

# Decision of the Competition and Markets Authority

Competition Act 1998  
Residential estate agency services  
Case 50543

17 December 2019

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].

Certain 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. These names have been redacted or replaced by a general descriptor of the individual's role.

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# 1. INTRODUCTION AND GLOSSARY

## A. Introduction

1.1 By this decision (the '**Decision**'), the Competition and Markets Authority (the '**CMA**') has concluded that the persons listed at paragraph 1.2 have infringed the prohibition imposed by section 2(1) (the '**Chapter I prohibition**') of the Competition Act 1998 (the '**Act**').

1.2 This Decision is addressed to:

- (a) Michael Hardy & Company (Wokingham) Limited and Geocharbert UK Ltd (together '**Michael Hardy**')  
(b) Prospect Estate Agency Limited and Prospect Holdings (Reading) Limited (together '**Prospect**')  
(c) Richard Worth Limited (in administration) and Richard Worth Holdings Limited (together '**Richard Worth**')  
(d) The Romans Group (UK) Limited and Romans 1 Limited (together, '**Romans**')  
which, in this Decision, are referred to singularly as a '**Party**' and collectively as the '**Parties**'.

1.3 The CMA has found that between at least 1 September 2008 and 19 May 2015 (the '**Relevant Period**') the Parties infringed the Chapter I prohibition by participating in a single and continuous infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition within the UK by fixing and maintaining a minimum level of commission fees to be charged for the provision of traditional residential estate agency services in the five areas of Wokingham, Winnersh, Crowthorne, Bracknell and Warfield (the '**Relevant Areas**'), including through the exchange of confidential pricing information and taking steps to monitor or reinforce compliance (the '**Infringement**' or the '**Minimum Fee Arrangement**').

1.4 The CMA has also imposed financial penalties under section 36 of the Act on Michael Hardy, Prospect and Richard Worth.

## B. Glossary

- 1.5 In this Decision, the following terms have the definitions set out below. Where in this Decision it is helpful for the reader to reference a defined term in the text, such term may also be defined in the text.

Term	Definition
the Act	the Competition Act 1998
Infringement	the agreement and/or concerted practice between the Parties to fix and maintain a minimum level of commission fees to be charged for the provision of traditional residential estate agency services in the Relevant Areas during the Relevant Period, including through the exchange of confidential pricing information and taking steps to monitor or reinforce compliance, with the object of preventing, restricting or distorting competition
TFEU	Treaty on the Functioning of the European Union
the CMA	the Competition and Markets Authority
the CMA Rules	the Competition Act 1998 (Competition and Market Authority's Rules) Order 2014, SI 2014/458
the Chapter I prohibition	the prohibition in section 2(1) of the Competition Act 1998
traditional residential estate agency services	agency services for and related to the sale of property offered by estate agents that operate with a 'high street' presence. This does not encompass other services which can be provided by estate agents, such as services for the letting of property.
the First Wokingham meeting	the meeting at which the Minimum Fee Arrangement was established
Michael Hardy	Michael Hardy & Company (Wokingham) Limited and Geocharbert UK Ltd
Minimum Fee Arrangement	the agreement and/or concerted practice between the Parties to fix and maintain a minimum level of commission fees to be charged for the provision of traditional residential estate agency services in the Relevant Areas during the Relevant Period, including through the exchange of confidential pricing information

	and taking steps to monitor or reinforce compliance, with the object of preventing, restricting or distorting competition
Party or Parties	Michael Hardy, Prospect, Richard Worth and Romans
Penalty Guidance	CMA's <i>Guidance as to the appropriate amount of a penalty</i> (CMA73, 18 April 2018)
Prospect	Prospect Estate Agency Limited and Prospect Holdings (Reading) Limited
Relevant Areas	the five areas of Wokingham, Winnersh, Crowthorne, Bracknell and Warfield
Relevant Period	between at least 1 September 2008 and 19 May 2015
Relevant Turnover	turnover in the market affected by the Infringement
Richard Worth	Richard Worth Limited (in administration) and Richard Worth Holdings Limited
Romans	The Romans Group (UK) Limited and Romans 1 Limited
Settling Parties	Michael Hardy and Prospect
Statement	the Statement of Objections issued on 13 June 2019
the UK	the United Kingdom

## **2. THE INVESTIGATION**

### **A. Launch of the investigation**

- 2.1 In February 2018, the CMA opened a formal investigation under section 25 of the Act, having determined that there were reasonable grounds for suspecting that the Parties had infringed the Chapter I prohibition by participating in cartel activity in the provision of traditional residential estate agency services in the Berkshire area.
- 2.2 On 27 February 2018, the CMA carried out searches of the Parties' Wokingham business premises. With the exception of Romans, for which voluntary inspections were undertaken at its head office and Wokingham office, these searches were carried out under section 28 of the Act. The CMA obtained both hardcopy material and digital material relevant to its investigation.

### **B. Leniency**

- 2.3 Prior to the CMA commencing its investigation, Romans applied to the CMA for leniency and provided information to the CMA under the CMA's leniency policy. Romans was the first to apply under the leniency policy and was granted immunity from financial penalty (a Type A immunity marker), conditional on its continuing to meet the requirements of the CMA's policy.
- 2.4 On 3 June 2019, the CMA entered into a leniency agreement under the CMA's leniency policy with Romans in relation to its involvement in the Infringement.
- 2.5 Following the launch of the investigation, Prospect applied to the CMA for leniency and provided information to the CMA under the CMA's leniency policy and was granted a Type C leniency marker conditional on its continuing to meet the requirements of the CMA's policy.
- 2.6 On 3 June 2019, the CMA entered into a leniency agreement under the CMA's leniency policy with Prospect in relation to its involvement in the Infringement.

### **C. State of play meetings**

- 2.7 The CMA held 'state of play' meetings with each of the Parties in September 2018. The CMA offered further 'state of play' meetings with each of the Parties in February 2019 and May 2019. The CMA held such meetings with Michael Hardy and Prospect at the end of May 2019 and with Romans at the beginning of June 2019.



## D. Evidence gathering and assessment

- 2.8 In addition to the evidence gathered under section 28 of the Act, Prospect and Romans each provided information and documents consistent with their obligation to cooperate under the CMA's leniency policy, including responses to information requests from the CMA.<sup>1</sup>
- 2.9 The CMA also issued compulsory document and/or information requests to Michael Hardy and Richard Worth under section 26 of the Act.<sup>2</sup>
- 2.10 The CMA conducted voluntary interviews with an individual from Michael Hardy ([Director]),<sup>3</sup> an individual from Prospect ([Director A])<sup>4</sup> and three individuals who were employed by Romans during the Relevant Period ([Director B],<sup>5</sup> [Director A]<sup>6</sup> and [branch manager]<sup>7</sup>). The transcripts of all of these interviews were checked by the CMA against the relevant recordings and have been included as part of the CMA's file.
- 2.11 [Director B] (Romans)<sup>8</sup> and [Director A] (Prospect)<sup>9</sup> also each provided a witness statement based on their interviews. [Director A] (Romans) also subsequently provided a witness statement.<sup>10</sup>
- 2.12 Following the issuing of the Statement of Objections (the '**Statement**') on 13 June 2019, the CMA also conducted an interview under section 26A of the Act with an individual from Richard Worth ([Director]).<sup>11</sup> The transcript of this interview was checked by the CMA against the relevant recording and has been included as part of the CMA's file.

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<sup>1</sup> Section 5 of OFT1495: *Applications for leniency and no-action in cartel cases* (July 2013, adopted by the CMA Board) (the '**Leniency Guidance**'). The CMA issued requests for information to Prospect on 15 May 2018 and 20 September 2018 and to Romans on 20 September 2018.

<sup>2</sup> The CMA issued document and information requests under section 26 of the Act on 14 May 2018 and 20 September 2018.

<sup>3</sup> [Director] (Michael Hardy) was interviewed on 13 November 2018 (URN0092).

<sup>4</sup> [Director A] (Prospect) was interviewed on 18 June 2018 (URN0311) and 1 November 2018 (URN0094).

<sup>5</sup> [Director B] (Romans) was interviewed on 15 November 2017 (URN0244) and 8 November 2018 (URN0093).

<sup>6</sup> [Director A] (Romans) was interviewed on 22 January 2018 (URN0270) and 19 November 2018 (URN0097).

<sup>7</sup> [branch manager] (Romans) was interviewed on 11 May 2018, primarily in relation to suspected conduct in an area that is not part of the Infringement and in respect of which the CMA has decided not to prioritise further investigation (see paragraph 2.28). [branch manager]'s (Romans) interview transcript is not, therefore, relied upon in this Decision.

<sup>8</sup> URN0172.

<sup>9</sup> URN0171.

<sup>10</sup> URN0801.

<sup>11</sup> [Director] (Richard Worth) was interviewed on 29 October 2019 (URN1000).

## ***Assessment of evidence***

2.13 As is frequently the case with infringements of this nature and duration, the documentary evidence obtained in this case is fragmentary. In addition, one of the main participants in the Infringement has confirmed that he did not put anything in writing, which is consistent with some of the contemporaneous documentary evidence.<sup>12</sup> However, despite its fragmentary nature, the CMA uncovered documentary evidence of a contemporaneous nature that is probative of the Infringement. This mainly comprises:

- (a) internal emails and reports from Romans and to a lesser extent Prospect;
- (b) email exchanges between the Parties and between some of the Parties and certain third parties, in particular in the lead up to the Infringement;
- (c) bi-monthly performance management reports for [Director B] (Romans) in 2013 and 2014;
- (d) diary and notebook entries of [Director B] (Romans) and [Director A] (Prospect); and
- (e) outlook appointments from [Director B] (Romans) and [Director] (Michael Hardy).

2.14 In its assessment of the evidence, the CMA gave particular weight to the available contemporaneous documentary evidence. The CMA also placed reliance on the recollection of two witnesses in particular, one from each of the leniency applicants, Romans and Prospect, who were directly involved in the Infringement: [Director B] (Romans) and [Director A] (Prospect). In addition, the CMA placed some limited reliance, for the reasons set out below, on the account of a further witness, [Director A] (Romans). Their respective roles, together with those of other key individuals, are summarised in Table 2 below.

2.15 The recollections of these three witnesses differ and lack certainty over some specific details. This is to be expected given the nature of the Infringement and that it commenced over ten years ago.

2.16 The CMA was also conscious, in approaching their evidence and the evidence of other witnesses, that even if only subconsciously, their accounts may have been influenced by their relationships, both with each other and with other

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<sup>12</sup> URN0172, paragraph 24. See also URN0057.

individuals. [§]<sup>13</sup> All the individuals worked in the same local areas providing traditional residential estate agency services.

2.17 Whilst [Director B]’s (Romans) recollection of certain events in particular is less detailed than [Director A]’s (Prospect), for the reasons set out below the CMA considers that their accounts are, for the most part, reliable:

- (a) much of the evidence provided by these individuals is consistent with the contemporaneous documentary evidence;
- (b) they were able to recall certain matters in detail and were careful not to overstate the extent of their recollections;
- (c) their accounts are similar in respect of the key features of the Infringement, including the participants, and the scope, implementation and duration of the conduct; and
- (d) they were interviewed in circumstances where their respective firms had applied for leniency, so had a strong incentive to provide a full and accurate account of events so as not to put the benefits of their respective firms’ leniency applications at risk.

2.18 With regard to [Director A] (Romans), the CMA placed limited reliance on his evidence mainly for the following reasons. First, although [Director A] (Romans) played an important role in setting up and implementing the Minimum Fee Arrangement, for most of the Relevant Period he was not as directly involved in meetings or contacts with the other Parties. For most of the Relevant Period, his knowledge of the Infringement is based on reports from [Director B] (Romans).

2.19 Second, there were a number of material inconsistencies between the accounts provided by [Director A] (Romans) in his first and second interviews. Whilst [Director A]’s (Romans) account in his second interview is in several important respects consistent with both the documentary evidence and the witness evidence of [Director B] (Romans) and [Director A] (Prospect), certain important aspects of his evidence in the second interview remained unclear until the provision of his witness statement.

2.20 Moreover, [Director A]’s (Romans) statement was only produced after the CMA had raised concerns with [Director A] (Romans) about his cooperation with the CMA’s investigation and after he had had an opportunity to review

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<sup>13</sup> URN0172, paragraphs 21 to 22 and 130; URN1000, pages 54 to 56.

additional evidence, including the witness statements of [Director B] (Romans) and [Director A] (Prospect), as well as contemporaneous documents which he would not otherwise have seen.<sup>14</sup>

- 2.21 For these reasons, the CMA placed only limited reliance on the witness statement provided by [Director A] (Romans), and only where it was supported by contemporaneous documentary and/or other witness evidence.
- 2.22 [Director] (Michael Hardy) and [Director] (Richard Worth) were also invited to attend an interview by the CMA prior to the Statement being issued.
- 2.23 [Director] (Michael Hardy) attended on 13 November 2018 and in summary stated that:<sup>15</sup>
- (a) He became aware, in 2008, that other estate agents were attempting to organise meetings to discuss and coordinate commission fee levels but that he did not want to be involved;
  - (b) He never met with any of the Parties to coordinate commission fee levels during the Relevant Period; and
  - (c) He met the Parties to discuss other issues, for example the display of sale boards and the advertising of properties in local newspapers.
- 2.24 The CMA has not placed any weight on this initial account by [Director] (Michael Hardy) having regard to its inconsistency both with the contemporaneous documentary evidence and with the witness evidence of [Director B] (Romans) and [Director A] (Prospect).
- 2.25 Moreover, as set out at paragraph 2.30 below, following the issue of the Statement, Michael Hardy settled the case with the CMA and has admitted liability for its participation in the Infringement. Michael Hardy has provided limited representations on the level of Michael Hardy's, and in particular, [Director]'s (Michael Hardy) involvement in the Infringement as set out in the Statement,<sup>16</sup> which contradict [Director]'s (Michael Hardy) initial interview account. The CMA's consideration of these representations is set out within Section 4 (Conduct of the Parties).

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<sup>14</sup> URN0171; URN0172; URN0472; URN0613; URN0752; URN0753.

<sup>15</sup> URN0092.

<sup>16</sup> Michael Hardy representations dated 25 July 2019 (URN0919), Michael Hardy representations dated 12 September 2019 (URN0968), Michael Hardy representations dated 18 September 2019 (URN0978) and witness statement of [Director] (Michael Hardy) dated 3 October 2019 (URN0990).

- 2.26 Whilst [Director] (Richard Worth) declined to be interviewed initially,<sup>17</sup> as set out at paragraph 2.12, [Director] (Richard Worth) was interviewed under section 26A of the Act. In this interview, [Director] (Richard Worth) admitted his involvement in the Infringement as set out in the Statement and provided additional detail regarding his participation in the Minimum Fee Arrangement.<sup>18</sup>
- 2.27 The CMA's consideration of [Director]'s (Richard Worth) interview account is set out at Section 4 (Conduct of the Parties). In reviewing the account given by [Director] (Richard Worth), the CMA has had regard to the fact that [Director] (Richard Worth) had seen the Statement and the underlying evidence, including the witness evidence from [Director B] (Romans), [Director A] (Romans) and [Director A] (Prospect).

### ***Scoping and prioritisation***

- 2.28 This Decision does not contain an exhaustive summary of all the evidence obtained by the CMA during the investigation which may be evidence of an infringement of the Chapter I prohibition. For reasons of administrative prioritisation,<sup>19</sup> the CMA's findings in this Decision are limited to the Relevant Period for the Relevant Areas.

## **E. Statement of Objections**

- 2.29 On 13 June 2019, the CMA issued the Statement to the Parties.<sup>20</sup> Romans and Michael Hardy made limited representations on what they considered to be material factual inaccuracies in the Statement. Prospect and Richard Worth made no representations on the Statement.

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<sup>17</sup> In response to the CMA's request for a voluntary interview, [Director] (Richard Worth) stated that he wished to take legal advice before deciding whether to accept the CMA's invitation and did not subsequently recontact the CMA.

<sup>18</sup> URN1000.

<sup>19</sup> In accordance with *Prioritisation principles for the CMA* (April 2014, CMA16).

<sup>20</sup> In accordance with section 31 of the Competition Act 1998 and Rules 5 and 6 of *The Competition Act 1998 (Competition and Market Authority's Rules) Order 2014*, SI 2014/458 (the '**CA98 Rules**').

## F. Settlement

2.30 On 24 and 25 October 2019, the CMA entered into settlement agreements with two of the parties, Michael Hardy and Prospect (together, the '**Settling Parties**'), in which each of the Settling Parties:<sup>21</sup>

- (a) admitted that it had infringed the Chapter I prohibition in the terms set out in the Statement;
- (b) agreed to accept a maximum penalty; and
- (c) agreed to cooperate in expediting the process for concluding the CMA's investigation.

## G. Draft Penalty Statement

2.31 On 15 November 2019, the CMA issued a Draft Penalty Statement to Richard Worth. Richard Worth made limited representations on the Draft Penalty Statement.<sup>22</sup>

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<sup>21</sup> *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases ('CMA8')*, paragraph 14.7.

<sup>22</sup> See fn545.

### 3. INDUSTRY BACKGROUND AND THE PARTIES

#### A. Industry Background

##### *Introduction*

- 3.1 The CMA has found that the Infringement affected the supply of ‘**traditional residential estate agency services**’ in the Relevant Areas.
- 3.2 Residential estate agency services refers to agency services for and related to the sale of residential property. It does not encompass other services which can be provided by estate agents, such as services for the letting of property.<sup>23</sup>
- 3.3 Estate agents can act as sales agents in respect of both residential and commercial properties. The present investigation only relates to estate agency services for the sale of residential properties and focuses on estate agents that operate with a ‘high street’ presence referred to as ‘traditional’ estate agents.<sup>24</sup>
- 3.4 Traditional estate agents tend to fall into three main categories: estate agency chains (operating locally, regionally or nationally), affinity groups (groups of smaller, independent estate agents allowing them to market their properties more widely through the group and in some cases use the brand name of the group) and those operating independently.<sup>25</sup>
- 3.5 In terms of geographic scope, previous research shows that competition takes place at a very local level.<sup>26</sup> The present case concerns the activities of estate agents at such a local level in the Relevant Areas.

##### *The provision of traditional residential estate agency services*

- 3.6 Estate agents act as intermediaries between the sellers and buyers of properties.<sup>27</sup> The estate agent’s client is the seller of a property.

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<sup>23</sup> As above, the term ‘estate agent’ only applies to the sale of interests in land (section 1 of the Estate Agents Act 1979) and therefore cannot be used in relation to, for example, property lettings.

<sup>24</sup> Alternatives to traditional estate agents include private selling (whether through direct sales or through private seller websites); online estate agents and auctions; *Home buying and selling*, A market study (OFT1186, February 2010), paragraphs 3.21 and 3.44 to 3.60.

<sup>25</sup> *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 3.29.

<sup>26</sup> *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 4.11.

<sup>27</sup> *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 3.18.

- 3.7 Estate agents tend to offer a range of services for sellers including property valuations, price recommendations, promotional services, arranging and conducting viewings, screening of potential buyers, negotiation, a range of ancillary services and liaison between sellers and buyers.<sup>28</sup>
- 3.8 In relation to the majority of prospective sales, several estate agents will compete to win the seller's instructions to market the property. The primary focus of this competition will be the estate agents' fees and the standards of their customer service.

### ***Fees for traditional residential estate agency services***

- 3.9 Estate agents tend to be remunerated for their services by a commission payable by the seller of a property. The commission fee is generally agreed when the estate agent is appointed and becomes payable on sale of the property.
- 3.10 The commission rate can be set as a percentage of the achieved sale price of the property, as a flat rate commission fee, or as a combination of a percentage commission rate and a minimum flat rate commission fee. In the latter (combination) case, the greater of the percentage fee or the minimum flat rate would be charged by the estate agent on sale of the property.<sup>29</sup>
- 3.11 A percentage commission rate ordinarily differs depending on whether the estate agent is instructed alone or together with other estate agents. In England and Wales, there are three main types of contracts between estate agents and property sellers, namely:
- (a) 'Sole' or 'single' agency, where only one estate agent is instructed by a seller on a particular property. This tends to be the most common arrangement and carries the lowest commission fee.
  - (b) 'Joint sole' or 'joint' agency, where two or more estate agents are instructed as sole agents and split the commission if one of them is successful.
  - (c) 'Multiple' agency, where two or more estate agents are instructed to sell the property at the same time. Commission is only paid to the

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<sup>28</sup> *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 3.21.

<sup>29</sup> For example, if an estate agent has a commission rate of 1.5% and a minimum fee of £2,000, the minimum fee would apply if 1.5% of the achieved sale price was not greater than £2,000.



estate agent that finds a buyer. The commission fees for multiple agency tend to be similar to joint sole/joint agency.<sup>30</sup>

- 3.12 The evidence obtained by the CMA indicates that estate agents, when negotiating with sellers, seek to stay within the parameters of internally set commission fee levels.<sup>31</sup> These parameters will include a minimum percentage fee and/or a minimum value fee below which an estate agent will generally not quote.<sup>32</sup>
- 3.13 In setting its internal commission fee levels, an estate agent will assess (i) the service given relative to that provided by its competitors; (ii) the estate agent's worth as a business; and (iii) the estate agent's business costs. For example, a large estate agent that has a good market presence and a strong reputation for selling in a particular area may set a higher minimum commission fee than a smaller competitor in the same area.<sup>33</sup>

### ***Traditional residential estate agency services in the Relevant Areas***

- 3.14 This investigation concerns the activities of traditional estate agents in five localities in Berkshire: Wokingham, Winnersh, Crowthorne, Bracknell and Warfield (the Relevant Areas).
- 3.15 During the Relevant Period, the Parties had offices in one or more of the Relevant Areas. This is set out in Table 1 below, together with the areas that each of those branches covered:

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<sup>30</sup> *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 3.26.

<sup>31</sup> URN0172, paragraph 16; URN0171, paragraph 7.

<sup>32</sup> For larger estate agents, the internally set minimum commission fees are used to ensure that staff negotiating with sellers do not go below the minimum level without referring to more senior personnel in the business; URN0171, paragraph 10.

<sup>33</sup> URN0171, paragraph 9.

**Table 1: Relevant areas of operation of the Parties**

Office location	Party	Geographic area(s) served	
<b>Wokingham</b>	Romans	Wokingham Winnersh* Earley*	Lower Earley* Hurst* Sindlesham*
	Prospect	Wokingham	
	Michael Hardy	Wokingham Finchampstead Barkham	Winnersh Arborfield Binfield
	Richard Worth	Wokingham Finchampstead Crowthorne	Eversley Swallowfield Shinfield
<b>Winnersh</b>	Romans (closed in second half of 2010)	Winnersh Earley Lower Earley	Hurst Sindlesham
	Prospect	Winnersh	
<b>Crowthorne</b>	Romans	Crowthorne Heathlands Holme Green	Gardeners Green Ravenswood
	Prospect	Crowthorne Sandhurst**	
	Michael Hardy	Crowthorne Sandhurst*** Little Sandhurst***	Bracknell***
<b>Bracknell</b>	Romans	Bracknell Warfield Binfield	Winkfield Ascot
	Prospect	Bracknell	
	Richard Worth (closed September 2014)	Bracknell Warfield Binfield	
<b>Warfield</b>	Prospect	Warfield	

Source: Information provided by the Parties to the CMA during the course of the investigation.<sup>34</sup>

\* From the second half of 2010 after Romans' Winnersh office was closed.

\*\* Until early 2015.

\*\*\* Only occasional sales.

<sup>34</sup> URN0717; URN0718; URN0750; URN0755.

3.16 As can be seen from the table, the coverage area for a particular estate agent's office is not limited to its particular town/locality but may also include neighbouring localities/areas.<sup>35</sup> The evidence also indicates that an estate agent may continue to do business in a locality following closure of its office as it will have established a reputation in that area.<sup>36</sup> The strength of the competition, however, may vary between estate agents that have offices in the locality and those based in neighbouring areas.<sup>37</sup>

## **B. The Parties**

### ***Michael Hardy***

3.17 Michael Hardy & Company (Wokingham) Limited is a private limited company registered in England and Wales, with the company number 01867303.<sup>38</sup> It provides traditional residential estate agency services and has branches in Wokingham and Crowthorne.

3.18 Throughout the Relevant Period, all shares in Michael Hardy & Company (Wokingham) Limited were owned by Studio Investments (Holdings) Limited,<sup>39</sup> a private limited company registered in England and Wales with the company number 04285803.<sup>40</sup> Its shareholders and directors were: [individual];

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<sup>35</sup> See also URN0660.

<sup>36</sup> For example, Richard Worth had an office in Bracknell, but it closed in 2014; URN0750 and Romans does not have an office in Warfield but covers the locality from its Bracknell office; URN0172, paragraph 34. See also URN0171, paragraph 44.

<sup>37</sup> See for example URN0171, paragraph 53 and URN0172, paragraph 38.

<sup>38</sup> Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2016, as filed at Companies House.

<sup>39</sup> Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2008; Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2009; Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2010; Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2011; Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2012; Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2013; Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2014; Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2015; Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2016, all as filed at Companies House.

<sup>40</sup> Studio Investments (Holdings) Limited Certificate of Incorporation dated 12 September 2001, as filed at Companies House.

[individual]; and [individual].<sup>41</sup> [individual] resigned on [X]<sup>42</sup> and ceased to be a shareholder on [X].<sup>43</sup>

- 3.19 On 17 December 2015, Studio Investments (Holdings) Limited was placed into liquidation and on 12 January 2017 it was dissolved.<sup>44</sup>
- 3.20 On the same date, 17 December 2015, Michael Hardy & Company (Wokingham) Limited was acquired by Geocharbert UK Ltd,<sup>45</sup> a private limited company registered in England and Wales with the company number 09800192.<sup>46</sup> Geocharbert UK Ltd is a private limited company whose principal activity is that of a holding company.
- 3.21 Geocharbert UK Ltd has four shareholders: [individual] [X]; [individual]; [individual]; and [individual].<sup>47</sup> [individual] is [X] director of Geocharbert UK Ltd.<sup>48</sup>

### **Prospect**

- 3.22 Prospect Estate Agency Limited is a private limited company registered in England and Wales, with the company number 04138071.<sup>49</sup> It provides traditional residential estate agency services and has branches in Berkshire and Surrey.

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<sup>41</sup> Studio Investments (Holdings) Limited Annual Return made up to 12 September 2008; Studio Investments (Holdings) Limited Annual Return made up to 12 September 2009; Studio Investments (Holdings) Limited Annual Return made up to 12 September 2010; Studio Investments (Holdings) Limited Annual Return made up to 12 September 2011; Studio Investments (Holdings) Limited Annual Return made up to 12 September 2012; Studio Investments (Holdings) Limited Annual Return made up to 12 September 2013; Studio Investments (Holdings) Limited Annual Return made up to 12 September 2014; Studio Investments (Holdings) Limited Annual Return made up to 12 September 2015, all as filed at Companies House.

<sup>42</sup> Studio Investments (Holdings) Limited Termination of a Director Appointment for [individual] dated [X], as filed at Companies House.

<sup>43</sup> Studio Investments (Holdings) Limited Annual Return made up to 12 September 2009, as filed at Companies House.

<sup>44</sup> Studio Investments (Holdings) Limited Final Gazette dated 12 January 2017, as filed at Companies House.

<sup>45</sup> Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2016, as filed at Companies House.

<sup>46</sup> Geocharbert UK Ltd Certificate of Incorporation dated 29 September 2015, as filed at Companies House.

<sup>47</sup> Geocharbert UK Ltd Confirmation Statement dated 28 September 2016, as filed at Companies House.

<sup>48</sup> Geocharbert UK Ltd Certificate of Incorporation dated 29 September 2015, as filed at Companies House.

<sup>49</sup> Prospect Estate Agency Limited Certificate of Incorporation dated 9 January 2001, as filed at Companies House.

- 3.23 From the beginning of the Relevant Period until 20 November 2009, the shareholders of Prospect Estate Agency Limited were: [individual] ([REDACTED] %); [individual] ([REDACTED] %); and [individual] ([REDACTED] %).<sup>50</sup>
- 3.24 On 20 November 2009, Prospect Estate Agency Limited was acquired by Prospect Holdings (Reading) Limited.<sup>51</sup> On 1 January 2014, Prospect Estate Agency Limited ceased to trade and the company's business, assets and liabilities were transferred to Prospect Holdings (Reading) Limited.<sup>52</sup>
- 3.25 Prospect Holdings (Reading) Limited is a private limited company registered in England and Wales with the company number 07005392.<sup>53</sup> It provides traditional residential estate agency services, lettings and professional services including surveying, conveyancing, property management and mortgage advice with nine branches in Berkshire and Surrey.
- 3.26 Throughout the Relevant Period, the main shareholders as well as directors of Prospect Holdings (Reading) Limited were [individual] ([REDACTED])<sup>54</sup> and [individual] ([REDACTED]).<sup>55</sup>
- 3.27 In addition, further directors and shareholders of Prospect Holdings (Reading) Limited were: [individual], director ([REDACTED]) and shareholder ([REDACTED]);<sup>56</sup> [individual],

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<sup>50</sup> Prospect Estate Agency Limited Annual Return made up to 2 January 2008; Prospect Estate Agency Limited Annual Return made up to 2 January 2009; Prospect Estate Agency Limited Annual Return made up to 2 January 2010, all as filed at Companies House.

<sup>51</sup> Prospect Estate Agency Limited Annual Return made up to 2 January 2010, as filed at Companies House.

<sup>52</sup> Prospect Estate Agency Limited Financial Accounts for the year ending 31 December 2014, as filed at Companies House, which state that the company ceased to trade during the year, and that '*following a restructuring of the Prospect group of companies the company's business, assets and liabilities were transferred to Prospect Holdings (Reading) Limited at the beginning of the year*' (that is, the beginning of 2014). Prospect Estate Agency Limited is still an active company according to Companies House and has not been dissolved.

<sup>53</sup> Prospect Holdings (Reading) Limited Certificate of Incorporation dated 1 September 2009, all as filed at Companies House.

<sup>54</sup> Prospect Holdings (Reading) Limited Appointment of a Director for [individual] dated [REDACTED]; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2010; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2011; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2012; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2013; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2014, all as filed at Companies House.

<sup>55</sup> Prospect Holdings (Reading) Limited Appointment of a Director for [individual] dated [REDACTED]; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2010; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2011; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2012; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2013; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2014, all as filed at Companies House.

<sup>56</sup> Prospect Holdings (Reading) Limited Appointment of a Director for [individual] dated [REDACTED]; (Reading) Limited Appointment of a Director for [individual] dated [REDACTED]; Prospect Holdings (Reading) Limited Termination of a Director Appointment for [individual] dated [REDACTED]; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2015, all as filed at Companies House.

director and shareholder ([REDACTED]%) from [REDACTED];<sup>57</sup> [individual], director ([REDACTED]);<sup>58</sup> and [individual], director from [REDACTED].<sup>59</sup>

### **Richard Worth**

- 3.28 Richard Worth Limited is a private limited company registered in England and Wales with the company number 06650427.<sup>60</sup> It was a residential estate agent with branches in Wokingham, Bracknell and London.
- 3.29 On 12 November 2018, [administrator] of Harvey Insolvency & Turnaround Limited was appointed as an administrator for Richard Worth Limited.<sup>61</sup> The CMA understands that, as at the date of this Decision, Richard Worth Limited remains in existence, although it is no longer trading.
- 3.30 Throughout the Relevant Period, [individual] was the [REDACTED] director of Richard Worth Limited and 100% of the shares of Richard Worth Limited were owned by Richard Worth Holdings Limited.<sup>62</sup>
- 3.31 Richard Worth Holdings Limited is a private limited company registered in England and Wales with the company number 06650887 whose principal activity is that of a holding company.<sup>63</sup>
- 3.32 During the Relevant Period, [individual] was the [REDACTED] director of Richard Worth Holdings Limited and its shareholders were: [individual] ([REDACTED]); [individual] ([REDACTED]); [individual] ([REDACTED]); and [individual] ([REDACTED]).<sup>64</sup>

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<sup>57</sup> Prospect Holdings (Reading) Limited Appointment of a Director for [individual] dated [REDACTED] and Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2015, both as filed at Companies House.

<sup>58</sup> Prospect Holdings (Reading) Limited Appointment of a Director for [individual] dated [REDACTED]; Prospect Holdings (Reading) Limited Termination of a Director Appointment for [individual] dated [REDACTED]; Prospect Holdings (Reading) Limited Appointment of a Director for [individual] dated [REDACTED]; Prospect Holdings (Reading) Limited Annual Return made up to 1 September 2015, as filed at Companies House.

<sup>59</sup> Prospect Holdings (Reading) Limited Appointment of a Director for [individual] dated [REDACTED], as filed at Companies House.

<sup>60</sup> Richard Worth Limited Certificate of Incorporation dated 18 July 2008, as filed at Companies House.

<sup>61</sup> Richard Worth Limited Notice of Administrators Appointment dated 12 November 2018, as filed at Companies House.

<sup>62</sup> Richard Worth Limited Annual Return made up to 18 July 2009; Richard Worth Limited Annual Return made up to 18 July 2010; Richard Worth Limited Annual Return made up to 18 July 2011; Richard Worth Limited Annual Return made up to 18 July 2012; Richard Worth Limited Annual Return made up to 18 July 2013; Richard Worth Limited Annual Return made up to 18 July 2014; Richard Worth Limited Annual Return made up to 18 July 2015, as filed at Companies House.

<sup>63</sup> Richard Worth Holdings Limited Certificate of Incorporation dated 18 July 2008, as filed at Companies House.

<sup>64</sup> Richard Worth Holdings Limited Annual Return made up to 18 July 2009; Richard Worth Holdings Limited Annual Return made up to 18 July 2010; Richard Worth Holdings Limited Annual Return made up to 18 July 2011; Richard Worth Holdings Limited Annual Return made up to 18 July 2012; Richard Worth Holdings Limited

## **Romans**

- 3.33 The Romans Group (UK) Limited is a private limited company registered in England and Wales, with the company number 02161874.<sup>65</sup> It provides traditional residential estate agency services, lettings and related services through a 29-branch network in Berkshire, Buckinghamshire, Greater London, Hampshire, Middlesex, Oxfordshire and Surrey.
- 3.34 The directors of The Romans Group (UK) Limited during the Relevant Period were: [individual],<sup>66</sup> [individual],<sup>67</sup> [individual],<sup>68</sup> [individual] ([X]);<sup>69</sup> [individual] ([X]);<sup>70</sup> [individual] ([X]);<sup>71</sup> [individual] ([X]);<sup>72</sup> [individual] ([X]);<sup>73</sup> [individual] ([X]);<sup>74</sup> [individual] ([X]);<sup>75</sup> and [individual] ([X]).<sup>76</sup>
- 3.35 The shareholders of The Romans Group (UK) Limited, from the beginning of the Relevant Period until 29 August 2013, were: [individual]; [individual]; [individual]; [individual]; [individual]; [individual] ([X]); Imperial Estate Agents Employee Benefit Trust Ltd ([X]); and [individual] ([X]).<sup>77</sup>

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Annual Return made up to 18 July 2013; Richard Worth Holdings Limited Annual Return made up to 18 July 2014; Richard Worth Holdings Limited Annual Return made up to 18 July 2015; Richard Worth Holdings Limited Annual Return made up to 18 July 2016, as filed at Companies House.

<sup>65</sup> The Romans Group (UK) Limited Confirmation Statement dated 24 June 2018, as filed at Companies House.

<sup>66</sup> Imperial Estate Agents Limited Appointment of a Director for [individual] dated [X], as filed at Companies House.

<sup>67</sup> Imperial Estate Agents Limited Appointment of a Director for [individual] dated [X], as filed at Companies House.

<sup>68</sup> Imperial Estate Agents Limited Appointment of a Director for [individual] dated [X], as filed at Companies House.

<sup>69</sup> Imperial Estate Agents Limited Notice of change of directors, Appointment of a Director for [individual] dated [X] and The Romans Group (UK) Limited Termination of a Director Appointment for [individual] dated [X], both as filed at Companies House.

<sup>70</sup> Imperial Estate Agents Limited Appointment of a Director for [individual] dated [X] and Imperial Estate Agents Limited Termination of a Director Appointment for [individual] dated [X], both as filed at Companies House.

<sup>71</sup> The Romans Group (UK) Limited Appointment of a Director for [individual] dated [X], as filed at Companies House.

<sup>72</sup> Imperial Estate Agents Limited Appointment of a Director for [individual] dated [X], as filed at Companies House.

<sup>73</sup> The Romans Group (UK) Limited Appointment of a Director for [individual] dated [X], as filed at Companies House.

<sup>74</sup> Imperial Estate Agents Limited Appointment of a Director for [individual] dated [X] and Imperial Estate Agents Limited Termination of a Director Appointment for [individual] dated [X], both as filed at Companies House.

<sup>75</sup> Imperial Estate Agents Limited Appointment of a Director for [individual] dated [X], as filed at Companies House.

<sup>76</sup> Imperial Estate Agents Limited Appointment of a Director for [individual] dated [X], as filed at Companies House.

<sup>77</sup> Imperial Estate Agents Limited Annual Return made up to 24 June 2008; Imperial Estate Agents Limited Annual Return made up to 24 June 2009; Imperial Estate Agents Limited Annual Return made up to 24 June 2010; Imperial Estate Agents Limited Annual Return made up to 24 June 2011; The Romans Group (UK) Limited

- 3.36 On 30 August 2013, The Romans Group (UK) Limited was acquired in its entirety by Romans 3 Limited,<sup>78</sup> a private limited company registered in England and Wales with the company number 8653616.<sup>79</sup> Romans 3 Limited is indirectly wholly owned by Romans 1 Limited.<sup>80</sup> Romans 1 Limited is a private limited company whose principal activity is that of a holding company.
- 3.37 During the Relevant Period, Romans 3 Limited and Romans 1 Limited had the same four individuals as directors: [individual]; [individual]; [individual]; and [individual].<sup>81</sup> Romans 1 Limited also had [individual] as a director.<sup>82</sup>
- 3.38 Throughout the Relevant Period the shareholders of Romans 1 Limited were: [individual]; [individual]; [individual]; [individual]; [individual]; [individual]; [individual]; and Ventry Nominees Limited.<sup>83</sup>

## C. Key Individuals

- 3.39 The following key individuals were involved in the Infringement:<sup>84</sup>

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Annual Return made up to 24 June 2012; The Romans Group (UK) Limited Annual Return made up to 24 June 2013, all as filed at Companies House.

<sup>78</sup> Romans 3 Limited Report and Financial Statements for the year ending 30 December 2014 and The Romans Group (UK) Limited Annual Return made up to 24 June 2014, both as filed at Companies House.

<sup>79</sup> Romans 3 Limited Certificate of Incorporation dated 16 August 2013, as filed at Companies House.

<sup>80</sup> Romans 1 Limited is a private limited company registered in England and Wales with the company number 8652570; Romans 1 Limited Certificate of Incorporation dated 15 August 2013 and Romans 1 Limited Annual Report and Financial Statements for the year ending 31 December 2017, both as filed at Companies House.

<sup>81</sup> Romans 3 Limited Annual Return made up to 16 August 2014 and Romans 3 Limited Annual Return made up to 16 August 2015, all as filed at Companies House.

<sup>82</sup> Romans 1 Limited Certificate of Incorporation dated 15 August 2013; Romans 1 Limited Appointment of a Director for [individual] dated [REDACTED]; Romans 1 Limited Appointment of a Director for [individual] dated [REDACTED]; Romans 1 Limited Appointment of a Director for [individual] dated [REDACTED]; Romans 1 Limited Annual Return made up to 15 August 2014; Romans 1 Limited Annual Return made up to 15 August 2015, all as filed at Companies House.

<sup>83</sup> Romans 1 Limited Annual Return made up to 15 August 2014 and Romans 1 Limited Annual Return made up to 15 August 2015, both as filed at Companies House. Ventry Nominees Limited (company number 5162163) changed their name to Bowmark Capital Partners IV Nominees Limited on 16 October 2017 - Certificate of Incorporation on Change of Name from Ventry Nominees Limited to Bowmark Capital Partners IV Nominees Limited dated 16 October 2017. The CMA has exercised its discretion to address this Decision to Romans 1 and The Romans Group (UK) Limited, and not to any other companies which owned shares (directly or indirectly) in Romans 1 Limited, as all such shareholdings fall short of the level required for the CMA to presume decisive influence over Romans 1 Limited and, indirectly, The Romans Group (UK) Limited under Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536.

<sup>84</sup> URN0800; URN0171 and paragraphs 3.18 and 3.30.



**Table 2: Key individuals involved in the Infringement**

Party	Individual	Position (during the Relevant Period)
Michael Hardy	[Director]	[REDACTED]
Prospect	[Director A]	[REDACTED]
	[Director B]	[REDACTED]
Richard Worth	[Director]	[REDACTED]
Romans	[Director B]	[REDACTED]
	[Director A]	[REDACTED]
	[Director C]	[REDACTED]

- 3.40 Throughout the Relevant Period [Director B] (Romans), [Director A] (Prospect), [Director] (Michael Hardy) and [Director] (Richard Worth) were the most directly involved in the conduct constituting the Infringement. They were all directors of the businesses that had oversight of the Parties' offices located in the Berkshire area.
- 3.41 The direct running of the offices was done locally by branch managers. Romans and Prospect, the two larger estate agents, also had area managers who had responsibility for a number of offices and who reported to [Director B] (Romans) and [Director A] (Prospect) respectively.

## 4. CONDUCT OF THE PARTIES

### A. Introduction

- 4.1 The CMA has found that between at least 1 September 2008 and 19 May 2015, the Parties infringed the Chapter I prohibition by participating in a single and continuous infringement through an agreement and/or concerted practice to fix and maintain a minimum level of commission fees to be charged for the provision of traditional residential estate agency services in the Relevant Areas, including through the exchange of confidential pricing information and taking steps to monitor or reinforce compliance.
- 4.2 The CMA's findings are supported by contemporaneous documents such as emails, reports, diary entries and outlook appointments, together with witness evidence from, in particular, two of the individuals directly involved in the Minimum Fee Arrangement.<sup>85</sup>

### B. The origins of the Minimum Fee Arrangement

#### *Background*

- 4.3 In 2007 and 2008, the economic downturn was having an adverse impact on the estate agency business and in particular turnover levels. In their accounts to the CMA, both [Director B] (Romans) and [Director] (Michael Hardy) noted the difficulties faced by their respective businesses and the steps that needed to be taken, which included redundancies.<sup>86</sup> [Director B] (Romans) also stated that raising commission fees was discussed within Romans at that time as there were fewer transactions.<sup>87</sup>

#### *Initial contacts mid-2008*

- 4.4 As evidenced below, the difficult market conditions in 2007 and 2008 prompted a number of estate agents in the Berkshire area to contact each other to discuss the need to increase commission fee levels. In particular, a meeting was held between several estate agents, including Romans and Prospect, operating in the Reading area at the end of May or the beginning of June at which it was agreed that it was necessary to increase minimum commission fees levels in the Reading area.

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<sup>85</sup> For further details on the CMA's approach to assessing the evidence, see paragraphs 2.13 to 2.27.

<sup>86</sup> URN0172, paragraphs 18 to 19; URN0092, pages 18 to 19.

<sup>87</sup> URN0172, paragraphs 18 to 19.

4.5 Following their attendance at this meeting, both Romans and Prospect looked to arrange discussions with other estate agents regarding the need to increase commission fee levels in other areas in Berkshire.

4.6 In an email dated 5 June 2008, [Director B] (Prospect)<sup>88</sup> informed a number of estate agents based in Wokingham, including Michael Hardy,<sup>89</sup> that:<sup>90</sup>

*‘Just to let you know that Prospect, [estate agent], Romans, [estate agent] and [estate agent] have had a meeting in Reading to talk about fees and are attempting the following:*

*‘Minimum fee of £2,500*

*‘Minimum fee % of 1.75%*

*‘Multiple Agency fee of 3%. It was also agreed that a multiple agency instruction one will only be instructed with one other agent and agent has to be one of the five of us at the same rate.*

*‘This is obviously not a cartel as the public has plenty of choice in terms of cheap, poorly-performing agents to go to. This is not a fixed fee either, but a minimum fee.’*

4.7 [Director B] (Prospect) finished this email with the suggestion:<sup>91</sup>

*‘If this works maybe some of us could get together to review the situation [the level of commission fees] in Wokingham, Crowthorne and Bracknell. I’d be happy to talk now if any of you are rather than wait and see.’*

4.8 In an internal Romans Monthly report summary for May 2008, [Director A] (Romans) noted, in similar terms to the email from [Director B] (Prospect) referred to at paragraphs 4.6 to 4.7, that:<sup>92</sup>

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<sup>88</sup> [Director B] (Prospect) [X]. The CMA has not interviewed him as part of its investigation.

<sup>89</sup> This email was not sent to Romans, although Romans is referred to in the email as having attended the meeting of Reading estate agents. For Romans’ attendance see paragraph 4.8.

<sup>90</sup> URN0472. This area is not part of the Infringement.

<sup>91</sup> URN0472.

<sup>92</sup> URN0568. The final amended version of the document was emailed to [Director A] (Romans) from [Director C]’s (Romans) personal assistant on 13 June 2008; URN0567.

*‘Recently attended a meeting of the main agents in Reading<sup>[93]</sup> where, stopping short of a Cartel<sup>[94]</sup> an agreement was made about the necessity to increase fees significantly and this is already bearing fruit.*

*‘I am intending to carry out similar meetings during June,<sup>[95]</sup> particularly in market places where there are low numbers of competitors such as Warfield, Winnersh, Lower Earley, Sandhurst and Yateley as these are will be the easiest places where a consensus can be reached most successfully.’*

- 4.9 As set out at paragraphs 4.10 to 4.24, the evidence demonstrates that in the months after 5 June 2008 (the date of the email from [Director B] (Prospect) referred to at paragraph 4.6) a number of estate agents, including the Parties, discussed the need to increase the level of commission fees in Bracknell, Warfield and Wokingham by agreeing minimum fee levels with the main estate agents operating in those areas.

#### *Bracknell and Warfield*

- 4.10 According to the evidence of [Director A] (Prospect), Prospect and Romans had discussions around July 2008 with the aim of increasing commission fee levels that led to minimum commission fees levels being agreed for Bracknell and Warfield.
- 4.11 [Director A] (Prospect) stated that he attended a meeting, which he believes was in July 2008, arranged by [Director A] (Romans) in [coffee shop] in Reading to discuss the potential sale of Prospect’s Winnersh office to Romans.<sup>96</sup>

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<sup>93</sup> The CMA’s finding of Infringement does not extend to Reading.

<sup>94</sup> This language mirrors that used by [Director B] (Prospect) in his email dated 5 June 2008 and described at paragraph 4.6. [Director A] (Romans) stated that he considered that an agreement between estate agents that commission fees needed to increase was not a ‘cartel’; URN0097, pages 20 to 21. See also URN0801, paragraphs 55 to 56. This also mirrors [Director B]’s (Romans) recollection of what [Director A] (Romans) told him when [Director B] (Romans) expressed concern at contacting other estate agents to agree minimum commission fees; URN0172, paragraph 22. [Director A]’s (Romans) understanding as to whether or not what the estate agents were doing amounted to a cartel, is similar to that of [Director] (Michael Hardy) some three years earlier, as reflected in an email dated 22 February 2005 (URN0547); see fn109.

<sup>95</sup> [Director A] (Romans) stated that he had attended a meeting in Reading with other estate agents at which commission fees had been discussed. [Director A] (Romans) stated that there was a general discussion and that there was agreement that commission fees needed to increase; URN0097, pages 19 to 20. See also URN0801, paragraphs 12 to 13.

<sup>96</sup> URN0171, paragraph 17. Whilst [Director A] (Romans) does not recall this specific meeting with [Director A] (Prospect), he does recall that Romans was trying to acquire Prospect’s Winnersh office and that he did meet with [Director A] (Prospect) to discuss this matter; URN0801, paragraph 24.

- 4.12 [Director A] (Prospect) stated that, after informing [Director A] (Romans) that he was not interested in selling Prospect's Winnersh office, the discussion then broadened to the state of the market and, in particular, the level of commission fees.<sup>97</sup>

*'The conversation then led onto the condition of the property market, which was falling quite a lot at the time with the collapse of Northern Rock, falling interest rates and the general state of the economy. We discussed that the number and value of property sales were falling which might result in quite a lot of estate agents going out of business. Only the bigger firms that had higher turnover, more sales volume and more cash reserves would survive.'*

*'It was then suggested by [Director A (Romans)] that we should join forces and agree fee levels to compensate for the falling balance of transactions and house prices. The idea was to try and maintain turnover levels through agreed minimum fee levels.'*

*'It was put to me in no uncertain terms by [Director A (Romans)] that Romans would survive in the difficult market conditions because it was about three times bigger than Prospect and had cash reserves. There was quite a lot of negative history between the two firms and we were strong competitors. Whilst I was not bullied into it, [Director A (Romans)] positively suggested that if I did not cooperate, there would be fall out between Prospect and Romans. Given that there were serious times ahead due to the economic situation and maybe I needed to think about the implications for Prospect as a business including job losses.'*<sup>98</sup>

- 4.13 [Director A] (Prospect) stated that it was agreed that they would arrange to meet at a later date,<sup>99</sup> and that a further meeting with [Director A] (Romans) was held at Romans' Winnersh office,<sup>100</sup> which was also attended by their

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<sup>97</sup> URN0171, paragraphs 19 to 21.

<sup>98</sup> Both Michael Hardy and [Director] (Richard Worth) have made similar statements with regard to being put under pressure to cooperate on minimum fee levels by Romans. This is considered in more detail at paragraphs 7.40 to 7.45. These statements were made following sight of the evidence provided by [Director A] (Prospect).

<sup>99</sup> URN0171, paragraph 22.

<sup>100</sup> [Director A] (Prospect) recollected that a second meeting took place in vacated office space upstairs at Romans' Winnersh office which had previously been used as Romans' head office prior to its relocation to Crowthorne House in Wokingham. The downstairs area was still being used at the time by Romans' sales staff prior to Romans closing the Winnersh office completely in 2009; URN0171, paragraph 22.

respective local branch managers, but also possibly other unnamed estate agents.<sup>101</sup>

4.14 [Director A] (Prospect) recalled:<sup>102</sup>

*'It was at this meeting in Romans' Winnersh office where it was agreed at least between Romans and Prospect that Romans and Prospect would not charge below a fee level of 1.8%. Fees were on average about 1.75% at the time so the aim was to maintain those average fee levels. I also recall there was some discussion of the pounds-and-pence fee level but the focus of the meeting was on a minimum percentage fee level. There was no fixed term discussed for the arrangement.'*

4.15 Whilst the meeting was held at Romans' Winnersh office, [Director A]'s (Prospect) recollection is that the minimum fee agreed was for Bracknell and Warfield:<sup>103</sup>

*'My initial recollection is that we agreed minimum percentage fee level for Bracknell of 1.8% at this meeting. When I refer to Bracknell I also mean Warfield because it is the same area and Romans' Warfield department was located in its Bracknell office.'*

4.16 Based on [Director A]'s (Prospect) recollection, these meetings between Romans and Prospect are likely to have taken place in July 2008. The precise timing of these meetings, however, is not material to the CMA's findings.

### *Wokingham*

4.17 The evidence obtained by the CMA also demonstrates that, at around the same time as Prospect was discussing minimum commission fee levels for Bracknell and Warfield with Romans, Prospect was also engaged in discussions with Michael Hardy regarding agreeing minimum commission fee levels in Wokingham.

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<sup>101</sup> [Director A] (Prospect) also explained that he was 'pretty sure', although he cannot 'categorically confirm' as the meeting was over ten years ago, that there were other people present; URN0171, paragraph 23.

<sup>102</sup> URN0171, paragraph 24.

<sup>103</sup> URN0171, paragraph 25. [Director A] (Prospect) noted that, as 'Winnersh is like a suburb of Wokingham, it would make sense for Wokingham to be part of any Winnersh agreement. I am therefore, pretty sure that the meeting was about Bracknell including Warfield despite its location and the presence of Winnersh branch managers'; URN0171, paragraph 26.

4.18 On 3 July 2008, in what appears to be a follow up to the email [Director B] (Prospect) sent on 5 June 2008 (as set out at paragraph 4.6),<sup>104</sup> [Director] (Michael Hardy) and [Director B] (Prospect) discussed by email the level of commission fees being charged by Prospect in Wokingham and a potential meeting of local estate agents.

4.19 [Director] (Michael Hardy) wrote:<sup>105</sup>

*'[...] you sent out an email a few weeks ago<sup>[106]</sup> about commission rates and how important they are for all our survival. Most of the agents seem to be trying out to get their rates up however your Wokingham office still appear to be quoting 1.25%. we have come up against this on 3 occasions in the last two weeks. The higher commission rates we are achieving are probably what will guarantee our long term survival in what we all know is not a quick fix situation. Do you think you can get your lads to practice what you're preaching?!!!!'*

4.20 [Director B] (Prospect) replied:<sup>107</sup>

*'On the basis of the lack of response from my e-mail nothing really changed from our side. The company average fee is now around 1.8% but for some reason agents in Wokingham have always under-sold themselves in my opinion. It's strange that both our Reading and Bracknell offices consistently get 2% yet the Wokingham agents seem to maintain that it isn't possible and so nothing has changed.'*

*'I am willing to do whatever it takes to get this sorted. We've had meetings over the last few weeks with other agents, including Romans, and there is at last a general consensus that something should be done.'*

*'Let me know if you would like to meet with several of our competitors.'*

4.21 [Director] (Michael Hardy) replied on the same day stating:<sup>108</sup>

*'I am not keen on a cartel [Director B (Prospect)], and what you described in your email was a cartel even though not everyone was involved,<sup>[109]</sup>*

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<sup>104</sup> URN0472.

<sup>105</sup> URN0550. [Director] (Michael Hardy) stated that he wrote this email because he was irritated with [Director B]'s (Prospect) approach on this matter as Prospect staff were quoting low fees; URN0092, pages 46 to 47.

<sup>106</sup> This appears to be the email sent by [Director B] (Prospect) dated 5 June 2008; URN0472.

<sup>107</sup> URN0550.

<sup>108</sup> URN0550.

<sup>109</sup> [Director] (Michael Hardy) stated in interview that he believed that what [Director B] (Prospect) was proposing was a 'cartel'; URN0092 page 46. Three years previously, in an email dated 22 February 2005 to Richard Worth

*which is why I didn't respond. [...] Do we need to meet again to agree that we need to help each other by being sensible on our fees?*<sup>[110]</sup> *If you know of an agent who is consistently charging 1.25% or less other than Prospect let me know and I will have a word!*<sup>[111]</sup>

4.22 [Director B] (Prospect) responded:<sup>[112]</sup>

*'I'm not sure the exact definition of a cartel, but I do think the top 3 or 4 agents could quite easily agree a higher minimum fee [...].*

*'Anyway, I'll see what I can find out and come back to you.'*

4.23 [Director B] (Prospect) followed up his email to [Director] (Michael Hardy) later the same day, copying in a Prospect area director, suggesting a meeting to 'agree a way forward' on commission fees between Prospect, Romans, another estate agent and possibly Richard Worth:<sup>[113]</sup>

*'[...] Rather than to discuss each individual case we think it's best we get together, with Romans and [estate agent],<sup>[114]</sup> to agree a way forward. Are you happy with this or would you prefer to meet just us?*

*'I am not sure any of us trust RW [Richard Worth] on this, but I'll be guided by you and the others.'*

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regarding low commission fees being charged in Wokingham and Crowthorne, [Director] (Michael Hardy) noted '[t]he fact is we can't have a cartel nor would I suggest it but a general agreement that agents don't drop below a certain commission figure seems a good idea'; URN0547. In addition, in at least 2005, [Director] (Michael Hardy) was willing to enter into an agreement on minimum commission fee levels on the basis that he believed erroneously that such an arrangement would not be a 'cartel'. This belief is similar to the views held by [Director B] (Prospect) and [Director A] (Romans) as described at paragraphs 4.6 and 4.8 respectively. It may explain why [Director] (Michael Hardy), notwithstanding his statement of not wanting to be involved in a 'cartel', agreed to meet with his competitors to agree minimum commission fee levels as described at paragraphs 4.35 to 4.60.

<sup>[110]</sup> With regard to the sentence 'Do we need to meet and agree that we need to help each other by being sensible on our fees', [Director] (Michael Hardy) stated, in interview, that he believed that he was 'being rhetorical' because earlier in the same email he was telling [Director B] (Prospect) that he was not interested in 'getting involved in that cartel'; URN0092, page 49. In light of the content of this email, and the subsequent exchanges between [Director B] (Prospect) and [Director] (Michael Hardy), the CMA does not consider that this statement was rhetorical. It is clear from his response that [Director B] (Prospect) did not consider it to be rhetorical, as described at paragraphs 4.22 and 4.23, and [Director]'s (Michael Hardy) subsequent email described at paragraph 4.24 is not consistent with [Director]'s (Michael Hardy) interpretation.

<sup>[111]</sup> [Director] (Michael Hardy) told the CMA that he wrote the comment 'If you know of an agent who is consistently charging 1.25% or less other than Prospect let me know and I will have a word!' because he would have said to any estate agent who was trying to survive in 2008 that, if they wanted to survive, they needed to charge more than a low fee; URN0092, pages 50 to 51.

<sup>[112]</sup> URN0550.

<sup>[113]</sup> URN0550.

<sup>[114]</sup> This estate agent is not a party to the Infringement.



4.24 [Director] (Michael Hardy) responded again on 3 July 2008, requesting the inclusion of Richard Worth in a meeting, noting:<sup>115</sup>

*‘RWs [Richard Worth] are in the process of changing ownership<sup>[116]</sup> and [✂] so I would be keen to talk to them as well if poss.’*

4.25 The documentary evidence set out above shows that [Director] (Michael Hardy) was aware of the contacts between estate agents in the Reading area to increase commission fees<sup>117</sup> and of the contacts Prospect was having with other estate agents in other areas to reach ‘a *general consensus*’ on commission fees.<sup>118</sup>

4.26 The CMA infers<sup>119</sup> from the email exchange described at paragraphs 4.19 to 4.24 that in June and early July 2008, Michael Hardy confirmed, to at least Prospect, that it shared Prospect’s desire to increase the level of commission fees in the areas in which it operated and that Michael Hardy would be willing to meet with other estate agents including Romans and Richard Worth to discuss ways they could cooperate to increase commission fee levels. Indeed, it was [Director] (Michael Hardy) who requested that, if possible, Richard Worth be included in any discussions.<sup>120</sup>

### ***Arrangements leading to the First Wokingham meeting***

4.27 The witness and documentary evidence demonstrates that, in July 2008, around the same time as the contacts outlined at paragraphs 4.18 to 4.24 took place, Romans was also taking steps to arrange a meeting between the Parties to agree a minimum level of commission fees to be charged for the provision of traditional estate agency services in at least the Wokingham area which was when the Minimum Fee Arrangement was established (the ‘**First Wokingham meeting**’).

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<sup>115</sup> URN0550.

<sup>116</sup> [Director] (Richard Worth), in interview, confirmed the change in ownership of the Richard Worth business in the summer of 2008 and commented that Richard Worth would not have been involved prior to this as the previous owner did not have a relationship with the other estate agents so [Director] (Richard Worth) was ‘*confident in saying that that discussion hadn’t been had previously*’; URN1000, page 41.

<sup>117</sup> See paragraph 4.6. See also fn109 with regard to [Director]’s (Michael Hardy) views on what constitutes a ‘*cartel*’.

<sup>118</sup> See paragraphs 4.19 to 4.24.

<sup>119</sup> None of the Parties have contested these findings.

<sup>120</sup> In response to [Director B]’s (Prospect) suggestion of a meeting with Romans and another estate agent to ‘*agree a way forward*’ on commission fees, [Director] (Michael Hardy) confirmed that he ‘*would be keen to talk to [Richard Worth] as well [as Romans and another estate agent] if possible*’; URN0550.

4.28 [Director B] (Romans) recalled a conversation he had with [Director A] (Romans) in which the possibility of a meeting between Romans, Richard Worth, Michael Hardy and Prospect to discuss commission fees in Wokingham was first raised. [Director B] (Romans) stated that this conversation was held in [Director A]'s (Romans) office shortly after a Romans board meeting in the summer of 2008 in which the future viability of the Romans business was discussed.<sup>121</sup>

4.29 [Director B] (Romans) stated:<sup>122</sup>

*'[Director A Romans]] said he had spoken with [Director],<sup>[123]</sup> [REDACTED] Richard Worth, about fees. [Director A Romans]] mentioned that [Director (Richard Worth)] would be putting Richard Worth's fees up to a similar figure to Roman's fees in Wokingham. He mentioned that a figure of 1.8% had been discussed. He then suggested that I should meet and speak to [Director (Richard Worth)] about the fee levels.*

*'I cannot recall whether [Director (Richard Worth)] and I were tasked by [Director A (Romans)] at this time to speak to two other estate agents, [Director] at Michael Hardy and [Director A] at Prospect to introduce the idea of such an arrangement on minimum fees to them or whether [Director A (Romans)] had already spoken to them.<sup>[124]</sup> The reason why it was Prospect, Michael Hardy and Richard Worth is that these three estate agents were Romans' main competitors in the Wokingham area. I knew [Director (Richard Worth)] quite well [REDACTED]. I also knew [Director A (Prospect)] and [Director (Michael Hardy)] reasonably well, [REDACTED].'*

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<sup>121</sup> URN0172, paragraph 18.

<sup>122</sup> URN0172, paragraphs 20 to 21. [Director A] (Romans) stated that he communicated to [Director B] (Romans) that it would be '*sensible*' or '*advantageous*' to have similar meetings with other estate agents to agree levels below which they would not reduce their commission fees and that [Director B] (Romans) did go on and become involved in such arrangements with the other Parties; URN0097, pages 58 to 60. See also URN0801, paragraph 28.

<sup>123</sup> [Director] (Richard Worth) stated, in interview, that his initial contact was with [Director A] (Romans) and that it was '*a general conversation about fees and the fact that we were all able to charge a reasonably comfortable fee and that [Director A (Romans)] wouldn't like to see that start to reduce*'. This conversation was '*subsequently followed up by [Director B (Romans)]*'; URN1000, pages 39 and 43.

<sup>124</sup> tions on the [Director] (Richard Worth) stated in interview that in his subsequent contact with [Director B] (Romans) it was '*becoming more of an agreement not to charge below a certain level*' and that [Director B] (Romans) had the '*understanding that we were all going to be party to this situation*' which, from his recollection, was not '*representative of the conversation that [Director A (Romans)] and I had previously had*'; URN1000, pages 57 to 62. Even if [Director B] (Romans) may have been under the allegedly wrong impression from [Director A] (Romans) that [Director] (Richard Worth) was already on board with the idea of an arrangement on minimum fees, [Director] (Richard Worth) did not correct any such misunderstanding and, as set out at paragraphs 4.35 to 4.37, Richard Worth became a party to the Minimum Fee Arrangement.

4.30 [Director B] (Romans) went on to state:<sup>125</sup>

*'It did not surprise me that [Director A (Romans)] and [Director (Richard Worth)] had been in contact [X] but I felt uncomfortable to begin with as I had never had a conversation with another estate agent about fees. We used to know what other agents quoted because of feedback from customers but not direct communication like this. However, I had worked with [Director A (Romans)] [X] and he told me it was fine. He said this was because not every estate agent would be involved,<sup>[126]</sup> that agents would still charge what they wanted to at times and that there would be a lot of different situations where it would not be 1.8%.'*

4.31 [Director A]'s (Prospect) account is consistent with [Director B]'s (Romans) recollection regarding [Director A]'s (Romans) request to set up a meeting between the Parties in Wokingham. He stated that:<sup>127</sup>

*'I remember [Director A (Romans)], around this time, telling me that [Director B (Romans)] would carry on dealing with the arrangement and it was suggested that we look at Wokingham as an opportunity to do the same and involve two other estate agents, Michael Hardy and Richard Worth.'*

4.32 The CMA considers that [Director B]'s (Romans) and [Director A]'s (Prospect) conversations with [Director A] (Romans) most likely took place around the same time as an internal email sent from [Director C] (Romans) to [Director A] (Romans) on 8 July 2008, entitled 'WOKINGHAM'. This email made the request that a meeting be set up between Romans, Michael Hardy and Prospect, with the possibility of a further meeting with Richard Worth:<sup>128</sup>

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<sup>125</sup> URN0172, paragraph 22. His recollection of what [Director A] (Romans) said about discussing commission fees with other estate agents is consistent with what [Director A] (Romans) stated in the Romans May 2008 monthly report as detailed at paragraph 4.8 and fn94.

<sup>126</sup> The argument that a minimum fee arrangement was not problematic because not all estate agents were involved was also used by [Director B] (Prospect) in his emails dated 5 June 2008 (described at paragraph 4.6) and 3 July 2008 (described at paragraph 4.22). In addition, [Director] (Richard Worth) has stated that he was reassured by Romans' statement that '*not everybody's involved, so it is fine to be doing this*'; URN1000, pages 76 to 77. [Director]'s (Richard Worth) statement was made after having seen the evidence of [Director B] (Romans) and the email exchange involving [Director B] (Prospect). In any event, the Parties' understanding at the time as to what type of conduct was or was not a cartel and whether a Party received '*reassurance*' does not impact the CMA's finding of Infringement and Richard Worth's liability for its participation in the Infringement, as ignorance or mistake of the law does not prevent the finding of intentional infringement, as set out at paragraph 7.15.

<sup>127</sup> [Director A] (Prospect) also stated that the meeting at Romans' Winnersh office, described at paragraphs 4.13 to 4.15, was the last meeting he had with [Director A] (Romans); URN0171, paragraph 34.

<sup>128</sup> URN0358.

*'[...] please get a meeting scheduled with [Director (Michael Hardy)], Prospects, concentrate not just on fees but price. The town is expensive, For RW's [Richard Worth] - don't worry, once they have sorted themselves<sup>129</sup> out we will address them if the need arises.'*

- 4.33 Given the statements of [Director B] (Romans),<sup>130</sup> as set out at paragraph 4.28, and [Director A] (Prospect), as set out at paragraph 4.31, the CMA considers that [Director A] (Romans) delegated responsibility for organising the First Wokingham meeting between the four Parties to [Director B] (Romans).

## **C. The Minimum Fee Arrangement**

- 4.34 The witness and documentary evidence obtained by the CMA, as set out at paragraphs 4.35 to 4.60, demonstrates that the Parties met and agreed minimum level of commission fees to be charged for the provision of traditional estate agency services in Wokingham, Winnersh, Crowthorne, Bracknell and Warfield (the Relevant Areas).

### ***The First Wokingham meeting***

- 4.35 Based on the available evidence, the CMA has concluded that the first meeting between the four Parties was held in Wokingham, at which they agreed a minimum level of commission fees for the sale of residential properties in at least the Wokingham area.

- 4.36 [Director A] (Prospect) stated:<sup>131</sup>

*'Shortly after the meeting at Roman's Winnersh office, I attended a meeting held at the redundant first floor of Michael Hardy's office in Wokingham<sup>132</sup> with [Director B] of Romans, [Director] of Michael Hardy and [Director] of Richard Worth.'*

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<sup>129</sup> The CMA believes this to be a reference to the change in ownership of Richard Worth, also referred to in [Director]'s (Michael Hardy) email dated 3 July 2008 (URN0550), see paragraph 4.24.

<sup>130</sup> [Director B] (Romans) also stated that '[a]fter [Director A (Romans)] had contact with [Director (Richard Worth)], whilst he did have some contact with the others and exchanged the odd email, he passed the responsibility to me to manage the situation'; URN0172, paragraph 23. In addition, [Director A] (Romans) explained that the request to 'get a meeting scheduled' did not necessarily mean that [Director C] (Romans) expected him to arrange or attend the meeting. He therefore delegated responsibility for arranging and attending the meeting to [Director B] (Romans); URN0097, pages 27 and 55.

<sup>131</sup> URN0171, paragraphs 36 to 38.

<sup>132</sup> This description of Michael Hardy's office space is broadly consistent with the one given by [Director] (Michael Hardy), who stated that the first floor of one Michael Hardy's offices was sublet to a third party and it was agreed

*'I cannot recall who arranged the meeting but it is likely that [Director B (Romans)] took the lead. [...]*

*'It was at this meeting at Michael Hardy's Wokingham office that the four of us discussed a minimum fee arrangement for at least Wokingham. We were all in agreement with the principal idea of agreed minimum commission fee levels and there was discussion about the right percentage level. I do not remember any differences of views being expressed by anyone at the meeting as to what was being proposed. At the end of the meeting there was a collective agreement between the four of us on a minimum fee percentage and there may have also have been agreement on a minimum pounds-and-pence fee.'*

4.37 [Director B] (Romans), who does not remember where the meeting was held,<sup>133</sup> recalled:<sup>134</sup>

*'I cannot recall how it was arranged or the exact timing of it but, following my conversation with [Director A (Romans)] regarding his discussion with [Director (Richard Worth)], a meeting was held to set up the fee arrangement. The meeting was attended by [Director (Richard Worth)], [Director (Michael Hardy)], [Director A (Prospect)] and me.*

*'As far as I can remember, the first meeting held between the four estate agents focussed on the Wokingham area, and going forward, Wokingham was always the nucleus of the arrangement, as it was where the four of us were the main competitors and had offices there.*

*'I do not remember the meeting itself, or whether conversations had already taken place with [Director (Michael Hardy)] and [Director A (Prospect)] before the meeting. We may have just met to agree the terms*

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that Michael Hardy could still use this space for meetings; URN0092, page 78. See fn133 for [Director B]'s (Romans) recollection of the location of this meeting.

<sup>133</sup> [Director B] (Romans) does not recollect the exact location of this meeting but believes *'it was likely to have been held at the office of Richard Worth in Wokingham as that was where many of the subsequent meetings were held'*; URN0172, paragraph 29 (see paragraph 4.74 for the location of these subsequent meetings). The CMA considers that this difference in recollection between [Director B] (Romans) and [Director A] (Prospect) regarding the specific location of the First Wokingham meeting is not material to the CMA's findings.

<sup>134</sup> URN0172, paragraphs 26 to 28. When shown an email dated 26 August 2008 regarding arrangements for a meeting to be held at Romans' Wokingham office on 3 September 2008 with [director] (Prospect), [Director A] (Prospect), [Director] (Michael Hardy) and [director] (estate agent) in attendance (URN0572), [Director B] (Romans) noted that it is possible that this could have related to the First Wokingham meeting; URN0172, paragraph 31. The CMA, however, considers that, based on [Director B]'s (Romans) best recollection of events, [Director A]'s (Prospect) account, the timing of this meeting (see paragraphs 4.44 to 4.50), its location and the presence of other attendees, the meeting arrangements which were the subject of this email dated 26 August 2008 did not concern the First Wokingham meeting.

*of what had already been agreed beforehand.<sup>[135]</sup> There was no disagreement at the meeting as far as I can remember. I would expect if there had been a disagreement, it would be more memorable. To the best of my memory, we agreed at the meeting that we would all stick to a minimum fee of 1.8% in this area. Romans' standard fee was 2% at the time and the other three had similar standard fees and we agreed we were not to drop below 1.8%.'*

#### **Extension of the Minimum Fee Arrangement to neighbouring areas**

4.38 Both [Director A] (Prospect) and [Director B] (Romans) recalled that after the First Wokingham meeting, the four Parties agreed within a short period of time to extend the Minimum Fee Arrangement to the neighbouring areas of Winnersh, Crowthorne, Bracknell and Warfield.

4.39 [Director B] (Romans) stated:<sup>136</sup>

*'Although I do not recall there being any plan in relation to the expansion of the minimum fee arrangement into any other areas when it started in Wokingham, it very quickly went on to involve neighbouring areas where the firms concerned had offices or did business.'*

*'I do not remember specific conversations, or whether it was [Director A (Romans)] or one of the others who suggested it, but very quickly after the first meeting there were conversations around "if it is working here, we can do it here". Thereafter, the arrangement came to also cover Winnersh, Crowthorne, Bracknell and Warfield.'*

4.40 [Director A] (Prospect) recalled that:<sup>137</sup>

*'[...] over a short period of time, maybe a matter of weeks or a couple of months, [Director B (Romans)], [Director (Michael Hardy)], [Director*

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<sup>135</sup> [Director] (Richard Worth) stated, in interview, that [Director B] (Romans) came *'to the meeting with the understanding that we were all going to be party to this situation'* and whilst he does not recall the specifics of the conversation *'there was a general agreement around the table'* that *'we would all try and charge a minimum level of fee'*; URN1000, pages 62 and 50. Whilst [Director] (Richard Worth) confirmed that there was a consensus to try and maintain a minimum level of fee, he stated in interview that *'I came away from that meeting thinking, "All right. Fair enough. We will try and keep our fees at this level, but that's what our fees have always been, so it shouldn't be an issue. However, I will keep that discretion for my business to myself and if I choose to charge less or more than that, that will be down to me"'*; URN1000, pages 51 to 52. The CMA's consideration of [Director]'s (Richard Worth) submission that Richard Worth did not adhere to the Minimum Fee Arrangement is set out at paragraphs 4.96 to 4.98.

<sup>136</sup> URN0172, paragraphs 32 to 33.

<sup>137</sup> URN0171, paragraphs 39 to 40.

(Richard Worth)] and myself met, discussed and collectively agreed to extend the minimum fee arrangement to Crowthorne, Winnersh, Bracknell and Warfield.

*‘We may, however, in the first Wokingham meeting have also discussed Bracknell (including Warfield), which [Director A (Romans)] and I had discussed at the meeting at Winnersh only a few weeks previously. Otherwise the other areas of Crowthorne, Winnersh, Bracknell and Warfield were discussed and agreed between the four agents at meetings held shortly after the first Wokingham meeting.’*

- 4.41 Whilst the four Parties did not have offices in all of these neighbouring areas,<sup>138</sup> they were all present at the meetings, participated in discussions and were aware of the agreed minimum level of commission fees in all five areas. [Director A] (Prospect) stated:<sup>139</sup>

*‘The four of us attended all these meetings at which the minimum fee arrangement was extended to the other areas [...].’*

*‘During these meetings, the four of us participated in the discussions and agreed to what was going to happen in terms of commission fees. Wokingham was the common ground as we all had offices there but we were all party to the same discussions about the arrangement in all the areas whether we had a branch in the area or not. For example, Crowthorne where Richard Worth does not have a branch and Bracknell where Michael Hardy does not have a branch were discussed at the meetings we held and [Director (Richard Worth)] and [Director (Michael Hardy)] were present during those discussions even if they were not directly relevant to them.’*

- 4.42 In addition, [Director B] (Romans) noted:<sup>140</sup>

*‘There were areas in which some of the agents involved very rarely sold houses, such as Michael Hardy in Bracknell. Where this was the case, those agents were nevertheless party to the discussions. They were*

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<sup>138</sup> See Table 1 at paragraph 3.15. [Director B] (Romans) also stated ‘Romans did not have an office in Warfield, but we had what we called our Warfield office in our Bracknell branch. Similarly, Winnersh is very close to Wokingham and so we would cover Winnersh from Wokingham office. Prospect had offices in Wokingham, Bracknell, Warfield and Winnersh. Richard Worth also had offices in Bracknell and Crowthorne. The Crowthorne one was subsequently closed, but that area was covered by its Wokingham branch. I do not think that Michael Hardy ever had an office in Bracknell, but had ones in Wokingham and Crowthorne’; URN0172, paragraph 34.

<sup>139</sup> URN0171, paragraphs 42 to 43.

<sup>140</sup> URN0172, paragraph 35.

*present in the room when the conversations about those areas took place, but they were not necessarily always involved in the discussion.'*

4.43 Michael Hardy submitted that [Director] (Michael Hardy) did not participate actively in the discussions extending the arrangement to Crowthorne, Bracknell and Warfield as Michael Hardy did not have offices in these areas.<sup>141</sup> Whether or not [Director] (Michael Hardy) actively participated in these discussions does not affect the CMA's finding of Infringement or of Michael Hardy's liability for its participation in the Infringement.<sup>142</sup> As set out at paragraph 6.14, the fact that a party may have played only a limited part in setting up an agreement, may not have been fully committed to its implementation, or may not have put the initiatives into effect, does not mean that it is not party to the agreement.

4.44 The evidence of [Director A] (Prospect) and [Director B] (Romans) is supported by the documentary evidence obtained by the CMA that demonstrates the arrangement of subsequent meetings.

4.45 An internal email dated 30 July 2008 sent by [Director A] (Romans) to [Director C] (Romans) refers to a meeting between the Parties which was also to be attended by their local branch managers to discuss '*prices and fees*' in the Wokingham and Crowthorne areas:<sup>143</sup>

*'FYI - seeing [Director (Michael Hardy)], [Director A (Prospect)] and [Director (Richard Worth)] with their respective managers Thursday night ref wok and growth prices and fees.'*

4.46 The details of this meeting, as described in the email, are consistent with the meeting that [Director A] (Prospect) recalled<sup>144</sup> attending shortly after the First

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<sup>141</sup> URN0919.

<sup>142</sup> See paragraph 6.35.

<sup>143</sup> URN0570.

<sup>144</sup> In addition to the email from [Director A] (Romans) dated 30 July 2008 and [Director A]'s (Prospect) recollection, are three 2008 diary entries of [Director A] (Prospect). [Director A] (Prospect) noted [Director A]'s (Romans) name and telephone numbers on 29 July 2008 (URN0613) and [Director]'s (Michael Hardy) name and phone numbers, one of which was Michael Hardy's office number, on 30 July 2008 (URN0614). He also noted [Director]'s (Michael Hardy) name and direct line number on 7 August 2008 (URN0615). Whilst [Director A] (Prospect) does not recall these entries in his diary, he explained that, given that they were on his to do list, these entries suggest to him that he may have contacted [Director A] (Romans) and [Director] (Michael Hardy) on those dates; URN0171, paragraphs 28 to 33.



Wokingham meeting, albeit with [Director B] (Romans) rather than [Director A] (Romans) in attendance.<sup>145</sup> [Director A] (Prospect) recollected that:<sup>146</sup>

*‘shortly after this initial meeting between all four companies, a further meeting was again held upstairs at Michael Hardy’s Wokingham office which our local Wokingham branch managers also attended.’*

4.47 He explained that:<sup>147</sup>

*‘The purpose of this particular meeting was that these members of staff, given that they ran our respective Wokingham offices on a day-to-day basis, realised that the four companies in the room were in agreement over minimum fee levels and that they needed to abide by the agreed fee parameters. The branch managers understood the situation and raised no objections. They were to put the agreed minimum fee arrangement into practice.’*

4.48 In a further internal email to [Director B] (Romans) dated 18 September 2008, [Director A] (Romans) describes a discussion he had had with [Director] (Richard Worth) following up on *‘your [Director B’s (Romans)] discussions with him [Director (Richard Worth)] about prospect in bracknell in particular’* as well as in Wokingham.<sup>148</sup>

4.49 [Director A] (Romans) wrote in relation to Wokingham:<sup>149</sup>

*‘He [Director (Richard Worth)] did question fee on one we did in woko [...] I checked the control sheets while he was on the phone as I keep the last*

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<sup>145</sup> [Director A] (Romans) does not recall attending this meeting with these individuals. He stated that it would have been either himself or [Director B] (Romans) and, given that he was keen to delegate responsibility, he considers it likely that it was [Director B] (Romans) who attended the meeting; URN0097, pages 68 to 69. See also URN0801, paragraphs 31 to 32. [Director B] (Romans) also confirmed that [Director A] (Romans) passed on to him responsibility for managing commission fee discussions with competitors including attendance at meetings prior to the First Wokingham meeting, see paragraphs 4.28 to 4.29. This would suggest that [Director B] (Romans) rather than [Director A] (Romans) attended this meeting, which is consistent with [Director A]’s (Prospect) account of the meeting. [Director B] (Romans), however, stated that Romans’ area and branch managers would not have attended any meetings between the four Parties, although he also confirmed that as soon as a minimum fee was agreed in a particular area the relevant managers (area and branch) would have to be informed, otherwise the arrangement would not work; URN0172, paragraph 36. In addition, Michael Hardy submitted that [Director] (Michael Hardy) was the only attendee from Michael Hardy at the meetings between the four Parties; URN0978.

<sup>146</sup> URN0171, paragraph 47.

<sup>147</sup> URN0171, paragraph 48.

<sup>148</sup> URN0359.

<sup>149</sup> URN0359. [Director A] (Romans) also stated that, in order to verify the percentage fee Romans agreed with the property seller, he checked Romans’ control sheets; URN0097, pages 76 to 77. See also URN0801, paragraph 41.

*months here and was able to confirm that the fee was def 1.8% and his guy was [...] making excuses.*

*'We agreed that we should have another meeting in 1<sup>st</sup> week of oct when [Director (Michael Hardy)] back from holiday.'*<sup>150</sup>

- 4.50 The CMA considers that this email demonstrates that the Minimum Fee Arrangement was being implemented in at least the Wokingham area during the course of August 2008.
- 4.51 [Director B] (Romans) confirmed that the phrase *'He did question fee on one we did in woko'* related to the Minimum Fee Arrangement in Wokingham and that it was in place by this time.<sup>151</sup> Specifically, he stated, this comment was an example of [Director] (Richard Worth) questioning whether or not Romans had complied<sup>152</sup> with the Minimum Fee Arrangement by agreeing with a seller a commission fee below 1.8%.<sup>153</sup>
- 4.52 Whilst [Director A]'s (Romans) email is dated 18 September 2008, [Director A] (Romans) wrote that he *'checked the control sheets while he was on the phone as I keep the **last months here** and was able to confirm that the fee was def 1.8'* [emphasis added].<sup>154</sup> The CMA infers from this that the challenge from Richard Worth related to the commission fee being quoted by Romans to a seller in respect of a contract entered into sometime in August 2008 and that the Minimum Fee Arrangement must, therefore, have been in place by then.
- 4.53 The CMA also infers from the statement in the email *'we agreed that we should have **another meeting*** [emphasis added] *in 1<sup>st</sup> week of oct when [Director (Michael Hardy)] back from holiday'* that at least one meeting between the Parties had already taken place at which a minimum fee for Wokingham of 1.8% had been discussed and agreed. It is also consistent with

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<sup>150</sup> [Director B]'s (Romans) evidence is that he is not sure that [Director] (Michael Hardy) would have needed to be present to discuss Bracknell given Michael Hardy's limited business in Bracknell *'but the chances are that all four of us attended the meeting referred to in this email, as normally the meetings only went ahead with the four of us in attendance'*; URN0172, paragraph 41. The CMA considers that this is a misinterpretation of the email. The CMA considers that the reference to the need for a further meeting immediately after confirmation that Romans was quoting the correct fees in Wokingham was not related to Bracknell specifically but was for a follow up meeting to discuss the Minimum Fee Arrangement more generally. This is consistent with [Director] (Michael Hardy) needing to be in attendance for such a meeting. As set out at paragraphs 4.41 to 4.42, [Director] (Michael Hardy) attended meetings at which the Minimum Fee Arrangement was discussed in respect of Bracknell.

<sup>151</sup> URN0172, paragraph 40; URN0097, page 77. See also URN0801, paragraph 41.

<sup>152</sup> See paragraphs 4.69 to 4.146 for the implementation of the Minimum Fee Arrangement and in particular paragraph 4.92.

<sup>153</sup> URN0172, paragraph 40.

<sup>154</sup> URN0359.

when the CMA considers that the First Wokingham meeting and the follow up meeting which included branch managers must have taken place, as described at paragraphs 4.45 to 4.47.

- 4.54 The rest of [Director A]’s (Romans) email focuses on Bracknell and in particular issues arising in relation to Prospect’s commission fees.<sup>155</sup>

*‘[...] I’m aware that you and [Director (Richard Worth)] are looking for proof of prospects and he/you can/will then tackle [Director A (Prospect)]. I told [Director (Richard Worth)] that in my view the problem there is [director (prospect)] [...] and that “tacking” Bracknell on to other offices without [Director (Richard Worth)] or [Director A (Prospect)] being present was probably why in that area it was possibly a bit “wooly”? Anyway he agreed and feels a re-convene with the right people in attendance for Bracknell is probably what is needed.’*

- 4.55 [Director B] (Romans) confirmed that these comments related to the expansion of the Minimum Fee Arrangement to Bracknell. Based on the content of this email, [Director B] (Romans) explained that, whilst it had been discussed, the Minimum Fee Arrangement had not been fully set up in Bracknell at that point. [Director B] (Romans) notes that a reason for this was perhaps that [Director] (Richard Worth) or [Director A] (Prospect) had not been present at the meetings.<sup>156</sup>

- 4.56 The fact that discussions had taken place in respect of Bracknell early on is consistent with [Director A]’s (Prospect) account. As described at paragraph 4.40, [Director A] (Prospect) stated that Bracknell may have been discussed at the First Wokingham meeting but that it was certainly discussed and agreed by the Parties shortly after the First Wokingham meeting.<sup>157</sup>

- 4.57 Further documentary evidence demonstrates that the Minimum Fee Arrangement was in place in Warfield (which as described at paragraph 4.15 was included as part of Bracknell) by at least the beginning of October 2008. In an internal email dated 3 October 2008 to [Director A] (Romans), [Director B] (Romans) stated:<sup>158</sup>

*‘[...] Encouragingly heard about a Warfield one today that the vendor said he has now had 3 agents all stick at a min of 1.8% [...] [Director (Richard*

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<sup>155</sup> URN0359.

<sup>156</sup> URN0172, paragraph 41.

<sup>157</sup> URN0171, paragraph 40.

<sup>158</sup> URN0400.

Worth)) and I agreed to meet [Director B (Prospect)] in a few weeks to review again. May even try to push to 2%!!'

- 4.58 [Director B] (Romans) confirmed that the Minimum Fee Arrangement had been extended to Bracknell and Warfield by this time.<sup>159</sup>
- 4.59 The CMA therefore infers that between [Director A]'s (Romans) email to [Director B] (Romans) on 13 September 2008 and the email from [Director B] (Romans) to [Director A] (Romans) on 3 October 2008, further meetings and/or discussions were held as a result of which the Minimum Fee Arrangement was made more effective in Bracknell and Warfield.
- 4.60 Whilst the CMA has little or no contemporaneous documentary evidence to demonstrate the initial extension of the Minimum Fee Arrangement into Crowthorne and Winnersh,<sup>160</sup> the CMA considers that the evidence of both [Director A] (Prospect) and [Director B] (Romans), set out at paragraphs 4.39 to 4.42, is credible and sufficient to support a finding that, shortly after the First Wokingham meeting, the Minimum Fee Arrangement was also extended with the knowledge and involvement of all four Parties to Winnersh and Crowthorne as well as Bracknell and Warfield.<sup>161</sup>

### ***The level of the agreed minimum commission fees***

- 4.61 In terms of the level of minimum commission fees agreed<sup>162</sup> between the Parties, [Director A] (Prospect) noted that:<sup>163</sup>

*'the arrangement discussed and agreed between the four agents was about trying to maintain the fee levels we had been charging despite the falling house sales and prices. The levels we agreed initially were more or*

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<sup>159</sup> URN0172, paragraph 42.

<sup>160</sup> The only reference to Crowthorne is in the internal Romans email dated 30 July 2008 regarding the arrangement of the meeting with local branch managers that refers to '*wok and growth prices and fees*'; URN0570. With the exception of Prospect (and Romans until the second half of 2010), the Parties covered Winnersh from their Wokingham offices, which would support the premise that any agreement on Wokingham would cover Winnersh. This is further supported by the fact that the level of the initial agreed minimum commission fees for Wokingham and Winnersh were both initially 1.8% and were subsequently reduced to 1.75%. See paragraph 4.63.

<sup>161</sup> In addition, a number of later contemporaneous documents during the Relevant Period confirm that the Minimum Fee Arrangement extended to Winnersh and Crowthorne as well as to the other areas, see for example URN0608 for Crowthorne and URN0536 for Winnersh.

<sup>162</sup> [Director A] (Prospect) also stated, in addition to a minimum commission fee percentage that '*I think there would have been minimum pounds-and-pence fee levels agreed in certain locations. I cannot recall exactly what they were but I would say about £3,000 or maybe £2,500*'; URN0171, paragraph 52.

<sup>163</sup> URN0171, paragraph 50. See also paragraph 3.13 regarding the ability of larger estate agents to charge higher commission fees.

*less the average fee levels that we were achieving at the time. For example in Bracknell the average fee at the time was about 1.75% and we agreed 1.8% as the minimum percentage fee.'*

- 4.62 Whilst the agreed minimum commission fee percentages varied between the five areas, all four Parties agreed to adhere to them. [Director B] (Romans) stated:<sup>164</sup>

*'Under the terms of the minimum fee arrangement, it was agreed that in these areas, we would not charge below the agreed minimum fee. In the Wokingham area, this was set at 1.8% and then it varied in the other areas between 1.5% and 1.8%.'*

- 4.63 The percentages stated by [Director B] (Romans) are consistent with the ones recollected by [Director A] (Prospect) as being the minimum fee levels agreed for each area:<sup>165</sup>

Wokingham:	1.8%, later 1.75%
Winnersh:	1.8%, later 1.75%
Crowthorne:	1.7%, later 1.5%
Bracknell and Warfield:	1.8%

- 4.64 [Director B] (Romans) also explained that, over the period of the Minimum Fee Arrangement, the minimum commission fee levels were adjusted.<sup>166</sup> He recalled:<sup>167</sup>

*'In about 2012 to 2013 we were coming out of the recession, but we wanted to keep our fee level at sensible levels. At this time there was increased pressure on fees from online only agents. We all felt that the*

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<sup>164</sup> URN0172, paragraph 37.

<sup>165</sup> [Director A] (Prospect) also stated 'I am not sure when the changes to the minimum fee percentage levels in Wokingham, Winnersh and Crowthorne occurred but they were after 2009'; URN0171, paragraph 51. It is also consistent with the documentary evidence: an initial minimum fee of 1.8% for Wokingham is consistent with the emails dated 3 July 2008 (URN0550) and 18 September 2008 (URN0359). A subsequent reduced minimum fee in Wokingham is also consistent with an email dated 27 May 2012 (URN0060). An agreed minimum fee of 1.8% for Warfield is also consistent with the level noted in an internal email dated 3 October 2008 (URN0400). Similarly, a subsequent reduced minimum fee of 1.5% in Crowthorne is consistent with an email dated 25 September 2014 (URN0608) and a subsequent reduced minimum fee of 1.75% in Winnersh with an email dated 19 May 2015 (URN0536).

<sup>166</sup> The CMA infers that the agreed minimum level of commission fees in each area were discussed and, where relevant, amended during the course of the Relevant Period at the *ad hoc* meetings that were held to maintain the Minimum Fee Arrangement and address potential non-compliance as set out at paragraphs 4.73 to 4.94.

<sup>167</sup> URN0172, paragraph 56. See also fn165.

*fees were too high so we agreed to drop some of them.'*

- 4.65 [Director B]'s (Romans) recollection is that in Wokingham the minimum commission fee was dropped from 1.8% to 1.7%. He also stated that a few years into the minimum fee arrangement '*we also agreed that fees on properties over £1,000,000 could go down to a minimum of 1.25%*'.<sup>168</sup>
- 4.66 Both [Director B] (Romans) and [Director A] (Prospect) also stated that the minimum fee may have varied for a Party if it did not have a physical presence in a particular area.<sup>169</sup> Both gave the example that Richard Worth could offer, under the Minimum Fee Arrangement, a lower commission fee in Crowthorne as it did not have an office there.<sup>170</sup>

### **Conclusions on the Minimum Fee Arrangement**

- 4.67 Based on the evidence set out at paragraphs 4.35 to 4.66,<sup>171</sup> the CMA has found that:
- (a) the Parties attended the First Wokingham meeting, which most likely took place in July 2008, at which they agreed the minimum percentage commission fee, initially 1.8%, they would charge in, at least, the Wokingham area;
  - (b) during August 2008, the Minimum Fee Arrangement was being implemented by the Parties in at least the Wokingham area;

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<sup>168</sup> URN0172, paragraph 56.

<sup>169</sup> [Director B] (Romans) stated that '*there were some variations to this general approach to the minimum fee arrangement*'; URN0172, paragraph 38. [Director A] (Prospect) stated '*in some areas, if one of us did not have a branch, we were still part of the minimum fee arrangement but may have had a slightly lower minimum percentage figure*'; URN0171, paragraph 53.

<sup>170</sup> [Director A] (Prospect) stated '*I cannot remember the details but I think we may have agreed a lower minimum commission fee level for Richard Worth. I seem to remember [Director (Richard Worth)] complaining that he was not able to compete on a level footing because Richard Worth did not have an office in Crowthorne [...] we therefore agreed that his minimum fee was 0.25% less than the agreed minimum level in other areas*'; URN0171, paragraph 53. [Director B] (Romans) noted '*an example of this was the lower minimum commission fee that Richard Worth could offer, under the arrangement, for properties in Crowthorne, because it did not have an office there*'. He also noted that Michael Hardy never did a lot of business in Bracknell and although Richard Worth had an office in Bracknell, Romans and Prospect '*held the majority of the Bracknell market*'. Given this, he considers that it is likely that there was a general expectation that Michael Hardy would have stuck to some form of the Minimum Fee Arrangement in Bracknell although probably at a lower percentage than Prospect and Romans; URN0172, paragraphs 38 to 39. Michael Hardy has not made any comments on the levels and variations of the minimum commission fees that were agreed between the four Parties, although as set out at paragraph 4.43, Michael Hardy has submitted that it made few sales in Bracknell and Warfield and that [Director] (Michael Hardy) did not actively participate in discussions concerning these areas.

<sup>171</sup> In addition, none of the Parties have contested these findings on the establishment and extension of the Minimum Fee Arrangement.

- (c) soon after the First Wokingham meeting, the Parties had further discussions and attended further meetings at which the Parties agreed to extend this arrangement to the neighbouring areas of Bracknell, Crowthorne, Warfield and Winnersh. The minimum agreed percentage commission fees varied slightly by area; and
- (d) there were some exceptions, for example if a Party did not have a physical presence in a particular area then it could offer a lower agreed commission fee.

4.68 The CMA has also found that, by at least October 2008, in addition to Wokingham, the Minimum Fee Arrangement was being implemented in all the Relevant Areas.

## **D. The implementation of the Minimum Fee Arrangement**

4.69 Following the establishment of the Minimum Fee Arrangement, the focus of the subsequent contacts and meetings between the Parties was to ensure its implementation in the Relevant Areas.

4.70 Throughout the Relevant Period, the Parties used a number of mechanisms to implement and monitor compliance with the Minimum Fee Arrangement and address suspected breaches.<sup>172</sup> In particular:

- (a) meetings were held between the Parties at which the level of the agreed minimum commission fees and suspected breaches<sup>173</sup> as well as the Parties' general pricing were discussed (as described at paragraphs 4.72 to 4.97);
- (b) the Parties monitored and exchanged information on each other's commission fees including contacting each other directly on suspected breaches (as described at paragraphs 4.99 to 4.114);
- (c) at least two of the Parties developed internal reporting and monitoring mechanisms to check compliance by the other Parties with the Minimum Fee Arrangement (as described at paragraphs 4.115 to 4.146); and

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<sup>172</sup> As set out at paragraph 4.82, the Parties did not always adhere to the Minimum Fee Arrangement.

<sup>173</sup> See paragraph 4.63 in respect of the level of agreed minimum commission fees in each area. [Director B] (Romans) stated '*there were occasions when agents did not stick to the minimum fee arrangement in relation to individual properties*'; URN0172, paragraph 46. [Director A] (Prospect) noted '*there were also discussions about where the minimum fee arrangement had not been stuck to on certain properties*'; URN0171, paragraph 67.

- (d) for a period, the Parties agreed that penalty payments would be made if a Party breached the Minimum Fee Arrangement (as described at paragraphs 4.147 to 4.163).

4.71 In addition, implementing the Minimum Fee Arrangement and seeking opportunities for similar arrangements in other areas with other estate agents<sup>174</sup> was part of [Director B]’s (Romans) performance objectives in 2013 and 2014 (as described at paragraphs 4.165 to 4.174).

### ***Meetings between the Parties 2008 to 2015***

4.72 Following the initial meetings and discussions, as set out at paragraphs 4.36 to 4.60, the Parties had a number of meetings throughout the Relevant Period to ensure the continuance and compliance with the Minimum Fee Arrangement.

### ***Attendees and location of the meetings***

4.73 Both [Director B] (Romans) and [Director A] (Prospect) stated that the four individuals ([Director] (Michael Hardy), [Director] (Richard Worth), [Director B] (Romans) and [Director A] (Prospect)) met around two to four times a year on an *ad hoc* basis.<sup>175</sup> [Director B] (Romans) noted that these meetings were usually held when the Minimum Fee Arrangement was not being adhered to and that there may have been six to nine month gaps between some meetings.<sup>176</sup>

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<sup>174</sup> These areas included Lower Earley and Woodley which are not within the scope of the Infringement.

<sup>175</sup> [Director B] (Romans) stated ‘[a]ll four of us met probably no more than three or four times a year’; URN0172, paragraph 45. [Director A] (Prospect) stated ‘I attended further meetings between 2008 and 2015 with the same three people: [Director B (Romans)], [Director (Michael Hardy)] and [Director (Richard Worth)]. These were arranged on an *ad hoc* basis, around two to four times a year, generally by telephone’; URN0171, paragraph 57. [Director] (Richard Worth) also confirmed in interview that he attended such meetings; URN1000, pages 97 to 100. While Michael Hardy has acknowledged that [Director] (Michael Hardy) attended such meetings, it submitted nevertheless that [Director] (Michael Hardy) believes that on occasion, meetings took place without him and he has no recollection of attending any meetings from about 2012; URN0919 and URN0968. Accordingly, all Parties have confirmed their attendance at such meetings during the Relevant Period. Although [Director] (Michael Hardy) cannot recall attending such meetings after 2012, his attendance is also confirmed by other evidence (for example URN0014 as set out at paragraph 4.170 and URN1000, pages 97 to 100) and Michael Hardy has not adduced any evidence that it publicly distanced itself at any time during the Relevant Period from the Infringement (see paragraphs 6.15 to 6.16).

<sup>176</sup> URN0172, paragraph 45.



- 4.74 These meetings took place at the Parties' Wokingham offices, usually during the day. Both [Director B] (Romans) and [Director A] (Prospect) recalled that the meetings were predominately held at Richard Worth's office.<sup>177</sup>
- 4.75 Given the passage of time, [Director A] (Prospect) and [Director B] (Romans) are understandably unable to recall the dates of all the meetings that were held. It is not material to the CMA's findings when the actual meetings were held but, on the basis of outlook appointments and diary entries, some likely meeting dates are set out below:

<b>Meeting date</b>	<b>Outlook appointment/diary entry</b>
26 March 2009:	'[Director B (Romans)], [Director A (Prospect)] <i>and</i> [Director (Richard Worth)]' <sup>178</sup>
25 May 2010:	'14:00 [Director (Richard Worth)]' <sup>179</sup>
28 June 2010:	'16:00 [Director (Richard Worth)]' <sup>180</sup> '[Director A (Prospect)] <i>and</i> [Director (Richard Worth)]' <sup>181</sup>
16 March 2012:	'[Director A (Prospect)]' <sup>182</sup> '10:30 [Director (Richard Worth)]' <sup>183</sup>
11 May 2012:	'[Director A (Prospect)]' <sup>184</sup> '9:30 <i>Wok</i> ' <sup>185</sup>
30 January 2013:	'[Director (Richard Worth)]/[Director (Michael Hardy)]/[Director A (Prospect)] <i>re boards</i> ' <sup>186</sup> ' <i>Richard Worth meeting</i> ' <sup>187</sup>

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<sup>177</sup> [Director B] (Romans) also recollected that a couple of meetings were held at Prospect's office, certainly one at Michael Hardy's office and one may have been at Romans' office; URN0172, paragraph 45. [Director A] (Prospect) noted '*unlike the first two meetings between the four of us which took place at Michael Hardy's Wokingham office, the subsequent meetings were predominantly at Richard Worth's Wokingham office*'; URN0171, paragraph 58. [Director] (Richard Worth), noted in his interview that '*quite often they were held at my offices*' and that '*I think probably it became my offices because Michael Hardy moved to a smaller, high street office which perhaps didn't have a separate meeting room*'; URN1000, pages 98 to 99.

<sup>178</sup> URN0553 ([Director] (Michael Hardy) outlook appointment).

<sup>179</sup> URN0621 ([Director A] (Prospect) diary entry).

<sup>180</sup> URN0622 ([Director A] (Prospect) diary entry).

<sup>181</sup> URN0555 ([Director] (Michael Hardy) outlook appointment).

<sup>182</sup> URN0023 ([Director B] (Romans) outlook calendar entry).

<sup>183</sup> URN0627 ([Director A] (Prospect) diary entry).

<sup>184</sup> URN0023 ([Director B] (Romans) outlook calendar entry).

<sup>185</sup> URN0628 ([Director A] (Prospect) diary entry).

<sup>186</sup> URN0023 ([Director B] (Romans) outlook calendar entry). See also URN0172, paragraph 53(i).

<sup>187</sup> URN0167 ([Director] (Michael Hardy) outlook appointment).

‘9:30 Wok’<sup>188</sup>

17 February 2014: ‘Catch up with [Director (Richard Worth)], [Director (Michael Hardy)] and [Director A (Prospect)] re *advertisin...*’<sup>189</sup>

‘[Director (Richard Worth)] *office*’<sup>190</sup>

‘1.00 [Director (Richard Worth)]’<sup>191</sup>

29 September 2014: ‘*meeting*’<sup>192</sup>

‘11:00 Wok [Director (Richard Worth)]’<sup>193</sup>

30 January 2015: ‘[Director (Richard Worth)]’<sup>194</sup>

‘[Director (Richard Worth)], [Director A (Prospect)] and [Director (Michael Hardy)] re *Portals*’<sup>195</sup>

‘2.30 [Director (Richard Worth)]’<sup>196</sup>

- 4.76 [Director A] (Prospect) explained in relation to his diary entries that he would just write ‘[Director]’ when Richard Worth’s office in Wokingham was the location of the meeting. He also confirmed that the meetings were attended by the same four individuals from the four Parties.<sup>197</sup>
- 4.77 [Director B] (Romans) clarified, in relation to his outlook appointments, that sometimes he was ‘*being lazy*’ and so did not write all the names of those attending in his calendar even though nearly all of the meetings were attended by all four individuals: [Director] (Michael Hardy), [Director] (Richard Worth), [Director A] (Prospect) and himself.<sup>198</sup>
- 4.78 [Director B] (Romans) also explained, as set out in further detail at paragraphs 4.86 to 4.87, that although he referred to other topics in the title of his outlook appointments, such as ‘*boards*’ and ‘*advertising*’, these meetings were arranged to discuss the Minimum Fee Arrangement.

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<sup>188</sup> URN0638 ([Director A] (Prospect) diary entry).

<sup>189</sup> URN0023 ([Director B] (Romans) outlook calendar entry). See also URN0172, paragraph 53(ii).

<sup>190</sup> URN0563 ([Director] (Michael Hardy) outlook appointment).

<sup>191</sup> URN0639 ([Director A] (Prospect) diary entry).

<sup>192</sup> URN0170 ([Director] (Michael Hardy) outlook appointment).

<sup>193</sup> URN0642 ([Director A] (Prospect) diary entry).

<sup>194</sup> URN0021 ([Director B] (Romans) diary entry).

<sup>195</sup> URN0023 ([Director B] (Romans) outlook calendar entry). See also URN0172, paragraph 53(iii).

<sup>196</sup> URN0643 ([Director A] (Prospect) diary entry).

<sup>197</sup> URN0171, paragraph 61.

<sup>198</sup> URN0172, paragraph 52.

### *The purpose of the meetings*

4.79 [Director B] (Romans) and [Director A] (Prospect) confirmed that the primary reason for these meetings was the continuation and implementation of the Minimum Fee Arrangement.<sup>199</sup>

4.80 This is supported by an internal email dated 17 December 2008, in which [Director A] (Romans) requested that [Director B] (Romans) schedule a meeting in the new year between the Parties:<sup>200</sup>

*'it'll be important to keep the fee arrangement strong in the new year so in anticipation of this if not already schedule can you get a meet of the relevant people lined up in advance before the end of jan to help everyone on track as it were.'*

4.81 [Director B] (Romans) explained that [Director A] (Romans) wanted him to ensure that everyone involved remained committed to the Minimum Fee Arrangement as it was still in its infancy back then. He also confirmed that the '*relevant people*' referred to in this email were [Director] (Michael Hardy), [Director A] (Prospect) and [Director] (Richard Worth).<sup>201</sup>

4.82 In particular, given that the Parties did not always adhere to the Minimum Fee Arrangement, meetings were held to discuss instances of potential breaches. [Director B] (Romans) stated that '*there were occasions when agents did not stick to the minimum fee arrangement in relation to individual properties*' and that '*there were also times when some of us were more committed than others*' which would lead to meetings.<sup>202</sup>

4.83 [Director A] (Prospect) also stated that '*the purpose of these subsequent meetings would have been about whether we were adhering to what had been agreed*' and that there were '*discussions about where the minimum fee arrangement had not been stuck to on certain properties*'.<sup>203</sup>

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<sup>199</sup> URN0172, paragraph 43; URN0171, paragraph 62.

<sup>200</sup> [Director B] (Romans) replied '*Dotted to book and meet in first week in jan*'; URN0574.

<sup>201</sup> URN0172, paragraph 44. [Director A] (Romans) stated that he sent the email to [Director B] (Romans) to encourage him to maintain the Minimum Fee Arrangement by continuing to meet with the '*relevant people*', namely [Director] (Michael Hardy), [Director A] (Prospect) and [Director] (Richard Worth) as [Director B] (Romans) had been doing in 2008; URN0097, pages 98 to 99. See also URN0801, paragraph 36.

<sup>202</sup> URN0172, paragraph 46.

<sup>203</sup> URN0171, paragraphs 62 and 67.

4.84 [Director A] (Prospect) also remembered:<sup>204</sup>

*‘discussions in the meetings around the fact that the minimum fee arrangement needed to be inclusive and I sometimes raised concerns. The general consensus in these discussions was that it would only work if we were each sticking to our corner. It would have come up in discussion that everyone needed to do what had been agreed because otherwise there would be not be any point in continuing with the minimum fee arrangement.’*

4.85 [Director A] (Prospect) stated that the meetings had no formal agenda or a chairperson and that they also involved discussions about market conditions more generally as well as other topics. These included instances of where boards were being kept outside properties, increasing newspaper advertising rates and marketing plans including the use of property portals.<sup>205</sup>

4.86 [Director B] (Romans) also stated that the Parties discussed these other topics and noted that he included them in the titles to the meeting appointments in his calendar<sup>206</sup> *‘to conceal the true purpose of the meetings’* which was to discuss the Minimum Fee Arrangement.<sup>207</sup>

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<sup>204</sup> URN0171, paragraph 63. [Director] (Richard Worth) stated in interview that he *‘wasn’t comfortable with being dictated to in terms of what I was able to charge or not charge with my own business’* and that *‘it would have been a concern that was brought up in the meetings from more than just myself “is what we’re seeking to do here legal?” and the reassurance was that not everybody’s involved, so it is fine to be doing this’*; URN1000, pages 74 and 77. A similar reassurance was given by [Director A] (Romans) to [Director B] (Romans) when the arrangements leading up to the First Wokingham meeting were being made, as described at paragraph 4.30. [Director]’s (Richard Worth) statement was made after having seen the evidence of [Director B] (Romans) and the email exchange involving [Director B] (Prospect). The CMA considers that whether a Party received *‘reassurance’* does not impact the CMA’s finding of Infringement and Richard Worth’s liability for its participation in the Infringement, as ignorance or mistake of the law does not prevent the finding of intentional infringement, as set out at paragraph 7.15. The CMA also refers to evidence at paragraphs 4.48 to 4.55, 4.92 to 4.93 and 4.104 to 4.105 regarding instances of [Director] (Richard Worth) actively monitoring the Minimum Fee Arrangement.

<sup>205</sup> URN0171, paragraph 62. Michael Hardy and [Director] (Richard Worth) also commented that the meetings covered other topics. Michael Hardy stated that *‘the primary reason for the meetings was the continuation and implementation of the Minimum Fee Arrangement’* but that [Director]’s (Michael Hardy) recollection is that *‘discussions at these meeting covered multiple topics’*; URN0968. [Director] (Richard Worth) stated in interview *‘the meetings weren’t solely about fees. There were other aspects of discussion as well [...] quite often the discussion was about advertising’*; URN1000, page 120.

<sup>206</sup> URN0023 includes the following calendar entries: 30 January 2013 *‘[Director (Richard Worth)]/[Director (Michael Hardy)]/[Director A (Prospect)] re boards’*; 17 February 2014 *‘Catch up with [Director (Richard Worth)], [Director (Michael Hardy)] and [Director A (Prospect)] re advertising’* and 30 January 2015 *‘[Director (Richard Worth)], [Director A (Prospect)] and [Director (Michael Hardy)] re portals’*. [Director B] (Romans) confirmed that the Minimum Fee Arrangement was discussed at these meetings; URN0172, paragraph 53.

<sup>207</sup> URN0172, paragraph 54; URN0092, pages 74 to 75. [Director B]’s (Romans) calendar entry for a meeting held on 30 January 2013 between the Parties has the entry *‘[Director (Richard Worth)]/[Director (Michael Hardy)]/[Director A (Prospect)] re boards’* (URN0023) and [Director]’s (Michael Hardy) outlook appointment for

4.87 For example, a meeting in his calendar on 17 February 2014 at Richard Worth's office has the subject '*Catch up with [Director (Richard Worth)], [Director (Michael Hardy)] and [Director A (Prospect)] re advertising*'. [Director B] (Romans) stated that they would have discussed the Minimum Fee Arrangement at this meeting.<sup>208</sup>

4.88 [Director B] (Romans) and [Director A] (Prospect) do not recall taking notes at the meetings.<sup>209</sup> Whilst [Director B] (Romans) does not recall having a conversation with the other three attendees about not writing down anything about the meetings, he assumes they must have had one.<sup>210</sup> He did, however, note that the attendees may have had '*notes in notebooks relating to individual properties when we were querying where the arrangement was not working*'.<sup>211</sup>

4.89 An example is an entry from his own daybook on the page dated 30 January 2015 where, next to 2.30pm, it is written:<sup>212</sup>

'*Advertising / [Director (Richard Worth)] / [Director (Michael Hardy)] + [Director A (Prospect)] / [Director (Michael Hardy)] – 1.5% at 500k / [...] Riding Way / [Director (Richard Worth)] – [...] Bakham R – [seller].*'

4.90 [Director B] (Romans) confirmed that these were two specific addresses in Wokingham in respect of which he needed to query the commission fees being charged by the other estate agents at the meeting that was scheduled to be held that day at 2.30pm.<sup>213</sup>

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that date (URN0167). In light of the consistent explanations provided by [Director B] (Romans) and [Director A] (Prospect), the CMA has found that this meeting was likely to have been about the Minimum Fee Arrangement but that the topic of boards may also have been discussed.

<sup>208</sup> URN0172, paragraph 53(ii). Other meetings with similar subject matters include: 30 January 2013 '[Director (Richard Worth)]/[Director (Michael Hardy)]/[Director A (Prospect)] re boards'; 30 January 2015 '[Director (Richard Worth)], [Director A (Prospect)] and [Director (Michael Hardy)] re Portals'; URN0023.

<sup>209</sup> URN0172, paragraph 47; URN0171, paragraph 69.

<sup>210</sup> URN0172, paragraph 48. In addition, [Director B] (Romans) states that '[f]rom the outset it was also suggested by [Director A (Romans)] that I should not put anything relating to the minimum fee arrangement in writing. For example, I did not put "fees" on the meeting titles in my work diaries as I felt uncomfortable with doing so. I also directed my staff not to put anything in writing relating to the minimum fee arrangement'; URN0172, paragraph 24. [Director] (Richard Worth), in interview, stated that it '*would have been very unusual for [Director B (Romans)] to email*' and that most discussions were '*via telephone*' or [Director B] (Romans) '*would appear at the office to ask me about various fees we have been charging*'; URN1000, pages 83 and 84. This supports [Director B]'s (Romans) account that he did not put anything in writing.

<sup>211</sup> URN0172, paragraph 47.

<sup>212</sup> URN0021.

<sup>213</sup> URN0172, paragraph 72. See also the calendar appointment for 2.30pm on 30 January 2015 with the title '[Director (Richard Worth)], [Director A (Prospect)] and [Director (Michael Hardy)] re Portals'; URN0023.

- 4.91 If there were queries about the commission fees that had been charged, both [Director B] (Romans) and [Director A] (Prospect) confirmed that copies of the signed sales agreement<sup>214</sup> were taken to meetings to prove either that the Minimum Fee Arrangement had not been adhered to or that it had not been breached.<sup>215</sup>
- 4.92 This is supported by an internal email from [Director A] (Romans) to [Director B] (Romans) dated 18 September 2008, discussed at paragraphs 4.48 to 4.55, regarding a discussion with [Director] (Richard Worth) that day and the desire to obtain proof of Prospect's commission fees:<sup>216</sup>
- 'I'm aware that you and [Director (Richard Worth)] are looking for proof of prospects and he/you can/will then tackle [Director A (Prospect)].'*
- 4.93 It appears from the email that Romans and Richard Worth suspected that Prospect was quoting commission fees at below the agreed minimum level and [Director B] (Romans) and [Director] (Richard Worth) were seeking proof, which they would bring along to a meeting.
- 4.94 The CMA infers that these meetings were also used to review the minimum fee levels that had been agreed.<sup>217</sup> During the Relevant Period, the Parties agreed to reduce, in some areas, the minimum fee levels initially agreed in 2008. In addition, the penalty mechanism described at paragraphs 4.147 to 4.163 was also agreed in the meetings.
- 4.95 Michael Hardy submitted that whilst [Director] (Michael Hardy) attended meetings at which monitoring of compliance was taking place, such monitoring

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<sup>214</sup> These are also referred to as 'terms of business'. Sales agreements are signed by the house seller and show the commission fee agreed. [Director A] (Prospect) stated that *'the signed terms of business was a way to prove the fee level that had been agreed with the vendor and whether the terms of the minimum fee arrangement had been breached'*; URN0171, paragraph 67. Both [Director B] (Romans) and [Director A] (Prospect) stated that they requested copies of competitors' sales agreements from house sellers when they had lost their business; URN0172, paragraphs 48 and 62; URN0171, paragraph 68.

<sup>215</sup> [Director B] (Romans) stated *'if Romans had been accused of not sticking to the minimum fee arrangement, I would take the information given to me by my staff, sometimes this included copies of our own sales agreements to meetings of the four agents, as proof of what fee we had charged. If I thought that one of the other agents was not sticking to the arrangement, I would take copies of the other agents' sales agreements, if these were available, to meetings of the four agents as proof that the minimum fee arrangement was not being stuck to'*; URN0172, paragraph 63. [Director A] (Prospect) stated *'if one of the other parties claimed that it thought that Prospect was not adhering to the minimum fee arrangement, I would bring along the relevant terms of business that the house seller had signed with us to the meeting' and 'I would also take along copies of the terms of business that house sellers had provided to us when Prospect had lost business as proof of non-adherence to the minimum fee arrangement by the other parties. The other three did the same'*; URN0171, paragraphs 67 to 68.

<sup>216</sup> URN0359.

<sup>217</sup> See paragraphs 4.63 to 4.64.

was carried out by Romans and/or Prospect. Michael Hardy never complained about others' non-compliance with the Minimum Fee Arrangement.<sup>218</sup> Whether or not [Director] (Michael Hardy) actively participated in the monitoring of the Minimum Fee Arrangement or complained about others' compliance at these meetings does not affect the CMA's finding of Infringement or of Michael Hardy's liability for its participation in the Infringement. As set out at paragraph 6.14, the fact that a party may not have been fully committed to its implementation, or may not have put the initiatives into effect, does not mean that it is not party to the agreement.<sup>219</sup> There is also no evidence to suggest that Michael Hardy publicly distanced itself from the Infringement at any time during the Relevant Period.<sup>220</sup>

- 4.96 [Director] (Richard Worth) submitted that he only paid *'lip service to the arrangement'*, that he would *'do whatever I needed to do in order to do business'* and so did not adhere to the Minimum Fee Arrangement but that *'for the point of the meetings, I'd go along with what we were saying'*.<sup>221</sup>
- 4.97 [Director] (Richard Worth) also stated in interview that it was Romans who actively *'policed'* the arrangement.<sup>222</sup> As described at paragraphs 4.72 to 4.94, however, the CMA considers that Richard Worth was also actively involved in the monitoring of the Minimum Fee Arrangement. This was primarily through the meetings between the Parties, the majority of which were held at Richard Worth's office.<sup>223</sup> This is supported by the email referred to at paragraph 4.92, which is evidence of Richard Worth's involvement in seeking proof of breaches of the Minimum Fee Arrangement by Prospect to be raised at a meeting between the Parties.
- 4.98 Even if Richard Worth was not fully committed to the implementation of the Minimum Fee Arrangement, or may not have put the initiatives into effect, as set out at paragraph 6.14, this does not mean that Richard Worth was not party to the Infringement. There is also no evidence to suggest that Richard Worth publicly distanced itself from the Infringement at any time during the Relevant Period.<sup>224</sup>

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<sup>218</sup> URN0919 and URN0968.

<sup>219</sup> See also paragraph 6.35.

<sup>220</sup> See paragraphs 6.15 to 6.16.

<sup>221</sup> URN1000, pages 101 to 102.

<sup>222</sup> URN1000, pages 124 to 128.

<sup>223</sup> See paragraphs 4.75 to 4.77.

<sup>224</sup> See paragraphs 6.15 to 6.16.

## **Bilateral Contacts**

4.99 The Parties were also in contact on a bilateral basis to discuss the Minimum Fee Arrangement and in particular to raise with each other potential non-compliance.

4.100 [Director B] (Romans) stated:<sup>225</sup>

*'In addition to having meetings with each other when we wanted to discuss individual properties, there were occasions when I, [Director A (Prospect)], [Director (Richard Worth)] and [Director (Michael Hardy)] would contact each other about them. Most of this contact was by phone, both landline and mobile, and very little was ever written down.'*

4.101 He also stated:<sup>226</sup>

*'there were also a small number of occasions when I would meet up with another one of the agents individually, if there was an issue about not sticking to the minimum fee arrangement that concerned just the two of us. For example, in Bracknell there came a time when neither Michael Hardy nor Richard Worth did much, if any, business in Bracknell and Prospect had raised concerns about Romans' Bracknell branch offering commission fee rates below the minimum agreed. I met with [Director A (Prospect)] to discuss this.'*

4.102 [Director A] (Prospect) similarly explained:<sup>227</sup>

*'a meeting would not necessarily always be held when there were challenges over another party's fee level. We might just speak to the other party directly about the issue. The other two parties would not necessarily know about it unless it was mentioned in passing at a meeting.'*<sup>228</sup>

4.103 As noted at paragraphs 4.100 to 4.102, whilst bilateral contacts between the Parties were mainly by telephone, the CMA has found emails (both direct contacts and internal reporting) that set out the nature of these contacts and that on occasion the Parties met to discuss non-compliance outside of the meetings attended by all four Parties.

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<sup>225</sup> URN0172, paragraph 76.

<sup>226</sup> URN0172, paragraph 49.

<sup>227</sup> URN0171, paragraph 73.

<sup>228</sup> See fn210. [Director] (Richard Worth) stated in interview that contact was primarily 'via telephone conversation' and that 'I can remember occasions where [Director B (Romans)] would appear at the office'; URN1000, pages 83 and 84.



4.104 For example, as set out at paragraphs 4.48 to 4.50, [Director A] (Romans) described, in an internal email to [Director B] (Romans) dated 18 September 2008, a discussion he had had with [Director] (Richard Worth), in which he stated:<sup>229</sup>

*'He [Director (Richard Worth)] did question fee on one we did in woko [...] I checked the control sheets while he was on the phone as I keep the last months here and was able to confirm that the fee was def 1.8% and his guy was [...] making excuses.'*

4.105 As a further example, in an internal email dated 3 October 2008, [Director B] (Romans) updated [Director A] (Romans) on a meeting between [Director] (Richard Worth) and [Director B] (Prospect) regarding potential non-compliance with the Minimum Fee Arrangement:<sup>230</sup>

*'[Director (Richard Worth)] met with [Director B (Prospect)] yesterday re another matter but did ask [Director B (Prospect)] to check the addresses we both highlighted. [Director B (Prospect)] emailed copy of the contracts across today and they were all at 1.8% bar one at 1.75% which he apologized about. [...].'*

4.106 In response to an email dated 11 November 2011 from an area manager setting out that Richard Worth had offered a lower commission fee than agreed under the Minimum Fee Arrangement, [Director B] (Romans) replied:<sup>231</sup>

*'call [Director (Richard Worth)] to question [...]*

*'Let me know what he says.*

*'Whats the name and address of the client as I may be seeing [Director (Richard Worth)] over weekend so I can address if you cant reach him today.'*

4.107 In an email to [Director] (Richard Worth) dated 17 August 2012, [Director B] (Romans) noted:<sup>232</sup>

*'[...] we need to catch up re my messages left on your mobile (which you chose to ignore again!) as these types of scenarios cannot continue. So I*

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<sup>229</sup> URN0359.

<sup>230</sup> URN0400.

<sup>231</sup> URN0058.

<sup>232</sup> URN0050.

*have made a note to call you on my return on Monday 3<sup>rd</sup> September. I trust there won't be other similar incidents in between times and look forward to resolving amicably.'*

4.108 On the basis of this email, [Director B] (Romans) stated that this probably related to:<sup>233</sup>

*'instances when I had heard, repeatedly, that Richard Worth was charging fees lower than the fee arrangement minimum. [Director (Richard Worth)] had not replied to my phone calls and my staff were chasing me for answers. As I was going on holiday I sent him this email, which I would not usually have done. I think I would have been more specific on the phone messages I had left, than I had been on this email.'*

4.109 A further example is an email dated 6 January 2014<sup>234</sup> from [Director] (Richard Worth) to [Director] (Michael Hardy) who then forwarded it to [Director B] (Romans). The email attached a Prospect promotional flyer which offered 30% off Prospect's commission fees if *'we don't sell or let your property within 6 weeks from the point of marketing'*.<sup>235</sup>

4.110 [Director] (Michael Hardy) stated, in interview, that he did not know why he had forwarded the email and attachment onto [Director B] (Romans), nor why [Director] (Richard Worth) had sent it to him in the first place.<sup>236</sup> He might, he stated, have forwarded it simply because he was irritated by the promotion.<sup>237</sup>

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<sup>233</sup> URN0172, paragraph 78. [Director] (Richard Worth), in interview, stated *'I don't specifically remember it. However, I can understand what will have happened. [...] we [Richard Worth] were charging pretty much what we wanted to charge and what we needed to charge, dependant on the situation at the time. [Director B (Romans)] would constantly question what we were charging and phone or, [...] occasionally pop in. and that email obviously was borne out of frustration for the fact that I'd got fed up of answering to [Director B's (Romans)] demands and questions and hadn't returned his calls and then he turned to the email to threaten me that this needed to be dealt with'* and that his reaction to this email was *'probably here we go again. I've got to answer to [Director B (Romans)] because he's asking me whether or not we're charging the fees that have been agreed'*; URN1000, pages 86 and 87.

<sup>234</sup> URN0051.

<sup>235</sup> URN0052.

<sup>236</sup> [Director] (Richard Worth) stated in interview that *'as far as I was concerned this demonstrated that there wasn't really an agreement in place if Prospect were offering a deal that offered 30 per cent off of their fees'* and that he *'sent it to [Director (Michael Hardy)] just to see what his comments were in that respect'*; URN1000 page 105. [Director] (Richard Worth) went on to state *'there were quite often meetings where we wanted to move away from the agreement and we were pulled back into it. I think by demonstrating that perhaps there wasn't really an agreement in place, it would have helped an argument to move away from it'*; URN1000, page 106. As set out at paragraphs 4.176 to 4.181, whilst the Parties did not always comply with the Minimum Fee Arrangement and concerns were raised about it at various points, there is no evidence to suggest that any of the Parties, including Richard Worth, publicly distanced themselves from the Infringement at any time as set out at paragraphs 6.15 to 6.16.

<sup>237</sup> URN0092, pages 94 to 95.

Michael Hardy submitted that the forwarding of the email dated 6 January 2014 by [Director] (Michael Hardy) without any comment to [Director B] (Romans) was just '*a query being passed on by one colleague to another, in the course of ordinary conversation*'.<sup>238</sup>

4.111 The CMA, however, has found that [Director] (Michael Hardy) forwarded details of Prospect's promotion to [Director B] (Romans) because he considered that [Director A] (Prospect) should be challenged on the compatibility of the promotion with the Minimum Fee Arrangement. As [Director B] (Romans) stated this promotion '*went against the spirit of the minimum fee arrangement and I recall discussing it with [Director A] (Prospect)] at either a meeting or on the telephone. It was decided that as it was a short-lived offer we would just move on from it*'.<sup>239</sup>

4.112 [Director A] (Prospect) also confirmed that he '*was questioned about this promotion*'<sup>[240]</sup> by one or all of [Director B (Romans)], [Director (Michael Hardy)] and [Director (Richard Worth)]', but he considered that the promotion did not breach the Minimum Fee Arrangement.<sup>241</sup>

4.113 Michael Hardy submitted that neither Michael Hardy nor [Director] (Michael Hardy) in particular were involved in bilateral communications with the other Parties.<sup>242</sup>

4.114 The CMA considers that the email exchange set out at paragraph 4.109 demonstrates that at least on one occasion, Michael Hardy did contact another Party regarding compliance by another Party with the Minimum Fee Arrangement. However, the CMA does not consider that the extent of Michael Hardy's involvement in bilateral contacts affects the CMA's finding of Infringement or of Michael Hardy's liability for its participation in the Infringement. As set out at paragraph 6.14, the fact that a party may not have been fully committed to its implementation, or may not have put the initiatives into effect, does not mean that it is not party to the agreement.<sup>243</sup>

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<sup>238</sup> URN0919.

<sup>239</sup> URN0172, paragraph 79.

<sup>240</sup> [Director A] (Prospect) stated '*I think [the promotion] was in Wokingham and maybe Bracknell but it may have been company wide*'; URN0171, paragraph 76.

<sup>241</sup> URN0171, paragraph 76.

<sup>242</sup> URN0919 and URN0968.

<sup>243</sup> See also paragraph 6.35.

## ***Internal reporting and monitoring of compliance by the Parties***

### ***Awareness of the Minimum Fee Arrangement***

4.115 Area and branch managers in the Relevant Areas, of at least Romans and Prospect, were aware of the existence of the Minimum Fee Arrangement.

4.116 As set out at paragraphs 4.46 to 4.47, [Director A] (Prospect) recalled that local managers attended a meeting held after the First Wokingham meeting so *'the branch managers understood the situation and raised no objections. They were to put the agreed minimum fee arrangement into practice'*.<sup>244</sup>

4.117 [Director B] (Romans) also stated that as soon as a minimum fee was agreed in a particular area the relevant branch managers would need to be informed as soon as possible otherwise the Minimum Fee Arrangement would not work.<sup>245</sup> He also recalled that Romans' branch managers:<sup>246</sup>

*'would have been aware that they (a) needed to stick to their own fee structure, and (b) report if they were made aware of the other estate agents charging below the agreed minimum fee level.'*

4.118 [Director A] (Prospect) similarly stated:<sup>247</sup>

*'Within Prospect, the branch managers would have had knowledge of the minimum fee arrangement to make sure that those who were going to see prospective house sellers and provide quotes knew what were the minimum fee levels that had been agreed. They would also report back if they thought one of the other agents was quoting below the agreed minimum levels.'*

4.119 Knowledge of the Minimum Fee Arrangement within the Prospect business is evidenced in internal Prospect emails. In an email from an area director to [Director A] (Prospect) dated 17 February 2012 with the title 'Richard Worth', the area manager enquired *'[a]re they still part of the fee agreement in all towns?'*.<sup>248</sup>

4.120 Another example is an internal email dated 20 June 2012 from a director to [Director A] (Prospect) with reference to a four-month 0% commission fee offer

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<sup>244</sup> URN0171, paragraph 48.

<sup>245</sup> URN0172, paragraph 36.

<sup>246</sup> URN0172, paragraph 60.

<sup>247</sup> URN0171, paragraph 55.

<sup>248</sup> URN0327.

by an estate agent that was not party to the Minimum Fee Arrangement which stated, *'this could have an impact on fee agreement within Warfield and Bracknell'*.<sup>249</sup>

- 4.121 A further example is an internal Prospect email dated 22 January 2015 between a director and area manager which notes the need to be careful in quoting a commission fee of 1.5% with the comment from the area manager that in Bracknell:<sup>250</sup>

*'We are sticking to the 1.8% when we are up against Romans but when [two other estate agents] are offering 1% then we are doing 1.5%.'*

- 4.122 This email exchange demonstrates that Prospect was willing to quote lower commission fees when faced with competition from estate agents other than the Parties. When up against Romans, however, Prospect complied with the Minimum Fee Arrangement.

- 4.123 As regards Romans, [Director B] (Romans) instructed his staff not to put anything in writing.<sup>251</sup> This is supported by an internal email dated 11 November 2011, which was a follow up to an email noting that Richard Worth had offered a lower commission fee than Romans. The member of staff, who was clearly aware of the Minimum Fee Arrangement, asked a branch manager *'[t]hought you had fee agreements?'* to which the reply was *'[n]ever a good idea to make a comment in writing - will delete your email like it never arrived'*.<sup>252</sup>

- 4.124 Notwithstanding [Director B]'s (Romans) instruction, Romans staff did on occasion refer to the Minimum Fee Arrangement in writing. At the end of an email discussion on sales targets, a branch manager (of an area not covered by the Minimum Fee Arrangement) commented to another branch manager:<sup>253</sup>

*'My sales team has a combined experience of 8 weeks between the two of them, and we don't have a sweet fee agreement with the other market leading agent to make our jobs easier...'*

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<sup>249</sup> URN0529. [Director A] (Prospect) noted that this estate agent did open with its 0% commission fee offering and after a time started charging a commission fee, but he did not recall the percentage level or that the Minimum Fee Arrangement changed in that period. He did not think that this offer had an impact; URN0171, paragraph 54.

<sup>250</sup> URN0328.

<sup>251</sup> URN0172, paragraph 24.

<sup>252</sup> URN0057.

<sup>253</sup> URN0655. Further internal Romans communications that refer to the Minimum Fee Arrangement and in particular to breaches as *'dodgy fees'* and *'being sneaky'* are set out at paragraphs 4.128, 4.130, 4.135 and 4.140.

## Complaints of non-compliance

4.125 [Director B] (Romans) stated that:<sup>254</sup>

*'there were also occasions when Romans did not stick to the agreed minimum fee. Occasionally, Romans staff would reduce our fees without my knowledge.'*

4.126 [Director A] (Prospect) also commented:<sup>255</sup>

*'Prospect did not always adhere to the minimum fee arrangement. There was a fair amount of business that was conducted under the agreed minimum levels. I would not say it was a regular occurrence but it would happen some of the time.'*

4.127 He also noted that compliance was undertaken at the branch level:<sup>256</sup>

*'I would also not necessarily know if Prospect was complying with the minimum fee arrangement because branch managers were the ones agreeing commission fees with sellers and in order to secure an instruction they might agree lower fees. I would not know and do not check the terms of business we sign for every property.'*

4.128 This non-compliance with the Minimum Fee Arrangement was sometimes the subject of internal emails between branch managers. For example, in an internal Romans email dated 25 February 2015 between Romans branch managers, one of whom noted in relation to Bracknell: <sup>257</sup>

*'I can't believe how quickly Prospect get onto our dodgy fees and how much [Director B (Romans)] is happy to turn a blind eye to theirs'*

4.129 The response to this email was:<sup>258</sup>

*'[...] I remember how frustrating that was when I was there [Bracknell], but remember we have to set the example and be whiter than white whilst everybody else has carte blanche to do whatever they want!'*

4.130 A further example is in an internal email exchange dated 19 March 2015 between Romans branch managers. In response to a comment that '*prospects*

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<sup>254</sup> URN0172, paragraph 75.

<sup>255</sup> URN0171, paragraph 74.

<sup>256</sup> URN0171, paragraph 75.

<sup>257</sup> URN0612.

<sup>258</sup> URN0612.

*are doing a few sneaky ones!*” in Wokingham, the other branch manager replied.<sup>259</sup>

*‘They [Prospect] are feeding [Director B (Romans)] with couple they are holding their hands up on to make him think they are being honest and just keeping quiet about the mountain of others.’*

4.131 In an internal Prospect email dated 19 May 2015 regarding a request by a seller located in Winnersh to match Richard Worth’s fee offer of 1.25%, a branch manager enquired.<sup>260</sup>

*‘I believe Richard Worth are in the same fee agreement as us with Romans so they should only be going as low as 1.75%?’*

### *Reporting of breaches*

4.132 The evidence demonstrates that area and branch managers of Romans and Prospect supported the continuation of the Minimum Fee Arrangement by monitoring commission fees and reporting upwards potential breaches by other Parties. [Director B] (Romans) stated:<sup>261</sup>

*‘My staff would inform me, through their managers, of times when the other estate agents charged below the agreed minimum fees. I also requested that I was provided with copies of the agreements made by our competitors with customers as proof they were charging less than the agreed minimums.’*

4.133 The responses given to an internal email from [Director A] (Prospect) dated 10 April 2012 setting out that Prospect should maintain its position on minimum fee levels state:

*‘Richard worth need to come back on song and increase min in Bracknell and other area’s like Crowthorne.’<sup>262</sup>*

*‘makes total business sense so long may it continue and we will carry on trying to find evidence of other agents not playing ball...’<sup>263</sup>*

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<sup>259</sup> URN0661.

<sup>260</sup> URN0536.

<sup>261</sup> URN0172, paragraph 62.

<sup>262</sup> URN0527.

<sup>263</sup> URN0526.

4.134 In an internal email dated 25 September 2014 to a Romans area manager, a member of Romans staff stated:<sup>264</sup>

*'I wanted to make you aware of this as the fee structure is not being upheld at the moment*

*'[...]*

*'[...] I lost [address] to Prospects as they charged the owner less than 1.5% which was the sole reason for him putting it on with them.*

*'[...] lost [address] to Michael Hardy as the owner would only consider an agent that would do less than 1.5%. They subsequently have failed to sell it and now they are going on with Prospects for a similar agreement.*

*'[...] I wanted you to be aware that this was going on in Crowthorne.'*

4.135 In an internal email between Romans branch managers dated 23 October 2014, it was noted that:<sup>265</sup>

*'We finally got a Prospect dodgy contract and I dropped it down to [Director B (Romans)]. [...] Lets see what he has to say now.'*

4.136 A further Romans example is an internal email dated 3 February 2014 from a branch manager to [Director B] (Romans) noting that:<sup>266</sup>

*'Richard Worth are about to get it as they quoted 1.5% on £725k, [...] Thought you should know.'*

4.137 An example from Prospect is an internal email dated 12 March 2015 from a Prospect director to the Prospect area managers, which stated:<sup>267</sup>

*'I have just had another convo with [Director A (Prospect)] on fee's.'*

*'Can I have every address that we believe Romans have done less than the agreed fee's in each office please asap.'*

4.138 Once notified of a property for which one of the other Parties was suspected of quoting a lower fee, the matter would be taken up with the Party in question. For example, in response to an internal email dated 14 April 2015 from a

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<sup>264</sup> URN0608.

<sup>265</sup> URN0069.

<sup>266</sup> URN0061.

<sup>267</sup> URN0333.



director informing him of a lost instruction in Crowthorne to Michael Hardy noting the seller is ‘adamant they are getting 1.35%’, [Director A] (Prospect) stated ‘Ok will investigate’.<sup>268</sup>

4.139 When asked about this email, [Director A] (Prospect) stated:<sup>269</sup>

*‘I would have rung up [Director] at Michael Hardy and asked him what the circumstances were surrounding that property.’*

4.140 A further example is a Romans internal email exchange on 27 May 2013 following a prospective seller informing a member of Romans staff that she had been offered a lower a fee by Richard Worth. In his email to [Director B] (Romans), the Romans staff member enquired:<sup>270</sup>

*‘[...] this is a previous RWs [Richard Worth] client now Romans. Looking to sell [address]. Am I able to offer 1.5% or should I stick to 1.75% and risk losing it to RWs [Richard Worth] being sneaky? Please can you let me know?’*

4.141 [Director B] (Romans) replied:<sup>271</sup>

*‘Take it at 1.5 if you have to but get [branch manager] (Romans)] to call [Director (Richard Worth)] to sort out tomorrow. Ie [Director (Richard Worth)] can’t keep offering a discount as they aren’t his landlords anymore!’*

4.142 [Director B] (Romans) confirmed that ‘RW being sneaky’ meant that Richard Worth was going lower than what had been agreed. He explained that the reference to landlords related to the fact that sellers that are also landlords on an estate agent’s books get discounted commission fees. Although the seller was no longer a Richard Worth landlord, Richard Worth was still trying to give this customer a discounted rate.<sup>272</sup>

#### *Requests for copies of sales agreements*

4.143 As set out at paragraph 4.91, both [Director B] (Romans) and [Director A] (Prospect) stated that copies of the signed sales agreements were taken to

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<sup>268</sup> URN0340.

<sup>269</sup> URN0171, paragraph 78.

<sup>270</sup> URN0060.

<sup>271</sup> URN0060.

<sup>272</sup> URN0172, paragraphs 68 to 69.

meetings between the Parties as proof of breaches of the Minimum Fee Arrangement.

- 4.144 [Director B] (Romans) confirmed, as noted at paragraph 4.132, that he requested that his staff provide him with copies of sales agreements when these could be obtained as proof that the other Parties were charging less than the agreed minimum commission fee levels. This is supported by an internal document dated 31 July 2009, circulated by him to Romans' area managers, which states at point number nine, titled 'Other Agents Agreements':<sup>273</sup>

*'It is always good for me to note whether there is any changes in your competitors agreements and in particular I would like to see a recent Prospects or Richard Worth's agreement so please make the effort to find one for me.'*

- 4.145 An internal email discussion dated 21 and 22 January 2015 between a Prospect director and a Prospect area manager similarly refers to the need to obtain evidence on Romans' commission fees, although the motivation behind the email exchange may have been to try and justify why Prospect might want to deviate from the Minimum Fee Arrangement. The director wrote:<sup>274</sup>

*'Just had [Director A (Prospect)] on the phone for 30 mins. We need to be careful on the 1.5%. I believe there was a convo with [Director A (Prospect)] at the end of last year about straightening up more.'*

*'Do we have any tout contracts or more ammo where Romans have gone lower?'*

- 4.146 A further example of Prospect staff looking to notify [Director A] (Prospect) if they considered the other Parties were offering commission fees below the agreed minimum is in an internal Prospect email dated 29 April 2015 sent to [Director A] (Prospect) by a Prospect branch manager. Attached to the email is a copy of an agreement between a seller and Richard Worth that had a commission fee of 1.25%, a fee below the agreed minimum level.<sup>275</sup>

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<sup>273</sup> URN0054, attached to email URN0055.

<sup>274</sup> URN0328; see also URN0337.

<sup>275</sup> URN0342; URN0343.

## **Penalties for non-compliance**

4.147 In addition to monitoring each other's compliance with the Minimum Fee Arrangement, evidence from both [Director B] (Romans) and [Director A] (Prospect) is that, for a period, a penalty payment mechanism was agreed for non-compliance.

4.148 [Director B] (Romans) noted:<sup>276</sup>

*'At times it was quite tight, and we were more committed to it, however, at times it was quite loose because all the estate agents, including Romans, would breach it. Prospect and Richard Worth were the two who tended not to stick to it the most. To try and deal with this, from possibly the end of 2010 or the start of 2011 until 2014, there was a penalty for breaching it.'*

*'Myself, [Director (Richard Worth)], [Director A (Prospect)] and [Director (Michael Hardy)] all agreed that if a participant in the minimum fee arrangement was found to have charged a commission below the agreed minimum then they would be obliged to make a payment to the estate agent who had lost out. I cannot recall who exactly came up with the idea, but we all agreed this at one of our meetings and we all thought it was a good idea.'*

4.149 [Director A] (Prospect) stated:<sup>277</sup>

*'It was, over time, agreed in the meetings that if one of us did not adhere to the minimum fee arrangement and then sold the property, the commission fee would be invoiced by the agent who had challenged the instructed agent.'*

4.150 Both [Director B] (Romans) and [Director A] (Prospect) recalled that this payment would have been half of the fee earned.<sup>278</sup> This is supported by notes of a meeting held between [Director B] (Romans) and [Director A] (Romans) in February 2011.<sup>279</sup>

*'[Director (Richard Worth)]*

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<sup>276</sup> URN0172, paragraphs 81 to 82.

<sup>277</sup> URN0171, paragraph 80.

<sup>278</sup> URN0172, paragraphs 83 to 84; URN0171, paragraph 80.

<sup>279</sup> URN0007.

*'Has gone to ground - caught him out on a couple of deals, [Director B (Romans)] has requested half the fee on a big one recently.'*

4.151 [Director B] (Romans) stated that he discussed the monitoring of the Minimum Fee Arrangement and this penalty payment mechanism with [Director A] (Romans) at their regular meetings.<sup>280</sup> In relation to the note, set out above, [Director B] (Romans) stated:<sup>281</sup>

*'I believe this related to a time when we had found out that Richard Worth had sold a property at a lower fee than agreed under the minimum fee arrangement and this was about asking for a penalty payment.'*

4.152 Whilst estate agents may legitimately split fees, for example in instances where two estate agents who have been instructed by the same client consider they have both sold the property, which may result in one estate agent invoicing the other,<sup>282</sup> [Director B] (Romans) stated:<sup>283</sup>

*'this mechanism was used to deter deviation from the fee arrangement with an invoice being sent to the agent in breach of the minimum fee arrangement demanding payment for half of the fee received.'*

*'I remember that Romans received three payments, one from each of Prospect, Michael Hardy and Richard Worth for times that they had charged lower commission fees than under the minimum fee arrangement. They would pay half the fees they had earned to Romans, and payments were made either via BACS payment or by cheque.'*

4.153 [Director A] (Prospect) noted that this happened two or three times as far as Prospect was concerned, although none of these were payments to or from Michael Hardy.<sup>284</sup>

4.154 Michael Hardy submitted that, whilst [Director] (Michael Hardy) agreed to the penalty payment mechanism, there is no evidence to support the assertion made by [Director B] (Romans) that Michael Hardy was involved in the payment of any penalties (either as a payer or payee).<sup>285</sup>

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<sup>280</sup> URN0172, paragraph 88. [Director A] (Romans) stated that he did not know what this meeting note is referring to specifically and that he does not recall being told that there was a penalty payment mechanism; URN0097, pages 127 to 128. See also URN0801, paragraph 49.

<sup>281</sup> URN0172, paragraph 89.

<sup>282</sup> See paragraph 3.11; URN0172, paragraph 83; URN0171, paragraph 84.

<sup>283</sup> URN0172, paragraphs 83 to 84.

<sup>284</sup> URN0171, paragraph 80.

<sup>285</sup> URN0978.

4.155 In addition, [Director] (Richard Worth) stated in interview with regard to the penalty payments that ‘we’ve [Richard Worth] *have never had a fine levied against us and we’ve never paid a fine or received a fine*’.<sup>286</sup>

4.156 The CMA’s finding of Infringement and of Michael Hardy’s and Richard Worth’s liability for their participation in the Infringement does not depend on being able to determine precisely who paid or received a penalty payment.<sup>287</sup> As set out at paragraph 6.14, the fact that a party may have played only a limited part in setting up an agreement, may not have been fully committed to its implementation, or may not have put the initiatives into effect, does not mean that it is not party to the agreement.

4.157 Prospect and Romans both identified an invoice dated 18 July 2013 from Prospect to Romans as potentially being a penalty payment for breaching the Minimum Fee Arrangement.<sup>288</sup> [Director B] (Romans) explained in relation to this invoice<sup>289</sup> which has the description ‘*introduction of client*’, that it ‘*does not have the address of the property involved on it - if it was a genuine split fee it would have done*’.<sup>290</sup>

4.158 He stated that:<sup>291</sup>

*‘In this case, Prospect had sent Romans an invoice as we had broken the fee arrangement. I signed the payment off and it was paid from the commission earned by the Bracknell office [...] as it was that branch that had broken the minimum fee arrangement.*

*‘I do not recall the specific conversation, but I assume [Director A (Prospect)] would have phoned me and told me this had happened, and I would have checked, agreed and paid the fee.’*

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<sup>286</sup> URN1000, page 116.

<sup>287</sup> See paragraph 6.35.

<sup>288</sup> 18 July 2013 invoice (URN0753; URN0042). The CMA asked the Parties to provide invoices and other records of payments made between each other. Given the passage of time and the fact that, as described above, estate agents may legitimately share fees on the sale of a property and that only a few payments were made, it has been difficult to identify invoices and other payment records which are likely to have been penalty payments. The CMA has, therefore, only relied on those invoices identified by Romans and Prospect. For the purposes of its finding of Infringement, however, it is not material that the CMA has not been able to identify further specific invoices or payment records in respect of penalty payments because, as set out at paragraph 6.14, the fact that a party may not have put the initiatives into effect, does not mean that it is not party to the agreement.

<sup>289</sup> URN0042; URN0753.

<sup>290</sup> URN0172, paragraph 85.

<sup>291</sup> URN0172, paragraphs 86 to 87.

- 4.159 Prospect identified a further invoice from Romans to Prospect dated 7 November 2014 as potentially being a penalty payment.<sup>292</sup> The invoice addressed to Prospect's accounts department from Romans had the description '*Re: Split fee for introduction for buyer*'.
- 4.160 [Director A] (Prospect) stated '*it is possible, that these invoices*<sup>[293]</sup> *related to penalty payments made between Romans and Prospect for not sticking to the minimum fee arrangement*'.<sup>294</sup>
- 4.161 Like [Director B] (Romans), [Director A] (Prospect) stated that penalty payment invoices '*would not include the property address, which would ordinarily be on our invoices*'.<sup>295</sup> This is supported by an internal email from the Prospect accounts department to [Director A] (Prospect) dated 25 November 2014 noting the lack of property details on the 7 November 2014 invoice.<sup>296</sup>
- 'We have received invoice from Romans. I contact them to ask which property attached invoice relates to but they advised me to check with you.'*
- 4.162 Based on the evidence of [Director B] (Romans), [Director A] (Prospect) and Michael Hardy, supported by the invoices identified, the CMA has concluded that the Parties agreed a system of penalty payments in the event of breaches of the Minimum Fee Arrangement. In addition, given the identified invoices, the CMA has concluded that payment was made between at least two of the Parties, Romans and Prospect, under this penalty payment system.
- 4.163 Based on the witness evidence and the date of the meeting note, described at paragraph 4.150, the CMA infers that the Parties agreed to the payment of penalties sometime before February 2011. Given that both [Director B] (Romans) and [Director A] (Prospect) noted that they were only involved in potentially three payments, it is difficult to determine when these payments occurred and when the penalty system mechanism ceased.
- 4.164 It is not, however, necessary for the CMA to determine precisely when the Parties agreed to the penalty mechanism, how many payments were made under it, which Parties these payments were between or when the Parties abandoned it for the purpose of its finding of Infringement. The penalty

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<sup>292</sup> URN0752.

<sup>293</sup> The two invoices identified by Prospect dated 18 July 2013 (URN0753) and 7 November 2014 (URN0752).

<sup>294</sup> URN0171, paragraph 81.

<sup>295</sup> URN0171, paragraph 82.

<sup>296</sup> URN0352.

mechanism was agreed as part of the broader Minimum Fee Arrangement which was in place during the whole of the Relevant Period between all four Parties.

***[Director B]’s (Romans) performance objectives***

4.165 The maintenance of the Minimum Fee Arrangement (as well as seeking opportunities for similar arrangements in other areas with other agents) was made part of [Director B]’s (Romans) performance objectives between 2013 and 2014. Objective 5, titled ‘*Collaborative Arrangements*’ stated:<sup>297</sup>

*‘[Director B (Romans)] to maintain the mutually beneficial collaboration where it already exists and endeavour to establish similar cooperation where it currently does not.’*

4.166 [Director B] (Romans) stated that this objective directly related to the Minimum Fee Arrangement<sup>298</sup> and that ‘[Director A (Romans)]<sup>[299]</sup> *came up with this wording. I think that it was assumed that no one other than [Director A (Romans)] and me would understand the meaning of this objective*’.<sup>300</sup>

4.167 [Director B] (Romans) explained:<sup>301</sup>

*‘The term “where it already exists” referred to the core minimum fee arrangement centred on Wokingham and surrounding areas. I was expected under this objective to continue to speak and meet with [Director (Richard Worth)], [Director (Michael Hardy)] and [Director A (Prospect)] regarding the minimum fee arrangement to ensure it remained in place.’*

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<sup>297</sup> URN0010. See also URN0011; URN0012; URN0013; URN0014; URN0015; URN0016; URN0017; URN0018; URN0019; URN0020; URN0500; URN0501.

<sup>298</sup> [Director A] (Romans) stated that the wording ‘*mutually beneficial collaboration*’ covered not just fees but encompassed a number of things including opening hours, boards, advertisements. He said it was deliberately non-specific because it was to cover a lot, ‘*rather than having ten different objectives, I could put everything under one*’; URN0097, pages 111 to 112. See also URN0801, paragraph 34.

<sup>299</sup> [Director A] (Romans) stated that [Director B] (Romans) would initially draft his objectives which would then be discussed. [Director A] (Romans) confirmed that the handwritten notes on the Objectives Progress Review document (URN0006) are his notes, written during a meeting to discuss [Director B]’s (Romans) objectives; URN0097, pages 107 to 110.

<sup>300</sup> URN0172, paragraph 91.

<sup>301</sup> URN0172, paragraph 93.

4.168 Copies of [Director B]’s (Romans) performance reports show that this objective was monitored on a bi-monthly basis between 2013 and 2014 in face to face meetings between [Director B] (Romans) and [Director A] (Romans).<sup>302</sup>

4.169 [Director B] (Romans) was scored on his performance against this objective<sup>303</sup> and statements setting out the evidence of his progress were recorded in the reports of the meetings. The evidence statements given for Objective 5 in his reports during 2013 included:

*‘Evidence: all existing situations remain in place despite some recent issues in Bracknell, Wokingham and LE.’<sup>304</sup>*

*‘Evidence: all existing situations remain in place despite some recent issues in Woodley<sup>305</sup> and Wokingham.’<sup>306</sup>*

4.170 The notes of the appraisal meeting covering the period January to February 2014 included the following statement under Objective 5:<sup>307</sup>

*‘Evidence: Met with [Director (Richard Worth)], [Director (Michael Hardy)] and [Director A (Prospect)] last month and managed to keep everything together despite [Director A (Prospect)] and [Director (Richard Worth)] having a wobble.’*

4.171 [Director B] (Romans) explained that he thought that this statement related to a meeting held on 14 February 2014<sup>308</sup> between all four Parties<sup>309</sup> and that:<sup>310</sup>

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<sup>302</sup> URN0006; URN0010; URN0011; URN0012; URN0013; URN0014; URN0015; URN0016; URN0017; URN0018; URN0019; URN0020; URN0500; URN0501. [Director A] (Romans) stated that the objective was ‘collectively’ agreed between himself and [Director B] (Romans) at the start of the year. Once agreed, the monitoring of [Director B]’s (Romans) performance against the objective would start and the objective would not change for the rest of the year; URN0097, pages 109 to 110.

<sup>303</sup> [Director B] (Romans) scored a ‘C’ for this objective throughout 2013 and 2014; URN0010 and URN0011. [Director B] (Romans) explained a ‘C’ meant that he was ‘on track’ (‘B’ is above target and excelling is an ‘A’); URN0172, paragraph 97.

<sup>304</sup> URN0501. ‘LE’ is Lower Earley. Lower Earley is not included within the scope of the Infringement.

<sup>305</sup> Woodley is not included within the scope of the Infringement.

<sup>306</sup> URN0500.

<sup>307</sup> URN0014.

<sup>308</sup> This date was incorrectly noted in [Director B]’s (Romans) witness statement (URN0172, paragraph 98(iv)). The meeting referred to took place on 17 February 2014 rather than 14 February 2014, as evidenced in [Director B]’s interview transcript (URN0244) and documents (URN0023, URN0563 and URN0639), as set out at paragraph 4.75.

<sup>309</sup> [Director B] (Romans), [Director] (Michael Hardy) and [Director A] (Prospect) all had a meeting appointment on this date (17 February 2019); URN0023, URN0563 and URN0639.

<sup>310</sup> URN0172, paragraph 98(iv).



*‘the “wobble” is a reference to [Director A (Prospect)] and [Director (Richard Worth)] feeling that they were losing market share and that they potentially wanted to charge lower fees, so they could try and regain any market share they may have lost.’*

4.172 The notes of the appraisal meetings obtained for the rest of 2014 contain the same statement under Objective 5:<sup>311</sup>

*‘Evidence: I continue to communicate with all relevant parties to ensure that current arrangements are adhered to.’*

4.173 [Director B] (Romans) noted that this statement was confirmation that ‘[Director (Richard Worth)], [Director (Michael Hardy)], [Director A (Prospect)] and I continued to speak to each other or occasionally meet and that everything was as it was’. He also stated that over time the focus of this objective was on maintaining the Minimum Fee Arrangement rather than trying to establish new ones elsewhere.<sup>312</sup>

4.174 [Director B] (Romans) stated that Objective 5 was removed from his appraisal in 2015.<sup>313</sup>

### ***Conclusions on the implementation of the Minimum Fee Arrangement***

4.175 Based on the evidence set out in this section, the CMA has found that:

- (a) the Parties attended *ad hoc* meetings at which they discussed at least the Minimum Fee Arrangement, including the level of the agreed minimum commission fees and suspected breaches;
- (b) the Parties monitored and exchanged information on each other’s commission fees including by contacting each other directly about suspected breaches of the Minimum Fee Arrangement;
- (c) at least two of the Parties developed internal reporting and monitoring mechanisms to check compliance by other Parties with the Minimum Fee Arrangement;
- (d) for a period, the Parties agreed that penalty payments would be made if a Party breached the Minimum Fee Arrangement; and

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<sup>311</sup> URN0016; URN0017; URN0015; URN0019; URN0018. [Director A] (Romans) stated that he did not recall the discussions and that, whilst he knew that there were agreements, he does not know what elements of the agreements [Director B] (Romans) was referring to; URN0097, pages 116 to 117.

<sup>312</sup> URN0172, paragraph 98(v).

<sup>313</sup> URN0172, paragraph 100.

- (e) in 2013 and 2014, the maintenance of the Minimum Fee Arrangement was made part of [Director B]’s (Romans) performance objectives.

## **E. The breakdown of the Minimum Fee Arrangement**

4.176 Whilst the Parties did not always comply with the Minimum Fee Arrangement, there is no evidence to suggest that there was a break in the Minimum Fee Arrangement or that any of the Parties proactively sought to end their involvement at any time.

4.177 Concerns were raised over the Minimum Fee Arrangement by some of the Parties at various points. For example, an internal email between three Prospect directors dated 25 January 2013 regarding competing with Romans for lettings business, refers to the Minimum Fee Arrangement, with one director making the comment to [Director A] (Prospect):<sup>314</sup>

*‘this has to stop [Director A (Prospect)], there is no point having a sales fee agreement!!*

*‘[...] this agreement suits them [Romans] far better than us and we need to increase market share. We can’t do that with our arms tied behind our back!’*

4.178 [Director A] (Prospect) recalled that the directors of Prospect at this time had discussed whether Prospect should continue to be part of the Minimum Fee Arrangement. He noted there was a feeling that Romans was in an advantageous position as it was doing a lot better than the other Parties involved.<sup>315</sup>

4.179 As confirmed by [Director A] (Prospect), despite these concerns within Prospect, there were no changes to the Minimum Fee Arrangement during the Relevant Period as a result:<sup>316</sup>

*‘I also recall raising the issue in discussions with the other three agents at meetings and I do remember saying that my guys were not happy with what was going on in terms of feeling disadvantaged by it. I think the message from those discussions was that it was important that we all*

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<sup>314</sup> URN0530. These concerns were also noted in an internal email dated 14 May 2013 between branch managers (Romans), which included the statement ‘[I]ook at our year to date new instructions in WarfieldR you can see why Prospects want to come out the fee agreement :-)’ , URN0650.

<sup>315</sup> URN0171, paragraph 65.

<sup>316</sup> URN0171, paragraph 66.

*stuck to the minimum fee arrangement. I do not recall any change as a result of my raising these concerns.'*

4.180 A similar reference is made in the report on [Director B]'s (Romans) performance objectives for January and February 2014 regarding concerns expressed by Prospect and Richard Worth about maintaining the Minimum Fee Arrangement: '[m]et with [Director (Richard Worth)], [Director (Michael Hardy)] and [Director A (Prospect)] last month and managed to keep everything together despite [Director A (Prospect)] and [Director (Richard Worth)] having a wobble'.<sup>317</sup> As the statement notes, despite the 'wobble', the Minimum Fee Arrangement remained in place.

4.181 [Director B] (Romans) also remembers an incident in Wokingham, although not the exact circumstances, when another estate agent was able to charge lower commission fees than the four Parties and increase its market share.<sup>318</sup> He noted:<sup>319</sup>

*'This raised the question of whether we reduce the fee or forget about the arrangement. I remember discussing it between the four of us and we came to the conclusion that we should stick to the minimum fee arrangement and not worry about it too much.'*

4.182 [Director A] (Prospect) and [Director B] (Romans) both state, however, that by early 2015, the Minimum Fee Arrangement was breaking down.<sup>320</sup> The CMA also observes that in 2015 [Director B]'s (Romans) performance objective regarding the Minimum Fee Arrangement was removed.<sup>321</sup>

4.183 [Director A] (Prospect) noted there was never any specific termination date or any conversation to 'draw a line' under the Minimum Fee Arrangement. His recollection was that 'it was more of a dissipation over a period of time coming to an end, I estimate in early 2015'.<sup>322</sup>

4.184 He stated that early in 2015:<sup>323</sup>

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<sup>317</sup> URN0014.

<sup>318</sup> [Director] (Michael Hardy) also recalled a discussion at a meeting he attended at Richard Worth's office in Wokingham about the same estate agent seeking to gain market share. He recalled that Romans and he 'complained about that because it was annoying'; URN0092, pages 65 to 66.

<sup>319</sup> URN0172, paragraph 57.

<sup>320</sup> URN0172, paragraph 101; URN0171, paragraph 86.

<sup>321</sup> URN0172, paragraph 100.

<sup>322</sup> URN0171, paragraph 86.

<sup>323</sup> URN0171, paragraphs 87 to 88.

*'there were a lot of questions being raised suggesting that the minimum fee arrangement was not working properly and that there was less trust between us. [...]*

*'I remember a few times in early 2015, though not exactly when, [Director B (Romans)] had not being happy with what some of his staff were doing. I remember there was a meeting, although I am not sure where or when it was held, in which [Director B (Romans)] said something along the lines of "We have got to maintain this. Sorry my staff are doing this but we have got to maintain it".'*

4.185 [Director B] (Romans) also stated that by 2015 it was getting increasingly challenging to keep the Minimum Fee Arrangement going. Whilst, during the first half of the year, they were still trying to keep it going in Wokingham and the neighbouring areas, by the second half of the year, they had '*lost heart*' as the market had changed.<sup>324</sup>

4.186 He explained that the Minimum Fee Arrangement ended for a number of reasons. The first reason was the impending opening of an office in Wokingham in early 2016 by another large estate agent as it was anticipated that it would be offering an introductory 0% commission to customers, as that estate agent had done in other areas.<sup>325</sup>

4.187 [Director B] (Romans) also commented that there was more downward pressure on commission fees due to the increasing presence of online estate agents which charged a commission fee of less than £1,000 per property. [Director B] (Romans) also noted he became aware of the CMA's '*Three Counties case*'<sup>326</sup> and that this was the first time he had seen estate agents being fined for a '*cartel*'.<sup>327</sup>

4.188 As set out at paragraph 4.75, the latest meeting between the Parties that the CMA has evidence of was held on 30 January 2015.<sup>328</sup> In addition, the latest internal email exchanges referring to the Minimum Fee Arrangement, including potential non-compliance by some of the Parties, are dated between March

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<sup>324</sup> URN0172, paragraph 101.

<sup>325</sup> URN0172, paragraph 102.

<sup>326</sup> Restrictive arrangements preventing estate and lettings agents from advertising their fees in a local newspaper, Case CE/9827/13, 8 May 2015.

<sup>327</sup> URN0172, paragraphs 103 to 104.

<sup>328</sup> URN0021; URN0023; URN0643. See also [Director B]'s (Romans) comments on the diary entry for 30 January 2015 that the Minimum Fee Arrangement was discussed at this meeting; URN0172, paragraph 53(iii). [Director A] (Prospect) also recollects a meeting in early 2015 at which the Parties agreed to maintain the Minimum Fee Arrangement; URN0171, paragraph 88.

and May 2015.<sup>329</sup> The last one, an internal Prospect email, is dated 19 May 2015.<sup>330</sup>

### ***Conclusions on the breakdown of the Minimum Fee Arrangement***

4.189 Based on the evidence set out at paragraphs 4.176 to 4.188,<sup>331</sup> the CMA has found that:

- (a) there was no agreed specific end date to the Minimum Fee Arrangement, with it gradually breaking down in early 2015 with increasing instances of breaches by all the Parties; and
- (b) employees including branch managers were reporting instances of potential breaches of the Minimum Fee Arrangement and enquiring whether they should continue to abide by the agreed minimum level of commission fees in the first half of 2015. The last documented incidence of this is in May 2015.

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<sup>329</sup> See Prospect internal email dated 12 March 2015 (URN0333), Romans internal email dated 19 March 2015 (URN0661) and Prospect internal email dated 29 April 2015 (URN0342 and URN0343).

<sup>330</sup> URN0536. [Director A]'s (Prospect) belief is, however, that the Minimum Fee Arrangement had ended earlier in 2015; URN0171, paragraph 90.

<sup>331</sup> In addition, none of the Parties have contested these findings on the breakdown of the Minimum Fee Arrangement.

## 5. MARKET DEFINITION

### A. The relevant market

#### *Introduction*

- 5.1 When applying the Chapter I prohibition, the CMA is not obliged to define the relevant market, unless it is impossible without such a definition, to determine whether the agreement and/or concerted practice under investigation has as its object or effect the appreciable prevention, restriction or distortion of competition.<sup>332</sup>
- 5.2 In the present case, the CMA considers that it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement and/or concerted practice which had as its object or effect the appreciable prevention, restriction or distortion of competition.
- 5.3 The CMA has formed a view of the relevant market in order to calculate the Parties' turnover in the market affected by the Infringement (the '**Relevant Turnover**') for the purposes of establishing the level of the financial penalties that the CMA has decided to impose.<sup>333</sup>
- 5.4 For these purposes, it is not necessary to carry out a formal analysis. The relevant market may properly be assessed on a broad view of the particular trade affected by the infringement in question.<sup>334</sup> The market definition reached in this case should therefore be viewed in context, and in light of its purpose as outlined above, and is not determinative for the purposes of any future cases.
- 5.5 The CMA is not bound by market definitions adopted in previous cases, although earlier definitions can, on occasion, be informative when considering the appropriate market definition. Equally, although previous cases can

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<sup>332</sup> Judgment in *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, paragraph 230 and judgment in *SPO and Others v Commission*, T-29/92, EU:T:1995:34, paragraph 74. This principle has also more recently been applied by the CAT in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, in which the CAT stated at [176] that '[i]n Chapter I cases...determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement'.

<sup>333</sup> CMA's guidance as to the appropriate amount of a penalty (CMA73, 18 April 2018), paragraphs 2.1 and 2.3 to 2.11.

<sup>334</sup> *Argos and Littlewoods v OFT and JJB Sports v OFT* [2006] ECWA Civ 1318, paragraphs 169 to 173 and 189 and the CAT judgment on penalty, *Argos and Littlewoods v OFT* [2005] CAT 13, paragraph [178].

provide useful information, the relevant market must be identified according to the particular facts of the case in hand.

### ***Framework for assessing the relevant market***

- 5.6 In assessing the relevant market, the CMA considers what products and/or services are part of the product market (the '**relevant product market**') and the geographic scope of the relevant market (the '**relevant geographic market**') in this case.<sup>335</sup>

#### *The relevant product market*

- 5.7 As set out at paragraph 3.3, the CMA considers that the Infringement related to the provision of traditional residential estate agency services (that is, services for and related to the sale of property, by providers with a 'high street' presence). This has therefore been used as the focal service(s) for the market definition exercise.
- 5.8 Starting with this focal service of traditional residential estate agency services, the CMA has considered whether there are reasons to define the relevant market more broadly for the purpose of calculating any financial penalties. In particular the CMA has considered whether it would be appropriate to define the product market to cover non-traditional residential estate agency services (for example, online-only agents), property lettings services or commercial estate agency services.
- 5.9 For the purposes of calculating the financial penalties in this case and given the scope of the Infringement (which concerns the provision of traditional residential estate agency services), taking a conservative approach, the CMA considers that it would not be appropriate to define the relevant product market more broadly. The CMA has, therefore, concluded that the relevant product market is the provision of traditional residential estate agency services.

#### *The relevant geographic market*

- 5.10 As set out at paragraph 3.14, the CMA has found that the Infringement related to the provision of traditional residential estate agency services in five

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<sup>335</sup> See *Market Definition: understanding Competition Law* (OFT403, December 2004, adopted by the CMA Board), paragraph 3.2 and paragraphs 2.9 to 2.10.

localities in the Berkshire area: Wokingham, Winnersh, Crowthorne, Bracknell and Warfield.

- 5.11 As set out at paragraph 3.5, competition in the estate agency market takes place at a local level. Previous research suggests a five-mile radius around an estate agent's office is a reasonable area within which estate agents offer their services.<sup>336</sup> This is also reflected in the coverage areas of the Parties' offices located within the Relevant Areas.<sup>337</sup> This is consistent with the approach adopted in *Three Counties*, where the CMA defined the geographic market as the area within an approximately five-mile radius of the town of Fleet, which included seven neighbouring towns in Hampshire, Surrey and Berkshire.<sup>338</sup>
- 5.12 Adopting this approach, in principle, the assessment would begin by treating the five-mile radius around each Party's office as a focal geographic area. In practice, for these purposes, the CMA considers that the Parties' offices in each of the five localities are located sufficiently close to each other such that these five localities can be treated as the focal geographic areas. The CMA considers that, even if this were not the case and the assessment began with a higher number of localities, it would not lead to a substantially different geographic market definition in practice.
- 5.13 Whilst not all of the five localities are within five miles of each other, as set out at paragraphs 3.15 to 3.16, the Parties' respective offices in these areas have overlapping areas of coverage. For example, Winnersh is only two miles from Wokingham, Warfield is only three miles from Bracknell and Crowthorne is only four miles from both Bracknell and Wokingham. The largest towns of Wokingham and Bracknell are themselves less than five miles apart.<sup>339</sup>
- 5.14 With the overlaps in their areas of coverage and the fact that defining these areas as a number of separate geographic markets or as a single geographic market does not affect the relevant turnover from traditional residential property sales used for the purpose of calculating any financial penalty, the CMA has therefore defined the relevant geographic market as these five

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<sup>336</sup> *Competition in markets with commission rates, Five UK case studies*, (OFT889a, January 2007), paragraph A.28. *Home Buying and Selling*, Survey of Estate Agents (OFT1140b, February 2010) and *Home buying and selling* (OFT1186, February 2010), paragraph 4.11. *Estate agency market in England and Wales*, (OFT693, March 2004), paragraph 1.9, and Table 3.9, page 31.

<sup>337</sup> URN0717, URN0718, URN0750, URN0755 and URN0660.

<sup>338</sup> The geographic market was defined as the area: '*within an approximately five mile radius from Fleet ... which includes the towns of Aldershot, Camberley, Farnborough, Fleet, Frimley, Sandhurst and Yateley, located in the three counties of Hampshire, Surrey and Berkshire ...*'; Restrictive arrangements preventing estate and lettings agents from advertising their fees in a local newspaper, Case CE/9827/13, 8 May 2015, paragraphs 1.15, C.26 to C.28.

<sup>339</sup> Google maps: Wokingham to Bracknell.



localities without concluding on the exact delineation of the market or indeed of any narrower markets.

- 5.15 Given our understanding that estate agents' offices offer their services over an approximate five-mile radius, the geographic market could be defined as being wider than these five localities, as additional areas would fall within the five-mile radius. However, on a conservative basis, for the purposes of calculating the financial penalties in this case, the CMA has similarly not defined the relevant market as being wider than these five localities.
- 5.16 In addition, as two of the Parties have other offices in close proximity to two of the Relevant Areas,<sup>340</sup> the CMA has also considered whether it would be appropriate for the purposes of calculating the financial penalties in this case to take into account turnover of the Parties from traditional residential property sales services in the Relevant Areas which was generated by the branches of the Parties located elsewhere.
- 5.17 As set out above, while these offices may have generated turnover in the Relevant Areas and so may be considered to be within the relevant geographic market(s), the CMA has decided, taking a conservative approach, that it would not be appropriate to take into account turnover from traditional residential property sales services in the Relevant Areas which was generated by the Parties' offices located elsewhere. The CMA considers that the primary focus of competition is likely to be between estate agents whose offices are located in, or which primarily serve, the Relevant Areas.
- 5.18 Given all of the above, for present purposes and taking a conservative approach, for the purposes of calculating the financial penalties in this case and taking into account the scope of the Infringement, the CMA has found that the relevant geographic market in this case is limited to the provision of traditional residential estate agency services from the Parties' offices located in the Relevant Areas.

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<sup>340</sup> Prospect has an office in Sandhurst which is less than two miles from Crowthorne and an office in Reading which is less than six miles from Winnersh; ([www.prospect.co.uk/contact](http://www.prospect.co.uk/contact); Google maps: Crowthorne to Sandhurst; Google maps: Winnersh to Reading). Romans also has offices in Sandhurst and Reading as well as offices in Lower Earley and Woodley, both of which are less than three miles from Winnersh; ([www.romans.co.uk/contact](http://www.romans.co.uk/contact); Google maps: Winnersh to Lower Earley; Google maps: Winnersh to Woodley).

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

- 5.19 For the reasons set out above, the CMA has found that the relevant market(s) in this case is the provision of traditional residential estate agency services in the Relevant Areas.
- 5.20 The CMA, therefore, has treated the Parties' turnover derived from traditional residential estate agency services generated by their respective offices that are located within the Relevant Areas as Relevant Turnover for the purposes of the penalty calculation.

## 6. LEGAL ASSESSMENT

### A. Introduction

- 6.1 Unless an exclusion applies or the agreements or concerted practices in question are exempt, section 2 of the Act prohibits agreements or concerted practices between undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK (the 'Chapter I prohibition'). References to the UK are to the whole or part of the UK.<sup>341</sup>
- 6.2 Section 60 of the Act provides, broadly, that the Chapter I prohibition is to be interpreted consistently with Article 101 of the TFEU.
- 6.3 For the reasons set out below, the CMA has found that each of the Parties infringed the Chapter I prohibition by participating in a single and continuous infringement through an agreement and/or concerted practice to fix and maintain a minimum level of commission fees to be charged for the provision of traditional residential estate agency services in the Relevant Areas during the Relevant Period, including through the exchange of confidential pricing information and taking steps to monitor or reinforce compliance.

### B. Undertakings

- 6.4 For the purposes of the Chapter I prohibition, the term 'undertaking' covers every entity engaged in economic activity, regardless of its legal status and the way in which it is financed.<sup>342</sup> The term therefore includes, among others, companies, partnerships<sup>343</sup> and individuals operating as sole traders.<sup>344</sup>
- 6.5 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>345</sup>
- 6.6 The term 'undertaking' also designates an economic unit, even if in law that unit consists of several natural or legal persons.<sup>346</sup>

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<sup>341</sup> Section 2(1) and (7) of the Act.

<sup>342</sup> Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, EU:C:1991:161, paragraph 21.

<sup>343</sup> Commission decision *Breeders' rights: Roses*, OJ [1985] L369/9.

<sup>344</sup> Case 210/81 *Demo-Studio Schmidt v Commission* [1983] EU:C:1983:277.

<sup>345</sup> Case C-118/85 *Commission v Italian Republic*, EU:C:1987:283, paragraph 7.

<sup>346</sup> Case C-97/08 P *Akzo Nobel NV v Commission* EU:C:2009:536, paragraph 55.

- 6.7 The CMA has found that, throughout the Relevant Period, each of Michael Hardy, Prospect, Richard Worth and Romans was engaged in an economic activity, namely the provision of traditional residential estate agency services in the UK.
- 6.8 In view of this, the CMA has concluded that each of the Parties was engaged in economic activity and constitutes an undertaking for the purposes of the Chapter I prohibition.

## C. Agreements and/or concerted practices between undertakings

### *Key legal principles*

- 6.9 The Chapter I prohibition applies to ‘*agreements*’, ‘*concerted practices*’ and ‘*decisions by associations of undertakings*’.<sup>347</sup>

### *Agreements*

- 6.10 The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements and ‘gentlemen’s agreements’.<sup>348</sup> An agreement may be expressed or implied, and there is no requirement for it to be formal or legally binding, to be made in writing, or for it to contain any enforcement mechanisms.<sup>349</sup> Tacit acquiescence may also be sufficient to give rise to an agreement for the purpose of the Chapter I prohibition.<sup>350</sup> An agreement may also consist of either an isolated act, or a series of acts, or a course of conduct.<sup>351</sup>
- 6.11 The key question in establishing an agreement 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>352</sup>

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<sup>347</sup> Section 2(1) of the Act.

<sup>348</sup> Case C-41/69 *ACF Chemiefarma NV v Commission*, EU:C:1970:71, in particular, paragraphs 106-114.

<sup>349</sup> See, for example, the following Commission decisions: *Soda-ash - Solvay*, CFK OJ [1991] L 152/16, at paragraph 11; *Greek Ferries* OJ [1999] L109/24, at paragraph 141; and *Raw Tobacco Spain*, 20 October 2004, paragraph 265. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 paragraph [658].

<sup>350</sup> See for example Case T-41/96 *Bayer v Commission*, EU:T:2000:242 at paragraph 102; OFT decision No. CA98/08/2004 of 8 November 2004, Case CE/2464-03 (*double glazing*).

<sup>351</sup> Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraph 81.

<sup>352</sup> Cases T-44/02 etc, *Dresdner Bank v Commission*, EU:T:2006:271, paragraph 55, citing Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96-97).

- 6.12 The General Court has held that: '*it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way*'.<sup>353</sup>
- 6.13 Although it is sufficient to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the CMA is not required to establish a joint intention to pursue an anti-competitive aim.<sup>354</sup>
- 6.14 The fact that a party may, for example (i) have played only a limited part in setting up an agreement,<sup>355</sup> (ii) not have been fully committed to its implementation, (iii) not have put the initiatives into effect,<sup>356</sup> (iv) have participated only under pressure from other parties or against its will, or (v) have cheated on the agreement, does not mean that it is not party to the agreement.<sup>357</sup> Furthermore, an undertaking which, despite colluding 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>358</sup> Such an undertaking may win a customer's business because it knows the price fixed at a meeting, for example.<sup>359</sup>
- 6.15 Additionally, agreements of an anti-competitive nature can still be reached where an undertaking may have attended a meeting out of 'courtesy' but did not then publicly distance itself from what was discussed.<sup>360</sup>
- 6.16 As regards 'public distancing', the burden of proof lies on the undertaking concerned to put forward evidence demonstrating that it had indicated to the

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<sup>353</sup> Case T-7/89 *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, paragraph 256.

<sup>354</sup> Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, EU:T:2006:265, paragraph 77 (upheld on appeal in Joined cases C-501/06P etc *GlaxoSmithKline Unlimited v Commission*, EU:C:2009:610).

<sup>355</sup> The principles set out in this paragraph also apply to concerted practices.

<sup>356</sup> See e.g. Case T-141/89 *Trefileurope v Commission* [1995] ECR II-791, paragraphs 60 and 72; Case T-25/95 etc *Cimenteries CBR v Commission* [200] ECR II-491, paragraph 1389; Case C-49/92 P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, paragraphs 70 to 80.

<sup>357</sup> *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.8. See also e.g. Case T-25/95 *Cimenteries CBR and Others v Commission*, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability by the CJ in Joined cases C-204/00 P etc. *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6, although the fine was reduced); and Case T-566/08 *Total Raffinage Marketing v Commission*, EU:T:2013:423, paragraph 254. See also Case C-246/86 *BELASCO*, paragraphs 15 and 16; and Case T-141/89 *Trefileurope v Commission* [1995] ECR II-791, paragraphs 58, 71 and 178.

<sup>358</sup> Case T-308/94 *Cascades v Commission*, EU:T:1998:90, paragraph 230.

<sup>359</sup> Case T-62/02 *Union Pigments v Commission*, EU:T:2005:430, paragraph 41.

<sup>360</sup> Case T-83/08 *Denka Chemicals v Commission* EU:T:2012:48, paragraphs 62-63; Case T-377/06 *Comap v Commission* EU:T:2011:108, paragraph 76. Upheld in case C-290/11 P *Comap v Commission*, not published but referenced in Case C-68/12 *Protimonopolný* EU:C:2013:71, paragraph 27. Remaining silent at a meeting where parties collude on pricing policy does not equate to firm and unambiguous disapproval and thus public distancing: Case T-303/02 *Westfalen Gassen Nederland v Commission* [2006] ECR II-4567, paragraph 76 *et seq.*

other participants that it was participating in the meetings in a ‘spirit’ that was different to theirs.<sup>361</sup> The Court of Justice has held that, ‘*if an undertaking’s participation in such a meeting is not to be regarded as tacit approval of an unlawful initiative or as subscribing to what is decided there, the undertaking must publicly distance itself from that initiative in such a way that the other participants will think that it is putting an end to its participation, or it must report the initiative to the administrative authorities*’.<sup>362</sup>

- 6.17 As regards the duration of participation in the Infringement, the CMA is entitled to rely on: the pieces of evidence that an undertaking actively participated in the agreement; lack of evidence that an undertaking publicly distanced itself from the agreement; and the perception of the other participants in the cartel.<sup>363</sup>

### *Concerted practices*

- 6.18 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>364</sup>
- 6.19 The Court of Appeal has noted that ‘*concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for [the] purpose*’ of determining whether there is consensus between the undertakings said to be party to a concerted practice.<sup>365</sup>
- 6.20 The following key points arise from the case law on the concept of a concerted practice:
- (a) The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently

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<sup>361</sup> Case C-373/14 P *Toshiba Corporation v Commission* EU:C:2015:427, paragraph 61 and the case law cited.

<sup>362</sup> Case C-68/12 *Protimonopolný v Slovenská sporiteľňa a.s.*, EU:C:2013:71, paragraph 27 and case law cited. See also Case T-377/06 *Comap v Commission* [2011] 4 CMLR 1576, paragraph 76 where the General Court held that for communication to constitute public distancing, it must be ‘*expressed firmly and unambiguously, so that other participants in the cartel fully understand the intention of the undertaking concerned*’ and Case C-510/06P *Archer Daniels Midland Co v Commission* EU:C:2009:166, paragraph 120, where the Court of Justice found that leaving a meeting cannot in itself be regarded as public distancing.

<sup>363</sup> Case C-634/13 P *Total Marketing Services v European Commission*, EU:C:2015:614, paragraph 31.

<sup>364</sup> Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 23; see also Case C-49/92P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 131 and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, paragraph [206(ii)].

<sup>365</sup> *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318, paragraph 22.

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>366</sup>

- (b) 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>367</sup> The Court of Justice has added that '[b]y 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>368</sup>
- (c) The coordination (which is prohibited by the requirement of independence) comprises any direct or indirect contact between undertakings which has the object or effect of influencing the conduct on the market of an actual or potential competitor<sup>369</sup> thereby creating conditions of competition which do not correspond to the normal conditions of the market in question.<sup>370</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*'.<sup>371</sup> However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting

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<sup>366</sup> Cases 40/73 etc. *Suiker Unie v Commission*, EU:C:1975:174, paragraph 173. The Court of Justice added that the concept of a concerted practice does not require the working out of an actual plan. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, paragraph [206(iv)]. See also Case C-49/92 P *Commission v Anic Participazioni SpA*, EU:C:1999:356, paragraph 116; Case C-199/92 P *Hüls AG v Commission* EU:C:1999:358, paragraph 159 and Case C-286/13 P *Dole v Commission* EU:C:2015:184, paragraph 119.

<sup>367</sup> Cases 48/69 etc. *ICI Ltd v Commission*, EU:C:1972:70, paragraph 64. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, paragraph [151] to [153].

<sup>368</sup> Cases 48/69 etc. *ICI Ltd v Commission*, EU:C:1972:70, paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at [151].

<sup>369</sup> Cases 40/73 etc. *Suiker Unie v Commission*, EU:C:1975:174, paragraph 174. See also Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 33; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [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.

<sup>370</sup> Case 172/80, *Gerhard Züchner v Bayerische Vereinsbank*, EU:C:1981:178, paragraph 14; Case C-49/92P *Commission v Anic Participazioni*, EU:C:1999:356, paragraph 117; Case C-8/08 *T-Mobile Netherlands and Others v NMa*, EU:C:2009:343, paragraph 33 and Case C-286/13 P *Dole v Commission* EU:C:2015:184, paragraph 120.

<sup>371</sup> Case C-49/92P *Commission v Anic Participazioni* EU:C:1999:356, paragraph 118. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, paragraph [206(ix)].

competition.<sup>372</sup> Further, there is a presumption (which may nevertheless be rebutted by evidence from the participants) that where the parties taking part in collusive arrangements remain active on the market, they will take account of the information exchanged with their competitors when determining their conduct in the market, particularly when they concert together on a regular basis over a long period.<sup>373</sup>

### *Agreement and/or concerted practice*

- 6.21 The Court of Justice has held that *‘whilst the concepts of an agreement and of a concerted practice have partially different elements, they are not mutually incompatible’*. It is not therefore necessary, in order to find an infringement, to characterise conduct as either exclusively an agreement or a concerted practice.<sup>374</sup> Nothing turns on the precise form taken by each of the elements comprising the overall agreement and/or concerted practice. As explained by the Court of Justice, *‘it is settled case-law that, although Article [101 TFEU] distinguishes between “concerted practice”, “agreements between undertakings” and “decisions by associations of undertakings”, the aim is to have the prohibition of that article catch different forms of coordination between undertakings of their conduct on the market [...] and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct.’*<sup>375</sup>
- 6.22 It is also established that a series of agreements, concerted practices or decisions by associations of undertakings can be characterised as constituting a single and continuous infringement where they are interlinked in terms of pursuing a common objective (see further paragraphs 6.30 to 6.35).

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<sup>372</sup> Case C-49/92P *Commission v Anic Partecipazioni* EU:C:1999:356, paragraph 124. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, paragraph [206(xi)]. See also Case C-286/13 P *Dole v Commission* EU:C:2015:184, paragraphs 125 and 127.

<sup>373</sup> *Balmoral Tanks Limited and other v Competition and Markets Authority* [2017] CAT 23, paragraph 40.

<sup>374</sup> Case C-49/92 P *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraphs 131 and 132; Case T-1/89 *Rhône-Poulenc v Commission*, EU:T:1991:56, paragraph 127.

<sup>375</sup> Judgment of 11 September 2014, Case C-382/12 P *MasterCard and Others v Commission*, EU:C:2014:2201, paragraph 63 and the case law cited. See Judgment of 20 March 2002, Case T-9/99 *HFB and Others v Commission*, EU:T:2002:70, paragraphs 186 to 188; Judgment of 23 November 2006, Case C-238/05 *ASNEF-EQUIFAX*, EU:C:2006:734, paragraph 32. See also Judgment of 20 April 1999, joined cases T-305/94, T-306/94, etc, *LVM v Commission*, 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.’*



### ***Application in this case***

- 6.23 The CMA has found that the evidence, as set out in Section 4 (Conduct of the Parties), demonstrates that there was a concurrence of wills and/or coordination of conduct between the Parties amounting to an agreement and/or concerted practice to fix and maintain a minimum level of commission fees to be charged for the provision of traditional residential estate agency services in the Relevant Areas during the Relevant Period.
- 6.24 In particular, the evidence shows this concurrence of wills and/or coordination of conduct was achieved during the Relevant Period through a series of actions with a common objective designed to fix and maintain minimum commission fee levels for traditional residential estate agency services in the Relevant Areas, including through the exchange of confidential pricing information and taking steps to monitor or reinforce compliance. More specifically:
- (a) the First Wokingham meeting, which most likely took place in July 2008, at which the Parties agreed to fix and maintain commission fee levels they would charge for traditional residential estate agency services in the Wokingham area and exchanged confidential pricing information, and the extension of this arrangement to the remainder of the Relevant Areas over a short period of time, as demonstrated by the evidence set out at paragraphs 4.35 to 4.60;
  - (b) regular *ad hoc* meetings until early 2015 attended by the Parties at which they continued to fix and maintain minimum commission fee levels in the Relevant Areas including through monitoring and reporting upon compliance with the agreed minimum commission fee levels in the Relevant Areas, as demonstrated by the evidence set out at paragraphs 4.72 to 4.94;
  - (c) monitoring by the Parties of each other's commission fee levels and compliance with the Minimum Fee Arrangement in the Relevant Areas throughout the Relevant Period including - at least at Romans and Prospect - by branch and area managers who would report instances of non-compliance by other Parties internally. Instances of breaches of the Minimum Fee Arrangement in relation to specific customer contracts in the Relevant Areas were raised between the Parties by their senior representatives, either in the periodic meetings or bilaterally. This monitoring and reporting is demonstrated by the evidence set out at paragraphs 4.115 to 4.124; and

- (d) the existence of a penalty payment mechanism agreed for non-compliance, as established by the evidence set out at paragraphs 4.147 to 4.163.

- 6.25 The evidence regarding the inclusion as part of [Director B]'s (Romans) performance objectives to ensure the continued maintenance of the Minimum Fee Arrangement between 2013 and 2014, as described at paragraphs 4.165 to 4.174, provides further evidence of the Minimum Fee Arrangement between the Parties. The contemporaneous documents refer to '*all existing situations remain in place*' and to meetings and communications with the other Parties to discuss the arrangement.<sup>376</sup>
- 6.26 The evidence of instances of breaches by the Parties, such as those referred to at paragraphs 4.125 to 4.142, by offering lower commission levels than those agreed under the Minimum Fee Arrangement, does not mean that the Parties were not party to the arrangement for the purposes of the Chapter I prohibition. As explained at paragraph 6.14, the fact that a party may have cheated on the agreement and/or concerted practice does not mean that it was not party to the agreement and/or concerted practice.
- 6.27 In addition, the CMA has not found any evidence to suggest that any of the Parties sought to distance themselves publicly from the Minimum Fee Arrangement. While concerns were raised by some of the Parties at various points, as described at paragraphs 4.177 to 4.181, the evidence obtained by the CMA shows that the Parties participated in the Minimum Fee Arrangement throughout the Relevant Period.
- 6.28 In view of the above and the evidence set out at set out in Section 4 (Conduct of the Parties), the CMA has found that there was an agreement and/or concerted practice between the Parties during the Relevant Period to fix and maintain a minimum level of commission fees to be charged for the provision of traditional residential estate agency services in the Relevant Areas, including through the exchange of confidential pricing information and taking steps to monitor or reinforce compliance.
- 6.29 In the remainder of this Decision, a reference to agreement in relation to the Infringement includes, in addition or in the alternative, a concerted practice.

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<sup>376</sup> See paragraphs 4.168 to 4.173.

## D Single and continuous infringement

### *Key legal principles*

- 6.30 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>377</sup> 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>378</sup>
- 6.31 Thus, an infringement need not be based on a single, isolated act, but may operate through a pattern of conduct involving a series of agreements, concerted practices and decisions entered into over a period of time. Those arrangements may also vary and adapt to new circumstances, sub-agreements or inner circles of closer cooperation may be established and new implementing mechanisms developed. Some participants may drop out, others may join in, and not every undertaking may necessarily be involved in every aspect of the infringing arrangement.<sup>379</sup>
- 6.32 Where it is established that a set of individual agreements, concerted practices or decisions by associations of undertakings are interlinked in terms of pursuing a single anti-competitive aim, they can be characterised as constituting a single and continuous infringement.<sup>380</sup>
- 6.33 The Court of Justice has held that this approach does not contravene the principle of personal responsibility for infringements, nor does it ignore the

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<sup>377</sup> Judgment in *Rhône-Poulenc v Commission*, EU:T:1991:56, paragraph 126.

<sup>378</sup> Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraphs 111 to 114. See also Commission Decision of 10 December 2003, *Organic peroxides*, Case COMP/E-2/37.857, paragraphs 7 and 8.

<sup>379</sup> *European Union Law of Competition*, Bellamy & Child, Seventh Edition, at 2.071. See also Judgment in *LR AF 1998 v Commission*, T-23/99, ECR, EU:T:2002:75, paragraphs 106-109; Judgment in *Belasco v Commission*, EU:C:1989:301, paragraphs 10 to 16; Commission Decision of 21 October 1998, *Pre-Insulated Pipe Cartel*, case No IV/35.691/E-4, paragraphs 129 to 134; Judgment in *AC-Treuhand v Commission*, T-99/04, ECR, EU:T:2008:256, paragraph 132.

<sup>380</sup> Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 113. See also Judgment in *BASF and UCB v Commission*, joined cases T-101&111/05, ECR, EU:T:2007:380, paragraph 159. See also Judgment in *Team Relocations and Others v Commission*, joined cases T-204/08 and T-212/08, ECR, EU:T:2011:286; Judgment in *Buchmann v Commission*, T-295/94, ECR, EU:T:1998:88; Judgment in *Cimenteries CBR v Commission*, EU:T:2000:77.

individual analysis of evidence or breach the rights of defence of the undertakings involved.<sup>381</sup>

- 6.34 Various agreements or concerted practices can be considered to form part of a single and continuous infringement where:
- (a) the agreements or concerted practices pursued a common objective or objectives;
  - (b) through its own conduct, each undertaking intended to contribute to the common objective(s) pursued by all the participants; and
  - (c) each undertaking was aware of the offending conduct (planned or put into effect) of the other participants in pursuit of the same objective(s) or each undertaking could reasonably have foreseen it and was prepared to take the risk that it would occur.<sup>382</sup>
- 6.35 Each participating undertaking may bear personal responsibility not only for its own conduct, but also for the operation of the overall anti-competitive arrangement during the period in which it participated in it.<sup>383</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>384</sup>

### ***Application in this case***

- 6.36 The CMA has found that, during the Relevant Period, there was a single overall arrangement consisting of one or more agreements and/or concerted practices which formed part of a single and continuous infringement for the purposes of the Chapter I prohibition.
- 6.37 The conduct of the Parties in entering into and maintaining the Minimum Fee Arrangement pursued a common anti-competitive objective in each of the Relevant Areas. This common aim was to fix and maintain minimum commission fee levels charged in the Relevant Areas for the provision of traditional residential estate agency services.

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<sup>381</sup> Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraphs 83 to 85 and 203.

<sup>382</sup> Judgment in *Team Relocations and Others v Commission*, EU:T:2011:286, paragraphs 32 to 37; Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 87.

<sup>383</sup> Judgment in *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraph 83.

<sup>384</sup> Judgment in *AC-Treuhand v Commission*, EU:T:2008:256, paragraph 132.

- 6.38 The Parties' shared aim and their method of achieving it was the same in each of the Relevant Areas. The Parties agreed minimum commission fee levels which they would charge for traditional residential estate agency services in each of the Relevant Areas, had a shared understanding that they would adhere to these minimum levels, actively participated in and/or were aware of monitoring of each other's compliance with the agreed minimum fee levels and, during part of the Relevant Period, agreed a penalty mechanism for non-compliance.<sup>385</sup>
- 6.39 The CMA has found that each of the Parties intended to contribute to the common objective pursued by all four Parties, as set out at paragraphs 6.23 to 6.27. In particular, the evidence shows that:
- (a) each of the Parties communicated with each other a shared desire to fix minimum commission fee levels in the Relevant Areas and agreed a common objective to achieve this by agreeing minimum commission fee levels for each of the Relevant Areas;
  - (b) each Party agreed to comply with the minimum commission fee levels set for each of the Relevant Areas if they sold residential property in those areas; and
  - (c) senior representatives from each of the Parties regularly attended *ad hoc* meetings throughout the Relevant Period at which they each contributed to, or at the very least were present at, discussions regarding the implementation, maintenance and enforcement (including for at least some of the Relevant Period through a penalty system) of the Minimum Fee Arrangement.
- 6.40 The CMA also has found that all the Parties were involved in or at the very least were aware of all elements of the anti-competitive conduct planned or put into effect in pursuit of the common objective towards which they each intended to contribute. The vast majority of the contacts described in Section 4 (Conduct of the Parties) involved the same senior representatives from each of the Parties. Furthermore:
- (a) as stated, the Parties all agreed to the Minimum Fee Arrangement originally covering at least the Wokingham area, and shortly thereafter extended to the neighbouring areas of Winnersh, Crowthorne, Bracknell and Warfield;

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<sup>385</sup> See Section 4 (Conduct of the Parties) for the evidence in relation to these findings.

- (b) the Parties were involved in regular ongoing *ad hoc* meetings and monitoring efforts in relation to this arrangement and agreed a penalty system for non-compliance. Both [Director B] (Romans) and [Director A] (Prospect) stated that the four individuals ([Director] (Michael Hardy), [Director] (Richard Worth), [Director B] (Romans) and [Director A] (Prospect) met around two to four times a year on an *ad hoc* basis;<sup>386</sup>
- (c) whilst the Parties did not all have offices in each of these neighbouring areas, the witness evidence of both [Director B] (Romans) and [Director A] (Prospect) confirms that meetings relating to the Minimum Fee Arrangement generally only went ahead with all four attendees, and all four Parties agreed to minimum commission fees in all of the Relevant Areas. For example, [Director B] (Romans) explained that *'[t]here were areas in which some of the agents involved very rarely sold houses, such as Michael Hardy in Bracknell. Where this was the case, those agents were nevertheless party to the discussions. They were present in the room when the conversations about those areas took place, but they were not necessarily involved in the discussion'*;<sup>387</sup> and
- (d) whilst some bilateral contacts relating to compliance did occur,<sup>388</sup> this does not alter the fact that all four Parties were aware of and party to the full scope of the Minimum Fee Arrangement.

6.41 Notwithstanding that the Parties did not always adhere to the Minimum Fee Arrangement, the CMA has not seen evidence that any of the Parties sought to distance themselves publicly from any aspect of the Infringement, as discussed at paragraph 6.27.

6.42 Finally, the CMA has found that the evidence set out in Section 4 (Conduct of the Parties) shows the Minimum Fee Arrangement spanned at least the entirety of the Relevant Period, was continuous throughout the Relevant Period and that there were regular anti-competitive contacts between the Parties throughout this period. The Parties met regularly on an *ad hoc* basis (around two to four times a year throughout the Relevant Period), as well as having bilateral contacts. The CMA considers that any gap between meetings is not indicative of any break in the Minimum Fee Arrangement, as the

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<sup>386</sup> [Director B] (Romans) stated '[a]ll four of us met probably no more than three or four times a year'; URN0172, paragraph 45; [Director A] (Prospect) stated '*I attended further meetings between 2008 and 2015 with the same three people: [Director B (Romans)] , [Director (Michael Hardy)] and [Director (Richard Worth)]. These were arranged on an ad hoc basis, around two to four times a year, generally by telephone'*'; URN0171, paragraph 57.

<sup>387</sup> URN0172, paragraph 35. See paragraphs 4.41 to 4.43.

<sup>388</sup> See paragraphs 4.99 to 4.113.

meetings were usually held when the Minimum Fee Arrangement was not being adhered to by one or more Parties.<sup>389</sup>

- 6.43 The CMA therefore has found that it would be artificial to split up the different elements of the collusive conduct in circumstances where they clearly formed part of an overall plan to fix and maintain commission fee levels for traditional residential estate agency services across the Relevant Areas.

## **E. Object of preventing, restricting or distorting competition**

### ***Key legal principles***

- 6.44 Chapter I of the Act prohibits agreements and/or concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. The term ‘object’ in the Chapter I prohibition refers to the ‘aim’, ‘purpose’, or ‘objective’, of the coordination between undertakings in question.<sup>390</sup>
- 6.45 Where an agreement and/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 had, or would have, any actual anti-competitive effects in order to establish an infringement.<sup>391</sup>
- 6.46 The Court of Justice of the European Union has held that object infringements are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.<sup>392</sup> The Court of Justice 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>393</sup>

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<sup>389</sup> See paragraphs 4.82 to 4.83.

<sup>390</sup> See, for example, respectively: Case 56/64 *Consten & Grundig v Commission*, EU:C:1966:41, p. 343 (‘...Since the agreement thus aims at isolating the French market... it is therefore such as to distort competition...’); Case 96/82 *IAZ and Others v Commission*, EU:C:1983:310, paragraph 25; C-209/07 *Competition Authority v Beef Industry Development Society*, EU:C:2008:643, paragraphs 32-33.

<sup>391</sup> See, for example, Case C-8/08 *T-Mobile Netherlands BV v NMa*, EU:C:2009:343, paragraphs 28-30 and the case law cited therein, and *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, paragraph [269].

<sup>392</sup> Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50; affirmed in Case C-373/14 P *Toshiba v Commission* EU:C:2016:26, paragraph 26.

<sup>393</sup> Case C-67/13 P *Groupeement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraphs 49 and 57. See also Case C-373/14 P *Toshiba v Commission* EU:C:2016:26, paragraph 26.

- 6.47 The object of an agreement or concerted practice 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 or concerted practice.<sup>394</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>395</sup> Where appropriate, the way in which the coordination (or collusive behaviour) is implemented may be taken into account.<sup>396</sup> The object of an agreement and/or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it.<sup>397</sup>
- 6.48 Anti-competitive subjective intentions on the part of the parties can, however, be taken into account in the assessment, but they are not a necessary factor for a finding that the object of the conduct was anti-competitive.<sup>398</sup>
- 6.49 Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition, even if the agreement or concerted practice had other objectives.<sup>399</sup> The fact that an agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.<sup>400</sup>

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<sup>394</sup> Judgment in Case C-32/11 *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 36 and Judgment in Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53. See also Judgment in Case C-501/06 P *GlaxoSmithKline Services Unlimited v Commission*, EU:C:2009:610, paragraph 58; Judgment of 20 November 2008 in Case C-209/07 *Competition Authority v Beef Industry Development Society and Barry Brothers*, EU:C:2008:643, paragraphs 16 and 21; Judgment of 4 October 2011 in Case C-403/08 *Football Association Premier League and Others*, EU:C:2011:631, paragraph 136.

<sup>395</sup> Judgment in Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 53 and Judgment in Case C-32/11 *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 36.

<sup>396</sup> *Cityhook Limited v OFT* [2007] CAT 18, at [268] which noted the provisions of paragraph 22 of the Commission Notice: Guidelines on the application of Article 81(3) of the Treaty (now Article 101(3) TFEU), OJ C 101/97, 27 April 2004 ('**Article 101(3) Guidelines**'). Paragraph 22 provides that '*the way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect.*'

<sup>397</sup> Judgment of 28 March 1984 in joined cases 29/83 and 30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* EU:C:1984:130, paragraphs 25 and 26.

<sup>398</sup> Judgment in Case C-32/11 *Allianz Hungária Biztosító and Others*, EU:C:2013:160, paragraph 37 and Judgment in Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 54.

<sup>399</sup> For example, Judgment of 8 November 1983 in joined cases C-96-102, 104, 105, 108 and 110/82, *NV IAZ International Belgium and others v Commission of the European Communities*, EU:C:1983:310, paragraphs 22 to 25.

<sup>400</sup> Judgment in Case C-209/07 *Competition Authority v Beef Industry Development Society and Barry Brothers*, EU:C:2008:643, paragraph 21. See also Judgment in Case C-67/13 P *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 70.



6.50 There is no need to take account of the actual effects of an agreement or concerted practice once it appears that it has as its object the prevention, restriction or distortion of competition.<sup>401</sup>

*Price fixing (including minimum prices) and the sharing of competitively sensitive information*

6.51 The Chapter I prohibition specifically prohibits agreements or concerted practices which '*directly or indirectly fix purchase or selling prices or any other trading conditions*'.<sup>402</sup> The CMA considers that agreements and concerted practices which fix prices have as their object the prevention, restriction or distortion of competition.<sup>403</sup>

6.52 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, and an agreement may restrict price competition even if it does not eliminate it.<sup>404</sup>

6.53 Price fixing can manifest itself in a number of ways including (but not limited to): agreeing a sliding scale for commission to be charged to buyers by the vendors,<sup>405</sup> setting target prices,<sup>406</sup> exchanging price information,<sup>407</sup> pre-pricing communications<sup>408</sup> and pursuing a collaborative strategy of higher

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<sup>401</sup> Judgment of 13 July 1966, Case C-58/64 (joined Cases C-56/64, C-58/64) *Consten and Grundig v Commission*, EU:C:1966:41, paragraph 342. See also *Cityhook Limited v OFT* [2007] CAT 18, paragraph [269].

<sup>402</sup> Section 2(2)(a) of the Act.

<sup>403</sup> *Guidance on Agreements and Concerted Practices*, paragraphs 3.4 to 3.8. For example, Judgment of 30 January 1985 in Case C-123/83 *Bureau national interprofessionnel du cognac v Guy Clair*, EU:C:1985:33, paragraph 22; and Judgment of 19 April 1988 in Case C-27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne SC*, EU:C:1988:183, paragraph 15. See also Judgment of 10 March 1992 in Case T-14/89 *Montedipe SpA v Commission*, EU:T:1992:36, paragraphs 246 and 265; and Judgment of 6 April 1995 in Case T-148/89 *Tréfilunion v Commission*, EU:T:1995:68, paragraphs 101 and 109.

<sup>404</sup> *Guidance on Agreements and Concerted Practices*, paragraphs 3.5 and 3.6.

<sup>405</sup> See Commission decision of 30 October 2002 in COMP/E-2/37.784 *Fine Art Auction Houses* IP/02/1585, which concerned, for example, the introduction of a new sliding scale for the vendor's commission, making the commission scale non-negotiable and monitoring adherence to the scale. See also joined cases C-209 to 215 and 218/78 *Van Landewyck v Commission* [1980] EU:C:1980:248 and Commission Decision of 24 June 2004 in COMP/A.38549 *Architectes Belges*, [2005] OJ L004/10.

<sup>406</sup> Case C-8/72, *Vereeniging van Cementhandelaren v Commission* EU:C:1972:84, paragraph 21: '*even fixing a price which merely constitutes a target or recommendation, affects competition because it enables all participants to predict with a reasonable degree of certainty what the pricing policy pursued by the competitors will be.*'

<sup>407</sup> See Joined cases C-204/00 P etc. *Aalborg Portland A/S and Others v Commission*, EU:C:2004:6.

<sup>408</sup> Case C-286/13 P *Dole v Commission* EU:C:2015:184, paragraph 134.

pricing.<sup>409</sup> As such, the Court of Justice has consistently found such coordination to reveal in itself a sufficient degree of harm to competition such that it restricts competition by its very nature (and therefore by object).<sup>410</sup>

- 6.54 The Court of Justice has held that, in cases involving restrictions of competition which fall within a category of agreements expressly prohibited by Article 101(1) TFEU, such as price fixing, the analysis of the legal and economic context may be limited to what is strictly necessary in order to establish the existence of a restriction by object.<sup>411</sup>
- 6.55 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>412</sup>
- 6.56 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>413</sup>
- 6.57 The Court of Justice has therefore held that the exchange of information between competitors is liable to be incompatible with Article 101 TFEU (and EU Member States' equivalent national competition laws) if it reduces or removes the degree of uncertainty as to the operation of the market in

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<sup>409</sup> Case T-202/98 *Tate & Lyle v Commission* [2001] EU:T:2001:185.

<sup>410</sup> Case C-67/13 P *Groepement des carte bancaires v Commission* EU:C:2014:2204. In Case C-8/08 *T-Mobile Netherlands v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, paragraph 39, the Court of Justice found in order for a concerted practice to have an anti-competitive object, there does not need to be a direct link between that practice and consumer prices, that is, the practice does not need to have a direct effect on the end prices paid by consumers to be restrictive of competition by object.

<sup>411</sup> Case C-373/14 P *Toshiba v Commission* EU:C:2016:26, paragraphs 28 and 29.

<sup>412</sup> Commission Decision of 15 October 2008 in Case COMP/39.188 *Bananas*, upheld in Judgment of 19 March 2015 in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, and Judgment of 24 June 2015 in Case C-293/13 P *Fresh Del Monte Produce v Commission and Commission / Fresh Del Monte Produce*, EU:C:2015:416. In addition, the 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>413</sup> See for example: Judgment in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraphs 113 to 127; Judgment in Case C-8/08 *T-Mobile Netherlands and Others*, EU:C:2009:343. See also the Horizontal Cooperation Agreements Guidelines; and *Article 101(3) Guidelines*, paragraphs 72 to 74.

question, with the result that competition between undertakings is restricted.<sup>414</sup> In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anti-competitive object.<sup>415</sup>

### ***Application in this case***

- 6.58 The CMA has found that the Minimum Fee Arrangement between the Parties was a price fixing agreement which had as its object the prevention, restriction or distortion of competition within the UK, by fixing and maintaining minimum commission fee levels (and thereby prices) to be charged for the provision of traditional residential estate agency services in the Relevant Areas, including through the exchange of confidential pricing information and taking steps to monitor or reinforce compliance.
- 6.59 Such an agreement and/or concerted practice, by removing (or reducing) the benefits to consumers of price competition between direct competitors, by its very nature restricted price competition between the four competing estate agents (that is, the Parties).
- 6.60 In reaching this finding, the CMA has assessed the content of the Minimum Fee Arrangement, its objectives and the legal and economic context of which it forms part.

### ***Content of the Minimum Fee Arrangement***

- 6.61 Based on the evidence set out in Section 4 (Conduct of the Parties), the CMA has found that the content of the Minimum Fee Arrangement was agreed at meetings and during discussions which took place in 2008 between senior representatives of the four Parties. The Parties agreed that there would be minimum commission fee levels which the Parties would charge for residential sales services in the Relevant Areas. Different minimum fee level percentages were agreed for each of these areas, as set out at paragraph 4.63.

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<sup>414</sup> Judgment in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 121; Judgment of 11 March 1999 in Case C-194/99 P *Thyssen Stahl v Commission*, EU:C:2003:527, paragraph 81; Judgment in Case C-8/08 *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 35.

<sup>415</sup> Judgment in Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 122; Judgment in Case C-8/08 *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraph 41.

- 6.62 The Parties also undertook monitoring of compliance with the Minimum Fee Arrangement, raising instances of non-compliance at the *ad hoc* meetings or in bilateral communications.<sup>416</sup>
- 6.63 There is evidence that the precise details of the Minimum Fee Arrangement varied in specific circumstances during the Relevant Period, namely:
- (a) the minimum commission fee level in a Relevant Area was at times varied for a specific Party, if it did not have a physical presence in that area, such as for Richard Worth in Crowthorne;<sup>417</sup> and
  - (b) the level of the minimum commission fee in a Relevant Area was adjusted during the Relevant Period to reflect changes in market conditions, for example when the minimum fee level for Wokingham was reduced.<sup>418</sup>
- 6.64 The content of the Minimum Fee Arrangement also developed over time, with the introduction of a penalty system for non-compliance with the arrangement, as set out at paragraphs 4.147 to 4.163.
- 6.65 However, despite such variations and developments, the overall content of the Minimum Fee Arrangement between the Parties remained the same, namely not to charge commission fees below a certain agreed level.

### *Objectives of the Minimum Fee Arrangement*

- 6.66 In view of the content of the Minimum Fee Arrangement, the CMA has found that the clear objective aim of the Minimum Fee Arrangement was to restrict price competition between the Parties for the provision of traditional residential estate agency services in the Relevant Areas.
- 6.67 Although the Parties' subjective intention is not a necessary factor in determining whether an agreement has an anti-competitive object, anti-competitive subjective intentions can nevertheless be taken into account in the assessment.<sup>419</sup> The CMA considers that the Parties' subjective intention to restrict price competition between themselves through the Minimum Fee Arrangement is also explicit on the face of much of the evidence, as set out in Section 4 (Conduct of the Parties). For example:

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<sup>416</sup> See paragraphs 4.115 to 4.146.

<sup>417</sup> See paragraph 4.66.

<sup>418</sup> See paragraphs 4.64 and 4.65.

<sup>419</sup> See paragraphs 6.47 and 6.48.

- (a) in his witness statement, [Director A] (Prospect) explains that *'the arrangement discussed and agreed between the four agents was about trying to maintain the fee levels we had been charging despite the falling house sales and prices'*;<sup>420</sup>
- (b) in his witness statement, [Director B] (Romans) explains that he was *'uncomfortable to begin with [about making contact with other estate agents to discuss a minimum fee arrangement] as I had never had a conversation with another estate agent about fees'*. However, [Director A] (Romans) told him *'it was fine [...] because not every estate agent would be involved, that agents would still charge what they wanted to at times and that there would be a lot of different situations where it would not be 1.8%'*.<sup>421</sup> This shows not only that [Director B] (Romans) felt that discussing commission fees with competitors was out of the ordinary or something he should not be doing,<sup>422</sup> but that, despite [Director A]'s (Romans) explanation that the arrangement would not completely restrict price setting, it was intended to limit the circumstances in which the Parties were able freely to determine their own prices. Similarly, [Director] (Michael Hardy) stated in an email to [Director B] (Prospect) that he was *'not keen on a cartel'* but went on to ask *'Do we need to meet again to agree that we need to help each other by being sensible on our fees? If you know of an agent who is consistently charging 1.25% or less other than Prospect let me know and I will have a word!'*<sup>423</sup>
- (c) in their witness statements [Director A] (Prospect) and [Director B] (Romans) explain that, within each of Prospect and Romans respectively, there was knowledge among the branch managers of the Minimum Fee Arrangement and the need to comply with it, as well as to report back if they were aware of the other Parties charging below the agreed minimum commission fee levels.<sup>424</sup> There is also evidence of instructions within Romans not to put anything in writing; for example, an internal Romans email chain from November 2011, which was a follow up to an email noting that Richard Worth had offered a lower

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<sup>420</sup> URN0171, paragraph 50.

<sup>421</sup> URN0172, paragraph 22.

<sup>422</sup> This is further reinforced by the fact that [Director B] (Romans) included topics other than the Minimum Fee Arrangement in the meeting appointments in his calendar to *'conceal the true purpose of the meetings'*; URN0172, paragraph 54.

<sup>423</sup> URN0550.

<sup>424</sup> URN0171, paragraph 55 and URN0172, paragraph 60. There is also documentary evidence of this arrangement; see URN0007.

commission fee than Romans, included the reply, *'Never a good idea to make a comment in writing - will delete your email like it never arrived'*;<sup>425</sup>

- (d) the evidence of both [Director B] (Romans) and [Director A] (Prospect) is that, for at least some of the Relevant Period, a penalty system was in place between the Parties for non-adherence to the Minimum Fee Arrangement.<sup>426</sup> This penalty system demonstrates the Parties' intention that each of the Parties would be restricted in their ability to price below the minimum agreed commission fee levels or discouraged from doing so;
- (e) documentary evidence also shows that the Parties were concerned about price competition from estate agents that were not party to the Minimum Fee Arrangement. For example, an internal email dated 20 June 2012 from a Prospect director to [Director A] (Prospect) with reference to a four-month 0% commission fee offer by an estate agent that was not party to the Minimum Fee Arrangement, stated, *'this could have an impact on fee agreement within Warfield and Brackell'*;<sup>427</sup>
- (f) documentary evidence of the monitoring of each other's compliance with the Minimum Fee Arrangement shows that it was the Parties' subjective intention to restrict price competition between the four of them, including:
  - (i) an internal Romans email dated 3 October 2008 in which [Director B] (Romans) updated [Director A] (Romans) on [Director]'s (Richard Worth) contact with [Director B] (Prospect) regarding breaches.<sup>428</sup> *'[Director (Richard Worth)] met with [Director B (Prospect)] yesterday re another matter but did ask [Director B (Prospect)] to check the addresses we both highlighted. [Director*

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<sup>425</sup> URN0057. See also fn210, which sets out that [Director B] (Romans) stated that *'[f]rom the outset it was also suggested by [Director A] [(Romans)] that I should not put anything relating to the minimum fee arrangement in writing. For example, I did not put "fees" on the meeting titles in my work diaries as I felt uncomfortable with doing so. I also directed my staff not to put anything in writing relating to the minimum fee arrangement'*; URN0172, paragraph 24.

<sup>426</sup> URN0172, paragraphs 81 to 84 and URN0171, paragraph 80.

<sup>427</sup> URN0529. [Director A] (Prospect) noted that this estate agent did open with its 0% commission fee offering and after a time started charging a commission fee, but he did not recall the percentage level or that the minimum fee arrangement changed in that period. He did not think that this offer had an impact; URN0171, paragraph 54. [Director B] (Romans) considered that one of the reasons for the Minimum Fee Arrangement coming to an end was because of another estate agent's anticipated opening of an office in Wokingham with an introductory 0% commission offer to customers; URN0172, paragraph 102.

<sup>428</sup> URN0400.

B (Prospect)] *emailed copy of the contracts across today and they were all at 1.8% bar one at 1.75% which he apologized about.* [...]’ [emphasis added];

- (ii) responses to an internal Prospect email sent by [Director A] (Prospect) dated 10 April 2012 setting out that Prospect should maintain its position on minimum fee levels which state: *‘Richard worth need to come back on song and increase min in Bracknell and other area’s like Crowthorne’*<sup>429</sup> and that it *‘makes total business sense so long may it continue and we will carry on trying to find evidence of other agents not playing ball...’*<sup>430</sup> and
- (iii) an email to [Director] (Richard Worth) dated 17 August 2012 in which [Director B] (Romans) noted:<sup>431</sup> *‘[...] we need to catch up re my messages left on your mobile (which you chose to ignore again!) as these types of scenarios cannot continue. So I have made a note to call you on my return on Monday 3<sup>rd</sup> September. I trust there wont be other similar incidents in between times and look forward to resolving amicably’*. [Director B] (Romans) explained that this related to instances when he had heard that Richard Worth was charging below the minimum agreed commission fee levels.<sup>432</sup>

6.68 This evidence, as well as the evidence more generally set out in Section 4 (Conduct of the Parties), shows that the object of the Minimum Fee Arrangement was to reduce price competition between themselves and that this was also the Parties’ subjective intention. The motivation behind the Minimum Fee Arrangement was to enable the Parties to maintain their commission fee levels in the Relevant Areas. The monitoring of compliance by the Parties with the Minimum Fee Arrangement shows the intention behind the arrangement, namely that it would prevent the Parties from pricing below the agreed level.

#### *Legal and economic context of the Minimum Fee Arrangement*

6.69 Section 3 (Industry background) and Section 5 (Market definition) provide an overview of the CMA’s findings regarding the contextual factual background

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<sup>429</sup> URN0527.

<sup>430</sup> URN0526.

<sup>431</sup> URN0050.

<sup>432</sup> URN0172, paragraph 77.

relevant to the investigation, including with respect to the nature of the services and functioning of the relevant market.

6.70 The CMA considers that the points that are particularly relevant to the legal and economic context for the purposes of determining the object of the Minimum Fee Arrangement are that:

- (a) in times of economic recession, with fewer transactions, an estate agent may seek to increase commission rates;<sup>433</sup>
- (b) estate agents would not normally have direct knowledge of the levels of commission fees quoted by their competitors to sellers, even though they may obtain this information through customers.<sup>434</sup> Internally set minimum commission fees, below which an estate agent will generally not quote,<sup>435</sup> would be confidential information to each estate agent;
- (c) the Minimum Fee Arrangement was between four competitors for the provision of traditional residential estate agency services in the Relevant Areas. Whilst none of the Parties had offices in all five areas, they were all direct competitors in the Wokingham area. In addition, the evidence indicates that the area covered by the Parties' offices was not limited to their particular towns/localities but also extended, or at least had the potential to extend to neighbouring localities/areas within the Relevant Areas;<sup>436</sup>
- (d) in each Relevant Area, the Minimum Fee Arrangement involved the main or at least very significant competitors in that area, for example:
  - (i) [Director B] (Romans) explained the reasons why the Minimum Fee Arrangement was with Prospect, Michael Hardy and Richard Worth *'is that these three estate agents were Romans' main competitors in the Wokingham area'*;<sup>437</sup>
  - (ii) [Director A] (Prospect) explained that: (i) Romans is *'pretty much the market leader in most of its locations'*; (ii) Prospect and Romans are the two main competitors in the Bracknell area; (iii) in Wokingham, Richard Worth and Michael Hardy have *'good*

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<sup>433</sup> URN0172, paragraph 19.

<sup>434</sup> URN0172, paragraph 22.

<sup>435</sup> See paragraph 3.12.

<sup>436</sup> URN0717, URN0718, URN0750, URN0755 and URN0660.

<sup>437</sup> URN0172, paragraph 21. [Director] (Richard Worth), in interview, also stated *'Romans, Richard Worth, Michael Hardy were the strongest players in Wokingham at that time [the Relevant Period]'*; URN1000, page 21.



*market shares*', and that Prospect might be '*third or fourth in the town*'; and (iv) Michael Hardy has '*a large market share in Crowthorne*';<sup>438</sup> and

- (e) one of the reasons that the Minimum Fee Arrangement ultimately broke down was the impending opening of an office in Wokingham in early 2016 by another large estate agent, which it was anticipated would be offering an introductory 0% commission to customers, as it had done in other areas.<sup>439</sup> This suggests that, during the Relevant Period, the Parties faced limited competition in the Relevant Areas from other estate agents that were not party to the Minimum Fee Arrangement.

### ***Conclusions on the object of preventing, restricting or distorting competition***

- 6.71 For the reasons set out above, the CMA has concluded that the Minimum Fee Arrangement was a price fixing agreement which had as its object the prevention, restriction or distortion of competition within a part of the UK (namely in the Relevant Areas), by fixing and maintaining a minimum level of commission fees to be charged for the provision of traditional residential estate agency services in the Relevant Areas, including through the exchange of confidential pricing information and taking steps to monitor or reinforce compliance.
- 6.72 By removing or reducing the benefits to consumers of price competition between direct competitors, the Minimum Fee Arrangement was by its very nature a restriction of price competition. It reveals, in and of itself, a sufficient degree of harm to competition such that there is no need to examine its effects. Accordingly, the CMA has concluded that it was restrictive of competition by object.<sup>440</sup>

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<sup>438</sup> URN0171, paragraphs 11 to 12.

<sup>439</sup> URN0172, paragraph 102.

<sup>440</sup> In making this finding, the CMA has also had regard to the European Commission's decision in *Agreements between manufacturers of glass containers*, OJ [1974] L160/1, in which agreements between manufacturers of glass containers to implement a set of rules that prohibited the undercutting of a competitor's prices in certain circumstances were found to be restrictive of competition by object. The Commission found that the clauses in question which contained the rules on undercutting had '*as their real and principal object the restriction of competition between the parties to the detriment of users of glass containers*' (at paragraph 34). It added that '*[s]uch provisions thus tend to prevent competitive behaviour, such as the practice of the most efficient and viable undertaking offering lower prices than those of its competitors...*' and concluded that the clauses in question had '*as their object the prevention of price competition between the parties*' (at paragraph 35).

## F. Appreciable restriction of competition

### ***Key legal principles***

- 6.73 An agreement will fall within the Chapter I prohibition only if it has as its object (or effect) an appreciable prevention, restriction or distortion of competition.<sup>441</sup>
- 6.74 The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.<sup>442</sup>
- 6.75 In accordance with section 60(2) of the Act,<sup>443</sup> this principle also applies with the necessary changes in respect of the Chapter I prohibition: accordingly, an agreement that may affect trade within the UK or a part of it and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

### ***Application in this case***

- 6.76 As set out above, the CMA has found that the Minimum Fee Arrangement had the object of preventing, restricting or distorting competition. As the test on effect on trade within the UK or a part of it is satisfied (see paragraphs 6.87 to 6.89), the CMA has found that the Minimum Fee Arrangement constituted, by its very nature, an appreciable restriction of competition.
- 6.77 In any event, the CMA has found that the Minimum Fee Arrangement had an appreciable potential (and likely actual) impact on competition, particularly price competition, for the supply of traditional residential estate agency services in the Relevant Areas. This potential and/or actual impact on competition in the Relevant Areas results from the fact that the Minimum Fee Arrangement was implemented and in place throughout at least the Relevant

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<sup>441</sup> It is settled case law that an agreement between undertakings falls outside the prohibition in Article 101(1) TFEU if it has only an insignificant effect on the market: see Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 16 citing, among other cases, Case 5/69 *Völk v Vervaecke*, EU:C:1969:35, paragraph 7. See also *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.15.

<sup>442</sup> Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 37; and Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 13.

<sup>443</sup> Section 60(2) of the Act provides that, when determining a question in relation to the application of Part 1 of the Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. See also *Carewatch and Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraphs 148.

Period (albeit the Parties did not always strictly adhere to its terms) and in view of the fact that the evidence confirms that the Parties were direct competitors with significant market coverage in the Relevant Areas.<sup>444</sup>

- 6.78 The Minimum Fee Arrangement therefore constituted an appreciable restriction on competition by its very nature and is likely to have had an appreciable actual (or at least potential) impact on competition, and particularly price competition, for the supply of traditional residential estate agency services in the Relevant Areas.

## G. Duration

- 6.79 The duration of the Minimum Fee Arrangement is a relevant factor for determining the financial penalties that the CMA has decided to impose in relation to the Infringement.
- 6.80 Commenting on the availability of evidence in cartel cases, the European Court has noted that it is necessary to take into account that *'anticompetitive activities take place clandestinely, meetings are held in secret, the associated documentation is reduced to a minimum, the evidence discovered by the Commission is normally only fragmentary and sparse, and, accordingly, in most cases, the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules'*.<sup>445</sup>
- 6.81 In determining the duration of the Infringement, the CMA is entitled to rely on pieces of evidence that an undertaking actively participated in the agreement, lack of evidence that an undertaking publicly distanced itself from the agreement and the perception of the other participants in the cartel.<sup>446</sup> Further, if there is no evidence *'directly establishing the duration of the infringement'*, it is sufficient to adduce evidence of the facts sufficiently proximate in time for it

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<sup>444</sup> See paragraphs 6.69 and 6.70.

<sup>445</sup> Case T-438/14 *Silec Cable SAS and General Cable Corp v European Commission*, EU:T:2018:447, paragraph 64, citing Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, EU:C:2004:6, paragraphs 55 to 57; Case C-634/13 P *Total Marketing Services v Commission*, EU:C:2015:614, paragraph 26 and the case-law cited; and Case T-439/07 *Coats Holdings v Commission*, EU:T:2012:320, paragraph 42.

<sup>446</sup> Case C-634/13 P *Total Marketing Services v European Commission* ECLI:EU:C:2015:614, paragraphs 26-31.

to be reasonable to accept that the infringement continued uninterrupted between two specific dates.<sup>447</sup>

6.82 As described in Section 4 (Conduct of the Parties), on the basis of the evidence available, it is difficult to establish a precise start and end date for the Infringement, given the passage of time,<sup>448</sup> the secret nature of the Minimum Fee Arrangement<sup>449</sup> and that most of the contact between the Parties was in meetings or by phone.<sup>450</sup> However, despite its fragmentary nature, the documentary evidence provides the CMA with a good indication that the Minimum Fee Arrangement was in place between at least 1 September 2008 and 19 May 2015, which is corroborated by witness evidence. In particular:

- (a) the First Wokingham meeting is likely to have taken place in July 2008, and the Minimum Fee Arrangement was being implemented at least in Wokingham during August 2008, as evidenced by the email dated 18 September 2008 detailed at paragraphs 4.48 to 4.55, which refers back to the arrangement being in place in the preceding month of August;
- (b) there is no evidence to suggest that there was a break in the Minimum Fee Arrangement or that any of the Parties proactively sought to end their involvement during the Relevant Period; and
- (c) there was no agreed specific end date to the Minimum Fee Arrangement, which gradually broke down, with increasing instances of breaches by all the Parties during the early part of 2015, the last reference to the arrangement being in a document dated 19 May 2015.<sup>451</sup>

6.83 On the basis of this evidence, the CMA has found that the Infringement lasted between at least 1 September 2008 and 19 May 2015. The CMA considers it is very likely that the Minimum Fee Arrangement would have been in place before 1 September 2008 and that it might still have been in place after 19 May 2015. The CMA, however, has taken a conservative approach and limited

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<sup>447</sup> Case T-43/92 *Dunlop Slazenger International Ltd v Commission* EU:T:1994:79, paragraph 79; cited further in Case T-62/98 *Volkswagen AG v Commission* EU:T:2000:180, paragraph 188; Case T-279/02 *Degussa v Commission* EU:T:2006:103, paragraph 153; Case T-120/04 *Peróxidos Orgánicos v Commission* EU:T:2006:350, paragraph 51. See also Case T-113/07 *Toshiba v Commission*, EU:T:2011:34, paragraph 235 and the case law cited; cited further in e.g. Case T-450/13 *Sumitomo Electric Industries Ltd v European Commission* EU:T:2018:455, paragraph 52 and Case T-448/14, *Hitachi Metals Ltd v European Commission* EU:T:2018:442, paragraph 122.

<sup>448</sup> See for example paragraph 4.75.

<sup>449</sup> See for example paragraph 4.123. See generally the assessment of the evidence at paragraph 2.13.

<sup>450</sup> See for example paragraph 4.101.

<sup>451</sup> URN0536.

its findings to the period starting from 1 September 2008, given that it cannot be certain when the First Wokingham meeting was held or the date in August of the arrangement's earliest implementation. Similarly, the CMA has treated the end date of the Infringement as the last date for which there is documentary evidence of the arrangement still being in place.

## **H. Application of Article 101 TFEU: Effect on trade between EU member states**

- 6.84 Article 101 TFEU will apply where an agreement, concerted practice or decision by an association of undertakings has the potential to affect trade between EU member states to an appreciable extent.
- 6.85 The CMA's finding is that, in the present case, the Infringement was not cross-border in nature and was entered into by a number of estate agents in respect of their activities within a local market. The CMA has found that the nature of traditional residential estate agency services in the Relevant Areas is inherently local.<sup>452</sup>
- 6.86 In light of this, the CMA has concluded that the Infringement would not be likely to have had an influence, direct or indirect, actual or potential, on the pattern of trade between EU member states such that the CMA has concluded that it has no grounds for action under Article 101 TFEU.

## **I. Effect on trade within the UK or a part of it**

### ***Key legal principles***

- 6.87 The Chapter I prohibition applies to agreements which may affect trade within the UK or a part of it.<sup>453</sup>
- 6.88 As regards the question whether such an effect must be appreciable for these purposes, the Competition Appeal Tribunal ('**CAT**') has held that there is no need to import into the Act the rule of 'appreciability' under EU law, the essential purpose of which is to demarcate the fields of EU law and UK domestic law respectively.<sup>454</sup> An agreement or concerted practice is not in fact

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<sup>452</sup> See Section 5 (Market definition).

<sup>453</sup> The UK includes any part of the UK in which an agreement operates or is intended to operate: section 2(7) of the Act. It is not necessary to demonstrate that an agreement has had an actual impact on trade - it is sufficient to establish that the agreement is capable of having such an effect: joined cases T-202/98 etc. *Tate & Lyle plc and Others v Commission*, EU:T:2001:185, paragraph 78.

<sup>454</sup> *Aberdeen Journals v Director of Fair Trading* [2003] CAT 11 at [459] to [461].

required to affect trade provided it is capable of doing so.<sup>455</sup> In practice, it is very likely that an agreement which appreciably restricts competition within the UK will also affect trade within the UK.<sup>456</sup>

### ***Application in this case***

6.89 As already discussed, the CMA has found that the Parties engaged in a minimum fee arrangement which had the object of restricting or distorting competition and that this constitutes, by its very nature, an appreciable restriction of competition. In addition, the CMA considers that the Minimum Fee Arrangement is likely to have had an appreciable actual impact on competition in the Relevant Areas during the Relevant Period. Accordingly, and considering the evidence set out in Section 4 (Conduct of the Parties), the CMA has found that the Minimum Fee Arrangement was, at the very least, capable of altering the pattern of trade within the UK or a part of the UK to an appreciable extent such that it may have had an effect on trade within the UK or a part of it.

## **J. Exclusions and exemptions**

### ***Exclusion***

6.90 The Chapter I prohibition does not apply in any of the cases in which it is excluded by or as a result of Schedules 1 to 3 to the Act.<sup>457</sup>

6.91 The CMA has found that none of the relevant exclusions applies to the Minimum Fee Arrangement.

### ***Exemption***

#### ***Block Exemption***

6.92 Pursuant to section 10 of the Act, an agreement is exempt from the Chapter I prohibition if it does not affect trade between EU Member States but otherwise falls within a category of agreement which is exempt from Article 101(1) TFEU by virtue of a block exemption regulation.

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<sup>455</sup> Judgment in *Tate & Lyle and Others v Commission*, T-202/98, ECR, EU:T:2001:185, paragraph 78.

<sup>456</sup> *Guidance on Agreements and Concerted Practices*, paragraph 2.25.

<sup>457</sup> Section 3 of the Act sets out the following exclusions: Schedule 1 covers mergers and concentrations; Schedule 2 covers competition scrutiny under other enactments; and Schedule 3 covers general exclusions.

- 6.93 It is for the parties wishing to rely on this provision to prove that the restrictive agreement in question benefits from a block exemption.<sup>458</sup>
- 6.94 The CMA has found that the Minimum Fee Arrangement does not benefit from a block exemption regulation.
- 6.95 In view of the foregoing, the CMA has found that the Minimum Fee Arrangement is not exempt from the application of the Chapter I prohibition pursuant to section 10 of the Act.

#### *Individual exemption*

- 6.96 Agreements which satisfy the criteria set out in section 9 of the Act are exempt from the Chapter I prohibition.
- 6.97 There are four cumulative criteria to be satisfied:
- (a) the agreement contributes to improving production or distribution, or promoting technical or economic progress;
  - (b) while allowing consumers a fair share of the resulting benefit;
  - (c) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
  - (d) it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- 6.98 In considering whether an agreement satisfies the criteria set out in section 9 of the Act, the CMA will have regard<sup>459</sup> to the Commission's Article 101(3) Guidelines.
- 6.99 It is for the party claiming the benefit of exemption to prove that the conditions for exemption are satisfied.<sup>460</sup> In any event, the CMA considers it unlikely that the conditions would be met in this case.
- 6.100 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

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<sup>458</sup> Article 101(3) Guidelines, paragraph 35.

<sup>459</sup> *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 5.5.

<sup>460</sup> Section 9(2) of the Act.

neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).<sup>461</sup> However, each case ultimately falls to be assessed on its merits.

6.101 In view of the above, the CMA has found that the Minimum Fee Arrangement is not exempt from the application of the Chapter I prohibition pursuant to section 9 of the Act.

## **K. Attribution of liability**

6.102 In determining who is liable for an infringement, and, therefore, subject to any financial penalty which the CMA may impose, it is necessary to identify the legal or natural persons which constitute the undertakings involved in the infringement.

6.103 For each Party which the CMA has found to have infringed the Chapter I prohibition, 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. In relation to certain Parties, the CMA has identified that one undertaking is the economic successor of another undertaking which was involved in the Infringement, and that the successor is therefore liable for that undertaking's involvement in the Infringement.

### ***Key legal principles***

#### ***Parental liability***

6.104 A legal entity may be held liable for an infringement committed by its subsidiary where, as a matter of economic reality,<sup>462</sup> it can be said to have exercised 'decisive influence' over its subsidiary during its ownership period.<sup>463</sup> This assessment turns not only on intervention in or supervision of the subsidiary's commercial conduct in the strict sense,<sup>464</sup> but on the

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<sup>461</sup> Article 101(3) Guidelines, paragraph 46.

<sup>462</sup> Case C-293/13 P *Del Monte v Commission*, EU:C:2015:416.

<sup>463</sup> Case C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:536; Case C-179/12 P *Dow v Commission*, EU:C:2013:605.

<sup>464</sup> Case C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:536.



economic, organisational and legal links between parent and subsidiary, which may be informal.<sup>465</sup>

6.105 A parent company can be held jointly and severally liable for an infringement committed by a subsidiary company where:

- (a) the parent company is able to exercise 'decisive influence' over the conduct of the subsidiary,<sup>466</sup> and
- (b) the parent company does in fact exercise such decisive influence,<sup>467</sup>

such that the two entities can be regarded as a single economic unit and thus jointly and severally liable.

6.106 Where a subsidiary is directly or indirectly wholly owned by its parent company (including where the parent company holds nearly 100% of the shares or voting rights), the CMA is entitled to presume (subject to rebuttal by the relevant undertaking) that the parent exercised decisive influence over the commercial policy of the subsidiary.<sup>468</sup> Where this presumption applies, it is for the undertaking in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acted independently on the market.<sup>469</sup>

6.107 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.

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<sup>465</sup> Case C-440/11 *Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV* EU:C:2013:514; Case C-97/08 P *Akzo Nobel v Commission*, EU:C:2009:356.

<sup>466</sup> Joined cases 32/78, and 36/78 to 82/78, *BMW Belgium and Others v European Commission*, EU:C:1979:191.

<sup>467</sup> Case C-102/82, *AEG-Telefunken v Commission*, EU:C:1983:293.

<sup>468</sup> Judgment in Case C-97/08 P *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraphs 60 and 61; Judgment in Case T-299/08 *Elf Aquitaine v Commission*, EU:T:2009:366, paragraphs 53-57 (where the presumption was held to apply in relation to a shareholding of approximately 98%); Judgment in Case T-217/06, *Arkema France and Others v Commission*, EU:T:2011:251 at paragraph 53; Judgment of 27 October 2010 in Case T-24/05, *Alliance One International and Others v Commission*, EU:T:2010:453, paragraphs 126-130. The General Court 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 in Case T-190/06, *Total and Elf Aquitaine v Commission*, EU:T:2011:378, paragraph 64; Judgment of 14 July 2011 in Case T-189/06, *Arkema France v Commission*, EU:T:2011:377, paragraph 65.

<sup>469</sup> Judgment of 27 November 2014 in Case T-517/09, *Alstom v European Commission*, EU:T:2014:999, paragraph 55; Judgment in Case C-97/08 P, *Akzo Nobel NV and Others v Commission*, EU:C:2009:536, paragraph 61; Judgment in Case T-24/05, *Alliance One International and Others v Commission*, EU:T:2010:453, paragraph 130.

6.108 The general principle is that liability for an infringement of UK competition rules rests with the person(s) responsible for the operation of the undertaking that committed the infringement at the time the infringement was committed (the ‘personal responsibility’ principle).<sup>470</sup> However, in certain circumstances, an exception is made to the personal responsibility principle where responsibility for the operation of the undertaking has changed following the commission of the infringement (the ‘economic successor’ principle).

6.109 For example, exceptions to the personal responsibility principle have been made, in particular, in the following circumstances:

- (a) where the person in control of the undertaking at the time the infringement was committed no longer exists<sup>471</sup> or is no longer economically active;<sup>472</sup> and/or
- (b) where there are ‘structural links’ (economic and organisational) between the original person responsible for the undertaking that committed the infringement and the economic successor.<sup>473</sup>

6.110 In order to establish whether a person may be regarded as an economic successor, it can be relevant to identify the ‘*combination of physical and human elements* [that is the assets and personnel] *which contributed to the commission of the infringement and then to identify the person who has become responsible for their operation*’.<sup>474</sup>

6.111 It is not necessary that the economic successor has taken over all of the assets and personnel of the relevant undertaking that committed the infringement. It is sufficient that the successor has taken over ‘*the main part of those physical and human elements that were employed in* [the relevant business] *and therefore contributed to the commission of the infringement in question*’.<sup>475</sup>

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<sup>470</sup> Judgment of 17 December 1991 in Case T-6/89, *Enichem Anic SpA v. European Commission*, EU:T:1991:74, paragraph 236.

<sup>471</sup> Judgment in Case T-6/89 *Enichem Anic SpA v European Commission*, ECLI:EU:T:1991:74.

<sup>472</sup> Judgment in of 11 March 1999 in Case T-134/94 *NMH Stahlwerke GmbH v. Commission*, EU:T:1999:44; judgment in Case C-280/06 *Autorita Garante Della Concorrenza e del Mercato v Ente Tabacchi Italiani - ETI SpA*, EU:C:2007:775, paragraph 40.

<sup>473</sup> Judgment in Case C-204/00 *P Aalborg Portland A/S v. Commission*, EU:C:2004:6.

<sup>474</sup> Judgment in Case T-6/89 *Enichem Anic SpA v. European Commission*, EU:T:1991:74, paragraph 237.

<sup>475</sup> Judgment of 11 March 1999 in Case T-134/94, *NMH Stahlwerke GmbH v. Commission*, EU:T:1999:44, paragraph 130.

## **Assessment**

### **Liability of Michael Hardy**

6.112 The CMA has found that Michael Hardy & Company (Wokingham) Limited was directly involved in, and is therefore liable for, the Infringement.

6.113 As a result of its 100% ownership of Michael Hardy & Company (Wokingham) Limited throughout the Relevant Period, Studio Investments (Holdings) Limited had the ability to exercise decisive influence over Michael Hardy & Company (Wokingham) Limited. The CMA has applied the presumption that Studio Investments (Holdings) Limited did actually exercise decisive influence over that company throughout the Relevant Period, and that Studio Investments (Holdings) Limited and Michael Hardy & Company (Wokingham) Limited formed part of the same economic entity. Michael Hardy has provided no evidence to refute this presumption.

6.114 However, Studio Investments (Holdings) Limited has since been dissolved. The CMA has found that there is functional and economic continuity between Studio Investments (Holdings) Limited and Geocharbert UK Ltd and that, therefore, Geocharbert UK Ltd is the economic successor of Studio Investments (Holdings) Limited for the purposes of the Chapter I prohibition. This is for the following reasons:

- (a) The Return of Final Meeting in a Members' Voluntary Winding Up of Studio Investment (Holdings) Limited filed at Companies House on 5 October 2016 explains that [X] shareholders of Studio Investment (Holdings) Limited ([individual] and [individual]) agreed to separate the two parts of the business. All of the shares in Michael Hardy & Company (Wokingham) Limited (as well as 50.1% of the shares in Michael Hardy & Company (Lettings) Limited) were transferred to Geocharbert UK Ltd.<sup>476</sup> [Director] (Michael Hardy) explained that the company was 'demerged' and that [X] had taken the estate agency business (as well as a share of the lettings business).<sup>477</sup>
- (b) A director and majority shareholder ([X]%) of Studio Investments (Holdings) Limited ([individual]) is also the [X] and [X] shareholder ([X]%) of Geocharbert UK Ltd.

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<sup>476</sup> Michael Hardy & Company (Wokingham) Limited Annual Return made up to 30 March 2016 and Michael Hardy & Company (Lettings) Limited Annual Return made up to 11 March 2016, both as filed at Companies House.

<sup>477</sup> URN0092, page 11.

- (c) The principal activity of Geocharbert UK Ltd is similar in nature to that of Studio Investment (Holdings) Limited, with both being the holding company for *inter alia* Michael Hardy & Company (Wokingham) Limited.

6.115 The CMA therefore has found that Geocharbert UK Ltd, as economic successor Studio Investments (Holdings) Limited, is jointly and severally liable with Michael Hardy & Company (Wokingham) Limited for Michael Hardy & Company (Wokingham) Limited's participation in the Infringement.

6.116 This Decision is therefore addressed to Michael Hardy & Company (Wokingham) Limited and Geocharbert UK Ltd (together Michael Hardy).

### ***Liability of Prospect***

6.117 The CMA has found that, from the beginning of the Infringement until Prospect Estate Agency Limited ceased to trade on 1 January 2014, Prospect Estate Agency Limited was directly involved in, and therefore liable for, the Infringement.

6.118 The CMA has found that there is functional and economic continuity between Prospect Estate Agency Limited and Prospect Holdings (Reading) Limited and that, therefore, Prospect Holdings (Reading) Limited is liable as the economic successor of Prospect Estate Agency Limited for the period from the beginning of the Infringement until 1 January 2014. This is for the following reasons:

- (a) Prospect Estate Agency Limited ceased trading on 1 January 2014;
- (b) as part of a group reorganisation, all of the business, assets and liabilities of Prospect Estate Agency Limited were transferred to Prospect Holdings (Reading) Limited on 1 January 2014;
- (c) there is significant overlap of both directors and shareholders between the two companies;
- (d) Prospect Holdings (Reading) Limited was the 100% shareholder of Prospect Estate Agency Limited from 20 November 2009; and
- (e) the registered office of both companies is the same.

6.119 In addition, as Prospect Holdings (Reading) Limited owned 100% of the shares in Prospect Estate Agency Limited from 20 November 2009 to 1 January 2014, it had the ability to exercise decisive influence over Prospect Estate Agency Limited during that period. The CMA is also therefore entitled

to apply the presumption that Prospect Holdings (Reading) Limited did actually exercise decisive influence over that company from 20 November 2009 to 1 January 2014 and that Prospect Holdings (Reading) Limited and Prospect Estate Agency Limited form part of the same economic entity.

6.120 As regards the period from 20 November 2009 to 1 January 2014, the CMA therefore has also found that (as well as being liable for Prospect Estate Agency Limited's participation in the Infringement as its economic successor) Prospect Holdings (Reading) Limited is also liable for Prospect Estate Agency Limited's participation in the Infringement by virtue of having exercised decisive influence over Prospect Estate Agency Limited.

6.121 For the period from 1 January 2014 to the end of the Relevant Period, the CMA has found that Prospect Holdings (Reading) Limited was directly involved in, and therefore liable for, the Infringement.

6.122 This Decision is addressed to Prospect Estate Agency Limited and Prospect Holdings (Reading) Limited (together Prospect).<sup>478</sup>

### ***Liability of Richard Worth***

6.123 The CMA has found that Richard Worth Limited was directly involved in, and is therefore liable for, the Infringement.

6.124 As a result of its 100% ownership of Richard Worth Limited, Richard Worth Holdings Limited had the ability to exercise decisive influence over Richard Worth Limited. The CMA proposes to apply the presumption that Richard Worth Holdings Limited did actually exercise decisive influence over that company throughout the Relevant Period, and that Richard Worth Holdings Limited and Richard Worth Limited form part of the same economic entity.

6.125 The CMA has found that Richard Worth Holdings Limited is therefore jointly and severally liable for Richard Worth Limited's participation in the Infringement.

6.126 This Decision is therefore addressed to Richard Worth Limited (in administration) and Richard Worth Holdings Limited (together Richard Worth).

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<sup>478</sup> Under Rule 10 of the CMA Rules, where the CMA has made an infringement decision, the CMA must give notice of the infringement decision to each person who the CMA considers is a party to the agreement, or is engaged in conduct, stating the facts on which the CMA bases the infringement decision and the CMA's reasons for making the infringement decision. As Prospect Estate Agency Limited still exists as a legal entity, Prospect Estate Agency Limited is also an addressee of this Decision.

### ***Liability of Romans***

- 6.127 The CMA has found that The Romans Group (UK) Limited was directly involved in, and therefore liable for, the Infringement.
- 6.128 The CMA has found that from 30 August 2013, with its indirect acquisition of 100% of the shares in The Romans Group (UK) Limited, Romans 1 Limited had the ability to exercise decisive influence over Romans Group (UK) Limited. The CMA proposes to apply the presumption that Romans 1 Limited did actually exercise decisive influence over The Romans Group (UK) Limited, and that these companies therefore form part of the same economic entity from 30 August 2013. The CMA therefore has found that Romans 1 Limited is jointly and severally liable for The Romans Group (UK) Limited's participation in the Infringement from 30 August 2013 to the end of the Relevant Period.
- 6.129 This Decision is therefore addressed to The Romans Group (UK) Limited and Romans 1 Limited (together Romans).

## 7. THE CMA'S ACTION

### A. The CMA's decision

- 7.1 In light of the above, the CMA has made a decision that, between at least 1 September 2008 and 19 May 2015, Michael Hardy, Prospect, Richard Worth and Romans infringed the Chapter I prohibition by participating in a single and continuous infringement through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition within the UK by fixing and maintaining a minimum level of commission fees to be charged for the provision of traditional residential estate agency services in the five areas of Wokingham, Winnersh, Crowthorne, Bracknell and Warfield, including through the exchange of confidential pricing information and taking steps to monitor or reinforce compliance.

### B. Directions

- 7.2 Section 32(1) of the Act provides that, if the CMA has made a decision that an agreement infringes the Chapter I prohibition, it may give such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. 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

#### *General*

- 7.3 Section 36(1) of the Act provides that, on making a decision that an agreement has infringed the Chapter I prohibition, the CMA may require an undertaking which is party to the agreement concerned to pay the CMA a penalty in respect of the infringement. In accordance with section 38(8) of the Act, the CMA must have regard to the guidance on penalties in force at the time when setting the amount of penalty (the '**Penalty Guidance**').<sup>479</sup>
- 7.4 The CMA has found that it is appropriate in the circumstances of this case to exercise its discretion under section 36(1) of the Act to impose a financial penalty on each of Michael Hardy, Prospect and Richard Worth given the

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<sup>479</sup> CMA's guidance as to the appropriate amount of a penalty (CMA73, 18 April 2018).

seriousness of the Infringement and in order to deter similar conduct in the future.

- 7.5 Each of the Settling Parties has admitted their involvement in, and liability for the Infringement and has agreed as part of settlement to pay a maximum penalty as set out in the terms of settlement.
- 7.6 Romans has been granted full immunity from financial penalty, conditional on its continuing to meet the requirements of the CMA's leniency policy.<sup>480</sup> Consequently, the CMA has not calculated the level of financial penalty that would be applied to Romans if immunity had not been granted.

*The CMA's margin of appreciation in determining the appropriate penalty*

- 7.7 Provided the penalties it imposes in a particular case are (i) within the range of penalties permitted by section 36(8) of the Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '**2000 Order**'),<sup>481</sup> and (ii) the CMA has had regard to the Penalty Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.<sup>482</sup>
- 7.8 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.<sup>483</sup> Rather, the CMA makes its assessment on a case-by-case basis<sup>484</sup> having regard to all relevant circumstances and the objectives of its policy on financial penalties.
- 7.9 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

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<sup>480</sup> See the Leniency Guidance.

<sup>481</sup> SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

<sup>482</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, paragraph [102].

<sup>483</sup> See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 (*Eden Brown*), paragraph [78].

<sup>484</sup> See, for example, *Kier Group and Others v OFT* [2011] CAT 3, paragraph [116] where the CAT noted that '*other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent*'. See also *Eden Brown*, paragraph [97] where the CAT observed that '*[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case*'.



breaches the prohibition in Chapter I of the Act (as well as other prohibitions under the Act and the TFEU as the case may be).<sup>485</sup>

### *Small agreements*

7.10 The CMA has decided that section 39 of the Act (which provides for limited immunity from penalties in relation to the Chapter I prohibition) does not apply in the present case on the basis that the Infringement amounted to a ‘price fixing agreement’ within the meaning of section 39(9) of the Act.<sup>486</sup>

### *Intention/negligence*

7.11 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently.<sup>487</sup> However, the CMA is not obliged to specify whether it considers the infringement to be intentional or negligent.<sup>488</sup>

7.12 The CAT has defined the terms ‘intentionally’ and ‘negligently’ as follows:<sup>489</sup>

*‘...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.’*

7.13 This is consistent with the Court of Justice’s statement in *Deutsche Telekom* that: *‘the question whether the infringements were committed intentionally or negligently...is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty’*.<sup>490</sup>

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<sup>485</sup> Section 36(7A) of the Act and Penalty Guidance, paragraph 1.3.

<sup>486</sup> A ‘price fixing agreement’ within the meaning of section 39(9) of the 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 Act, such an agreement is excluded from the benefit of the limited immunity from penalties provided by section 39 of the Act.

<sup>487</sup> Section 36(3) of the Act.

<sup>488</sup> *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paragraphs [453] to [457]; see also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph [221].

<sup>489</sup> *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph [221].

<sup>490</sup> Case 280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555 EU:C:2010:603, paragraph 124.

- 7.14 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement or conduct in question has as its object the restriction of competition.<sup>491</sup>
- 7.15 Ignorance or a mistake of law does not prevent a finding of intentional infringement, even where such ignorance or mistake is based on independent legal advice.<sup>492</sup>
- 7.16 In addition, based on the evidence set out in Section 4 (Conduct of the Parties), the CMA considers that each of the Parties must have been aware or could not have been unaware that their conduct had the object or would have the potential (and likely actual) appreciable effect of preventing, restricting or distorting competition.<sup>493</sup> In particular:
- (a) The CMA considers the evidence set out in Section 4 (Conduct of the Parties) shows that the Parties' intention was to restrict price competition between themselves through the Minimum Fee Arrangement.<sup>494</sup>
  - (b) Documentary evidence also shows that the Parties were concerned about price competition from estate agents not party to the Minimum Fee Arrangement, suggesting that they must have been aware that the Minimum Fee Arrangement restricted competition. For example, an internal Prospect email dated 20 June 2012 from a director to [Director A] (Prospect) referred to a four-month 0% commission fee offer by an estate agent that was not party to the Minimum Fee Arrangement which stated, *'this could have an impact on fee agreement within Warfield and Brackell'*.<sup>495</sup> This is further supported by statements made by [Director] (Richard Worth) that throughout the Relevant Period he was *'uncomfortable with the arrangement'*.<sup>496</sup>

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<sup>491</sup> See, for example, the CMA's Decision in Case 50481, Competition Act 1998 investigation in relation to design, construction and fit-out services, dated 16 April 2019, paragraph 6.10.

<sup>492</sup> See Case C-681/11 *Bundeswettbewerbsbehörde v Schenker & Co. AG*, EU:C:2013:404, paragraphs 38 and 41.

<sup>493</sup> See paragraph 7.13.

<sup>494</sup> This evidence is summarised at paragraphs 6.67 to 6.68.

<sup>495</sup> URN0529. [Director A] (Prospect) noted that this estate agent did open with its 0% commission fee offering and after a time started charging a commission fee, but he did not recall the percentage level or that the Minimum Fee Arrangement changed in that period. He did not think that the 0% fee offer had an impact; URN0171, paragraph 54. [Director B] (Romans) considered that one of the reasons for the Minimum Fee Arrangement coming to an end was because another estate agent anticipated opening an office in Wokingham with an introductory 0% commission offer to customers; URN0172, paragraph 102.

<sup>496</sup> URN1000.

7.17 Moreover, and notwithstanding the fact that ignorance or a mistake of law does not prevent a finding that an infringement has been committed intentionally, the CMA has found that in this case there is evidence showing that:

- (a) prior to its implementation some of the Parties contemplated the possibility that the Minimum Fee Arrangement amounted to a cartel but still went ahead with it;<sup>497</sup> and
- (b) subsequent to its implementation, there were internal instructions within Romans not to put anything in writing, which suggests that at least Romans was aware of the illegal nature of the Minimum Fee Arrangement.<sup>498</sup>

7.18 The CMA therefore has found that the Infringement was committed intentionally or, at the very least, negligently.

## **D. Calculation of the penalty**

7.19 As noted at paragraph 7.3, when setting the amount of the penalty, the CMA must have regard to the guidance on penalties in force at that time. The Penalty Guidance sets out a six-step approach for calculating the penalty.

### ***Step 1 – starting point***

7.20 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.<sup>499</sup>

#### ***Relevant turnover***

7.21 The ‘Relevant Turnover’ is the turnover of the undertaking in the relevant market affected by the infringement in the undertaking’s last business year.<sup>500</sup>

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<sup>497</sup> See paragraphs 4.21 to 4.22.

<sup>498</sup> See paragraph 4.123.

<sup>499</sup> Penalty Guidance, paragraphs 2.3 to 2.15.

<sup>500</sup> Penalty Guidance, paragraph 2.11. The Court of Appeal observed in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraph 169 that: ‘[ ] neither at the stage of the OFT investigation, nor on appeal to the Tribunal, is a formal analysis of the relevant product market necessary in order that regard can properly be had to step 1 of the Guidance in determining the appropriate penalty’. The Court of Appeal considered that it was sufficient for the OFT to ‘be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement’ (at paragraphs 170 to 173).

The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.<sup>501</sup>

- 7.22 As set out at paragraph 5.19, the CMA has found that the relevant market affected by the Infringement is the provision of traditional residential estate agency services in the Relevant Areas.
- 7.23 The CMA has taken into account the turnover from the provision of traditional residential estate agency services in the Relevant Areas in the financial year preceding the date when the Infringement ended, that is the financial year ending 31 December 2014 for Michael Hardy and Prospect and the financial year ending 31 January 2015 for Richard Worth.
- 7.24 On the basis of this approach, the CMA considers that the Relevant Turnovers are as follows:
- (a) Michael Hardy: £[REDACTED]
  - (b) Prospect: £[REDACTED]
  - (c) Richard Worth: £[REDACTED]

#### *Seriousness of the infringement*

- 7.25 In order to reflect adequately the seriousness of an infringement, the CMA will apply a starting point of up to 30% of the undertaking's relevant turnover.<sup>502</sup> The actual percentage which is applied to the relevant turnover depends, in particular, upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.<sup>503</sup> While making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.<sup>504</sup>
- 7.26 The CMA will use a starting point towards the upper end of the range for the most serious infringements of competition law, including hardcore cartel activity.<sup>505</sup> The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future.<sup>506</sup> The

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<sup>501</sup> Penalty Guidance, paragraph 2.11.

<sup>502</sup> Penalty Guidance, paragraph 2.4.

<sup>503</sup> Penalty Guidance, paragraphs 2.5 to 2.6.

<sup>504</sup> In accordance with paragraph 2.8 of the Penalty Guidance, these factors include the nature of the product, the structure of the market, the market shares of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The CMA may also take into account other relevant factors.

<sup>505</sup> Penalty Guidance, paragraph 2.6.

<sup>506</sup> Penalty Guidance, paragraph 2.9.

assessment is made on a case-by-case basis, taking account of all the circumstances of the case.<sup>507</sup>

7.27 In determining the starting point in this case, the following factors have been taken into account in assessing the seriousness of the Infringement:

- (a) The CMA considers that the Infringement involved the most serious type of cartel behaviour, that is, it was an agreement to fix minimum prices between competitors.
- (b) Competition in the market for residential estate agents takes place at a very local level.<sup>508</sup> Due to their size and/or reputation all four Parties were prominent in the Relevant Market.<sup>509</sup>
- (c) The commission fee charged by residential estate agents is an important factor considered by consumers (home sellers) when choosing between estate agents. Consumers who sought quotes from one or more of these estate agents will have been deceived as to the competitiveness of those quotes and may well have approached alternative estate agents had they been aware of the cartel conduct.
- (d) The conduct would have had a direct impact on home sellers given the significant cost of selling a home. Depending on the price of the property, the CMA estimates that the conduct could have increased commission fees paid by individual home sellers by hundreds of pounds.<sup>510</sup>
- (e) The conduct involved the setting of minimum commission fee levels to be charged for the provision of residential estate agency services in the Relevant Areas. The commercial objective of the agreement was to ensure that the Parties' turnover levels and fees were maintained.<sup>511</sup>
- (f) The Parties agreed to the use of penalty payments for breaches of the Minimum Fee Arrangement, and at least two of the Parties developed internal monitoring mechanisms to check compliance. These penalty payments, however, were only enforced on potentially three occasions<sup>512</sup>

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<sup>507</sup> Penalty Guidance, paragraph 2.5.

<sup>508</sup> *Home buying and selling*, A market study (OFT1186, February 2010), paragraph 4.11.

<sup>509</sup> URN0171, paragraphs 11 to 12.

<sup>510</sup> By way of illustration, for a property sold for £250,000, a commission fee of 1.5% would be £3,750, whilst a commission fee of 1.8% would be £4,500, a difference of £750.

<sup>511</sup> See paragraph 4.61.

<sup>512</sup> See paragraphs 4.152 to 4.153.

and the Parties did not always adhere to the Minimum Fee Arrangement.<sup>513</sup>

(g) The Parties were not the only estate agents in the Relevant Areas. In addition, the Minimum Fee Arrangement did not prevent the Parties from competing on commission fees with third party estate agents.<sup>514</sup>

(h) There have already been two investigations under the Act in the estate agency sector.<sup>515</sup> The CMA considers that the need for general deterrence means that the CMA should send a strong signal that anti-competitive behaviour in this sector will not be tolerated.

7.28 Considering the above factors in the round, the CMA considers that the appropriate starting point for the Infringement is 28%.

### ***Step 2 – adjustment for duration***

7.29 The starting point under step 1 may be increased, or in particular circumstances decreased, to take into account the duration of an infringement. Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional circumstances decide to round up the part year to a full year.<sup>516</sup>

7.30 In this case, the CMA has concluded that the duration of the Infringement was just over six years and eight months. The CMA has rounded up to the nearest quarter year and applied a multiplier of 6.75 at this step in the penalty calculation.

### ***Step 3 – adjustment for aggravating and mitigating factors***

7.31 The basic amount of the penalty, adjusted as appropriate at step 2, may be increased where there are aggravating factors, or reduced where there are mitigating factors. A non-exhaustive list of aggravating and mitigating factors is set out in the Penalty Guidance.<sup>517</sup>

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<sup>513</sup> See paragraphs 4.73 to 4.112.

<sup>514</sup> See paragraphs 4.121 to 4.122.

<sup>515</sup> Restrictive arrangements preventing estate and lettings agents from advertising their fees in a local newspaper, Case CE/9827/13, 8 May 2015 and Residential estate agency services, Case 50235, 31 May 2017.

<sup>516</sup> Penalty Guidance, paragraph 2.16.

<sup>517</sup> Penalty Guidance, paragraphs 2.17 to 2.19.

7.32 In the circumstances of this case, the CMA has adjusted the penalties at step 3 to take into account the following factors:

*Aggravating factor – involvement of directors/senior management*

7.33 The involvement of directors or senior management in an infringement can be an aggravating factor.<sup>518</sup>

7.34 In this case, the CMA has taken into consideration the direct involvement of the directors of Michael Hardy, Prospect and Richard Worth in establishing and implementing the Infringement. The CMA considers that company directors have an additional responsibility, beyond that of other employees, not to infringe the law, no matter the size of the undertaking.

7.35 The CMA has, therefore applied an increase of 15% to the penalties of Michael Hardy, Prospect and Richard Worth for this factor.

*Mitigating factor – adequate steps having been taken with a view to ensuring compliance with Chapter I and Chapter II prohibitions*

7.36 Adequate steps taken by an undertaking with a view to ensuring future compliance with competition law can be a mitigating factor, which may merit a discount in penalty of up to 10%.<sup>519</sup> The mere existence of compliance activities will not be treated as a mitigating factor, but such activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the undertaking (from the top down).<sup>520</sup>

7.37 The CMA considers that the compliance activities undertaken by Prospect (which were initially put in place pro-actively following the CMA's publication of its infringement decision in the '*Three Counties case*')<sup>521</sup> demonstrate a clear and unambiguous commitment to a culture of competition law compliance and that it has taken appropriate steps relating to risk identification, risk assessment, risk mitigation and review since their introduction.

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<sup>518</sup> Penalty Guidance, paragraph 2.18.

<sup>519</sup> Penalty Guidance, paragraph 2.19 and fn33.

<sup>520</sup> Penalty Guidance, fn33.

<sup>521</sup> Restrictive arrangements preventing estate and lettings agents from advertising their fees in a local newspaper, Case CE/9827/13, 8 May 2015.

- 7.38 The CMA therefore considers that it is appropriate to decrease the penalty by 10% for Prospect to reflect that it has taken appropriate steps with a view to ensuring compliance.
- 7.39 Michael Hardy submitted draft compliance materials to the CMA. Whilst the CMA welcomes this initial step, the CMA does not consider that the compliance steps taken by Michael Hardy in the context of this investigation are sufficient to constitute a mitigating factor such that Michael Hardy's penalty should be decreased for compliance.

*Mitigating factor – role of the undertaking, for example where an undertaking is acting under severe duress or pressure*

- 7.40 Michael Hardy<sup>522</sup> and [Director] (Richard Worth)<sup>523</sup> have suggested that Michael Hardy and Richard Worth respectively acted under duress from Romans to participate in the Minimum Fee Arrangement.<sup>524</sup> Both allege that Romans had the power to drive them out of business by undercutting them if they did not enter into or comply with the Minimum Fee Arrangement.
- 7.41 In the case of Michael Hardy, it submitted that the alleged threat was made in a single phone call in the summer of 2008 by [Director A] (Romans).<sup>525</sup>
- 7.42 In the case of [Director] (Richard Worth), he submitted that the alleged threat was made on several occasions by [Director B] (Romans) after the Minimum Fee Arrangement was agreed, to pressurise [Director] (Richard Worth) to comply with it. [Director] (Richard Worth) also stated that he had participated in the Minimum Fee Arrangement with a view to avoiding a 'fee war',<sup>526</sup> protecting his market share<sup>527</sup> and ensuring that Richard Worth was able to survive.<sup>528</sup>

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<sup>522</sup> URN0919; URN0990, paragraph 17 to 24. Michael Hardy also suggested that Prospect, as well as Romans, had put Michael Hardy under duress to participate in the Infringement, but has not explained how it did so or produced any evidence in support of this suggestion.

<sup>523</sup> URN1000, pages 64,82,94, 95 and 98.

<sup>524</sup> In both cases, the suggestion of duress was made after both Parties were provided with access to [Director A]'s (Prospect) witness statement (and transcript of interview in which he said that, although he was not 'bullied' into it, [Director A] (Romans) had told him in the summer of 2008 that unless Prospect cooperated with Romans by joining forces and agreeing fee levels there would be a falling out between them and that Romans, which was about three times bigger than Prospect and had cash reserves, would be more likely to survive. See paragraph 4.12.

<sup>525</sup> URN0919, paragraph 17.

<sup>526</sup> URN1000, page 82.

<sup>527</sup> URN1000, page 94.

<sup>528</sup> URN1000, page 94.



- 7.43 Whilst the Penalty Guidance provides that severe duress or pressure may be a mitigating factor,<sup>529</sup> the CMA considers that the threshold for establishing severe duress, in terms of the level of economic or other pressure that would need to be shown, is high.
- 7.44 It is incumbent on all undertakings irrespective of their size to resist commercial pressure from their competitors to participate in illegal anticompetitive activity. Only in cases involving severe duress or pressure would it be appropriate for such pressure to be treated as a mitigating factor. In this case:
- (a) throughout the Relevant Period all four Parties were leading high street estate agents in Wokingham and direct competitors;
  - (b) all four Parties were experiencing financial difficulties in the summer of 2008;<sup>530</sup>
  - (c) neither Michael Hardy nor Richard Worth were financially or otherwise dependent on Romans; and
  - (d) the commercial pressure allegedly applied did not go beyond general threats that Romans would undercut or otherwise compete vigorously against Michael Hardy and Richard Worth on commission fees.
- 7.45 For these reasons, the CMA does not consider that the commercial pressure of the type suggested by Michael Hardy and [Director] (Richard Worth) amounts to severe duress or pressure such as to be a mitigating factor.

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

- 7.46 The penalty may be adjusted at this step to achieve the objective of specific deterrence (namely, ensuring that the penalty imposed on the infringing undertaking will deter it from engaging in anti-competitive practices in the future), or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking<sup>531</sup> as well as any other relevant circumstances of the case.<sup>532</sup>

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<sup>529</sup> Penalty Guidance, paragraph 2.19.

<sup>530</sup> See paragraph 4.3.

<sup>531</sup> In this case the CMA has considered in particular, for each Party, the following indicators: worldwide turnover (three year average and last available year), profit after tax (three year average and last available year), net assets (last available year), adjusted net assets (that is the last available year's assets plus three years dividends), and three year average dividends.

<sup>532</sup> Penalty Guidance, paragraph 2.20.

- 7.47 At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round. Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.
- 7.48 Increases to the penalty figure at step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of the penalty reached at the end of step 3.<sup>533</sup>
- 7.49 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>534</sup>
- 7.50 Conversely, where necessary, the penalty may be decreased at step 4 to ensure that the level of penalty is not disproportionate or excessive. In carrying out this assessment of whether a penalty is proportionate, the CMA will have regard to the infringing undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the undertaking's infringing activity on competition.<sup>535</sup>
- 7.51 The CMA's consideration of step 4 in calculating the financial penalties for Michael Hardy, Prospect and Richard Worth is set out below.

#### *Michael Hardy*

- 7.52 The CMA considers that Michael Hardy's penalty after step 3 should be decreased by [~~8~~] % to ensure that the level of penalty is proportionate and appropriate, having regard to Michael Hardy's size and financial position, whilst also taking into account the seriousness and long-running nature of the Infringement, as well as Michael Hardy's level of involvement including in particular in the establishment<sup>536</sup> and maintenance of the Infringement.<sup>537</sup>
- 7.53 For the purpose of assessing Michael Hardy's size and financial position at step 4, the CMA has had regard to appropriate financial indicators in the

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<sup>533</sup> Penalty Guidance, paragraph 2.21.

<sup>534</sup> Penalty Guidance, paragraph 2.23.

<sup>535</sup> Penalty Guidance, paragraph 2.24.

<sup>536</sup> See paragraphs 4.27 to 4.60.

<sup>537</sup> See paragraphs 4.69 to 4.164.

round.<sup>538</sup> In particular, the CMA has taken into account that the adjusted penalty represents: [X]% of Michael Hardy's average worldwide turnover for its last three financial years; [X]% of Michael Hardy's average profit after tax for its last three financial years; and [X]% of Michael Hardy's adjusted net assets (being its net assets in 2018 plus the dividends it paid out in the financial years ending 2016, 2017 and 2018).

- 7.54 Assessing the resulting penalty in the round, the CMA considers that a penalty of £158,715 after step 4 is appropriate in this case to act as a specific deterrent, without being disproportionate or excessive.

### *Prospect*

- 7.55 The CMA considers that Prospect's penalty after step 3 should be decreased by [X]% to ensure that the level of penalty is proportionate and appropriate, having regard to Prospect's size and financial position, whilst also taking into account the seriousness and long-running nature of the Infringement, as well as Prospect's level of involvement, including in particular in the establishment<sup>539</sup> and maintenance of the Infringement.<sup>540</sup>

- 7.56 For the purpose of assessing Prospect's size and financial position at step 4, the CMA has had regard to appropriate financial indicators in the round.<sup>541</sup> In particular, the CMA has taken into account that the adjusted penalty represents: [X]% of Prospect's average worldwide turnover for 2018 and for its last three financial years; [X]% of Prospect's average profit after tax for its last three financial years; and [X]% of Prospect's net adjusted assets (being its net assets in 2018 plus the dividends, totalling just over £[X], which it paid out in the financial years ending 2016, 2017 and 2018).

- 7.57 Assessing the resulting penalty in the round, the CMA considers that a penalty of £597,255 after step 4 is appropriate in this case to act as a specific deterrent, without being disproportionate or excessive.

### *Richard Worth*

- 7.58 The CMA considers that Richard Worth's penalty after step 3 should be decreased by [X]% to ensure that the level of penalty is proportionate and appropriate, having regard to Richard Worth's size and financial position,

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<sup>538</sup> See fn531.

<sup>539</sup> See paragraphs 4.27 to 4.60.

<sup>540</sup> See paragraphs 4.69 to 4.164.

<sup>541</sup> See fn531.

whilst also taking into account the seriousness and long-running nature of the Infringement, as well as Richard Worth's level of involvement, including in particular in the establishment<sup>542</sup> and maintenance of the Infringement.<sup>543</sup>

7.59 For the purpose of assessing Richard Worth's size and financial position at step 4, the CMA has had regard to appropriate financial indicators in the round.<sup>544</sup> In particular, although Richard Worth is currently in administration,<sup>545</sup> the CMA has taken into account that it was making profits until 2017 (£[X]), and that the adjusted penalty represents: [X]% of Richard Worth's average profit after tax for its last three financial years; and [X]% of Richard Worth's average total turnover in its last three financial years.

7.60 Assessing the resulting penalty in the round, the CMA considers that a penalty of £193,911 after step 4 is appropriate in this case to act as a specific deterrent, without being disproportionate or excessive.

***Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy***

7.61 The CMA may not impose a penalty for an infringement that exceeds 10% of 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>546</sup>

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<sup>542</sup> See paragraphs 4.27 to 4.60.

<sup>543</sup> See paragraphs 4.69 to 4.164.

<sup>544</sup> See fn531.

<sup>545</sup> Richard Worth Limited went into administration on 12 November 2018. The financial statements and/or management accounts are not available for the year ending 31 January 2018. [Director] (Richard Worth) submitted a turnover figure for the year preceding the CMA's decision prepared on the basis of invoices issued (URN1052). The CMA does not consider that the figure provided was prepared in accordance with the principles for the calculation of turnover set out in the Penalty Guidance, including with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) (as amended by The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259)). The CMA has therefore used the financial statements for the year ending 31 January 2017 in considering whether any adjustments should be made at step 4 for specific deterrence or proportionality.

<sup>546</sup> Section 36(8) of the Act and the 2000 Order, as amended. See also Penalty Guidance, paragraph 2.25. Richard Worth's figures for the business year preceding the date of the CMA's decision are not available. Richard Worth Limited's financial statements for the year ending 31 January 2018 are still outstanding on Companies House. The administrator has confirmed that these were not prepared and that no management accounts are available for 2018. As set out at fn545, [Director] (Richard Worth) submitted a turnover figure for the year preceding the CMA's decision prepared on the basis of invoices issued (URN1052). The CMA does not consider that the figure provided was prepared in accordance with the principles for calculation of turnover set out in the Penalty Guidance. Accordingly, the CMA has used the turnover for the year ending 31 January 2017 as Richard Worth's applicable turnover for the purpose of this step in the penalty calculation.

- 7.62 In addition, the CMA must, when setting the amount of a penalty for a particular agreement or conduct, take into account any penalty or fine that has been imposed by the European Commission, or by a court or other body in another EU Member State in respect of the same agreement or conduct.<sup>547</sup>
- 7.63 The CMA has assessed the penalties for Michael Hardy, Prospect and Richard Worth after step 4 against the statutory maximum. This assessment has not necessitated a reduction to any of their penalties at step 5.

### ***Step 6 – application of reduction for leniency and settlement***

- 7.64 The CMA will reduce the undertaking's penalty where the undertaking has a leniency agreement with the CMA in accordance with the CMA's published guidance on leniency, provided always that the undertaking meets the conditions of the leniency agreement.<sup>548</sup>
- 7.65 Similarly, the CMA will reduce an undertaking's financial penalty at step 6 where the undertaking has entered into a settlement agreement with the CMA in accordance with the CMA's settlement policy.<sup>549</sup> This will involve, amongst other things, the undertaking admitting its participation in the infringement.<sup>550</sup>

### ***Leniency***

- 7.66 Prospect applied for and was granted leniency under the CMA's leniency policy. Under the terms of the leniency agreement which was entered into on 3 June 2019, Prospect was granted a penalty reduction of 50%, provided it continued to cooperate and comply with the conditions of the CMA's leniency policy as set out in its leniency agreement.
- 7.67 In determining the level of leniency discount for Prospect, the CMA has had regard to a number of factors, in particular the overall added value of the information provided, the documents and evidence it was able to provide as well as its overall level of cooperation.
- 7.68 Prospect applied for leniency at an early stage of the investigation and the evidence it provided, in terms of documentary evidence and in particular

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<sup>547</sup> Penalty Guidance, paragraph 2.28.

<sup>548</sup> Penalty Guidance, paragraph 2.29. See also the Leniency Guidance.

<sup>549</sup> CMA8, section 14.

<sup>550</sup> Penalty Guidance, paragraph 2.30.

witness evidence (as set out at paragraphs 2.14 to 2.17), added significant value to the CMA's investigation which merited the level of discount granted.

### *Settlement*

7.69 The CMA will apply a penalty reduction where an undertaking settles with the CMA, which will involve, among other things, the undertaking admitting its participation in the infringement.<sup>551</sup>

7.70 As set out at paragraph 2.30, Michael Hardy and Prospect have admitted the facts and allegations of infringement as set out in the Statement (subject to limited representations on manifest factual inaccuracies), which are now reflected in the Decision. In light of these admissions and their agreement to cooperate in expediting the process for concluding the investigation, the CMA has reduced Michael Hardy's and Prospect's penalties by 10%.

### *Financial hardship*

7.71 In exceptional circumstances, the CMA may reduce a penalty where the undertaking is unable to pay the penalty proposed due to its financial position. Such financial hardship adjustments will be exceptional.<sup>552</sup>

7.72 The penalties for Michael Hardy, Prospect and Richard Worth do not include any adjustment for financial hardship, which the CMA did not consider would be warranted in this case.

### ***Penalties imposed by the CMA***

7.73 The total payable penalties imposed are as follows:

(a) Michael Hardy: £142,843

(b) Prospect: £268,765

(c) Richard Worth: £193,911

## **E. Payment of penalty**

7.74 The CMA therefore requires Michael Hardy, Prospect and Richard Worth to pay their respective penalty set out at paragraph 7.73. Payment should be

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<sup>551</sup> Penalty Guidance, paragraph 2.30.

<sup>552</sup> Penalty Guidance, paragraph 2.33.

made to the CMA by close of the banking business on 18 February 2020 or on such date or dates agreed in writing with the CMA.

**Rory Field (Chair), Claudia Berg and Colin Raftery  
(the Case Decision Group)  
for and on behalf of the Competition and Markets Authority**

**17 December 2019**