*', typically the stronger the market position of the undertakings concerned, the more likely it is that an agreement or concerted practice capable of affecting trade between Member States can be found to do so appreciably.<sup>1034</sup> The CMA notes that:

- (a) the Infringement was operated from and implemented throughout Great Britain, a significant share of the UK market;<sup>1035</sup>
- (b) during the Relevant Period, SB, CPM and FPM had a very strong position in the relevant market. In particular:

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<sup>1033</sup> FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraphs 5.2, 6.8, 9.1 and 10.2, URN S0106. SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 122, 133 and 137, URN S0107. CPM's response dated 3 March to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request of 23 January 2018), questions 9 and 10, URN S0110. Witness statement of [Kijlstra employee 3], dated 10 February 2014, paragraph 9, URN 27098.

<sup>1034</sup> There is a negative rebuttable presumption that agreements are not capable of appreciably affecting trade between Member States when the aggregate share of the parties on any relevant market within the Community does not exceed 5% and, in the in the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million euro. See the Effect on Trade Guidelines, paragraph 52.

<sup>1035</sup> Estimations provided by FPM indicated that total annual sales of the Products in Northern Ireland amounted to between £7,278,776 and £9,573,721 for each year from 2010 to 2013 (data was not available for previous years). Based on this information the CMA notes that sales of the Products in Great Britain, where the Infringement was carried out, typically represented over 80% of the combined UK market (that is, including Northern Ireland sales) from 2010 to 2013 and that, in the absence of available evidence, it is reasonable to conclude that this proportion would be similar for the remainder of the Relevant Period (being 2006 to 2009). See FPM's response dated 25 May 2018 to the CMA's information request dated 10 May 2018, question 3, URN S0120.

- (i) SB, CPM and FPM were the leading suppliers of the Products in Great Britain (with FPM also holding a significant share of the market in Northern Ireland<sup>1036</sup>): from 2006 to 2010 they accounted for over half of the relevant market, and by 2010, they accounted for approximately 92% of that market;<sup>1037</sup>
- (ii) SB, CPM and FPM supplied a number of large and well known customers in Great Britain (see paragraphs 2.29, 2.40, and 2.45); and
- (c) SB, CPM and FPM were substantial undertakings with a combined annual turnover in the relevant market exceeding 40 million euros throughout the Relevant Period.<sup>1038</sup>

5.148 On the basis of the above, the CMA finds that the Infringement meets the threshold of appreciability.

## **K. Duration**

5.149 The duration of the Infringement is a relevant factor for determining any financial penalties that the CMA may decide to impose in the event of a finding of infringement. The CMA's Penalty Guidance<sup>1039</sup> states that:

- (a) penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement;
- (b) where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purposes of calculating the number of years of the infringement;
- (c) 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

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<sup>1036</sup> FPM estimated that its market share for the supply of the Products in Northern Ireland was between 29% and 42% from 2010 to 2013 (data was not available for previous years): see FPM's response dated 25 May 2018 to the CMA's information request dated 10 May 2018, question 3, URN S0120.

<sup>1037</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Schedule 2, URN S0107; CPM's response dated 3 March 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), question 8, URN S0110; FPM's response dated 23 February 2018 to the CMA's information request dated 16 January 2018 (as amended by the CMA's information request dated 23 January 2018), paragraph 7.3, URN S0106.

<sup>1038</sup> SB's response dated 30 May 2018 to the CMA's information request dated 10 May 2018, URN S0118. CPM's response dated 25 May 2018 to the CMA's information request dated 10 May 2018, URN S0119. FPM's response dated 25 May 2018 to the CMA's information request dated 10 May 2018, Annex 1, URN S0120.

<sup>1039</sup> *Guidance as to the appropriate amount of a penalty* (CMA73, 18 April 2018).

CMA may in exceptional cases decide to round up the part year to a full year.<sup>1040</sup>

- 5.150 On the basis of the evidence set out in Chapter 4, Section C, the CMA is of the view that SB, CPM and FPM were in regular contact with each other from the latter part of 2005, and that an initial meeting to discuss a coordinated approach on the market was held by SB, CPM and FPM in at least early to mid-2006, but possibly as early as 16 December 2005. Along with the documentary and witness evidence of initial contact, the CMA notes the implementation of a minimum price list within CPM by 6 July 2006, and the evidence of changing market conditions from the middle of 2006.
- 5.151 Therefore, taking account of the totality of the evidence highlighted in Chapter 4, Section C, and taking a conservative approach, the CMA concludes that the arrangement was put in place, and was in operation, by at least as early as 6 July 2006.
- 5.152 The CMA therefore finds that the agreement or concerted practice was entered into by at least as early as 6 July 2006 and continued until 13 March 2013. The duration of the Infringement was therefore six years, eight months and eight days.

## **L. Exemptions and exclusions**

- 5.153 The Parties have not sought to establish that the arrangement entered into is exempt from the Chapter I prohibition by operation of section 9 of the Competition Act, or from Article 101 by the operation of Article 101(3).
- 5.154 Notwithstanding that the burden of proving that the conditions for exemption under section 9 of the Competition Act or Article 101(3) would rest with the Parties, the CMA considers it unlikely that the conditions would be met in this case. Agreements which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).<sup>1041</sup> However, each case ultimately falls to be assessed on its merits.

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<sup>1040</sup> *Guidance as to the appropriate amount of a penalty* (CMA73, 18 April 2018), paragraph 2.16.

<sup>1041</sup> Article 101(3) Guidelines, paragraph 46.

5.155 In addition, the CMA finds that none of the exclusions from the Chapter I prohibition provided for by section 3 of the Competition Act apply.

## **M. Attribution of liability**

### ***Identification of the appropriate legal entity***

5.156 For each Party which the CMA finds has infringed the Competition Act and Article 101, the CMA has first identified the legal entity directly involved in the Infringement. It has then determined whether liability for the Infringement should be shared with another legal entity forming part of the same undertaking, in which case each legal entity's liability will be joint and several.

5.157 The conduct of a subsidiary undertaking<sup>1042</sup> may be imputed to its parent company where, although having a separate legal personality, the subsidiary did not decide independently upon its conduct on the market, but carried out, in all material respects, the instructions of its parent company.<sup>1043</sup> Where a subsidiary is wholly owned by its parent company, the CMA is entitled to presume that the parent exercised decisive influence over the commercial policy of the subsidiary; this presumption also applies if ownership of the subsidiary is just below 100%.<sup>1044</sup> It is for the parent company in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acted independently on the market.<sup>1045</sup>

5.158 Where a parent company is able to exercise decisive influence over the conduct of a subsidiary, and does in fact exercise such decisive influence, the conduct of a subsidiary may be imputed to its parent company (with joint and

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<sup>1042</sup> Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55.

<sup>1043</sup> Judgment of 14 July 1972, *ICI v Commission* C-48/69, EU:C:1972:70, paragraphs 132 and 133; Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 58.

<sup>1044</sup> Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraphs 60 and 61; Judgment of 17 May 2011, *Elf Aquitaine v Commission*, T-299/08, EU:T:2011:217, paragraphs 51 to 56 (where the presumption was held to apply in relation to a shareholding of approximately 98%); Judgment of 7 June 2011, *Arkema France and Others v Commission*, T-217/06, EU:T:2011:251, paragraph 53; Judgment of 27 October 2010, *Alliance One International and Others v Commission*, T-24/05, EU:T:2010:453, paragraphs 126-130. The General Court of the European Union has indicated, among other things, that neither the fact that the subsidiary operates independently in specific aspects of its policy on the marketing of the products concerned by the infringement, nor the lack of any direct involvement in, or knowledge of the facts alleged to constitute, the infringement by directors of the parent company, are sufficient, of themselves, to rebut the presumption: Judgment of 14 July 2011, *Total and Elf Aquitaine v Commission*, T-190/06, EU:T:2011:378, paragraphs 57 and 64; Judgment of 14 July 2011, *Arkema France v Commission*, T-189/06, EU:T:2011:377, paragraph 65.

<sup>1045</sup> Judgment of 27 November 2014, *Alstom v Commission*, T-517/09, EU:T:2014:999, paragraph 55; Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 61; Judgment of 27 October 2010, *Alliance One International and Others v Commission*, T-24/05, EU:T:2010:453, paragraph 130.

several liability for the subsidiary and its parent). In such circumstances, the parent company and its subsidiary form a single economic unit and, therefore, the same undertaking, for the purpose of applying the Chapter I prohibition and Article 101.<sup>1046</sup>

5.159 Where a Party which was directly involved in an Infringement was owned by natural persons during the Relevant Period, liability for the Infringement will not extend to those individuals.

### ***Application to the Parties***

#### ***SBC***

5.160 The CMA finds that SB was directly involved in, and is therefore liable for, the Infringement.

5.161 During the Relevant Period, SB was owned by Bonna Sabla and (until 2008) Saint-Gobain.<sup>1047</sup>

5.162 Saint-Gobain owned a 20% shareholding in SB from the start of the Relevant Period until 14 May 2008; since May 2008 SB has been wholly owned by Bonna Sabla.<sup>1048</sup> The CMA has considered whether Saint-Gobain's 20% stake in SB may have conferred decisive influence over SB during the period July 2006 to May 2008. Having reviewed the relationship agreement between Bonna Sabla and Saint-Gobain, the minutes of all board meetings from July 2006 to May 2008 and all shareholder resolutions passed during that time,<sup>1049</sup> the CMA considers that Bonna Sabla held decisive influence over Stanton Bonna during the entirety of the Relevant Period and that Saint-Gobain's minority stake did not give it decisive influence over SB during the period in which it held its stake in the Relevant Period.

5.163 During the Relevant Period, Bonna Sabla was 99.99% owned by Consolis Finance SAS; Consolis Finance was 100% owned by Consolis SAS; and (from 6 March 2007), Consolis SAS was 100% owned by Consolis Group

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<sup>1046</sup> Judgment of 27 November 2014, *Alstom v Commission*, T-517/09, EU:T:2014:999, paragraph 55; Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 59.

<sup>1047</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 3 to 5 and Annex 1.1, URN S0107.

<sup>1048</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, paragraphs 3 to 5 and Annex 1.1, URN S0107.

<sup>1049</sup> SB's response dated 20 February 2018 to the CMA's information request dated 23 January 2018, URN S0108, as updated by SB's response dated 22 February 2018, URN S0109.

SAS (see paragraphs 2.30 to 2.36).<sup>1050</sup> As a result, Consolis<sup>1051</sup> is presumed to have had decisive influence over Bonna Sabla during the Relevant Period.<sup>1052</sup>

5.164 This Decision is therefore addressed to SB, Bonna Sabla and Consolis (together 'SBC').

#### *CPM*

5.165 The CMA finds that CPM was directly involved in, and is therefore liable for, the Infringement.

5.166 During the Relevant Period, CPM was owned by [X] acting as trustees of the [X] retirement benefit scheme trust; [X] Pension Trustees Limited; [X]; [X]; [X]; Salop Sand and Gravel Supply Company Limited (until 2008); and [X] (from 2008).<sup>1053</sup>

5.167 Salop Sand and Gravel Supply Company Limited owned between a 10% and 13% shareholding in CPM from the start of the Relevant Period until October 2008. [X] Pension Trustees Limited owned a combined shareholding (with [X]) of between 8.25% and 12% from the start of the Relevant Period until October 2008.

5.168 The CMA reviewed a shareholders' agreement which was in place during the Relevant Period.<sup>1054</sup> The CMA found that there were no special rights attached to either company's shareholding in CPM that would confer upon them decisive influence over CPM. Therefore, the CMA concluded that Salop Sand and Gravel Company Limited and, separately, [X] Pension Trustees Limited did not have decisive influence over CPM during the Relevant Period.

5.169 The remaining shareholders in CPM were all individuals. This Decision is therefore addressed to CPM.

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<sup>1050</sup> SB's response dated 16 February 2018 to the CMA's information request dated 16 January 2018, Annex 1.1, URN S0107.

<sup>1051</sup> Including Consolis Group SAS from 6 March 2007 only.

<sup>1052</sup> Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536.

<sup>1053</sup> CPM Annual Returns made up to 9 October 2006, 9 October 2007, 9 October 2008, 9 October 2009, 9 October 2010, 9 October 2011, 9 October 2012, 9 October 2013.

<sup>1054</sup> CPM's email dated 14 March 2018, URN S0117.

*FPM*

5.170 The CMA finds that FPM was directly involved in, and is therefore liable for, the Infringement.

5.171 During the Relevant Period, FPM was owned by [X], [X], [X], [X], [X], and [X].<sup>1055</sup>

5.172 This Decision is therefore addressed to FPM.

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<sup>1055</sup> FPM Annual Returns made up to 30 November 2006, 30 November 2007, 30 November 2008, 30 November 2009, 30 November 2010, 30 November 2011, 30 November 2012, 30 November 2013.



## **6. THE CMA'S ACTION**

### **A. The CMA's decision**

- 6.1 On the basis of the evidence set out above, the CMA has made a decision that from at least as early as 6 July 2006 until 13 March 2013, SBC, CPM and FPM participated in a single continuous infringement through an agreement or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of the Products to customers in Great Britain, and thereby infringed the Chapter I prohibition and Article 101 (the '*Infringement*').
- 6.2 As set out in paragraphs 5.160 to 5.172, the CMA finds SBC, CPM and FPM liable for the Infringement.

### **B. Directions**

- 6.3 Section 32(1) of the Competition Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition or Article 101, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.
- 6.4 The CMA has decided not to impose any directions on the Parties in the circumstances of this case, as the Infringement is no longer continuing.

### **C. Financial penalties**

- 6.5 Section 36(1) of the Competition Act provides that, on making a decision that an agreement has infringed the Chapter I prohibition or Article 101, 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 Competition Act, the CMA must have regard to the guidance on penalties in force at the time when setting the amount of the penalty (the '*Penalty Guidance*').<sup>1056</sup>
- 6.6 The CMA considers that it is appropriate in the circumstances of this case to exercise its discretion under section 36(1) of the Competition Act to impose a penalty on SBC, CPM and FPM in respect of the Infringement, given the seriousness of the Infringement and in order to deter similar conduct in the future.

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<sup>1056</sup> *Guidance as to the appropriate amount of a Penalty* (CMA73, 18 April 2018).

## ***The CMA's margin of appreciation in determining the appropriate penalty***

- 6.7 The CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Competition Act, provided the penalties it imposes in a particular case are: (i) within the range of penalties permitted by section 36(8) of the Competition Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '2000 Order'),<sup>1057</sup> and (ii) the CMA has had regard to the Penalty Guidance in accordance with section 38(8) of the Competition Act.<sup>1058</sup> The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.<sup>1059</sup> Rather, the CMA makes its assessment on a case-by-case basis<sup>1060</sup> having regard to all relevant circumstances and the objectives of its policy on financial penalties.
- 6.8 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 infringes the Chapter I prohibition and Article 101 (as well as other prohibitions under the Competition Act and the Treaty on the Functioning of the European Union as the case may be).<sup>1061</sup>

### ***Small agreements***

- 6.9 The CMA considers that section 39 of the Competition 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 the combined applicable turnover of the Parties exceeded the relevant threshold,<sup>1062</sup> and, in any event, the Infringement amounts to a 'price fixing agreement' within the meaning of

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<sup>1057</sup> SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

<sup>1058</sup> *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, at paragraph 168 and *Umbro Holdings Limited and Manchester United PLC and JJB Sports PLC and Allsports Limited v OFT* [2005] CAT 22, at paragraph 102.

<sup>1059</sup> See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 ('*Eden Brown*'), at paragraph 78.

<sup>1060</sup> See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at paragraph 116, where the Competition Appeal Tribunal 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 Competition Appeal Tribunal observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.

<sup>1061</sup> Section 36(7A) of the Competition Act and paragraphs 1.3 and 1.4 of the Penalty Guidance.

<sup>1062</sup> Regulation 3 of the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 (SI/2000/262) provides that the category of agreements for which no penalty may be imposed under section 39 of the Competition Act comprises '*all agreements between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million*'. The combined applicable turnover of the Parties in the business year ending in 2012 exceeded £20 million.

section 39(9) of the Competition Act.<sup>1063</sup> Moreover, section 39 of the Competition Act does not apply in respect of infringements of Article 101.

### ***Intention/negligence***

6.10 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition or Article 101 only if it is satisfied that the infringement has been committed intentionally or negligently.<sup>1064</sup>

6.11 The CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent for the purposes of determining whether it may exercise its discretion to impose a penalty.<sup>1065</sup>

6.12 The Competition Appeal Tribunal 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'*.<sup>1066</sup>

6.13 This is consistent with the approach taken by the Court of Justice of the European Union, which has stated:

*'the question whether the infringements were committed intentionally or negligently...is satisfied where the undertaking concerned cannot be unaware*

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<sup>1063</sup> A '*price fixing agreement*' within the meaning of section 39(9) of the Competition Act is '*an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates*'. By virtue of section 39(1)(b) of the Competition Act, such an agreement is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Competition Act.

<sup>1064</sup> Section 36(3) of the Competition Act.

<sup>1065</sup> *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 paragraphs 453 to 457; *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 221; *Aberdeen Journals Limited v OFT* [2003] CAT 11, paragraphs 484 and 485; See also: Judgment of 25 March 1996, *SPO and Others v Commission*, C-137/95 P, EU:C:1996:130, paragraphs 53-57. It should be noted that the CMA has considered an uplift for intentionality at step 3 of the penalty calculation.

<sup>1066</sup> *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 221. See also: *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 paragraph 456: '*...an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition... It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I or Chapter II prohibition*'.

*of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty*.<sup>1067</sup>

- 6.14 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement, concerted practice or conduct in question has as its object the restriction of competition.
- 6.15 Ignorance or a mistake of law does not prevent a finding of intentional infringement.<sup>1068</sup>
- 6.16 The CMA notes that there is a large body of evidence indicating that SBC, CPM and FPM must have been aware, or could not have been unaware, that their conduct had the object or would have the effect of restricting competition. For example:
- (a) there is evidence that the arrangement was initiated in response to difficult market conditions, with the express intention that SB, CPM and FPM should start talking to each other in order to address the deterioration in prices in the market (see Chapter 4, Section C);
  - (b) statements made during the recorded meetings highlight that the objective of the arrangement was to increase prices and to maintain market positions, and that discussions went beyond '*banter*' (see paragraphs 4.55, 4.59, 4.74, 4.148, 4.187, 4.269, 4.292, 4.294 and 4.317);
  - (c) documents [X] from individuals [X] show that participants went to the meetings well prepared, and that they took a structured and rigorous approach to the ongoing implementation and monitoring of the arrangement (see paragraphs 4.84 to 4.93);
  - (d) there is evidence that SB, CPM and FPM sought to keep the arrangement secret (see paragraphs 4.94 to 4.100, 4.248 and Annex A), and evidence of discussions about how to disguise the existence of the arrangement from customers, including by ensuring that agreed prices were not exactly the same (see paragraphs 4.134 to 4.138 and 4.173 to 4.175);
  - (e) there is evidence that SB, CPM and FPM took steps to follow up on the implementation of the arrangement, to ensure that instances of cheating

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<sup>1067</sup> Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 124.

<sup>1068</sup> Judgment of 18 June 2013, *Schenker & Co. and Others*, 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*'.

on the arrangement were dealt with effectively, and to challenge each other when target or 'aspirational' prices were not achieved because certain quotations were considered to be too low (see paragraphs 4.56 to 4.69, 4.110 to 4.114, 4.127, 4.177, 4.193 to 4.196, 4.244 to 4.246);

- (f) there is evidence that individuals attending meetings with competitors had some awareness of competition law and had, [§], signed declarations confirming that they would not discuss prices or market shares, or engage in anti-competitive practices (see paragraphs 2.84, 2.94, 2.104, 2.109, 2.119, 2.123, and 2.127).

6.17 The CMA therefore concludes, for the purposes of determining whether to exercise its discretion to impose a penalty, that the Infringement was committed intentionally.<sup>1069</sup> In the alternative, the CMA considers that the threshold for it exercising its discretion to impose a penalty is satisfied on the basis that, at the very least, the Infringement was committed negligently.

#### **D. Calculation of penalty**

6.18 The Penalty Guidance sets out a six-step approach for calculating the penalty.

##### ***Step 1 – starting point***

6.19 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 and the need for general deterrence.<sup>1070</sup>

##### ***Relevant turnover***

6.20 The '*relevant turnover*' is the turnover of the undertaking in the relevant product and geographic market affected by the infringement in the undertaking's '*last business year*', that is the undertaking's financial year preceding the date when the infringement ended.<sup>1071</sup>

6.21 As regards the relevant market, the CMA notes the observation of the Court of Appeal in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc v Office of Fair Trading*<sup>1072</sup> that: '*... neither at the stage of the OFT*

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<sup>1069</sup> The CMA has considered an uplift for intentionality at step 3 of the penalty calculation.

<sup>1070</sup> Penalty Guidance, paragraphs 2.3 to 2.15.

<sup>1071</sup> Penalty Guidance, paragraph 2.11.

<sup>1072</sup> *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 169.

*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*'.<sup>1073</sup>

- 6.22 As set out in Chapter 3, the CMA has found that the relevant market in this case is the supply of the Products to customers in Great Britain.
- 6.23 The CMA has found that the Infringement came to an end on 13 March 2013.
- 6.24 Therefore, in the present case:
- (a) the '*last business year*' of SBC is the financial year ending 31 December 2012, which results in a relevant turnover of £13,374,030;<sup>1074</sup>
  - (b) the '*last business year*' of CPM is the financial year ending 31 December 2012, which results in a relevant turnover of £24,885,109;<sup>1075</sup>
  - (c) the '*last business year*' of FPM is the financial year ending 31 January 2013, which results in a relevant turnover of £24,450,600.<sup>1076</sup>

### *Seriousness*

- 6.25 The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other

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<sup>1073</sup> *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraphs 170 to 173.

<sup>1074</sup> SBC's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, question 1, URN S0114.

<sup>1075</sup> CPM's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, question 1, URN S0113.

<sup>1076</sup> FPM's response dated 13 April 2018 to the CMA's information request dated 23 March 2018, URN S0115. FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraphs 2.8 to 2.10, URN S1446, as clarified by URNs S1540 to S1544, URNs S1557 to S1559 (and URN S1558, Amended Attachment A) in particular). FPM has made representations that FPM's turnover in relation to the Products changed substantially between 2006 and 2013 due to the growing nature of the business (largely through acquisition), and that it is therefore not representative or proportionate to use its 2013 financial figures for the purposes of calculating its relevant turnover: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraphs 2.8 to 2.12, URN S1446. However, the CMA does not consider the circumstances to be exceptional such as to warrant a departure from the approach set out in the Penalty Guidance (noting that it is not exceptional for a business to grow and for its turnover figures to fluctuate), also noting that proportionality is considered at step 4.

undertakings generally from engaging in that type of infringement in the future.<sup>1077</sup>

- 6.26 In making this case-specific assessment, the CMA will first take into account how likely it is for the type of infringement at issue to, by its nature, harm competition.<sup>1078</sup> As set out in the Penalty Guidance, the CMA will generally use a starting point between 21% and 30% of relevant turnover for the most serious types of infringement. In relation to infringements of the Chapter I prohibition and/or Article 101, this includes cartel activities, such as price-fixing and market sharing and other, non-cartel object infringements which are inherently likely to cause significant harm to competition. A starting point between 10% and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect.<sup>1079</sup>
- 6.27 At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of the specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers.<sup>1080</sup>
- 6.28 Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence.<sup>1081</sup>
- 6.29 The CMA considers that the maximum starting point of 30% should be applied in this case to reflect adequately the seriousness of the Infringement and the need for deterrence.
- 6.30 In terms of the likelihood that this type of infringement will cause harm to competition, the CMA notes that the Infringement includes the most serious type of conduct: price fixing and/or coordination and market sharing.<sup>1082</sup> The three tenets of the arrangement show a careful and sophisticated series of mechanisms for suppressing competition across the whole of the market for the

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<sup>1077</sup> Penalty Guidance, paragraph 2.4.

<sup>1078</sup> Penalty Guidance, paragraph 2.5.

<sup>1079</sup> Penalty Guidance, paragraph 2.6.

<sup>1080</sup> Penalty Guidance, paragraph 2.8.

<sup>1081</sup> Penalty Guidance, paragraph 2.9.

<sup>1082</sup> This conduct was supported by the regular exchange of information. FPM has made representations (referring also to the representations set out in its response to the CMA's Statement of Objections (URN S1363)) that the CMA's penalty rests on a flawed characterisation of the arrangement as hard core price fixing and market sharing, noting that FPM did not implement the arrangement and there was no effect on prices, such that there was no 'agreement' or 'concerted practice' in place; and that the CMA has mischaracterised FPM's role in, and view of, the meetings: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraphs 1.3, 2.1 to 2.3, URN S1446. For the reasons set out in Chapters 4 and 5 of this Decision, the CMA is not persuaded by these arguments, and considers that the Infringement amounts to price fixing and/or price coordination and market sharing, the most serious type of infringing conduct. See also footnote 1087.

Products, which were established and operated with the express intention of increasing prices and maintaining the parties' respective market shares (see, for example, paragraphs 4.55, 4.59, 4.74, 4.148, 4.187, 4.269, 4.292, 4.294 and 4.317). It is well-established that such conduct amounts to the most serious type of infringement, which is very likely, by its nature, to cause harm to competition.<sup>1083</sup> Thus, the CMA considers that it is appropriate to use a starting point at the top of the 21 to 30% range.

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

- (a) the nature of the product: the Products are used in large infrastructure projects including drainage and water management, roads and railways, as well as in other construction projects of varying sizes. Although the products may form a small proportion of the overall cost of any construction project, they are nevertheless high value items. Typical customers include civil engineering companies, construction companies and suppliers to the construction industry, utilities providers, as well as (for publicly-funded projects) local and national government. End customers include house-buyers, construction companies and tax-payers (through their contribution to publicly-funded projects);
- (b) the structure of the market: throughout the Relevant Period, SB, CPM and FPM were the leading suppliers of the Products in Great Britain.<sup>1084</sup> From 2006 to 2010 they accounted for over half of the relevant market, and from 2010, they accounted for more than 90% of that market (see paragraphs 2.26 and 5.134(b));
- (c) the Infringement was carried out across the whole of Great Britain, a significant share of the UK market (see paragraph 5.134(a)).<sup>1085</sup>

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<sup>1083</sup> Penalty Guidance, paragraph 2.6.

<sup>1084</sup> With FPM also holding a significant share of the market in Northern Ireland.

<sup>1085</sup> FPM has made representations (referring also to the representations made in its response to the CMA's Statement of Objections (URN S1363)) that the facts of this case make it appropriate for the starting point for any penalty to be adjusted downwards from 30%, noting in particular that: the CMA's assessment of the market is too narrow and the relevant market should include drainage products made from products other than concrete (noting that suppliers of such products provided a competitive constraint); and that concrete pipes represent only a small proportion of the costs of an overall project: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraph 2.4, URN S1446. For the reasons set out in Chapters 3, 4 and 5, the CMA is not persuaded by FPM's representations as regards the scope of the relevant market; and the CMA



- 6.32 As the Infringement is an object infringement, the CMA is not required to make a formal assessment of the actual harm caused for the purposes of establishing an infringement.<sup>1086</sup> Nevertheless, the CMA considers that the potential for harm to competition is high in circumstances where competitors with significant market share discuss pricing, allocate customers to maintain market shares and exchange competitively sensitive information.<sup>1087</sup>
- 6.33 The CMA is also of the view that the maximum starting point of 30% is necessary for the purposes of general deterrence. The Infringement concerns the most serious types of infringing activity. A lower starting point would risk undermining the clear message for other businesses that they should not engage in similar conduct.<sup>1088</sup>
- 6.34 Applying 30% to:
- (a) SBC's relevant turnover of £13,374,030, results in a penalty of £4,012,209 for SBC;
  - (b) CPM's relevant turnover of £24,885,109, results in a penalty of £7,465,533 for CPM;

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considers it relevant, and important to recognise, that the Products were high value items, and therefore had a significant impact on the costs of construction projects, including publicly funded projects.

<sup>1086</sup> Judgment of 13 July 1966, *Consten and Grundig v Commission* joined cases C-56/64, C-58/64, EU:C:1966:41, page 342. See also: *Cityhook Limited v OFT* [2007] CAT 18, paragraph 269; Judgment of 13 July 2011, *Polimeri Europa v Commission*, T-59/07, EU:T:2011:361, paragraph 225.

<sup>1087</sup> FPM has made representations (referring also to the representations made in its response to the CMA's Statement of Objections (URN S1363)) that the facts of this case make it appropriate for the starting point for any penalty to be adjusted downwards from 30%, noting in particular that: there is no evidence that prices for FPM's Products increased as a result of any arrangement; FPM did not implement the spot market minimum price list tenet or term deal tenet; and that the CMA has mischaracterised the nature of the discussions between SB, CPM and FPM, as well as FPM's role in, and view of, such meetings, which '*at worst, amounted to a form of information sharing rather than hard core price fixing or market sharing*': FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraph 2.4, URN S1446. In its supplementary representations on the Draft Penalty Statement, FPM repeated its representations as regards the non-implementation of the arrangement and the lack of any effect on the market, further noting that CPM had made similar representations during an earlier period of the investigation, and that SBC's accounts for the year ending 31 December 2017 include '*a provision of £39,000 for 'customer claims' showing that SBC also does not appear to consider that the alleged arrangement had had any effect on the market (such that customers could bring follow on damages claims)*': FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 2.4 and 2.5, URN S1628. The CMA is not persuaded by these arguments, and considers that the Infringement amounts to price fixing and/or price coordination and market sharing (the most serious type of infringing conduct which is very likely by its nature to cause harm to competition), involving a comprehensive arrangement across the whole of the market for the Products, which was intended to increase prices and maintain market shares. The CMA has also considered and responded to both FPM and CPM's representations as regards non-implementation and effects in the market in Chapters 4 and 5. Following the CMA's consideration of, and response to, CPM's representations during an earlier stage of the investigation, CPM admitted that it had infringed the Chapter I prohibition and Article 101, by way of the arrangement as described in this Decision, under the CMA's settlement process.

<sup>1088</sup> Judgment of 13 July 2011, *Polimeri Europa v Commission*, T-59/07, EU:T:2011:361, paragraph 243.

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

at step 1.

### ***Step 2 – adjustment for duration***

6.35 The amount of the penalty resulting from Step 1 may be increased or, in particular circumstances, decreased to take into account the duration of an infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year.<sup>1089</sup>

6.36 The Infringement lasted from 6 July 2006 and continued until 13 March 2013. The duration of the Infringement was therefore 6 years, 8 months and 8 days. The CMA has rounded this up to the nearest quarter year: 6 years and 9 months.

6.37 The CMA has therefore applied a multiplier of 6.75 to the figure reached at the end of step 1. Applying this multiplier results in a penalty of:

(a) £27,082,441, for SBC;

(b) £50,392,346, for CPM; and

(c) £49,512,465, for FPM,

at step 2.

### ***Step 3 – adjustment for aggravating and mitigating factors***

6.38 The amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or decreased where there are mitigating factors.<sup>1090</sup> A non-exhaustive list of aggravating and mitigating factors is set out in paragraphs 2.18 and 2.19 of the Penalty Guidance.

#### ***Aggravating factor - intentionality***

6.39 The fact that an infringement was committed intentionally rather than negligently can be an aggravating factor.<sup>1091</sup> The CAT has determined that an

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<sup>1089</sup> Penalty Guidance, paragraph 2.16.

<sup>1090</sup> Penalty Guidance, paragraph 2.17.

<sup>1091</sup> Penalty Guidance, paragraph 2.18 and footnote 31.

infringement is committed '*intentionally*' for the purposes of section 36(3) of the Competition 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.<sup>1092</sup>

- 6.40 As set out in paragraph 6.16, there is a large body of evidence indicating that SB, CPM and FPM must have been aware, or could not have been unaware, that their conduct had the object or would have the effect of restricting competition.<sup>1093</sup>
- 6.41 The CMA therefore considers that it is appropriate to apply an uplift of 10% to the penalties of SB, CPM and FPM, for intentionality.

#### *Aggravating factor – involvement of directors or senior management*

- 6.42 The involvement of directors or senior management in an infringement can be an aggravating factor.<sup>1094</sup>
- 6.43 In the present case, the arrangement was set up and/or operated by the directors and senior management of SB, CPM and FPM. In particular, and as set out in Chapter 4, Section D:
- (a) SB was represented at cartel meetings during the Relevant Period by its [X], [SB senior employee 1];

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<sup>1092</sup> *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 221. See also: *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 paragraph 456: '*...an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition... It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I or Chapter II prohibition.*'

<sup>1093</sup> FPM has made representations (referring also to the representations set out in its response to the CMA's Statement of Objections (URN S1363)) that its role in the arrangement was different in nature from that of SBC and CPM, noting in particular that: it does not recognise the CMA's narrative as regards the origins of the arrangement and that it approached the meetings with a different mindset to SB and CPM; the documents recovered from individuals attending the meetings were of a different nature to those recovered from SB and CPM participants (and consisted merely of market reports and price lists); and the arrangement was not implemented by FPM: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraph 4.2, URN S1446. For the reasons set out in Chapters 4 and 5, the CMA is not persuaded by these representations. The CMA further notes that, as regards mitigating factors under step 3, the General Court of the European Union has held that non-implementation was not a mitigating factor for the purposes of calculating any penalty: '*the Commission is not required to recognise the existence of a mitigating circumstance consisting of non-implementation of a cartel unless the undertaking relying on that circumstance is able to show that it clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the cartel in question.*' Judgment of 13 July 2011, *Polimeri Europa v Commission*, T-59/07, EU:T:2011:361, paragraph 307.

<sup>1094</sup> Penalty Guidance, paragraph 2.18.

- (b) CPM was represented at cartel meetings during the Relevant Period by a combination of its:
- (i) [REDACTED], [CPM senior employee 1];
  - (ii) [REDACTED], [CPM senior employee 2]; and
  - (iii) [REDACTED], [CPM senior employee 3];
- (c) FPM was represented at cartel meetings during the Relevant Period by a combination of its:
- (i) [REDACTED], [FPM senior employee 1];
  - (ii) [REDACTED], [FPM senior employee 2]; and
  - (iii) [REDACTED], [FPM senior employee 3].

6.44 Given the direct involvement of directors and senior management in the Infringement, the CMA considers that it is appropriate to apply an uplift of 15% to the penalties of SB, CPM and FPM, for director and senior management involvement.<sup>1095</sup>

#### *Mitigating factor - cooperation*

6.45 The CMA may decrease the penalty at Step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. The Penalty Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion to merit a reduction).<sup>1096</sup>

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<sup>1095</sup> FPM has made representations that a 15% uplift for director involvement is not appropriate as 'FPM is a family-run company [REDACTED]: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraph 4.3, URN S1446. The CMA is not persuaded by this representation, noting that there is no reason to make exceptions for a family business in this case, and that the Competition Appeal Tribunal recognised the aggravated nature of situations where director-level staff permit and coordinate wrongdoing in *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 13, at paragraph 242 to 248: 'An example where director-level involvement is likely to be treated as an aggravating factor is the case of a secret cartel. Cartel behaviour is a serious infringement because it can restrict competition very significantly. Further, a cartel merits particularly stern punishment since the cartelists intend to restrict competition. Cartelists know their conduct has adverse effects, which is why they keep the existence of the cartel secret from their customers, who would much prefer a competitive market. However, a cartel organised by an undertaking's junior staff (without director-level knowledge) is clearly not to be treated as sternly as an infringement where director-level staff permit or coordinate the wrongdoing. This is because, as the CMA correctly notes, society has a greater expectation that senior management will lead by example and abide by the law. It is the fact that the intention to restrict competition extends to the highest echelons of the undertaking which aggravates the offence.'

<sup>1096</sup> Penalty Guidance, paragraph 2.19 and footnote 35.

6.46 In this case:

- (a) CPM provided cooperation during both the civil and criminal investigation, including by:
  - (i) making a number of CPM employees and ex-employees available for voluntary interviews (some of whom provided witness statements), and providing them with separate legal representation; and
  - (ii) assisting the CMA's criminal investigation in conducting a voluntary document review at CPM's premises;
- (b) FPM provided cooperation during both the civil and criminal investigation, including by:
  - (i) agreeing to a streamlined access to file process;
  - (ii) taking a constructive approach in discussions regarding the constitution of the CMA's file using material gathered during the parallel criminal investigation, which led to savings of time and resource;
  - (iii) making a number of employees available for interview (some of whom provided witness statements), and providing access to separate legal representation for relevant employees.<sup>1097</sup>

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

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<sup>1097</sup> FPM has made representations that the CMA should also take into account the fact that it waived its right to an oral hearing, as well as the length of the combined criminal and civil investigations: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraph 4.4.2, URN S1446. The CMA does not consider it appropriate to take into account the fact that FPM waived its right to an oral hearing as this did not lead to a significant resource savings for the CMA in the circumstances of this case. For the avoidance of doubt, the reduction in FPM's penalty at step 3 reflects the level of cooperation that the CMA considers was provided by FPM throughout both the criminal and the civil investigations. In its supplementary representations on the Draft Penalty Statement, FPM has made representations that it should receive a cooperation discount of above 5% (that is, a discount that is higher than the cooperation discount for CPM) because '*a number of matters suggest [CPM's] actions actually slowed down the CMA's investigation*': FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 2.6 to 2.8, URN S1628. The CMA has assessed the cooperation discounts granted to CPM and FPM in the same way, and by reference to the cooperation provided by each party. On the basis of its assessment, the CMA considers that a cooperation discount of 5% is appropriate for both parties. In particular, the CMA notes that all aspects of CPM's actions were taken into account in deciding CPM's cooperation discount, and that FPM's representations do not accurately reflect CPM's actions as a whole; for example, the CMA is of the view that CPM took a constructive approach during the access to file process during settlement; and CPM's representations on the draft Statement of Objections did not impact negatively on the efficiency of the process.

6.48 SBC will not receive a reduction for cooperation at step 3 given that continuous and complete cooperation is a condition of leniency. SBC's cooperation has therefore been reflected in the leniency discount applied at step 6.<sup>1098</sup>

*Mitigating factor - compliance*

6.49 The CMA may decrease the penalty at step 3 where an undertaking can show that adequate steps have been taken to ensure compliance with competition law.<sup>1099</sup> To qualify, an undertaking has to provide evidence of adequate steps taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation, from the top down, together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities. The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount to the penalty of up to 10%.

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

6.51 Submissions from SBC<sup>1100</sup> show that it has:

- (a) identified those areas where previous compliance programmes were not sufficiently robust, taking specific and tailored action to address them in a '*Reinforced Compliance Programme*', which includes:
  - (i) the provision of training for all staff;
  - (ii) ongoing training for those in positions assessed to be vulnerable to competition and bribery issues;
  - (iii) an internal system for reporting competition issues; and
  - (iv) a system for continuous review;
- (b) made a clear public commitment to compliance with competition law on both the SB and Consolis websites, with the Consolis CEO making a

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<sup>1098</sup> Penalty Guidance, paragraph 2.19 and footnote 35.

<sup>1099</sup> Penalty Guidance, paragraph 2.19 and footnote 33.

<sup>1100</sup> URN S0742, URN S0743 (and its annexes URNs S0743-1 to URN S0743-10); URN 0748, URN 0755, URN S0756, URN S0795, URN S0796; URN S1367, URN S1369, URN S1370, URN S1371, URN S1373.

personal and public commitment to compliance in the preface of the Consolis Code of Conduct; and

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

6.52 Submissions from CPM / Marshalls CPM and Marshalls plc<sup>1101</sup> show that CPM / Marshalls CPM has made a full commitment to, and adopted at Board level, the compliance programme of Marshalls plc, which includes:

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

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

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

(d) a Group Risk Register in which a breach of competition law is a separately identified risk, and which is reviewed at least every six months by the Executive Directors and their senior managers identified as having responsibility for each risk area; and

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

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

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<sup>1101</sup> URN S0457, URN S0486, URN S0487, URN S0488, URN S0489, URN S0490, URN S0491, URN S0492, URN S0493, URN S0523.

- 6.54 Submissions from FPM<sup>1102</sup> show that it has undertaken some compliance activity since 2013, including the provision of tailored training sessions on competition law compliance to a targeted pool of staff (in 2013 and 2017, with further training planned for late 2019 / early 2020), and the provision of a competition law manual to all staff. A whistleblowing policy is also in place, for staff to report malpractice or wrongdoing.<sup>1103</sup>
- 6.55 However, the CMA does not consider that FPM has demonstrated that adequate steps have been taken to achieve a clear and unambiguous commitment to compliance throughout the undertaking, from the top down, such as to merit a reduction in its penalty.
- 6.56 The CMA considers that the representations made by FPM in response to the CMA's Statement of Objections (including, in particular, representations as regards FPM's failure to implement the arrangement and the lack of any effects in the market) indicate a failure to understand and accept the underlying competition law principles which calls into question both the adequacy of the compliance training and the commitment to competition law compliance by FPM.
- 6.57 FPM's representations in this respect were echoed by [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3] in interview.<sup>1104</sup> This similarly calls into question whether there is a clear and unambiguous commitment to competition law compliance throughout the organisation from the top down, particularly given that FPM has stated that *'the company's directors monitor business and compliance risks through direct active*

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<sup>1102</sup> FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraph 4.4.1, URN S1446; URN S1447; URN S1448; URNs S1541 to S1544.

<sup>1103</sup> In its supplementary representations on the Draft Penalty Statement, FPM has made representations that it should receive a compliance discount of 10% on the basis that the measures set out in its compliance material are consistent with that of SBC and CPM and appropriate for a company of FPM's size; noting that *'numerous prompts and explanations'* were given to SBC and CPM as regards their compliance submissions, which appear to *'have ensured that those parties gave sufficient representations in order to benefit from a discount for compliance'*, but that *'FPM has not benefited from these types of prompts and explanations'*: FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 2.9 to 2.14, URN S1628. The CMA acknowledges that FPM has undertaken some compliance activity since 2013, but for the reasons set out in the paragraphs below, does not consider that FPM has demonstrated the genuine cultural shift, from the top down, that is at the heart of compliance. The CMA further notes that, following FPM's initial submission on compliance (contained within URN S1446), the CMA wrote to FPM to obtain further detail in relation to its compliance activities; the CMA considers that this approach was sufficient and appropriate given that FPM is represented by experienced competition lawyers.

<sup>1104</sup> Transcript of an interview with [FPM senior employee 1] held on 10 May 2019, URN S1387. Transcript of an interview with [FPM senior employee 2], held on 9 May 2019, URN S1386. Transcript of an interview with [FPM senior employee 3] held on 30 August 2019, URN S1546.



*involvement in the management of the company which it considers to be appropriate to the size of FPM*.<sup>1105</sup>

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

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

### *Penalty after step 3*

6.60 Applying the percentage increases and decreases for aggravating and mitigating factors, respectively, results in a penalty of:

- (a) £31,144,772, for SBC;
- (b) £55,431,580, for CPM; and
- (c) £59,414,958, for FPM,

at step 3.

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

6.61 The penalty may be adjusted at this step for specific deterrence (ensuring that the penalty imposed on the undertaking in question will deter it from breaching competition law in the future) or to ensure that it is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.<sup>1106</sup> At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round.<sup>1107</sup>

6.62 Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty. The assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing undertaking.<sup>1108</sup>

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<sup>1105</sup> FPM has further stated that it does not hold a risk register, and has not undertaken a formal classification or rating of the risk of breaching competition law: URN 1541, paragraph 6.1.

<sup>1106</sup> Penalty Guidance, paragraph 2.20.

<sup>1107</sup> Penalty Guidance, paragraph 2.24.

<sup>1108</sup> Penalty Guidance, paragraph 2.21.

- 6.63 Where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the infringing activity on competition.<sup>1109</sup>
- 6.64 The penalty may be increased at step 4 for specific deterrence. Increases to the penalty at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3.<sup>1110</sup> In considering the appropriate level of uplift for specific deterrence, the CMA will ensure that the uplift does not result in a penalty that is disproportionate or excessive having regard to the infringing undertaking's size and financial position and the nature of the infringement.<sup>1111</sup>

### *SBC*

- 6.65 Taking into account the serious nature of the Infringement, SB's direct and active participation in the Infringement (including through the regular attendance of a senior director at cartel meetings) and the impact of SB's infringing activity on competition, the CMA considers that a penalty of £31,144,772 is appropriate in the round.
- 6.66 In particular, CMA does not consider that a penalty of £31,144,772 after Step 3 is excessive or disproportionate given the size and financial position of SBC. This figure represents approximately:

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<sup>1109</sup> Penalty Guidance, paragraph 2.20. Unless stated otherwise, the CMA has based its assessment on:

- (i) financial information taken from accounts consolidated at the level of Consolis Group SAS (previously named Consolis Holdings SAS): Consolis Holdings SAS Historical Financial Information for the financial years ended 31 December 2015, 2016 and 2017: URN S1360. Figures have been converted from euros into sterling using the Bank of England's annual average and year end spot exchange rates over that period. Averages have been calculated over the three year period ending 31 December 2017;
- (ii) CPM Group Limited's annual accounts for the financial year ending 31 December 2017: URN S1391. Averages have been calculated over the three year period ending 31 December 2017: URN S1393; URN S1392; URN S1391; and
- (iii) FPM's annual report and accounts for the financial year ending 31 December 2018: URN S1388. Averages have been calculated over the three year period ending 31 December 2018: URN S1390; URN S1389; URN S1388.

<sup>1110</sup> Penalty Guidance, paragraph 2.21.

<sup>1111</sup> Penalty Guidance, paragraph 2.23.

- (a) 2% of SBC's annual worldwide turnover for the financial year ending 31 December 2017;<sup>1112</sup> and 3% of SBC's average annual worldwide turnover;<sup>1113</sup>
- (b) 40% of SBC's net assets and 39% of adjusted net assets;<sup>1114</sup>
- (c) -129% of SB's profit after tax for the financial year ending 31 December 2017;<sup>1115</sup> and -178% of SBC's average annual profit after tax;<sup>1116</sup> and
- (d) 42% of SBC's operating profit for the financial year ending 31 December 2017;<sup>1117</sup> and 61% of SBC's average operating profit.<sup>1118</sup>

6.67 The CMA does not consider that an increase in penalty is necessary to deter SBC from further breaches of competition law given that SBC has admitted its involvement in the Infringement (coming forward for leniency and settlement), and has put in place an extensive compliance programme both within SB and across the broader Consolis Group.

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

### *CPM*

6.69 The CMA considers that a penalty of £55,431,580 after step 3 is large given the size and financial position of CPM.<sup>1119</sup> This figure represents

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<sup>1112</sup> Based on annual worldwide turnover of £1,265,574,345.

<sup>1113</sup> Based on average annual worldwide turnover of £1,121,311,030.

<sup>1114</sup> Based on net assets for the year ended 31 December 2017 of £77,551,020, adjusted to £79,262,808 to reflect dividends paid out in the three year period ending 31 December 2017.

<sup>1115</sup> SBC was loss making in the financial year ending 31 December 2017, with a loss after tax of £24,095,330.

<sup>1116</sup> SBC was loss-making over the three year period ending 31 December 2017, with an average annual loss after tax of -£17,538,267.

<sup>1117</sup> Based on operating profit of £73,863,139.

<sup>1118</sup> Based on average annual operating profit of £51,008,689.

<sup>1119</sup> In the particular circumstances of this case, the CMA has carried out its assessment and calculation of CPM's penalty at step 4 on the basis of CPM's annual accounts for the three years ending 31 December 2017. CPM's accounts for the financial year ending 31 December 2017 reflect the most recent full year of normal economic activities over the 12 month period preceding the date of the CMA's decision. CPM's annual accounts for the financial year ending 31 December 2018 reflect a period of only 6 months' economic activities, as the trade and net assets of CPM were transferred to its parent company during this accounting period, at which point CPM ceased trading. Nonetheless, the CMA notes that CPM's performance for the 6 month period of economic activities during the financial year ending 31 December 2018 appears to have been broadly similar to its performance during the previous accounting year, such that there is nothing to indicate that CPM's annual accounts for the financial year ending 31 December 2017 do not provide the most accurate available information about the size and financial position of CPM at the time the penalty is being imposed.

approximately;<sup>1120</sup>

- (a) 100% of CPM's annual worldwide turnover for the financial year ending 31 December 2017;<sup>1121</sup> and 110% of CPM's average annual worldwide turnover;<sup>1122</sup>
- (b) 400% of CPM's net assets and 377% of adjusted net assets;<sup>1123</sup>
- (c) -22,173% CPM's profit after tax for the financial year ending 31 December 2017;<sup>1124</sup> and 2,613% of CPM's average annual profit after tax;<sup>1125</sup>
- (d) 4,442% of CPM's operating profit for the financial year ending 31 December 2017;<sup>1126</sup> and 1,638% of CPM's average operating profit.<sup>1127</sup>

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

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

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

- (a) 9% of CPM's worldwide turnover for the financial year ending 31 December 2017; and 10% of CPM's average worldwide turnover;
- (b) 36% of CPM's net assets and 34% of adjusted net assets;

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<sup>1120</sup> Using figures from CPM Group Limited's annual accounts for the years ended 31 December 2015 (URN S1393), 31 December 2016 (URN S1392) and 31 December 2017 (URN S1391). Averages have been calculated over the three year period ending 31 December 2017.

<sup>1121</sup> Based on annual worldwide turnover of £55,338,000.

<sup>1122</sup> Based on average annual worldwide turnover of £50,436,791.

<sup>1123</sup> Based on net assets for the year ended 31 December 2017 of £13,852,000, adjusted to £14,703,860 to reflect dividends paid out over the 3 year period ending 31 December 2017.

<sup>1124</sup> CPM was loss making in the financial year ending 31 December 2017, with a loss after tax of £250,000.

<sup>1125</sup> Based on average profit after tax of £2,121,511.

<sup>1126</sup> Based on operating profit of £1,248,000.

<sup>1127</sup> Based on average operating profit of £3,383,254.

- (c) -2,000% of CPM's profit after tax for the financial year ending 31 December 2017; and 236% of CPM's average annual profit after tax;
- (d) 401% of CPM's operating profit for the financial year ending 31 December 2017; and 148% of CPM's average operating profit.

## *FPM*

- 6.73 The CMA considers that a penalty of £59,414,958 after step 3 is large given the size and financial position of FPM. This figure represents approximately:
- (a) 23% of FPM's annual worldwide turnover for the financial year ending 31 December 2018;<sup>1128</sup> and 26% of FPM's average annual worldwide turnover;<sup>1129</sup>
  - (b) 45% of FPM's net assets and 40% of adjusted net assets;<sup>1130</sup>
  - (c) 362% of FPM's profit after tax for the financial year ending 31 December 2018;<sup>1131</sup> and 372% of FPM's average annual profit after tax;<sup>1132</sup> and
  - (d) 319% of FPM's operating profit for the financial year ending 31 December 2018;<sup>1133</sup> and 305% of FPM's average operating profit.<sup>1134</sup>
- 6.74 The CMA has therefore applied a reduction at step 4 to ensure that the penalty is not disproportionate or excessive.
- 6.75 Taking into account the serious nature of the Infringement, FPM's direct and active participation in the Infringement (including through the regular attendance of senior directors and management at cartel meetings) and the impact of FPM's infringing activity on competition, the CMA considers that a penalty of £28,000,000 is appropriate in the round.
- 6.76 The CMA considers that this figure achieves the specific deterrence required at a level which is fair, reasonable and proportionate given the size and financial position of FPM. This figure represents approximately:

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<sup>1128</sup> Based on annual worldwide turnover of £254,496,765.

<sup>1129</sup> Based on average annual worldwide turnover of £229,856,359.

<sup>1130</sup> Based on net assets for the year ended 31 December 2018 of £131,596,680, adjusted to £148,026,680 to reflect dividends paid out during the financial years ending 31 December 2016, 2017 and 2018, as well as an amount of £58.3 million to reflect a transfer of assets made to FPM Group Limited as part of a corporate restructuring in 2016.

<sup>1131</sup> Based on a profit after tax of £16,398,109.

<sup>1132</sup> Based on an average profit after tax of £15,988,706.

<sup>1133</sup> Based on operating profit of £18,647,355.

<sup>1134</sup> Based on an average operating profit of £19,459,703.

- (a) 11% of FPM's worldwide turnover for the financial year ending 31 December 2018; and 12% of FPM's average annual worldwide turnover;
- (b) 21% of FPM's net assets and 19% of adjusted net assets;
- (c) 171% of FPM's profit after tax for the financial year ending 31 December 2018; and 175% of FPM's average annual profit after tax; and
- (d) 150% of FPM's operating profit for the financial year ending 31 December 2018; and 144% of FPM's average operating profit.

6.77 FPM has made representations that the CMA's assessment of proportionality by reference to its 2018 accounts means that FPM has been '*disproportionately penalised by the length of the CMA's investigation*', given that FPM's turnover has grown significantly in the period since 2013.<sup>1135</sup>

6.78 As regards the length of the CMA's investigation, the CMA has proceeded as expeditiously as possible, in circumstances where both the criminal and civil investigations were large and complex.<sup>1136</sup>

6.79 In line with the Penalty Guidance, the penalty should ensure that the undertaking is deterred from breaching competition law in the future.<sup>1137</sup> The CMA considers that it is appropriate to assess proportionality and deterrence

<sup>1135</sup> FPM has also stated that: CPM's figure of £5,000,000 after step 4 is significantly different to FPM's figure of £28,000,000; the CMA has mischaracterised FPM's role in the arrangement; and a penalty of £28,000,000 will have a real and immediate impact on FPM's ability to carry out its business: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraphs 5.1 to 5.9, URN S1446. In its supplementary representations on the Draft Penalty Statement, FPM provided further information on the scale of the impact that the penalty would have on FPM's business, [§<]: FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 3. 1 to 3.2, URN S1628. Taking these representations in turn: the CMA notes that the Competition Appeal Tribunal has stated that comparisons of the levels of fine imposed on different parties, '*must be approached with caution. The final figure for the fine imposed on each addressee is the result of many different choices made by the OFT as to what factors should or should not be taken into account when setting the penalty in accordance with the framework set out in the Guidelines. The fact that the application of these choices results in two different companies being subject to widely varying fines is not a matter for complaint or criticism by itself: G F Tomlinson Group Ltd and Others v Office of Fair Trading* [2011] CAT 7, paragraph 150. For the reasons set out in Chapters 4 and 5, the CMA is not persuaded by FPM's representations as regards its role in the arrangement. As regards the impact of the fine on FPM, the CMA notes that FPM has not demonstrated [§<] as a result of the CMA's penalty, nor has it set out or quantified the [§<]. For example, in its representations, FPM has not taken account of the situation after 30 June 2019 (noting that half yearly accounts suggest [§<]); and (although it is a matter for parties to determine how they manage their business) the CMA notes that a transfer of assets of £58.3 million was made to FPM Group Limited as part of a corporate restructuring in 2016, which reduced FPM's stated net asset position. The CMA further notes that FPM will have the opportunity to make a reasoned application for additional time to pay should it consider this necessary.

<sup>1136</sup> The CMA notes that it has been established by the European Courts that, although there is a principle that administrative procedures should be conducted within a reasonable time, a decision can only be challenged on the '*reasonable time*' principle if the parties' rights of defence have been infringed and in any event cannot lead to a reduction of the fine imposed (see: Judgment of 26 January 2017, *Villeroy & Boch SAS v Commission*, Case C-644/13 P, EU:C:2017:59, paragraph 79 and Judgment of 12 July 2018, *The Goldman Sachs Group v Commission*, T-419/14, EU:T:2018:445, paragraph 261).

<sup>1137</sup> Penalty Guidance, paragraphs 2.20 and 2.21.

by reference to FPM's most recently available audited accounts because these accounts provide the most accurate reflection of FPM's size and financial position at the time the penalty is being imposed.<sup>1138</sup>

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

- (a) against average financial indicators over the three year period ending 31 December 2018, noting that these figures are broadly similar across the relevant financial indicators to those for the financial year ending 31 December 2018 (see paragraph 6.76);
- (b) against the financial indicators of SBC and CPM in order to ensure that all Parties are treated in a proportionate and consistent manner, taking account of the various differences in their individual financial circumstances.

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

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<sup>1138</sup> FPM has noted that the CMA has accepted CPM's representations that CPM's accounts, and not those of its ultimate parent (Marshalls plc), are relevant for the purposes of the step 4 (and step 5) penalty calculation, on the basis that Marshalls plc was not involved in any infringing conduct and was unconnected with CPM at the time of the Infringement. FPM states that CPM's representations in this respect are similar to FPM's representations that the use of FPM's 2018 accounts is disproportionate, given that FPM's turnover has grown significantly since 2013 for reasons which are '*wholly unconnected with, and occurred after, the period of the alleged infringement*'. FPM further notes that there was a large degree of overlap between the CPM and Marshalls' business in the 2017 / 2018 period, which would suggest that they could be seen as the same undertaking for the purposes of the proportionality assessment: FPM's representations on the CMA's Draft Penalty Statement, dated 18 October 2019, paragraphs 2.15 to 2.18, URN S1628. However, in the circumstances of this case, the CMA considers that the step 4 (and step 5) penalty calculation should be assessed by reference to the accounts of the undertaking to whom the decision is addressed. The CMA has addressed this Decision to CPM (on the basis that it was directly involved in the Infringement, and wholly unconnected with the Marshalls group at the time of the infringing conduct), and has therefore used CPM's accounts for the purposes of the step 4 (and step 5) penalty calculation. Consistently with this, the CMA has assessed FPM's penalty at step 4 (and step 5) by reference to the accounts of FPM (the undertaking to whom this Decision is addressed), and not the accounts of its parent company. The CMA does not consider that the fact that an undertaking may have been successful or unsuccessful during the period of any investigation, should affect the approach taken in this respect.

Financial indicators <sup>1139</sup>	SBC		CPM		FPM	
	£	After step 4	£	After step 4	£	After step 4
Worldwide turnover (last financial year)	£1,265,574,345	2%	£55,338,000	9%	£254,496,765	11%
Average worldwide turnover	£1,121,311,030	3%	£50,436,791	10%	£229,856,359	12%
Net assets	£77,551,020	40%	£13,852,000	36%	£131,596,680	21%
Adjusted net assets	£79,262,808	39%	£14,703,860	34%	£148,026,680	19%
Profit after tax (last financial year)	-£24,095,330	-129%	-£250,000	-2000%	£16,398,109	171%
Average profit after tax	-£17,538,267	-178%	£2,121,511	236%	£15,988,706	175%
Operating profit (last financial year)	£73,863,139	42%	£1,248,000	401%	£18,647,355	150%
Average operating profit	£51,008,689	61%	£3,383,254	148%	£19,459,703	144%

**Step 5 – adjustment to prevent maximum penalty from being exceeded and to avoid double jeopardy**

- 6.82 The CMA may not impose a penalty for an infringement that exceeds 10% of an undertaking’s ‘*applicable turnover*’, that is, the worldwide turnover of the undertaking in the business year preceding the date of the CMA’s decision or, if figures are not available for that business year, the one immediately preceding it.<sup>1140</sup>
- 6.83 The CMA has assessed SBC, CPM and FPM’s penalties at step 4 against the penalty threshold set out in the preceding paragraph.
- 6.84 SBC’s worldwide turnover for the year ending 31 December 2017 was £1,265,574,345.<sup>1141</sup> No reduction is required at this stage as the penalty after step 4 is below the statutory maximum.

<sup>1139</sup> See footnote 1109.

<sup>1140</sup> Section 36(8) of the Competition Act, the 2000 Order, as amended, and the Penalty Guidance, paragraph 2.25.

<sup>1141</sup> See Consolis Holdings SAS Historical Financial Information for the financial years ended 31 December 2015, 2016 and 2017, URN S1360. The 2017 net sales figure of €1,444,400,000 has been converted from euros into sterling using the Bank of England’s annual average spot exchange rates in 2017.



- 6.85 CPM's worldwide turnover for the year ending 31 December 2017 was £55,338,000.<sup>1142</sup> No reduction is required at this stage as the penalty after step 4 is below the statutory maximum.
- 6.86 FPM's worldwide turnover for the year ended 31 December 2018 was £254,496,765.<sup>1143</sup> An adjustment is therefore required to ensure that the penalty does not exceed the statutory maximum. FPM's penalty has therefore been reduced at this step to £25,449,676.

### **Step 6 – application of reductions for leniency, settlement or voluntary redress**

- 6.87 The CMA will reduce an undertaking's penalty at step 6 where the undertaking has a leniency agreement with the CMA or agrees to settle the case with the CMA.<sup>1144</sup> The CMA may also apply a penalty reduction where an undertaking obtains approval for a voluntary redress scheme.<sup>1145</sup>
- 6.88 As set out in paragraphs 2.67 and 2.68, 8 months after the start of the investigation into the supply of pre-cast concrete drainage products, SB approached the CMA's predecessor organisation, the OFT, with an application for Type B leniency. SBC has admitted its involvement in the Infringement and signed a leniency agreement with the CMA (dated 6 August 2018). Provided SBC continues to co-operate and comply with the conditions of the CMA's leniency policy, as set out in the leniency agreement, SBC will benefit from a 70% leniency discount.
- 6.89 As set out in paragraph 2.72, under the CMA's settlement policy, SBC and CPM have admitted the facts and allegations of the Infringement as set out in the draft Statement of Objections dated 26 November 2018, which are now reflected in this Decision. In light of those admissions, and SBC and CPM's

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<sup>1142</sup> See CPM Group Limited annual accounts for the year ended 31 December 2017, URN S1391. In the particular circumstances of this case, the CMA has calculated the statutory maximum on the basis of CPM's annual accounts for the year ending 31 December 2017, as these reflect the most recent full year of normal economic activities over a period of 12 months preceding the date of the CMA's decision. Although the annual accounts for the financial year ending 31 December 2018 are for a 12 month period, they reflect a period of only 6 months' activities, as the trade and net assets of CPM were transferred to its current parent company during the accounting period, at which point CPM ceased trading. The CMA considers that this approach is consistent with the intended operation of the 2000 Order (see judgment of 7 June 2007, *Britannia Alloys & Chemicals Ltd v Commission*, C-76/06 P, EU:C:2007:326 and judgment of 12 December 2012, *1. garantovaná a.s. v Commission*, T-392/09, EU:T:2012:674).

<sup>1143</sup> FPM's Annual Report and Accounts for the year ended 31 December 2018, URN S1388. FPM has made representations that an assessment by reference to FPM's 2018 financial figures means that FPM has been disproportionately penalised by the length of the CMA's investigation, given that FPM's turnover has grown significantly in the period since 2013: FPM's representations on the CMA's Draft Penalty Statement, dated 19 July 2019, paragraphs 6.1 to 6.12, URN S1446. However, the CMA does not consider the circumstances to be so exceptional as to warrant a departure from the approach set out in the Competition Act, the 2000 Order and the Penalty Guidance. See also footnote 1138.

<sup>1144</sup> Penalty Guidance, paragraphs 2.29 and 2.30.

<sup>1145</sup> Penalty Guidance, paragraph 2.31.

agreement to cooperate in the process for concluding the investigation, the CMA has reduced SBC's and CPM's financial penalty by 20% at step 6 such that:

- (a) the amount that will be payable by SBC is £7,474,745 (provided that SBC complies with the continuing requirements of settlement);
- (b) the amount that will be payable by CPM is £4,000,000 (provided that CPM complies with the continuing requirements of settlement).

6.90 Reductions for leniency, settlement or for a voluntary redress scheme are not applicable to FPM.

### **Penalty**

6.91 The following table sets out a summary of the penalty calculations and the penalties that the CMA requires the Parties to pay in relation to the Infringement.

Step	Description	CPM	FPM	SBC	
	<b>Relevant turnover</b>	<b>£24,885,109</b>	<b>£24,450,600</b>	<b>£13,374,030</b>	
1	Starting point	30%	30%	30%	
2	Duration multiplier	6.75	6.75	6.75	
3	Adjustment for aggravating or mitigating factors	Aggravating: director involvement	+15%	+15%	+15%
		Aggravating: intentionality	+10%	+10%	+10%
		Mitigating: cooperation	-5%	-5%	N/A
		Mitigating: compliance	-10%	0%	-10%
		Total step 3 adjustment	+10%	+20%	+15%
4	Adjustment for specific deterrence and proportionality	-£50,431,580	-£31,414,258	N/A	
5	Adjustment to take account of the statutory maximum penalty	N/A	-£2,550,323	N/A	
	<b>Penalty after Step 5</b>	<b>£5,000,000</b>	<b>£25,449,676</b>	<b>£31,144,772</b>	
6	Leniency discount	N/A	N/A	-£21,801,341	
	Pre-SO Settlement discount	-£1,000,000	N/A	-£1,868,686	
	<b>Penalty payable</b>	<b>£4,000,000</b>	<b>£25,449,676</b>	<b>£7,474,745</b>	

## **E. Payment of penalty**

6.92 The CMA requires:

- (a) SBC to pay a penalty of £7,474,745;
- (b) CPM to pay a penalty of £4,000,000;
- (c) FPM to pay a penalty of £25,449,676.

6.93 The penalty will become due to the CMA on 24 December 2019<sup>1146</sup> and must be paid to the CMA by close of banking business on that date.<sup>1147</sup>

SIGNED:

[~~✕~~]

Andrew Groves, Project Director (Chair of the Case Decision Group), for and on behalf of the Competition and Markets Authority

[~~✕~~]

Anne Fletcher, CMA Panel Member, for and on behalf of the Competition and Markets Authority

[~~✕~~]

George Lusty, Senior Director, Consumer Protection, for and on behalf of the Competition and Markets Authority

All of whom are the members of, and who together constitute, the Case Decision Group.

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<sup>1146</sup> The next working day two calendar months from the expected date of receipt of the Decision.

<sup>1147</sup> Details on how to pay are set out in the letter accompanying this Decision.

## Annex A – Schedule of meetings

The CMA sets out below a list of contemporaneous evidence demonstrating meetings between the directors or staff of SB, CPM and/or FPM on specific dates between June 2006 and 13 March 2013. Further references to meetings are set out in the main body of the Decision.

Date	Source	Location
12 June 2006	URN 7954, page 22 - [CPM senior employee 9] travel and expenses, invoice from Novotel, Coventry for 12 June 2006  URN 2881 - 20060612 - [SB senior employee 1] Diary 2006 - arrow, which the CMA infers indicates a meeting at 3pm  URN 1576 - 20060612 - [FPM senior employee 1] Diary 2006, '3pm M6 Jcn 3. CV6 6HL'	Novotel Hotel, Coventry
22 June 2006	URN 2881 - 20060622 - [SB senior employee 1] Diary 2006, '11.00am Coventry'  URN 1576 - 20060622 - [FPM senior employee 1] Diary 2006, '11.00 Meeting @ Coventry'	Coventry
10 August 2006	URN 6689, pages 1 and 8 - [CPM senior employee 2] travel and expenses August 2008, '10 August Lunches at Novotel with [CPM senior employee 1] and [CPM senior employee 9]' and receipt  URN 2881 - 20060810 - [SB senior employee 1] Diary 2006, '10.00 Coventry B'  URN 3207, page 4 - [SB senior employee 1] travel and expenses August 2006 - receipt from Novotel Hotel, Coventry for 10 August 2006	Novotel Hotel, Coventry
16 October 2006	URN 7944, page 26 - [CPM senior employee 1] travel and expenses October 2006, '16.10.06 Lunch with [CPM senior employee 2]'  URN 1327 - 20061016 - [CPM senior employee 2] Diary 2006, 'Meeting Holiday Inn'	Holiday Inn, Coventry

	<p>URN 2881 - 20061016 - [SB senior employee 1] Diary 2006, two entries: 'Boys?' and '[11am] ✓ <i>Holiday Inn J2 M6</i>'</p> <p>URN 1576 - 20061016 - [FPM senior employee 1] Diary 2006, '11.00 Sales meeting Eng'</p>	
15 November 2006	<p>URN 1327 - 20061115 - [CPM senior employee 2] Diary 2006, 'Meeting'</p> <p>URN 6692, pages 1 and 7 - [CPM senior employee 2] travel and expenses Nov 2006, '15<sup>th</sup> Nov Lunch with [CPM senior employee 1] Novotel', and invoice</p> <p>URN 2881 - 20061115 - [SB senior employee 1] Diary 2006, '11.00 Coventry Boys Meeting venue to be agreed'</p> <p>URN 1576 - 20061115 - [FPM senior employee 1] Diary 2006, '[10am] Sales Meeting'</p> <p>URN 1892, page 10 - [FPM senior employee 2] notebook 26 October 2006 - December 2006 - '15 Nov 06 England Precast meeting' and notes consistent with the arrangement</p>	Novotel Hotel, Coventry
29 November 2006	<p>URN 6679, pages 1, 8, 9 and 10 - [CPM senior employee 1] travel and expenses November 2006 - expenses and invoices from Holiday Inn Cheltenham for 29 November 2006 (including for room hire)</p> <p>URN 5040 - 20061129 - [CPM senior employee 3] Diary 2006, '[FPM senior employee 2] and [FPM senior employee 3] Holiday Inn Cheltenham Time 12.00'</p>	Holiday Inn, Cheltenham
26 January 2007	<p>URN 6786, pages 14 and 16 - [CPM senior employee 2] travel and expenses January 2007 - Fieldhead Hotel receipts for 26 January 2007</p> <p>URN 2882 - 20070126 - [SB senior employee 1] Diary 2007, '1.00 FieldHead'</p> <p>URN 1883 - 20070126 - [FPM senior employee 2] Diary 2007, '[1pm] Room book Fieldhead £55' and notes consistent with the arrangement</p>	Fieldhead Hotel, Leicester

4 April 2007	<p>URN 2882 - 20070404 - [SB senior employee 1] Diary 2007 '<i>1.00pm FH Markfield Boys</i>'</p> <p>URN 1883 - 20070404 - [FPM senior employee 2] Diary 2007, '<i>[1pm] Room Booked Fieldhead</i>' and notes of meeting including information consistent with the arrangement</p> <p>URN 2446, pages 53 and 54 - Invoices from the Fieldhead Hotel for 4 April 2007</p>	Fieldhead Hotel, Leicester
18 April 2007	<p>URN 2882 - 20070418 - [SB senior employee 1] Diary 2007, '<i>[2pm] Boys meeting Luton (...)</i>'</p> <p>URN 1883 - 20070418 - [FPM senior employee 2] Diary 2007, '<i>2.00 English meeting Luton Area J10 M1 Premier T LU1 3HJ Osbourne Road Luton</i>' and notes consistent with the arrangement</p>	Premier Inn, Luton Airport
2 May 2007	<p>URN 2882 - 20070502 - [SB senior employee 1] Diary 2007, '<i>2.30 Fieldhead</i>'</p> <p>URN 1883 - 20070502 - [FPM senior employee 2] Diary 2007, '<i>[2pm] Field head meeting Room + 2<sup>nd</sup> rooms booked</i>' and notes consistent with the arrangement</p>	Fieldhead Hotel, Leicester
22 May 2007	<p>URN 2882 - 20070522 - [SB senior employee 1] Diary 2007, '<i>2.30 J3 A444</i>'</p> <p>URN 7112, pages 52 and 53 - [SB senior employee 1] Credit Card Statements July 2006 to Sep 2008 - payment for meeting room at the Novotel Hotel, Coventry on 22 May 2007</p> <p>URN 1883 - 20070522 - [FPM senior employee 2] Diary 2007, '<i>[2.30] Nova Hotel</i>'</p>	Novotel Hotel, Coventry
18 June 2007	<p>URN 2882 - 20070618 - [SB senior employee 1] Diary 2007, '<i>2.00 Boys meeting Cov</i>' (moved from 11am)</p> <p>URN 7112, page 52 - [SB senior employee 1] Credit Card Statements July 2006 to Sep 2008 - payment for meeting room at the Novotel Hotel, Coventry on 18 June 2007</p> <p>URN 1883 - 20070618 - [FPM senior employee 2] Diary 2007, '<i>[11am] Novotel</i>'</p>	Novotel Hotel, Coventry

10 September 2007	<p>URN 2882 - 20070910 - [SB senior employee 1] Diary 2007, '<i>11.00 Boys Coventry me to book</i>'</p> <p>URN 7112, pages 71 and 74 - [SB senior employee 1] Credit Card Statements July 2006 to Sep 2008 - payment for room hire at the Novotel Coventry on 10 September 2007</p> <p>URN 1883 - 20070910 - [FPM senior employee 2] Diary 2007, '<i>Nova 11.00 ([SB senior employee 1]) T/Deals + update</i>'</p>	Novotel Hotel, Coventry
25 September 2007	<p>URN 2882 - 20070925 - [SB senior employee 1] 2007 Diary, '<i>11am Fieldhead</i>'</p> <p>URN 1883 - 20070925 - [FPM senior employee 2] Diary 2007, '<i>[11.00] England Fieldhead</i>'</p> <p>URN 2446 page 21 - Invoice from the Fieldhead for 25/26 September 2007</p>	Fieldhead Hotel, Leicester
9 October 2007	<p>URN 2882 - 20071009 - [SB senior employee 1] Diary 2007, '<i>10.30am FH</i>'</p> <p>URN 1883 - 20071009 - [FPM senior employee 2] Diary 2007, '<i>[10.30] Sales Meeting...F/head 10.30 booked</i>'</p> <p>URN 2446 pages 17 and 18 - Invoices from the Fieldhead for 8/9 October 2007</p>	Fieldhead Hotel, Leicester
30 January 2008	<p>URN 2070 - 20080130 - [SB senior employee 1] Diary 2008, '<i>[2pm] Field head</i>'</p> <p>URN 1882 - 20080130 - [FPM senior employee 2] Diary 2008, '<i>[2.30] Sales Meeting</i>'</p> <p>URN 2446 pages 2 to 5 - Invoices from the Fieldhead Hotel for 30 January 2008</p>	Fieldhead Hotel, Leicester
11 February 2008	<p>URN 6584, page 3 - [CPM senior employee 2] travel and expenses February 2008 - mileage record '<i>11 February Coventry Meeting</i>'</p> <p>URN 7945 page 24 - [CPM senior employee 3] travel and expenses various months - mileage record for 11 February 2008 '<i>Midlands Meetings</i>'.</p> <p>URN 2070 - 20080211 - [SB senior employee 1] Diary 2008, '<i>[11am] Coventry... [SB senior employee 1] to book... Booked Neville Room</i>'</p>	Novotel Hotel, Coventry

	URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12 and 15	
04 March 2008	<p>URN 6540 pages 2 and 3 - [CPM senior employee 1] travel and expenses March 2008 - mileage record for 4 March 2008, '<i>Coventry/Hinkley meeting</i>'</p> <p>URN 6585, pages 1 and 4 - [CPM senior employee 2] travel and expenses March 2008, '<i>4<sup>th</sup> March Meeting Room Coventry (Sales Meeting)</i>' and invoice from the Novotel Hotel, Coventry for 4 March 2008 (including for room hire)</p> <p>URN 2070 - 20080304 - [SB senior employee 1] Diary 2008, '<i>[12pm] Boys meeting</i>'</p> <p>URN 1882 - 20080304 - [FPM senior employee 2] Diary 2008, '<i>12pm</i>' is circled; entry contains notes consistent with the arrangement</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12 and 17</p>	Novotel Hotel, Coventry
10 April 2008	<p>URN 6586 pages 1 and 2 - [CPM senior employee 2] travel and expenses Apr 2008 - '<i>lunches with [CPM senior employee 1]</i>' and receipt from the Fieldhead, Leicester</p> <p>URN 2070 - 20080410 - [SB senior employee 1] Diary 2008, '<i>2.00 CPSA meeting Fieldhead</i>'</p> <p>URN 1882 - 20080410 - [FPM senior employee 2] Diary 2008, '<i>[2pm] Fieldhead Sales (Room Booked 2 1-5pm)</i>'</p>	Fieldhead Hotel, Leicester
14 May 2008	<p>URN 2070 - 20080514 - [SB senior employee 1] Diary 2008, '<i>1.00pm FHead</i>'</p> <p>URN 1882 - 20080514 - [FPM senior employee 2] Diary 2008, '<i>[1pm] Sales Meeting FH Booked</i>'</p> <p>URN 2447, page 43 - Invoice from Fieldhead Hotel for 14 May 2008 (including for conference room hire)</p>	Fieldhead Hotel, Leicester
13 June 2008	URN 2070 - 20080613 - [SB senior employee 1] Diary 2008, ' <i>11.00... FieldHead</i> '	Fieldhead Hotel, Leicester



	<p>URN 1882 - 20080613 - [FPM senior employee 2] Diary 2008, '[11am] Sales meeting PUK F/Head'</p> <p>URN 1882 - 20080515 - [FPM senior employee 2] Diary 2008 - 'Book F/head Friday 13 June'</p> <p>URN 1882 - 20080528 - [FPM senior employee 2] Diary 2008 - 'Check Room For 13 June F/head'</p> <p>URN 2447 page 41 - Invoice from Fieldhead Hotel for 13 June 2008 (including for conference room hire)</p>	
24 June 2008	<p>URN 6588, page 2 - [CPM senior employee 2] travel and expenses June 2008 - mileage record 'Coventry/Nuneaton'</p> <p>URN 2070 - 20080624 - [SB senior employee 1] 2008 Diary, '[10am] Coventry Boys'</p> <p>URN 7112 pages 135 and 136 - [SB senior employee 1] Credit Card statement and expenses July 06 to September 08 - expenses and invoice in relation to the Novotel Coventry for 24 June 2008</p> <p>URN 1882 - 20080624 - [FPM senior employee 2] Diary 2008, '10.00 Nova' and notes consistent with the arrangement</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12 and 21</p>	Novotel Hotel, Coventry
17 July 2008	<p>URN 6544 pages 1 and 7 - [CPM senior employee 1] travel and expenses July 2008 - lunch receipt from Novotel Coventry dated 17 July 2008</p> <p>URN 6589 pages 1 and 7 - [CPM senior employee 2] travel and expenses July 2008 - expenses and invoices in relation to the Novotel, Coventry for 17 July 2008</p>	Novotel Hotel, Coventry

	<p>URN 2070 - 20080717 - [SB senior employee 1] 2008 Diary, '[10am] Greville Room...Coventry???'...[SB senior employee 1] + [FPM senior employee 3] + [Milton Pipes senior employee]'</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12 and 23</p>	
5 August 2008	<p>URN 2070 - 20080805 - [SB senior employee 1] 2008 Diary, '[2pm] F Head Boys Meeting'</p> <p>URN 7112, pages 141 and 145 - [SB senior employee 1] Credit Card statement and expenses July 06 to September 08 - expenses and invoices in relation to the Novotel Hotel, Coventry for 5 August 2008 (including room hire)</p> <p>URN 1882 - 20080805 - [FPM senior employee 2] Diary 2008 - notes containing information consistent with arrangement</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12 and 25</p>	Novotel Hotel, Coventry
16 September 2008	<p>URN 6546, page 14 - [CPM senior employee 1] travel and expenses Sept 2008 - mileage for 'Coventry...Meeting'</p> <p>URN 2070 - 20080916 - [SB senior employee 1] Diary 2008 '[2pm] Boys at Coventry'</p> <p>URN 1882 - 20080916 - [FPM senior employee 2] Diary 2008 '[2pm] Sales meeting'</p>	Coventry
7 October 2008	<p>URN 6547, page 2 - [CPM senior employee 1] travel and expenses Oct 2008 - mileage in relation to Coventry meeting on 7 October 2008</p> <p>URN 2070 - 20081007 - [SB senior employee 1] Diary 2008, '2.00 Coventry'</p> <p>URN 1882 - 20081007 - [FPM senior employee 2] Diary 2008, '[2pm] Sales Meeting Nova'</p>	Novotel Hotel, Coventry
10 November 2008	<p>URN 2070 - 20081110 - [SB senior employee 1] Diary 2008, '10.30 FH Boys'</p> <p>URN 1882 - 20081110 - [FPM senior employee 2] Diary 2008, '[10.30] F/Head +3 No overnight rooms'</p>	Fieldhead Hotel, Leicester

	URN 2447 pages 22 to 24 - Invoices from the Fieldhead Hotel for 10 November 2008, including for room hire	
15 January 2009	<p>URN 2071 - 20090114 - [SB senior employee 1] Diary 2009, '<i>[SB senior employee 2] in your room and give him. I was due to meet [CPM senior employee 1] 3 o'clock Thurs Fieldhead hotel - phone [CPM senior employee 1]...[SB senior employee 2] in [SB senior employee 1's] stead</i>'</p> <p>URN 2071 - 20090115 - [SB senior employee 1] Diary 2009, '<i>[3pm] Field Head Boys</i>'</p> <p>URN 1881 - 20090115 - [FPM senior employee 2] Diary 2008 - notes consistent with arrangement</p> <p>URN 2447, pages 2 and 6 to 8 - Invoices from the Fieldhead Hotel for 15 January 2008, including for room hire</p> <p>URN 27124 - Witness Statement of [SB senior employee 2], paragraphs 76 to 87 (confirming presence of [CPM senior employee 1], [CPM senior employee 2], [FPM senior employee 3], [FPM senior employee 1], [FPM senior employee 2] and [CPM senior employee 3])</p>	Fieldhead Hotel, Leicester
30 January 2009	<p>URN 6646, pages 2 and 18 - [CPM senior employee 1] travel and expenses January 2009 - mileage record for 30 January 2009 '<i>Coventry/Leicester... meeting</i>'; receipt from Novotel Hotel, Coventry for parking</p> <p>URN 2071 - 20090130 - [SB senior employee 1] 2009 Diary - '<i>10.30 Cov Arden</i>'</p> <p>URN 2709, pages 3, 4 and 6 - [SB senior employee 1] credit card documents 21 January - expenses and receipts from Novotel Hotel, Coventry for 30 January 2009</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12, 13 and 25 (including that that [SB senior employee 1] booked the '<i>Arden</i>' room for 30 January 2009)</p>	Novotel Hotel, Coventry

21 April 2009	<p>URN 2071 - 20090421 - [SB senior employee 1] 2009 Diary, '4.30pm Field Head'</p> <p>URN 1573, page 22 - [FPM senior employee 1] notebook January to June 2009 '21 Apr 09... J3 - M6 Near Novotel'</p> <p>URN 2448, pages 105 to 108 - Invoices from Fieldhead Hotel for 21 April 2009 (including conference room hire on 21 April 2009)</p> <p>URN 1881 - 20090421 - [FPM senior employee 2] Diary 2009, 'F/head 2 nights'</p>	Fieldhead Hotel, Leicester
20 May 2009	<p>URN 2071 - 20090520 - [SB senior employee 1] 2009 Diary - '[11am] Coventry Grenville'</p> <p>URN 2706, pages 3, 29 and 30 - [SB senior employee 1] credit card documents 22 April to 21 May 2009 and receipts - receipts and expenses in relation to the Novotel Hotel, Coventry for 20 May 2009</p> <p>URN 1573, page 24 - [FPM senior employee 1] notebook Jan - Jun 2009, '20<sup>th</sup> May Coventry 11am'</p> <p>URN 1881 - 20090520 - [FPM senior employee 2] Diary 2009, '11.00 Precast Sales Nova' with notes consistent with the arrangement</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12, 13 and 29</p>	Novotel Hotel, Coventry
23 June 2009	<p>URN 6650 page 2 - [CPM senior employee 1] travel and expenses June 2009 'Leicester CPISA'</p> <p>URN 6613 page 3 - [CPM senior employee 3] travel and expenses June 2009, 'Leicester / Notts'</p> <p>URN 2071 – 20090623 – [SB senior employee 1] 2009 Diary – '2 to 2.30pm FH Boys'</p> <p>1881 - 20090623 - [FPM senior employee 2] Diary 2009 – '<del>2.00 Sales meeting</del>' and notes consistent with the arrangement</p>	Leicester

	URN 2448 pages 81, 82, 83 - Invoices from Fieldhead Hotel for 23 June 2009 (including for conference room hire on 23 June 2009)	
7 July 2009	URN 0411, page 27 - [CPM senior employee 1] mileage book, ' <i>Leicester</i> ' URN 6626, page 3 - [CPM senior employee 2] travel and expenses Jul 2009 ' <i>LEICESTER</i> ' URN 2071 - 20090707 - [SB senior employee 1] 2009 Diary, ' <i>4.30 Boys FH</i> ' URN 1881 - 20090707 - [FPM senior employee 2] Diary 2009, ' <i>4.30 Ellistown Sales meeting</i> ' URN 2448, page 80 - Invoice from Fieldhead Hotel for 6/7 July 2009	Fieldhead Hotel, Leicester
11 November 2009	URN 2071 - 20091111 - [SB senior employee 1] 2009 Diary, ' <i>*[4pm] meeting FH</i> ' URN 1881 - 20091111 - [FPM senior employee 2] Diary 2009, ' <i>4pm Sales Meeting</i> ' URN 2448 pages 33 to 35 - Invoices from Fieldhead Hotel, Leicester for 11/12 November 2009 (including for conference room hire on 11 November 2009)	Fieldhead Hotel, Leicester
27 January 2010	URN 6734 page 24 - [CPM senior employee 2] travel and expenses January 2010 - expense claim for Marriott Leicester Parking URN 6747 pages 22 and 24 - [CPM senior employee 3] travel and expenses January 2010 - including expense claim for ' <i>Marriott Leicester Parking £3 cash</i> ' URN 25216 - 20100127 - Calendar Entry [CPM senior employee 3] - ' <i>Marriott - LE19 1SW 01162 820100, Wed Jan 27 09:30 - 10:30</i> ' URN 2073 - 20100127 - [SB senior employee 1] 2010 Diary - ' <i>9.30 Leic Marriott Boys. LE19 1SW 01162 820100</i> ' URN 1879 - 20100127 - [FPM senior employee 2] Diary 2010, ' <i>9.30 Leicester Marriott LE19 1SW... Meeting Room £100 + t+c @ 2.00 each</i> ' and notes consistent with the arrangement	Marriott Hotel, Leicester

	URN 27157 - Witness Statement of [Hotel employee 4] paragraphs 4, 6 to 9, 14, 15, and 18 to 20	
10 February 2010	<p>URN 2073 - 20100210 - [SB senior employee 1] 2010 Diary, '2.30 <del>Coventry</del>'</p> <p>URN 2676 pages 6 and 7 - [SB senior employee 1] credit card statement 21 January to 16 February 2010 and receipts - invoice and receipt in relation to a booking at the Marriott Hotel, Leicester on 10 February 2010</p> <p>URN 1572, page 37 - [FPM senior employee 1] notebook Jun 2009 - August 2010, '10 Feb - meeting'</p> <p>URN 1879 - 20100210 - [FPM senior employee 2] Diary 2010 - '2.00 Sales meeting'</p> <p>URN 27157 - Witness Statement of [Hotel employee 4] paragraphs 4, 10, 11, 14, 16, 18, 21 and 22</p>	Marriott Hotel, Leicester
24 February 2010	<p>URN 2073 - 20100224 - [SB senior employee 1] 2010 Diary, '2.30 Boys'</p> <p>URN 1879 - 20100224 - [FPM senior employee 2] Diary 2010, '2.30 Holiday Express'</p>	Holiday Inn Express, Luton
26 March 2010	<p>URN 1879 - 20100326 - [FPM senior employee 2] Diary 2010, '10.00 PUK'</p> <p>URN 2073 - 20100326 - [SB senior employee 1] 2010 Diary, '10.00 FHH' ('Boys' written under doodle)</p>	Fieldhead Hotel, Leicester
16 April 2010	<p>URN 2073 - 20100416 - [SB senior employee 1] 2010 Diary, '11.30 FH'</p> <p>URN 1879 - 20100416 - [FPM senior employee 2] Diary 2010, 'PUK Sales'</p> <p>URN 2449, page 212 - Invoice from Fieldhead Hotel, for 16 April 2010 (including conference room hire)</p>	Fieldhead Hotel, Leicester

4 May 2010	<p>URN 2073 - 20100504 - [SB senior employee 1] 2010 Diary, '3.30pm FH'</p> <p>URN 1572, page 51 - [FPM senior employee 1] notebook June 2009 to Aug 2010, entry dated 4 May 2010: 'Thurs 20/5/2010 9am Novotel' (i.e. date of the next meeting)</p> <p>URN 2449, pages 205, 208, and 209 - Invoices from Fieldhead Hotel for 4 May (including hire of conference room on 4 May 2010)</p>	Fieldhead Hotel, Leicester
20 May 2010	<p>URN 6725, pages 1 and 14 - [CPM senior employee 1] travel and expenses May 2010 - expenses for Novotel Coventry on 20 May 2010</p> <p>URN 21700, page 1 - CPM movement sheet w/c 17/05/2010 - showing [CPM senior employee 1] and [CPM senior employee 2] in Coventry on 20 May 2010</p> <p>URN 2073 - 20100520 - [SB senior employee 1] 2010 Diary - '[9am] Cov Boys - me to book'</p> <p>URN 2673, pages 1, 2, 3 - [SB senior employee 1] credit card statement 22 Apr - 23 May 2010 and receipts - expenses, receipt and invoice for meeting room at the Novotel Hotel, Coventry on 20 May 2010</p> <p>URN 1572, page 51 - [FPM senior employee 1] notebook June 2009 to August 2010 - [Note dated 4 May] 'Thurs 20/5/2010 9am Novotel'</p> <p>URN 1879 - 20100520 - [FPM senior employee 2] Diary 2010 - '9.00 PUK... book F/Head June 15' and notes consistent with the arrangement</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] pages 12, 13, 31</p>	Novotel Hotel, Coventry
15 June 2010	<p>URN 2073 - 20100615 - [SB senior employee 1] 2010 Diary, '[2pm] FH boys'</p> <p>URN 1879 - 20100615 - [FPM senior employee 2] Diary 2010, '2.00 PUK F/Head'</p>	Fieldhead Hotel, Leicester
25 August 2010	<p>URN 22069, page 1 - CPM movement sheet w/c 23/08/2010 - showing [CPM senior employee 1] in Leicester on 25 August 2009</p>	Fieldhead Hotel, Leicester

	<p>URN 2073 - 20100825 - [SB senior employee 1] 2010 Diary - <i>'[9am] Boys Meeting'</i></p> <p>URN 1879 - 20100825 - [FPM senior employee 2] Diary 2010, <i>'9.00 Fieldhead Sales'</i></p> <p>URN 2449, pages 40, 42 and 44 - Invoices from Fieldhead Hotel, Leicester for 24/25 August 2010 (including conference room hire on 25 August 2010)</p> <p>URN 27148 - Witness Statement of [Hotel employee 5] paragraphs 8, 9, 12 and 18</p>	
29 September 2010	<p>URN 22077 page 1 - CPM movement sheet w/c 27/09/2010 - showing [CPM senior employee 1] would be in Coventry, [CPM senior employee 2] <i>'With [CPM senior employee 3] - Midlands'</i>, and [CPM senior employee 3] would be in the 'Midlands'</p> <p>URN 2073 - 20100929 - [SB senior employee 1] 2010 Diary, <i>'8.30 Cov'</i></p> <p>URN 2668, pages 1, 2 and 3 - [SB senior employee 1] credit card statement 20 September to 19 October 2010 and receipts - receipts and invoices in relation to Novotel Hotel, Coventry on 29 September 2010</p> <p>URN 1879 - 20100929 - [FPM senior employee 2] Diary 2010 - <i>'11.00 meeting sales UK... Book F/Head 26 Oct'</i></p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paras 12, 13, 33</p>	Novotel Hotel, Coventry
27 October 2010	<p>URN 6730 pages 14 and 15 - [CPM senior employee 1] travel and expenses October 2010 - receipts from Fieldhead Hotel dated 27 October 2010</p> <p>URN 2073 - 20101027 - [SB senior employee 1] 2010 Diary - <i>'[11am] Boys FH'</i> [written on 26 October 2010 with arrow to 27 October 2010]</p> <p>URN 2449, pages 57, 58 and 60 - Invoices from Fieldhead Hotel for 27 October 2010 (including room hire on 27 October 2010)</p>	Fieldhead Hotel, Leicester



	<p>URN 25213, page 788 - Calendar Entry - [FPM senior employee 1] - '<i>Strategy Meeting Fieldhead, Wed Oct 27 2010 11:00 - 13:30</i>'</p> <p>URN 1879 - 20101027 - [FPM senior employee 2] Diary 2010 - '<i>11.00 Sales</i>'</p> <p>URN 27148 - Witness Statement of [Hotel employee 5] paragraphs 8, 9, 13, 18</p>	
1 December 2010	<p>URN 2073 - 20101201 - [SB senior employee 1] 2010 Diary - '<i>9.00 meet boys</i>'; '<i>booked Longford room</i>'; '<del>10.30am</del><i>Novotel me to arrange</i>'</p> <p>URN 2666, page 1 - [SB senior employee 1] credit card statement 18 November to 20 December 2010 and receipts - '<i>Novotel Coventry meeting room</i>' (transaction dated 1 December 2010)</p> <p>URN 1571, page 19 - [FPM senior employee 1] notebook August 2010 to Jul 2011 - '<i>Wed 1st Dec @10.30 Novotel</i>'</p> <p>1879 - 20101201 - [FPM senior employee 2] Diary 2010 - '<i>10.30 Sales Nova</i>'</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12, 13, 35</p>	Novotel Hotel, Coventry
18 January 2011	<p>URN 5043 - 20110118 - [CPM senior employee 3] Diary 2011 - '<i>Out =9=AM</i>'</p> <p>URN 2072 - 20110118 - [SB senior employee 1] 2011 Diary - '<i>Boys F.H 9.00 am</i>'</p> <p>URN 1571, page 25 - [FPM senior employee 1] notebook August 2010 to July 2011, '<i>18<sup>th</sup> 9 am</i>'</p> <p>URN 1877 - 20110118 - [FPM senior employee 2] Diary 2011 - notes consistent with arrangement</p> <p>URN 2449, pages 12, 13 and 14 - Invoices from Fieldhead Hotel for 17/18 January 2011 (including room hire on 18 January 2011)</p> <p>URN 27148 - Witness Statement of [Hotel employee 5] paragraphs 8, 9, 14 and 18</p>	Fieldhead Hotel, Leicester

<p>15 February 2011</p>	<p>URN 21480, page 1 - CPM movement sheet w/c 14/02/2011 - showing [CPM senior employee 1] would be in Leicester, [CPM senior employee 2] would be in Coventry and [CPM senior employee 3] in the Midlands on 15 February 2011</p> <p>URN 5043 - 20110215 - [CPM senior employee 3] Diary 2011 - '<i>10am Meeting</i>'</p> <p>URN 2072 - 20110215 - [SB senior employee 1] 2011 Diary - '<i>10.30am. Cov Nov me</i>'</p> <p>URN 2664, pages 1, 2, 3 - [SB senior employee 1] credit card statement 19 January 2011 to 15 February 2011 and receipts - transaction on this date in relation to Novotel Hotel, Coventry (including room hire)</p> <p>URN 1571, page 30 - [FPM senior employee 1] notebook August 2010 to July 2011, '<i>Meeting 15th --&gt; 10.30 Coventry Novotel</i>'</p> <p>URN 1877 - 20110215 - [FPM senior employee 2] Diary 2011, notes consistent with arrangement (including '<i>Book Flights for 23 March and meeting room</i>' i.e. the date of the next meeting of the Parties)</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12, 13 and 37</p>	<p>Novotel Hotel, Coventry</p>
<p>23 March 2011</p>	<p>URN 7945 pages 1, 2 and 35 - [CPM senior employee 3] travel and expenses March 2011 - mileage record for this date '<i>Midlands, Purpose: meeting</i>'; and expenses/receipt from Fieldhead Hotel for 23 March 2011 '<i>Breakfast [CPM senior employee 3], [CPM senior employee 2]</i>'</p> <p>URN 2072 - 20110323 - [SB senior employee 1] 2011 Diary - '<i>10.30am FH</i>'</p> <p>URN 1571, page 35 - [FPM senior employee 1] notebook August 2010 to July 2011 - '<i>23rd March @10.30am F Head</i>'</p> <p>URN 2450 pages 277, 278, 280 - Invoices from the Fieldhead Hotel for 22/23/24 March 2011 (including room hire on 23 March 2011)</p>	<p>Fieldhead Hotel, Leicester</p>

	<p>URN 1877 - 20110323 - [FPM senior employee 2] Diary 2011 - '10.30 F/Head'</p> <p>URN 27148 - Witness Statement of [Hotel employee 5] paragraphs 8, 9, 15 and 18</p>	
1 April 2011	<p>URN 25216 - 20110401 - Calendar Entry - [CPM senior employee 3] - 'Novotel Fri Apr 01 09:30 - 10:30' and 'Skanska-M25 price increase, 09:00 - 10:00'</p> <p>URN 2072 - 20110401 - [SB senior employee 1] 2011 Diary, '9.30 - Novotel to book'</p> <p>URN 2662, page 1 - [SB senior employee 1] credit card statement 21 March to 11 April 2011 and receipts - Novotel Coventry 'meeting room (no receipt)'</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12, 13 and 39</p>	Novotel Hotel, Coventry
11 May 2011	<p>URN 6464 pages 1, 12 and 13 - [CPM senior employee 1] travel and expenses May 2011 - 'Meeting - CPSA' and invoice from Novotel Hotel Coventry</p> <p>URN 21505, page 1 - CPM movement sheet w/c 09/05/2011 - [CPM senior employee 1] and [CPM senior employee 2] in Coventry on 11 May 2011</p> <p>URN 2072 - 20110511 - [SB senior employee 1] 2011 Diary, '[2pm] Cov. Booked'</p> <p>URN 2661 pages 1, 9, 10 - [SB senior employee 1] credit card statement 20 April to 21 May 2011 and receipts - expenses for Novotel Coventry 'room', and receipt and invoice</p> <p>URN 1877 - 20110511 - [FPM senior employee 2] Diary 2011 - '2pm Nova'</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12, 13 and 41</p>	Novotel Hotel, Coventry
14 June 2011	<p>URN 21460 page 1 - CPM movement sheet w/c 13/06/2011 - [CPM senior employee 1] and [CPM senior employee 2] in Coventry</p> <p>URN 2072 - 20110614 - [SB senior employee 1] 2011 Diary, '10.30 Comedy Club - Coventry'</p> <p>URN 1877 - 20110614 - [FPM senior employee 2] Diary 2011, '10.30 Nova... 2.30 Nova'</p>	Novotel Hotel, Coventry

	URN 1571, page 52 - [FPM senior employee 1] notebook August 2010 to Jul 2011 [entry between 4 May and 12 May: URN 1571, pages 51 to 53] <i>'Date 14th June 10.30am'</i> [date of next meeting]	
16 August 2011	URN 2072 - 20110816 - [SB senior employee 1] 2011 Diary, <i>'1.30pm ?????'</i> and <i>'Coventry Boys'</i> URN 1877 – 20110816 – [FPM senior employee 2] Diary 2011, <i>'11.00 B Nova'</i>	Novotel Hotel, Coventry
7 September 2011	URN 1877 - 20110907 - [FPM senior employee 2] Diary 2011. <i>'Room Booked F/Head... F/head...11.00 [SB senior employee 1]+[CPM senior employee 3]...'</i> URN 2072 - 20110907 - [SB senior employee 1] 2011 Diary, <i>'2.30am Field Head'</i>	Fieldhead Hotel, Leicester
26 September 2011	URN 20876 page 1 - CPM movement sheet w/c 26/09/2011, showing [CPM senior employee 2] in Leicester and [CPM senior employee 3] in the Midlands/Mells URN 6487 pages 1, 2, and 8 - [CPM senior employee 3] travel and expenses Sept 2011, including invoice from Fieldhead Hotel for 26/27 September 2011 URN 2072 - 20110926 - [SB senior employee 1] 2011 Diary <i>'[2pm] Boys FH?? ✓'</i> URN 1570, page 18 - [FPM senior employee 1] notebook, notes consistent with arrangement URN 1877 - 20110926 - [FPM senior employee 2] Diary 2011, notes consistent with arrangement URN 25214, page 250 - Calendar Entry - [FPM senior employee 2], <i>'Book room feildhead for Monday 26'</i> URN 2450, page 142 - Invoice from Fieldhead Hotel for 26 September 2011 (including room hire)	Fieldhead Hotel, Leicester

<p>06 December 2011</p>	<p>URN 6493, pages 2 and 13 - [CPM senior employee 3] travel and expenses Dec 2011, showing [CPM senior employee 3] in the Midlands on 6 December 2011, and including an invoice from the Fieldhead Hotel for 6/7 December 2011</p> <p>URN 25216 - 20111206 - Calendar Entry - [CPM senior employee 3] '<i>Field Head Tue Dec 06 13.00-14.00</i>'</p> <p>URN 2072 - 20111206 - [SB senior employee 1] 2011 Diary, '<i>[1pm] Field Head!!</i>'</p> <p>URN 1570, page 37 - [FPM senior employee 1] notebook Jul 2011 - Jul 2012, notes consistent with the arrangement</p> <p>URN 25213, page 862 - Calendar Entry - [FPM senior employee 1], '<i>Meet [FPM senior employee 3] 'Fieldhead' 'Tues Dec 6 (...)</i>'</p> <p>URN 2450 pages 19 and 35 - Invoices from Fieldhead Hotel for 5/6 December 2011 (including room hire on 6 December 2011)</p> <p>URN 1877 - 20111206 - [FPM senior employee 2] Diary 2011, notes consistent with the arrangement</p>	<p>Fieldhead Hotel, Leicester</p>
<p>11 January 2012</p>	<p>URN 5044 - 20120111 - [CPM senior employee 3] Diary 2012, '<i>9.30 Coventry</i>'</p> <p>URN 2074 - 20120111 - [SB senior employee 1] 2012 Diary, '<i>9.30 Boys Cov</i>'</p> <p>URN 2686, pages 1, 10, 11 - [SB senior employee 1] credit card statement 20 December 2011 to 20 January 2012 and receipts - transaction for 11 January 2012 '<i>Novotel Coventry... meeting room</i>' invoice and receipt</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12, 13 and 43</p>	<p>Novotel Hotel, Coventry</p>

4 April 2012	<p>URN 6417, pages 2 and 8 - [CPM senior employee 1] travel and expenses Apr 2012 - mileage record '<i>Coventry...Meeting</i>' and receipt for parking at the Novotel Hotel, Coventry on 4 April 2012</p> <p>URN 6418 page 2 - [CPM senior employee 3] travel and expenses Apr 2012 - mileage record '<i>Midlands meeting</i>'</p> <p>URN 2074 - 20120404 - [SB senior employee 1] 2012 Diary - '<i>10am Cov Nov Long Ford</i>'</p> <p>URN 2689 pages 1, 3 and 10 - [SB senior employee 1] credit card statement 21 March to 19 April 2012 and receipts - transactions on 4 April 2012 for Novotel Hotel, Coventry (including for meeting room)</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12, 13 and 45</p>	Novotel Hotel, Coventry
21 June 2012	<p>URN 0600 - 20120621 - [CPM senior employee 2] Diary 2012 - '<i>8.30 Coventry Novotel</i>'</p> <p>URN 6428, page 2 - [CPM senior employee 3] travel and expenses Jun 2012 - mileage record '<i>Midlands, meetings</i>'</p> <p>URN 2074 - 20120621 - [SB senior employee 1] 2012 Diary - '<i>8.30 Cov Novotel</i>'</p> <p>URN 2692, Pages 1, 3 and 4 - [SB senior employee 1] credit card statement 21 June to 22 Jul 2012 and receipts - transactions on 21 June 2012 for Novotel Hotel, Coventry (including for meeting room)</p> <p>URN 27114 - Witness Statement of [Hotel employee 1] paragraphs 12, 13 and 47</p>	Novotel Hotel, Coventry
29 August 2012	20203A - transcript of a record of the August 2012 meeting	Novotel Hotel, Coventry
26 September 2012	URN 27613, page 165 - text message from [FPM senior employee 2] to [CPM senior employee 1] taken from an extraction report of [FPM senior employee 2's] ipad dated 25 September 2012 at 17.28: ' <i>[CPM senior employee 1] / [CPM senior employee 2] Meeting tomorrow at Royal</i>	Royal Arms, Sutton Cheney

	<p><i>Arms Main St Sutton Cheney, Nr Market Bosworth Warwickshire Cv13 0AG About 1 mile from our Cadeby Factory Sorry forgot to ring you earlier today'</i></p> <p>URN 0600 - 20120926 - [CPM senior employee 2] Diary 2012 - '<i>Field Head</i>' and 10am circled</p> <p>URN 25216 – 20120926 - Calendar Entry - [CPM senior employee 3] - '<i>Royal Arms, Off M42.jct 10 Sutton Cheaney CV13 0AJ Wed Sep 26 10:00 - 11:00</i>'</p> <p>URN 2074 - 20120926 - [SB senior employee 1] 2012 Diary - '<i>10.00 F.Head boys</i>'</p> <p>URN 0142, page 34 - [FPM senior employee 3] Notebook from 1 July 2010, '<i>Nxt meeting Wed 26 September... sales meeting f/head</i>'</p> <p>URN 27144 - Witness Statement of [Hotel employee 3] paragraphs 8 and 9</p>	
8 October 2012	<p>URN 6519 pages 1, 2, 6 - [CPM senior employee 3] travel and expenses Oct 2012, expenses record '<i>Hotel Meeting</i>' and invoice from Holiday Inn, Gloucester for 8 October 2012 (including for conference room hire on 8 October 2012)</p> <p>URN 2074 - 20121008 - [SB senior employee 1] 2012 Diary '<i>9.30 Boys meeting Holiday Inn...GL4 3RX</i>'</p>	Holiday Inn, Gloucester
6 November 2012	<p>URN 25216 – 20121106 - Calendar Entry - [CPM senior employee 3] - '<i>Meeting - CV13 0AJ All day Tue Nov 06</i>'</p> <p>URN 2074 - 20121106 - [SB senior employee 1] 2012 Diary - '<i>10.00 Boys at Royal Arms CV13 0AG Sutton Cheney</i>'</p> <p>URN 1547 - 20121106 - [FPM senior employee 2] Diary 2012 - '<i>10am PUK Royal Arms</i>' and notes consistent with the arrangement</p> <p>URN 27144 - Witness Statement of [Hotel employee 3] paragraphs 10, 11 and 12</p>	Royal Arms, Sutton Cheney

27 November 2012	20204A - transcript of a record of the November 2012 meeting	Fieldhead Hotel, Leicester
28 January 2013	20205A - transcript of a record of the January 2013 meeting	Novotel Hotel, Coventry
14 February 2013	<p>27614, page 305 - extraction report of [CPM senior employee 3's] iphone, '<i>Field Head</i>' with start time 18:00 and finish time 19:00</p> <p>URN 0002 - 20130214 - [FPM senior employee 3] Diary 2013, '<del>*meetings with [FPM senior employee 2]/[FPM senior employee 1]</del>'</p> <p>URN 7880, page 476 - extraction report of [FPM senior employee 1's] phone, '<i>07/02/2013 Ring Fieldhead re meeting room for Thurs</i>'</p> <p>URN 7880, page 476 - extraction report of [FPM senior employee 1's] phone, '<i>13/02/2013 Fieldhead booked ([name])</i>'</p> <p>URN 7880, page 491 - extraction report of [FPM senior employee 1's] phone, '<i>[13/02/2013] Check Fieldhead for 11 March</i>'</p> <p>URN 0185 - 20130214 - [FPM senior employee 2] Diary 2013, notes consistent with the arrangement</p> <p>25214, page 80 - Calendar entry - [FPM senior employee 2], '<i>PUK sales Thu Feb 14</i>'</p>	Fieldhead Hotel, Leicester
12 March 2013	URN 20206A - transcript of a record of the March 2013 meeting	Novotel Hotel, Coventry



## Annex B – Notebook and diary entries and records of meetings

This Annex sets out examples of entries in the notebooks and diaries of key individuals which were made on or around the time of the recorded meetings, alongside excerpts from the transcripts of those meetings.

### 29 August 2012 Meeting<sup>1148</sup>

Entry in notebook of [FPM senior employee 1] <sup>1149</sup>	Transcript																				
<p>Scott PARNELL 50k</p> <p>Burden.?</p>	<p>Page 82: [FPM senior employee 1] states ‘Guys can we talk about something else. <b>Scott Parnell</b>. I’m absolutely bemused. That made me angry. What’s this attraction with Scott Parnell? ... Well, with anybody, you’ve given them <b>fifty grand</b> of credit here.’</p> <p>Page 83: [CPM senior employee 3] states: ‘...I told you last time, the, the figures he had, or what he took was the <b>Burdens</b> one which is about fifty eight, fifty eight fifty, something like that on the twelve hundred ring.’</p>																				
<p>29/Aug/12</p> <table border="1" data-bbox="224 1050 963 1241"> <thead> <tr> <th colspan="4">JUL</th> </tr> </thead> <tbody> <tr> <td>CPM+M</td> <td>15860+2518=</td> <td>38.28</td> <td>37.82</td> </tr> <tr> <td>McCn</td> <td>18804</td> <td>39.17</td> <td>40.69</td> </tr> <tr> <td>SB</td> <td>10827</td> <td>22.5</td> <td>21.49.</td> </tr> <tr> <td></td> <td>48,009.</td> <td></td> <td>312288</td> </tr> </tbody> </table>	JUL				CPM+M	15860+2518=	38.28	37.82	McCn	18804	39.17	40.69	SB	10827	22.5	21.49.		48,009.		312288	<p>Pages 135 to 138: July tonnage and market share figures are exchanged in the following order:</p> <p>July tonnage:            [CPM senior employee 3]: <i>CPM 15860 Miltons 2518</i>            [FPM senior employee 3]: <i>McCanns 18804</i></p>
JUL																					
CPM+M	15860+2518=	38.28	37.82																		
McCn	18804	39.17	40.69																		
SB	10827	22.5	21.49.																		
	48,009.		312288																		

<sup>1148</sup> Transcript of recording at URN 20203A.

<sup>1149</sup> URN 0194, page 10.

	<p>[SB senior employee 1]: <i>Stantons 10827</i>  [CPM senior employee 3]: <i>Grand total 48009</i></p> <p>Market share figures:  [CPM senior employee 3]: <i>Stantons 22.55%, McCanns 39.1% ('thirty nine point one [Inaudible]'), CPM 33.04%, Miltons 5.24%, CPM and Miltons combined 38.28%</i>  [FPM senior employee 3]: <i>Year to date – McCanns 40.69%, CPM combined 37.82%, Stanton 21.49% Total market to date – 312288.</i></p>
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Entry in notebook of [FPM senior employee 1] <sup>1150</sup>	Transcript
<p><i>Nett 62 +5%</i>  <i>£65.</i></p> <p><i>58-</i>  <u><i>6</i></u>  <i>64</i></p>	<p>Pages 260 to 261:  [FPM senior employee 1]: <i>So, so our net, our net price at the moment is <b>Sixty two</b> okay. So...</i>  [CPM senior employee 2]: <i>Yeah</i>  [CPM senior employee 1]: <i>Sixty five pound</i>  [CPM senior employee 3]: <i>No not net it's not</i>  [FPM senior employee 1]: <i>So, the sixty ...</i>  [CPM senior employee 1]: <i>No, no, no ...</i>  [FPM senior employee 1]: <i>So ...</i>  [CPM senior employee 1]: <i>... that's what we are going to target</i>  [FPM senior employee 1]: <i>So. Yeah right so if we put five, <b>plus five per cent [Inaud] Sixty five quid.</b></i></p>

<sup>1150</sup> URN 0194, page 11.

	<p><i>[CPM senior employee 1]: Yeah</i></p> <p><i>[FPM senior employee 1]: What's your lowest price, what is your price to Rudridge or...?</i></p> <p><i>[CPM senior employee 3]: Call it Fifty eight, Fifty seven.</i></p> <p><i>[FPM senior employee 1]: [Inaud].</i></p> <p><i>[CPM senior employee 3]: Well the Burdens one is Fifty seven eighty.</i></p> <p><i>[FPM senior employee 1]: Fifty, we'll say <b>Fifty eight</b> so, if we go with then per cent pricing that's <b>Fifty eight and six ... Sixty four</b>'</i></p>
<p><i>26<sup>th</sup> Sept @10AM</i></p>	<p>Page 301:</p> <p><i>[CPM senior employee 2]: Right next meeting guys?</i></p> <p><i>[FPM senior employee 1]: Tuesday 25th, how does that sound or?</i></p> <p><i>[CPM senior employee 2]: Tuesday 25th of September?</i></p> <p>Page 302:</p> <p><i>[FPM senior employee 1]: Hmm.</i></p> <p><i>[CPM senior employee 2]: Yeah I'm okay.</i></p> <p><i>[SB senior employee 1]: I can't do that.</i></p> <p><i>[FPM senior employee 1]: You can't?</i></p> <p><i>[SB senior employee 1]: No.</i></p> <p><i>[FPM senior employee 1]: [Inaud] all right then 26th?</i></p> <p><i>[SB senior employee 1]: I can, I can do the 26th.</i></p> <p><i>[FPM senior employee 1]: Alright.</i></p> <p><i>[CPM senior employee 2]: Yeah 26th is okay, 27th is not okay for us because we've got a board meeting.</i></p> <p><i>[CPM senior employee 1]: Have we?</i></p> <p><i>[CPM senior employee 2]: Yeah.</i></p> <p><i>[FPM senior employee 1]: I can't do the 27th. I can do the 26th.</i></p> <p><i>[CPM senior employee 2]: 26th is okay?</i></p>

	<p>[SB senior employee 1]: 26th yeah.  [CPM senior employee 2]: Where.  [FPM senior employee 1]: Do you want us to book Fieldhead.  Page 305:  [FPM senior employee 2]: Ten then?  [FPM senior employee 1]: Ten, is ten O'Clock?  [CPM senior employee 2]: Ten's fine. Ten for me is okay.</p>
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Entry in notebook of [FPM senior employee 3] <sup>1151</sup>	Transcript
<p>29/8- Sales Meeting:-   Scott Parnell - £57.80.   Amp 5 spend v Budget:-   (Volker – Liverpool 2.4m £600m.)</p>	<p>Page 98: [SB senior employee 1] asks 'So what is the rate going forward with <b>Scott Parnell</b> for the rest of the year?' [CPM senior employee 3] replies 'The net rate is something like fifty seven ninety'   Page 143: [CPM senior employee 3] says 'we're half way through this <b>AMP five</b> [Inaud] aren't we'.   Pages 145 to 146: [FPM senior employee 1] says 'let's try and understand and get some figures out, where the <b>AMP spend</b> should be and where it's at'.   Page 208: [SB senior employee 1] says '<b>Volkers</b> have got two hundred metres of <b>two point four</b> at a job at Seaforth <b>Liverpool</b>, if you could be over <b>six hundred pound</b> on it I'd appreciate it please'.</p>

<sup>1151</sup> URN 0142, page 34.

-2.5m – Morgan Sindall Pipe Scarborough-	Pages 308 to 309: [FPM senior employee 3] says ' <b>Scarborough...that's what it was initially but they're now two point five.</b> '
27 <sup>th</sup> Nov Villa - Reading:-	Page 250: [SB senior employee 1] asks 'So is <b>Villa Reading</b> a date on the <b>27<sup>th</sup></b> then?'
*Nxt meeting Wed 26 <sup>th</sup> sept – * sales meeting f/head:- 1152	Pages 301 to 302: [CPM senior employee 2] asks 'Right next meeting guys?' [FPM senior employee 1] asks ' <b>Tuesday 25<sup>th</sup></b> , how does that sound'. [SB senior employee 1] says 'I can't do that' then [FPM senior employee 1] asks 'all right then <b>26<sup>th</sup></b> ?' All agree. [FPM senior employee 1] asks 'Do you want us to book <b>Fieldhead</b> '

Entry in diary of [FPM senior employee 2] <sup>1153</sup>	Transcript
[FPM senior employee 1] to  Book 26 F/head	Pages 301 to 302: [CPM senior employee 2] asks 'Right next meeting guys?' [FPM senior employee 1] asks ' <b>Tuesday 25<sup>th</sup></b> , how does that sound'. [SB senior employee 1] says 'I can't do that' then [FPM senior employee 1] asks 'all right then <b>26<sup>th</sup></b> ?' All agree. [FPM senior employee 1] asks 'Do you want us to book <b>Fieldhead</b> '
1200 Manhole Stock rate target for 2013 @ £65./m	Pages 260 to 261: ' <b>Sixty five pound...that's what we're going to target.</b> '

<sup>1152</sup> 'Wed 26<sup>th</sup>' is written over 'Tues 25<sup>th</sup>'

<sup>1153</sup> URN 1547 – 20120829 (diary entry dated 29 August 2012).

27 November 2012 Meeting<sup>1154</sup>

Entry in notebook of [FPM senior employee 1] <sup>1155</sup>	Transcript
<p>27/11/12. 58-e 60 –</p> <p>TERM DEAL –</p> <p>S<del>POT</del> Y<del>ARD</del>. 70.38.</p> <p>M<del>ERCHAN</del>T<del>S</del>. 66.00 central Belt</p> <p>MANhole 73.80 Spot mkt</p> <p>TERM Deal. 66.42 - [X]</p> <p>Delt St 61.20.</p> <p><del>TERM DEALS – LEVEL</del></p> <p>S<del>POT</del> MARKET – BENCHMARK</p> <p>TERMS DEAL – [X]</p>	<p>Page 67: [FPM senior employee 1] asks ‘...<i>what’s the <b>spot</b> market price per manhole then</i>’ and [FPM senior employee 3] responds ‘<i>It should be <b>seventy pound thirty eight</b></i>’ – [CPM senior employee 2] then says ‘<i>Correct. Same as the English price.</i>’</p> <p>Pages 65 to 67: Repeated references to sixty six for 1200 mm ring to merchants e.g. [FPM senior employee 1] says ‘<b>Sixty six</b> remember that’</p> <p>Page 128: [FPM senior employee 2]: ‘<i>The new <b>manhole</b> rate is going to be seventy plus five percent</i>’. [FPM senior employee 1]: ‘<i>So it’s <b>seventy three pound eighty</b> on the <b>spot market</b> okay</i>’</p> <p>Page 128: [FPM senior employee 1]: ‘<i>where should a <b>term deal</b> ideally?</i>’</p> <p>Page 129 [FPM senior employee 1]: ‘<i>And then if you take, if our new rate is seventy three eighty, if you take [X] percent, brings, [X]</i>’</p> <p>Page 133: [FPM senior employee 1] says ‘<i>Is that a realistic target then if you take the, if we take the <b>spot market</b> as the <b>benchmark</b>? The <b>term deal</b> is [X] percent off that and the depot stock [X] percent?</i>’</p>

<sup>1154</sup> Transcript of recording at URN 20204A.

<sup>1155</sup> URN 0194, page 23.

<i>DEPOT STOCK – [X]</i>			
<i>1200 mm s/c</i>	<i>73.80</i>		<p>Page 138: [FPM senior employee 1] says ‘if we take the spot market at <b>twelve hundred</b> manhole in <b>Scotland</b> is going to be what ... The spot market is going to be <b>seventy three eighty</b> okay’</p> <p>Page 138 in relation to direct rebate [FPM senior employee 3] says [X] <i>maximum</i>’</p> <p>Page 139: [FPM senior employee 1] says ‘Well, well alright, I said [X]. Brings it, brings it to one pound eighty four, let’s say <b>one pound eighty</b>’. [FPM senior employee 1] says ‘Brings it to <b>seventy two</b> okay’</p> <p>Page 139: [FPM senior employee 1] says ‘<b>term deal</b>, we think that it should be [X]’ and at Page 140: [FPM senior employee 1] says ‘if we said [X] per cent around [X] off it, so that means at term deal we should be looking at <b>sixty five quid</b> for a manhole in Scotland. Okay? Happy enough with that? So that sounds where we should be going’</p> <p>Pages 140 to 141: [FPM senior employee 1] says ‘<b>depot stock into Scotland</b>’; [CPM senior employee 1] says ‘<b>Sixty one pound seventy five</b>’. At p141 to 142: [FPM senior employee 3] says ‘<b>sixty three forty four</b> will be the new net price from the 1<sup>st</sup> of Jan...So sixty three forty four will be our net price’.</p>
<i>Less Reduct 2 1/</i>	<i>[X]</i>		
	<i>72.00.</i>		
<i>TERM DEAL – 10%</i>	<i>65.00</i>		
<i>DEPOT Sct</i>	<i>61.75.</i>	<i>63.44</i>	

Entry in notebook of [FPM senior employee 3] <sup>1156</sup>	Transcript
<p><u>Scotland</u> £70.38 1200 - £73.80 (£72.00 net/net)</p>	<p>Page 67: [FPM senior employee 1] asked ‘<i>what’s the spot market price per manhole then?</i>’ and [FPM senior employee 3] responded ‘<i>It should be <b>seventy pound thirty eight</b></i>’.</p> <p>Page138: [FPM senior employee 1] says ‘<i>if we take the spot market at <b>twelve hundred</b> manhole in <b>Scotland</b> is going to be what ... The spot market is going to be <b>seventy three eighty</b> okay’.</i></p> <p>Page 139: [FPM senior employee 1] says ‘<i>Brings it to <b>seventy two</b> okay’</i></p>

Entry in diary of [FPM senior employee 2] <sup>1157</sup>	Transcript
<p><i>T/D - 55</i> <i>Spot - 70</i> <i>Merchant – 66</i></p> <p><i>Gb Job</i></p>	<p>Page 54: [FPM senior employee 1] says ‘<i>Because when you count the haulage, we’ve all of the big haulage into Scotland [Inaud]... you get an average term deal price in Scotland of what will be <b>fifty five, fifty six quid?</b></i>’</p> <p>Page 55: [CPM senior employee 1] says ‘<i><b>spot market</b> is over sixty two quid’</i> and [FPM senior employee 2] says ‘<i>The spot market should be hitting <b>seventy quid</b> really’</i></p>

<sup>1156</sup> URN 0142, page 90.

<sup>1157</sup> URN 1547 – 20121126 (diary entry dated 26 November 2011).



<p>73.80 Spot  Less 10% For T/D  Less 15% For Stock</p>	<p>Page 65: [CPM senior employee 4] says <i>'Twelve hundred ring for us into the three <b>merchants</b> that we sort of deal with <b>sixty six quid</b> something like that'</i></p> <p>Page 94: [CPM senior employee 4] <i>'<b>Global Construction</b> or <b>GF Job</b>, I think its <b>Global</b>'. [CPM senior employee 2] <i>'Ah it's <b>Global</b>'.</i></i></p> <p>Page 138: [FPM senior employee 1] says <i>'if we take the spot market at <b>twelve hundred</b> manhole in <b>Scotland</b> is going to be what ... The spot market is going to be <b>seventy three eighty</b> okay'</i></p> <p>Page 133: [FPM senior employee 1] says <i>'Is that a realistic target then if you take the, if we take the spot market as the benchmark? The <b>term deal is ten percent off that and the depot stock fifteen percent?</b>'</i></p>
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28 January 2013 Meeting<sup>1158</sup>

Entry in notebook of [FPM senior employee 3] <sup>1159</sup>	Transcript																								
<p>-2013- Burdens (New C<sup>o</sup>).            C – 64.06 - -3%            S – 64.87 - -3%            Mc –</p> <p>Government indices –            I.C.E 1990 series            (BCIS)</p>	<p>Page 193: following discussion of the new Burdens company [CPM senior employee 3] says '<b>Sixty four o six our twelve hundred ring ... less three</b>'; and [SB senior employee 1] says '<b>Sixty four eighty seven less three</b>'</p> <p>Page 199: [SB senior employee 1] says 'you know the <b>Governmental indices, price adjustment formula</b>'.</p> <p>Page 200: [SB senior employee 1]: 'You've got the <b>ICE formula, but, a 1990 series</b>' and then '<b>But you, it's not on a website. You've got to, it's called BCIS</b>'</p>																								
<p>Wide load charges for 3.6m Ring.</p> <table border="1" data-bbox="224 909 851 1173"> <thead> <tr> <th>Pipe</th> <th><u>M</u></th> <th><u>S</u></th> <th><u>CPM</u></th> </tr> </thead> <tbody> <tr> <td>450</td> <td></td> <td>24.03</td> <td>23.85</td> </tr> <tr> <td>675</td> <td>67.14</td> <td>67.18</td> <td>67.85</td> </tr> <tr> <td>900</td> <td>103.64</td> <td>103.82</td> <td>103.85</td> </tr> <tr> <td>1350</td> <td>245.70</td> <td></td> <td>247.05</td> </tr> <tr> <td>1800</td> <td>434.70</td> <td>436.82</td> <td>437.60</td> </tr> </tbody> </table>	Pipe	<u>M</u>	<u>S</u>	<u>CPM</u>	450		24.03	23.85	675	67.14	67.18	67.85	900	103.64	103.82	103.85	1350	245.70		247.05	1800	434.70	436.82	437.60	<p>Page 211: [FPM senior employee 3] says '<b>wide load on a three point six.</b>'</p> <p>Pages 215 to 222:</p> <p>[SB senior employee 1]: <b>Four fifty pipe, who's going to go first, I'll go first.</b></p> <p>[CPM senior employee 3]: <b>Twenty three eighty five.</b></p> <p>[SB senior employee 1]: <b>You're always cheapest, I'm twenty four o three.</b></p>
Pipe	<u>M</u>	<u>S</u>	<u>CPM</u>																						
450		24.03	23.85																						
675	67.14	67.18	67.85																						
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1800	434.70	436.82	437.60																						

<sup>1158</sup> Transcript of recording at URN 20205A.

<sup>1159</sup> URN 0142, page 127.

1200 R	73.90	73.98	73.75	
1200 S	81.36	81.35	80.80	[SB senior employee 1]: <b>Six seven five</b>
1300 R	129.00	126.38	129.35	[CPM senior employee 3]: <b>sixty seven eighty five</b>
2100 R	393.67	392.26	393.25	[FPM senior employee 3]: <b>We're sixty seven fourteen</b>
3000 R	831.51	828.13	827.30	[SB senior employee 1]: <b>I'm sixty seven eighteen</b>
	42.34			[SB senior employee 1]: <b>Nine hundreds? I'm one 0 three eighty two</b>
1200 w/w	143.30	143.00	143.00	[CPM senior employee 3]: <b>One 0 three eighty five</b>
1500 w/w	226.00		225.00	[FPM senior employee 3]: <b>One 0 three sixty four.</b>
1800 w/w	288.75			
27 <sup>th</sup> feb – 10.00am – cov – sales meeting:-				[CPM senior employee 3]: <b>Thirteen fifty, two four seven 0 five</b>
				[FPM senior employee 3]: <b>Two forty five seventy</b>
				[SB senior employee 1]: <b>Last but not least, then, eighteen hundred</b>
				[CPM senior employee 3]: <b>Four three seven sixty.</b>
				[SB senior employee 1]: <b>I'm four three six eighty three</b>
				[FPM senior employee 3]: <b>four three four seventy</b>
				[CPM senior employee 3]: <b>Twelve hundred ring is for us seventy three seventy five</b>
				[FPM senior employee 3]: <b>seventy three ninety.</b>
				[SB senior employee 1]: <b>I'm seventy three ninety eight.</b>
				[SB senior employee 1]: <b>Twelve hundred slab</b>
				[FPM senior employee 3]: <b>Eighty one thirty six.</b>
				[CPM senior employee 3]: <b>Ours is eighty oh, eighty eighty.</b>
				[SB senior employee 1]: <b>I'm eighty one thirty five there</b>

[CPM senior employee 3]: **Fifteen hundred ring, a hundred and twenty nine thirty five**

[SB senior employee 1]: I'm **hundred and twenty six thirty eight**

[FPM senior employee 3]: **Fifteen hundred, one twenty nine dead.**

[FPM senior employee 3]: **Twenty one hundred ring, three nine three sixty seven.**

[SB senior employee 1]: I'm **three nine two twenty six**

[CPM senior employee 3]: **Three nine two twenty six.**

[SB senior employee 1]: **Three-metre**

[CPM senior employee 3]: **Eight two seven thirty**

[SB senior employee 1]: I'm **eight two eight thirteen**

[FPM senior employee 3]: **Three-metre ring, eight thirty one fifty one**

[SB senior employee 1]: *What did you put your gullies up by? ... Our four fifty nine hundred's now*

[FPM senior employee 3]: **Forty two thirty four.**

[CPM senior employee 3]: *what about sealed manholes?*

[FPM senior employee 3]: *the actual manhole, wide wall, twelve hundred, one forty three thirty.*

[CPM senior employee 3]: I've got **one four three dead here.**

[SB senior employee 1]: *Yep, mine is at one four three*

[FPM senior employee 3]: *the fifteen hundred's two two six dead.*

	<p>[CPM senior employee 2]: <b>Two two five dead.</b></p> <p>[SB senior employee 1]: <b>No idea, I haven't got the prices of</b></p> <p>[FPM senior employee 3]: <b>And my eighteen hundred is two eighty eight seventy five.</b></p> <p>[CPM senior employee 3]: <b>We haven't got an eighteen.</b></p>
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Note made by [CPM senior employee 3] <sup>1160</sup>	Transcript									
<p><u>SGBD</u> 1200C/R – 64.15MT From 1/2/13 – [X] <u>Rebate</u></p>	<p>Pages 184 to 185: [CPM senior employee 3]: 'I've got to see [employee] at <b>Saint Gobain</b> next week ... he's bleating on about something to do with Build Centre with yourselves has gone up four and a half percent... And they've been on the Saint Gobain deal or something'. [FPM senior employee 3] replies 'I've agreed new rates with him. We've scrapped the old – because most of our volume was Build Centre, we didn't hardly did anything through Jewson, although Archibald's was Jewson's, they've [Inaud] plastic as a Jewson's now. My new rate onto Jewson, <b>1st of Feb</b> this is as well. <b>Sixty four fifteen ... [X] rebate</b>'.</p>									
<p><u>Burdens</u></p> <table style="width: 100%; border: none;"> <tr> <td style="width: 30%;"></td> <td style="width: 30%; text-align: right;">Stantons</td> <td style="width: 40%;"></td> </tr> <tr> <td>- 1200C/R – 64-30MT</td> <td style="text-align: right;">64-87</td> <td></td> </tr> <tr> <td style="padding-left: 40px;">Less 2%</td> <td style="text-align: right;">Less 3%</td> <td></td> </tr> </table> <p>- WWW. <u>'BCIS'</u></p>		Stantons		- 1200C/R – 64-30MT	64-87		Less 2%	Less 3%		<p>Page 189: [SB senior employee 1]: 'have you got your new...<b>Burdens</b>' water rate?' [FPM senior employee 3] replies '<b>twelve hundred ring is sixty four thirty. That's only less two</b>'. [SB senior employee 1] says 'mine's <b>sixty four eighty seven less three</b>'.</p> <p>Pages 200 to 201: [CPM senior employee 3]: 'What <b>website</b> is this on, [SB senior employee 1]?' [SB senior employee 1] replies '...it's not on a website. You've got</p>
	Stantons									
- 1200C/R – 64-30MT	64-87									
Less 2%	Less 3%									

<sup>1160</sup> URN 0259, page 2.

	<p>to, it's called <b>BCIS</b>. It used to be ... BCIS, and you have to pay for it, but you don't have to pay'.</p>
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12 March 2013 Meeting<sup>1161</sup>

Note made by [CPM senior employee 3] <sup>1162</sup>	Transcript
<p>1 - <i>Civils + Lintels – (Moorcar)/Arrow C/E Refused to Price?</i></p>	<p>Page 27: [SB senior employee 1] asks ‘<i>Was anybody called by <b>Civils and Lintels</b> because you both <b>failed to price</b> one of my term deals, this last week or two weeks</i>’.</p> <p>Page 28: [CPM senior employee 3] asks ‘<i>Who is it [SB senior employee 1]?</i>’ [SB senior employee 1] says ‘<i>I can phone and get</i>’.</p> <p>[SB senior employee 1] then phones [SB employee 4] (pages 29 to 30) and asks ‘<i>[SB employee 4], you know that, you know that... term deal of mine, of ours, that you were saying that one of the merchants was going really shitty, because CPM, McCann hadn’t quoted, what was the name of the term deal? [sounds like <b>Mulcaire stroke Arrowville</b>]. Yeah. And who, which merchant was getting shitty because nobody was pricing?</i>’ [CPM senior employee 3] asks ‘<i>Mulcahy?</i>’ [SB senior employee 1] then asks DA, ‘<i>And who was it in sales? Maybe [employee of] <b>Civils and Lintels</b></i>’.</p> <p>Page 31: [CPM senior employee 3] asks ‘<i>What’s the contractor?</i>’ and [SB senior employee 1] replies ‘<i>Mulcahy. Might be known as Arrow, <b>Arrow Civil Engineering</b></i>’.</p>
<p>2 - <i>Grafton check rates</i> - <i>Cooper Clarke – copy quote</i></p>	<p>Page 56 [CPM senior employee 3] says ‘<i>What I can do then is <b>check, checking your Grafton rates with ours then</b></i>’.</p>

<sup>1161</sup> Transcript of recording at URN 20206A.

<sup>1162</sup> URN 0249, page 1.

	<p>Page 57: [CPM senior employee 3] says <i>'We could do with <b>checking Grafton rates, what we've all got I think</b></i>'. [FPM senior employee 3] replies <i>'No problem'</i>.</p> <p>Page 55: [FPM senior employee 3] <i>'that's the only exception [Inaud] <b>Cooper Clarkes</b></i>'</p>
3 Highlight jobs of interest	<p>Pages 43: [CPM senior employee 1]: <i>'We'll flag up the jobs'</i>; [SB senior employee 1]: <i>'I don't mind you flagging up one or two'</i>.</p>
4 L.O.R. – only Stanton's submitted	<p>Pages 99 to 103: [SB senior employee 1] has put prices in for A453 job; [FPM senior employee 3] confirms that McCanns has not put prices in for the A453 <b>Laing O'Rourke</b> job. Page 103: [CPM senior employee 3]: <i>'It's only you then [SB senior employee 1] who's put something in that's fine'</i>.</p>

Note made by [CPM senior employee 3] <sup>1163</sup>	Transcript
<p>6-30pm Novotel – Tuesday</p> <p>MH CP1 1050mm  <u>'sealed catchpit'</u></p> <p>CP1 1200mm catchpit £315=MT</p>	<p>Page 163: [CPM senior employee 3] says <i>'That's what [SB senior employee 1's], he's saying they're going <b>sealed catch pits</b></i>'</p> <p>Page 158: [CPM senior employee 3] says <i>'you get <b>CP1</b> that manhole reference, that's the first I've looked at it now [Inaud]. You gave me an all-</i></p>

<sup>1163</sup> URN 0407.



<p><i>'special base'</i></p> <p style="text-align: right;"><u>Total price</u> £551=ea Inc 2 S/Rings 1 no 1200x25 1 no base 1 no cover 4 no steps</p>	<p><i>in price, yours was <b>five hundred and fifty one quid</b>, which was the <b>base</b>, the <b>twelve hundred quarter</b>'.</i></p> <p>Page 160: [CPM senior employee 3] says 'you gave it to me, CP1 you gave me <b>five five one</b> ... that's the one you read look, I've got it all written down, you read this out to me the other day and you told me what was included in it'</p>
<p><u>'Sealed Catchpit'</u></p> <p>S4 1500 – 1x'base'                      £1,143-75ea</p> <p>3xS/Rings 7 Steps 1 Cover 1x75 Chamber</p>	<p>Page 160: [CPM senior employee 3] says 'So what was your <b>S4</b> you gave me as well then?'</p> <p>Page 161: [CPM senior employee 3]: '... you gave me one, one four three seventy five there look ... <b>One one four three seventy five you told me it was, consisting of a base, three seating rings, seven step irons, one cover slab and one chamber at seven fifty two</b>'</p>

Note made by [CPM senior employee 3] <sup>1164</sup>	Transcript																						
<p><u>A453 Nottingham Accomodation Works</u></p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 10%;">Manhole Ref</th> <th style="width: 10%;">Diameter</th> <th style="width: 10%;">Height</th> <th style="width: 10%;">Inlets</th> <th style="width: 10%;">Double Steps</th> <th style="width: 10%;">250</th> <th style="width: 10%;">500</th> <th style="width: 10%;">750</th> <th style="width: 10%;">1000</th> <th style="width: 10%;">c/s</th> <th style="width: 10%;">Total</th> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </table> <p style="text-align: right;"><b>STANTON'S</b></p>	Manhole Ref	Diameter	Height	Inlets	Double Steps	250	500	750	1000	c/s	Total												<p>Page 159: [SB senior employee 1]: '<b>CP1</b>, I told you I looked, I don't know where you got that price from. CP1 is four, <b>four six five fifty. All in</b>'</p>
Manhole Ref	Diameter	Height	Inlets	Double Steps	250	500	750	1000	c/s	Total													

<sup>1164</sup> Handwritten annotations on document titled 'SEALED CATCHPITS' showing specifications and price lists for various projects: URN 0400, page 1.

CP1	1200	825		5		1			1	460.15	<b>£465=</b>	<p>Page 174: [SB senior employee 1] says '<b>B101</b>, the total cost of that is <b>five seven nine point seven five</b>'. [CPM senior employee 3] replies 'See ours is over six hundred quid. <b>Six hundred and five</b>'</p>
<b>A453 Nottingham Network B1-B4</b>												
<u>Manhole Ref</u>	<u>Diameter</u>	<u>Height</u>	<u>Inlets</u>	<u>Double Steps</u>	<u>250</u>	<u>500</u>	<u>750</u>	<u>1000</u>	<u>c/s</u>	<u>Total</u>		
B1/00	1200	825		7				1	1	460.15		
B1/01	1200	825		9		1		1	1	605.55	<b>£579.75</b>	

## Annex C – Abbreviations and defined terms

Term	Definition
the 2000 Order	The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000
Article 101	Article 101 of the Treaty on the Functioning of the European Union
the August 2012 meeting	the meeting held between SB, CPM and FPM on 29 August 2012 at the Novotel Hotel in Coventry, which was attended by [SB senior employee 1], [CPM senior employee 1], [CPM senior employee 2], [CPM senior employee 3], [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3], and of which an audio-visual recording was made by the OFT
Bonna Sabla	Bonna Sabla SA
the BPDA	the British Precast Drainage Association
the Chapter I prohibition	the prohibition imposed by section 2(1) of the Competition Act 1998
the CMA	the Competition and Markets Authority
the Competition Act	the Competition Act 1998
Consolis	Consolis Finance SAS, Consolis SAS, and Consolis Group SAS
the CPSA	the Concrete Pipeline Systems Association
CPM	CPM Group Limited
Decision	this Decision, including Annexes
the European Courts	together, the General Court of the European Union and the Court of Justice of the European Union
FPM	FP McCann Limited
HICs	House Inspection Chambers

the Infringement	the infringement summarised in paragraphs 1.2 to 1.3
the January 2013 meeting	the meeting held between SB, CPM and FPM on 28 January 2013 at the Novotel Hotel in Coventry, which was attended by [SB senior employee 1], [CPM senior employee 1], [CPM senior employee 2], [CPM senior employee 3], [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3], and of which an audio-visual recording was made by the OFT
the March 2013 meeting	the meeting held between SB, CPM and FPM on 12 March 2013 at the Novotel Hotel in Coventry, which was attended by [SB senior employee 1], [CPM senior employee 1], [CPM senior employee 2], [CPM senior employee 3], [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3], and of which an audio-visual recording was made by the OFT
the November 2012 meeting	the meeting held between SB, CPM and FPM on 27 November 2012 at the Fieldhead Hotel in Leicester, which was attended by [CPM senior employee 1], [CPM senior employee 2], [CPM senior employee 4], [FPM senior employee 1], [FPM senior employee 2] and [FPM senior employee 3], and of which an audio-visual recording was made by the OFT
the OFT	the CMA's predecessor organisation, the Office of Fair Trading
Party / Parties	the persons listed in paragraph 1.1 (each a 'Party', together the 'Parties')
Penalty Guidance	<i>Guidance as to the appropriate amount of a Penalty</i> (CMA73, 18 April 2018).
the Products	certain pre-cast concrete drainage products set out in paragraph 2.1
the Relevant Period	6 July 2006 to 13 March 2013
Saint-Gobain	Saint-Gobain Pipelines plc (now Saint-Gobain PAM UK Limited)

SB	Stanton Bonna Concrete Limited
SBC	together, Stanton Bonna Concrete Limited and its parent companies Bonna Sabla SA and Consolis Finance SAS, Consolis SAS, and Consolis Group SAS
UK	the United Kingdom