Decision of the Competition and Markets Authority

Privately funded ophthalmology services
Case 50782-1

1 July 2020

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 [✂].

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.

Contents

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 1.3 have infringed the prohibition imposed by section 2(1) (the '**Chapter I prohibition**') of the Competition Act 1998 (the '**Act**').

1.2 The Decision is issued under section 31 of the Act and Rules 10 and 12 of the CMA's Rules.[1]

1.3 This Decision is addressed to the following:

a) Spire Healthcare Limited and Spire Healthcare Group Plc (together, '**Spire**');

b) Mr Aasheet Desai ('**Mr Desai**');

c) Hemmerdinger Eyecare Limited, as the corporate entity through which Mr Christopher Hemmerdinger ('**Mr Hemmerdinger**') operates;

d) Dr A D Hubbard Ophthalmology Limited, as the corporate entity through which Mr Alan Hubbard ('**Mr Hubbard**') operates;

e) Nguyen Vision Limited, as the corporate entity through which Mr Dan Nguyen ('**Mr Nguyen'**) operates;

f) Mr Say-Aun Quah ('**Mr Quah**');

g) Mr Arun Sachdev ('**Mr Sachdev**'); and

h) Mr Conrad Yuen ('**Mr Yuen**'),

which, in this Decision, are each referred to as a '**Party**' and together as the '**Parties**'. Mr Desai, Mr Hemmerdinger[2], Mr Hubbard[3], Mr Nguyen[4], Mr Quah, Mr Sachdev and Mr Yuen are jointly referred to as the '**Ophthalmologists**'.

1.4 The CMA has found that the Parties infringed the Chapter I prohibition by entering into an agreement and/or concerted practice to fix initial consultation

[1] The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458. (the 'CMA Rules').
[2] Operating through Hemmerdinger Eyecare Limited.
[3] Operating through Dr A D Hubbard Ophthalmology Limited.
[4] Operating through Nguyen Vision Limited.

fees for self-pay[5] patients charged by the Ophthalmologists practising at Spire's Regency Hospital in Macclesfield (the '**Hospital**'), lasting:

(a) for at least the period from 29 August 2017 to 3 July 2019 for each of Spire, Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen; and

(b) for the period from 29 August 2017 to 28 June 2018 for Mr Desai,

(for each Party, the '**Relevant Period**' and the '**Infringement**' for that Party).

1.5 The CMA has decided to attribute liability for Spire Healthcare Limited's infringement also to its parent company, Spire Healthcare Group Plc, making Spire Healthcare Limited and Spire Healthcare Group Plc jointly and severally liable for the Infringement.

1.6 By this Decision the CMA is imposing financial penalties on Spire, Hemmerdinger Eyecare Limited,[6] Dr A D Hubbard Ophthalmology Limited,[7] Nguyen Vision Limited,[8] Mr Quah, Mr Sachdev and Mr Yuen under section 36 of the Act in respect of the Infringement. No financial penalty will be imposed on Mr Desai in respect of the Infringement provided he continues to co-operate and comply with the conditions of the CMA's leniency programme (see further at paragraphs 2.3 to 2.4 below).

B. Glossary

1.7 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
Act	The Competition Act 1998
Arrangement	The agreement and/or concerted practice as described in sections 3 to 5 below

[5] This means patients who are not insured through private medical insurance and will pay for the cost of the initial consultation fee and subsequent treatment themselves.
[6] As the corporate entity through which Mr Hemmerdinger operates.
[7] As the corporate entity through which Mr Hubbard operates.
[8] As the corporate entity through which Mr Nguyen operates.

Infringement	The infringement of the Chapter I prohibition set out at paragraph 1.4 above
Chapter I prohibition	The prohibition imposed by section 2(1) of the Act
CMA	The Competition and Markets Authority
CMA Rules	The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 SI 2014/458
Decision	This CMA Decision, dated 1 July 2020
Leniency Guidance	Office of Fair Trading's 'Applications for leniency and no-action in cartel cases' (OFT 1495), which has been adopted by the CMA
Mr Desai	Mr Aasheet Desai
Mr Desai's immunity agreement	An immunity agreement under the CMA's leniency programme between the CMA and Mr Desai as defined in paragraph 2.4
Mr Hemmerdinger	Mr Christopher Hemmerdinger, operating through Hemmerdinger Eyecare Limited
Hospital	Spire Regency Hospital at West Street, Macclesfield SK11 8DW
Mr Hubbard	Mr Alan Hubbard, operating through Dr A D Hubbard Ophthalmology Limited
Mr Nguyen	Mr Dan Nguyen, operating through Nguyen Vision Limited
OFT	Office of Fair Trading
Ophthalmologists	Mr Desai, Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen

Penalties Guidance	CMA's Guidance as to the appropriate amount of a penalty (CMA73, 18 April 2018)
PMI	Private medical insurance
Mr Quah	Mr Say Aun Quah
Mr Sachdev	Mr Arun Sachdev
Settling Parties	Spire, Hemmerdinger Eyecare Limited,[9] Dr A D Hubbard Ophthalmology Limited,[10] Nguyen Vision Limited,[11] Mr Quah, Mr Sachdev and Mr Yuen
Settling Ophthalmologists	Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen
Spire	Spire Healthcare Limited (company number 01522532) and Spire Healthcare Group Plc (company number 09084066)

[9] As the corporate entity through which Mr Hemmerdinger operates.

[10] As the corporate entity through which Mr Hubbard operates.

[11] As the corporate entity through which Mr Nguyen operates.

2. Summary of the investigation

2.1 This section sets out the origin of this investigation and provides an overview of the investigatory steps taken to date.

A. Launch of the investigation

2.2 On 3 July 2019, 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 initial consultations by the Ophthalmologists to self-pay ophthalmology patients at the Hospital.

B. Leniency

2.3 On 6 August 2018, prior to the CMA opening its investigation, Mr Desai applied to the CMA for leniency and provided information to the CMA under the CMA's leniency programme.[12]

2.4 On 2 March 2020, the CMA entered into an immunity agreement under the CMA's leniency programme with Mr Desai in respect of his involvement in the Infringement ('**Mr Desai's Immunity Agreement**'). Mr Desai was the first to apply under the policy and was granted immunity from financial penalties, conditional on him continuing to meet the conditions of leniency.

C. Evidence gathering

2.5 In July 2019, the CMA requested information from Spire and the Ophthalmologists, except Mr Desai, under section 26 of the Act.

2.6 The CMA requested further information and/or documents from Spire under section 26 of the Act on 10 September 2019, 22 October 2019 and 22 January 2020 and from the Ophthalmologists, except Mr Desai, on 11 September 2019 and 22 January 2020.

2.7 The CMA also conducted voluntary interviews with the following individuals from Spire on the dates specified below:

(a) [Spire employee] on 22 August 2019; and

(b) [Spire employee] on 11 September 2019.

[12] Under the Office of Fair Trading ('**OFT**')'s leniency policy (which has been adopted by the CMA: '*Applications for leniency and no-action in cartel cases*' (OFT 1495) (the '**Leniency Guidance**'), available at www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases.

D. Prioritisation and case closures

2.8 On 10 December 2019, the CMA decided that there were no grounds to take action against another consultant ophthalmologist, [✂], on the grounds that there was no evidence that [✂] had participated in the Infringement. Specifically, they did not agree to fix their initial consultation fees charged to self-pay patients at the Hospital and communicated this to Spire (see paragraphs 3.55 to 3.57 below).

2.9 On 10 December, 2019 the CMA sent case closure letters to two further consultant ophthalmologists, Mr Hubbard and [✂], having decided to close the investigation in respect of those parties on administrative prioritisation grounds as there was no evidence at that time that they had agreed to fix their initial consultation fees charged to self-pay patients at the Hospital.

2.10 On 24 March 2020, in light of new evidence received, the CMA decided to reconsider the decision to close the investigation in respect of Mr Hubbard on administrative prioritisation grounds and sent a case initiation letter to Mr Hubbard.

E. State of play meetings

2.11 The CMA held 'state of play' meetings with Spire, Mr Desai, Mr Hemmerdinger, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen, between 28 November and 19 December 2019. The CMA held a 'state of play' meeting with Mr Hubbard on 30 March 2020.

F. Settlement

2.12 Spire, Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen expressed an interest in exploring settlement with the CMA.

2.13 In accordance with the CMA's settlement policy,[13] the CMA provided Spire, Mr Hemmerdinger, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen in March 2020 and Mr Hubbard in May 2020 with a draft penalty calculation, a draft statement of objections together with access to the documents referred to in the draft statement of objections and a list of documents on the CMA's file.

2.14 Spire, Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen were provided with an opportunity to make representations on the

[13] Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases ('CMA8'), paragraphs 14.14 and 14.15.

draft penalty calculation and draft statement of objections, both in writing and orally at settlement meetings in March and May 2020.

2.15 On 4 June 2020, the CMA entered into settlement agreements with each of the Settling Parties, in which the Settling Parties each:[14]

(a) admitted that it had infringed the Chapter I prohibition in the terms set out in the revised draft statement of objections dated 26 May 2020 and which is now reflected in this Decision;

(b) agreed to accept a maximum penalty; and

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

G. Statement of objections

2.16 On 9 June 2020, the CMA issued a Statement of Objections (the '**SO**') to the Parties,[15] in which it proposed to make a decision that they had infringed the Chapter I prohibition.

2.17 On 9 June 2020 Mr Desai and on 16 June 2020 Spire made limited representations on what they considered were manifest factual inaccuracies in the SO. Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen did not provide any representations on the SO. According to Rule 6(8) of the CMA's Rules, the CMA may proceed with the case in the absence of such representations.

[14] Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases ('CMA8'), paragraphs 14.7 and 14.8.

[15] In accordance with section 31 of the Act and Rules 5 and 6 of the CMA Rules.

3. Facts

3.1 This section summarises the factual scenario to which this case relates.

A. Parties under investigation

Spire

3.2 Spire Healthcare Limited (company number 01522532) is a private hospital operator in the UK which was founded in 2007. In the UK, Spire Healthcare Limited has 39 hospitals, 8 clinics and one specialist Care Centre across England, Wales and Scotland.[16]

3.3 Spire Healthcare Limited is a wholly owned subsidiary of Spire Healthcare Group plc.[17] Spire Healthcare Group plc is listed on the London Stock Exchange and is the ultimate holding company of a group of companies specialising in the provision of private healthcare services in the UK. In the financial year ended 31 December 2019, Spire Healthcare Group plc had a turnover of £981 million.[18]

The Ophthalmologists

3.4 Mr Desai is a consultant ophthalmologist. Mr Desai held practising privileges at the Hospital from 28 January 2011[19] but stopped consulting at the Hospital on 28 June 2018.[20]

3.5 Mr Hemmerdinger is a consultant ophthalmologist who operates as a consultant through Hemmerdinger Eyecare Limited (company registered number: 08530821).[21] Mr Hemmerdinger currently holds practising privileges at the Hospital and has done so since 18 May 2017.[22]

3.6 Mr Hubbard is a consultant ophthalmologist who operates as a consultant through Dr a D Hubbard Ophthalmology Limited (company registered number:

[16] Information available at: https://investors.spirehealthcare.com/about/key-facts/.
[17] Spire Healthcare Group Plc Annual Report and Accounts for the year ended 31 December 2019.
[18] Spire Healthcare Group Plc Annual Report and Accounts for the year ended 31 December 2019.
[19] Spire response to CMA s.26 Notice sent on 29 January 2020 - page 2 [Document URN0234].
[20] Mr Desai's email to the CMA sent on 28 January 2020 – page 1 [Document URN0233]. See also, Spire response to CMA s.26 Notice dated 29 January 2020 – page 2 [Document URN0234].
[21] Christopher Hemmerdinger and Amanda Hemmerdinger are directors of the company.
[22] Spire response to CMA s.26 Notice sent on 29 January 2020 – page 2 [Document URN0234].

09506313)[23]. Mr Hubbard holds practising privileges at the Hospital and has done so since 2000. [24]

3.7 Mr Nguyen is a consultant ophthalmologist who operates as a consultant through Nguyen Vision Limited (company registered number: 10078186).[25] Mr Nguyen currently holds practising privileges at the Hospital and has done so since 4 January 2013.[26]

3.8 Mr Quah is a consultant ophthalmologist. Mr Quah currently holds practising privileges at the Hospital and has done so since 16 June 2009.[27]

3.9 Mr Sachdev is a consultant ophthalmologist. Mr Sachdev currently holds practising privileges at the Hospital and has done so since 9 November 2012.[28]

3.10 Mr Yuen is a consultant ophthalmologist. Mr Yuen currently holds practising privileges at the Hospital and has done so since 13 September 2010.[29]

The relationship between the Parties

3.11 The Ophthalmologists are independent practitioners. They are not employees of Spire. Rather, the Hospital grants practising privileges to consultants, including the Ophthalmologists, to practise at the Hospital on a self-employed basis.[30]

3.12 The Hospital performs various administrative functions (e.g. aspects of patient bookings) and, for a fee, offers secretarial support to consultants who wish to practise there as well as access to Hospital facilities (such as a consultation room). However, the extent to which they use the services offered by the Hospital is ultimately a matter for each consultant practising at the Hospital. For example, some consultants engage their own private secretaries or other third-party providers to assist with administrative tasks.[31]

3.13 Whilst the Hospital administrative staff may communicate with consultants or their secretaries regarding the level of initial consultation fees for administrative purposes (e.g. for the purpose of invoicing where the hospital

[23] Mr Alan David Hubbard is the only director of the company.
[24] Mr Hubbard's response to Section A of the CMA s. 26 notice sent on 2 April 2020 – page 1 [Document URN1055].
[25] Dan Nguyen and Rachael Nguyen are directors of the company.
[26] Spire response to CMA s.26 Notice sent on 29 January 2020 – page 2 [Document URN0234].
[27] Spire response to CMA s.26 Notice sent on 29 January 2020 – page 2 [Document URN0234].
[28] Spire response to CMA s.26 Notice sent on 29 January 2020 – page 2 [Document URN0234].
[29] Spire response to CMA s.26 Notice sent on 29 January 2020 – page 2 [Document URN0234].
[30] Spire response to CMA s.26 Notice sent on 3 July 2019 – page 2, paragraph 2.1 [Document URN0302].
[31] Spire response to CMA s.26 Notice sent on 3 July 2019 – page 2, paragraph 2.1 [Document URN0302].

provides administrative support), the level of the initial consultation fee charged to patients is determined by the consultant as set out in paragraph 3.31 below.[32]

B. Industry overview

3.14 This section provides an overview of those aspects of privately funded ophthalmology services in the UK that are relevant to this investigation. It describes:

(a) ophthalmology;

(b) the 'patient pathway', including how private patients are referred for ophthalmology services, and how a consultant is chosen to provide those services; and

(c) the different methods by which the consultant is paid for ophthalmology services provided to private patients.

What is ophthalmology?

3.15 This Decision is concerned with the provision of ophthalmology services to privately funded patients. Ophthalmology is a branch of medicine dealing with the diagnosis, treatment and prevention of diseases of the eye and visual system and encompasses many different kinds of eye procedures, including cataract surgery, which is the most commonly performed surgical ophthalmology procedure in the UK.[33]

Patient pathway

3.16 Competition in the private healthcare sector can be characterised as a contest for control of the 'patient pathway' (i.e. the key stages from a patient's initial diagnosis and referral, to any treatment and follow-up care that may be required). The patient pathway will ultimately determine where the patient is treated, as well as the consultant who provides any such treatment (including any procedure that may be needed) and the facility where any such treatment and/or procedure and follow-up care is provided (i.e. the patient pathway ultimately determines the recipient of the payment for any treatment the patient may require).

3.17 Whilst there are variations to the different pathways that a patient may follow, set out below are the key stages of the patient pathway for privately-funded

[32] Spire response to CMA s.26 Notice sent on 3 July 2019 – page 7, paragraph 4.2 [Document URN0302].
[33] https://www.nhs.uk/conditions/cataract-surgery/. See also Spire response to Section B of CMA s.26 Notice sent on 10 September 2019 – pages 2 and 3 [Document URN0216].

ophthalmology patients, either under their private medical insurance ('**PMI**') (when the patient is insured though a PMI provider) or on a 'self-pay' basis (when patients pay for the services themselves without any PMI cover).

Referral by a GP or other healthcare provider

3.18 The patient pathway to private healthcare for most ophthalmology patients in the UK starts with a visit to a GP, optometrist, optician or other healthcare provider (e.g. an occupational health adviser or a nurse) to assess the patient's condition. If the diagnosis is that the patient may have a condition that requires ophthalmology treatment, the patient is referred to a consultant ophthalmologist.[34]

Consultant ophthalmologists

3.19 A consultant ophthalmologist is a medically trained doctor who has undertaken further specialist training and study in matters relating to the human eye. They examine, diagnose and treat diseases and injuries of the eye.[35] In order to practice, a consultant ophthalmologist is required to undergo specific training and be admitted to the UK specialist ophthalmology register.[36]

3.20 Consultants can provide ophthalmology services to both self-pay and insured patients. Consultants who wish to provide privately insured ophthalmology services need to obtain PMI provider recognition.[37]

Choice of consultant

3.21 When referring a patient to a consultant, the GP or optometrist can either refer a patient directly to a named consultant, who may practise locally, or make an unnamed referral (where the referring GP/optometrist does not name the consultant but specifies the specialty or sub-specialty). In addition to the GP/optometrist's recommendation, patients can also choose a consultant based on family or friends' recommendations or through their own research.[38]

3.22 Where a patient is insured, they may also ask their PMI provider, which will provide them with a choice from a number of consultants local to the patient. Some PMI providers may inform the patient that the consultant is not covered under the patient's PMI policy or limit the patient's choice to consultants who

[34] Spire response to CMA s.26 Notice sent on 3 July 2019 – page 2, paragraph 2.2 [Document URN0302].
[35] https://www.rcophth.ac.uk/patients/frequently-asked-questions-faqs/.
[36] https://www.rcophth.ac.uk/training/certification-of-training-and-specialist-training/certificate-confirming-eligibility-for-specialist-registration/.
[37] Consultants may still be able to provide services to self-pay patients, even when they are recognised by one or more PMI providers.
[38] Spire response to CMA s.26 Notice sent on 3 July 2019 – page 2, paragraph 2.3 [Document URN0302].

are covered under the relevant policy. Prior to confirming or making a choice of consultant, the patient will typically contact his or her PMI provider to pre-authorise treatment and inform the PMI provider of the consultant if already chosen.

Initial consultation

3.23 The patient's next step is to see a consultant for an initial consultation. The consultant may propose certain tests such as biometry or types of examination before coming to a firm diagnosis or recommending a particular form of treatment (e.g. a surgical procedure for cataract treatment).

3.24 The consultant with whom a patient chooses to have their initial consultation and the hospital at which the consultation takes place will normally determine where any follow-up treatment and/or procedure is performed. Although patients may sometimes change consultant and/or hospital after the initial consultation and throughout the patient pathway, patients will normally stay with the same consultant once the initial consultation has taken place and will generally receive any follow-up procedure and/or treatment required at the same hospital where the initial consultation was held.[39]

3.25 A patient's choice of consultant, and the facility in which the initial consultation takes place, is therefore likely to be determinative of which consultant will carry out any necessary follow-up treatment and/or procedure and at which facility any such follow-up services will be provided. This is particularly relevant for cataract surgery, the most common ophthalmology treatment, where patients will have been referred to a consultant by an optician or their GP on the basis that they are likely to need cataract surgery.[40]

Treatment and follow-up

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

Payment

3.27 Patients wishing to receive private ophthalmology services and treatment may fund it by either:

(a) paying for it themselves (i.e. on a self-pay basis); or

[39] Spire response to Section B of CMA s.26 Notice sent on 10 September 2019 – page 2, paragraph 2.1 [Document URN0216].
[40] Transcript of CMA interview with [Spire employee] on 11 September 2019 – page 130, lines 18 – 25 [Document URN0225].

(b) requesting the relevant fees be paid by their PMI, either under a policy they have taken out themselves or under an employer's private medical cover scheme.

Self-pay

3.28 If the patient does not have any PMI cover or if the condition they are seeking treatment for is not covered by their policy or has certain excesses under their policy, they will need to fund the treatment themselves on a self-pay basis. If an insured patient has an excess limit on their PMI policy, any excess is normally applied to the first part of the claim and is therefore frequently applied to the initial consultant fee.[41]

3.29 A patient may elect to pay for healthcare services on a self-pay basis for a number of reasons. For example, the treatment and/or procedure concerned may not be covered by their PMI policy, or (more often) the patient does not have PMI cover, and the treatment is not available at all through the NHS or only available after a long wait.[42]

3.30 Most private hospital groups offer package pricing to self-pay patients. This means that even if a patient is not covered by a PMI policy, they may be able to access private treatment by buying a treatment package or paying a one-off price. This may include, for example, coverage for hospital charges and drugs for inpatients, a private room, nursing and medical care, and the consultant's fee for any treatment and/or procedure. Package pricing usually requires a patient to pay in advance.[43]

3.31 The consultants' initial consultation fees are normally charged directly to self-pay patients by the consultant. As referred to in paragraph 3.13 above, the consultant is free to set the price of their initial consultation fees, taking into consideration market conditions. Any follow-up treatment and/or procedure fees will also normally be charged by the consultant and the hospital separately for each of their respective services to the patient, except where the procedure is provided as part of a package. For self-pay packages, a hospital will normally quote a package price to the patient, which will include the consultant's fee for any treatment and/or procedure in addition to the hospital's fees, which will then be collected by the relevant hospital on behalf of the consultant and for his account.[44]

[41] Spire response to Section B of CMA s.26 Notice sent on 10 September 2019 – page 5, paragraph 6.2 [Document URN0216].
[42] CMA Private Healthcare Market Investigation, Final Report – paragraph 2.46.
[43] CMA Private Healthcare Market Investigation, Final Report – paragraph 2.46.
[44] Spire response to Section B of CMA s.26 Notice sent on 10 September 2019 – page 4, paragraph 4.8 [Document URN0216].

PMI

3.32 If a patient has PMI cover, they will always need to contact their PMI provider or the organisation which administers their employer's scheme (typically the relevant PMI provider) to obtain the PMI's authorisation to proceed with an initial outpatient consultation and/or any follow-up treatment that may be needed.

3.33 For patients with PMI cover, the level and structure of consultant fees will depend on their PMI provider, the type of treatment being sought and what arrangements that PMI provider has in place with the relevant hospital. For example, certain PMI providers will have cataract pathways in place with different hospital groups whereby a total pathway price for the treatment is agreed between the relevant hospital and the PMI provider. Such a pathway price would normally be inclusive of a consultant's initial consultation fees as well as any fees charged for any follow-up treatment and/or procedure required by the consultant that is relevant to the treatment pathway. The relevant hospital would then collect such fees from the patient on behalf of the consultant (i.e. as a collecting agent). In order for a consultant to benefit from such arrangements they will need to be recognised by the relevant PMI provider and also to have signed up to the relevant network agreement and agreed to the PMI's network requirements (where applicable).[45]

C. Conduct relevant to the Infringement

3.34 On the basis of the conduct set out below, the CMA has found that during the Relevant Period the Parties infringed the Chapter I prohibition through an agreement and/or concerted practice to fix the level of initial consultation fees charged by the Ophthalmologists at the Hospital.

3.35 Whilst Spire does not itself provide initial consultations in competition with the Ophthalmologists, the CMA has found that Spire played a central role in the Infringement by instigating and facilitating it. As set out further below, Spire (i) brought up the topic during the ophthalmic dinner that the differing consultation fees were confusing for customers; (ii) followed-up, in writing, with the Ophthalmologists to suggest that the Ophthalmologists' initial consultation fees be aligned at £200; and (iii) liaised with its customer service team facilitating the agreement's implementation.

3.36 The CMA's findings are supported by contemporaneous documents, such as e-mails and price lists from the Hospital, as well as emails from the Ophthalmologists showing the Ophthalmologists' initial consultation fees,

[45] Spire response to Section B of CMA s.26 Notice sent on 10 September 2019 – page 4, paragraph 4.4 [Document URN0216].

together with information from the Ophthalmologists and witness accounts from current and former employees of Spire.

Ophthalmologist initial consultation fees prior to August 2017

3.37 The Ophthalmologists were asked to explain how they each set their own initial consultation fees at the time they were granted practising privileges at the Hospital.

3.38 Some of the Ophthalmologists explained that they determined the level of their consultation fees by reference to any available information on the fee levels charged by other consultants (not only other consultant ophthalmologists) and by reference to their own fees at other hospitals, or the fees paid by PMIs. Based on this assessment, the Ophthalmologists set a fee level in line with or around the average of these fees.[46]

3.39 In addition to market research of the kind described above, one Ophthalmologist, together with another consultant ophthalmologist who is not a Party said they also took into account the costs and overheads of providing the service.[47]

3.40 Lastly, one of the Ophthalmologists, together with another consultant ophthalmologist who is not a Party, said that they would take into account the potential impact on patient numbers when they considered whether to increase their fees and that they refrained from increasing them when the level of self-pay patient activity was low.[48]

3.41 A further Ophthalmologist explained that setting lower prices for the services offered is a common strategy used by consultants to attract more patients when they first start practising.[49] Two of the Parties explained that patients are sensitive to price differentiation.[50] One of the Parties along with a consultant ophthalmologist, who is not a Party, acknowledged that level of

[46] See Mr Hemmerdinger's response to CMA s.26 Notice sent on 23 July 2019 – page 2 [Document URN0296], Mr Sachdev's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0220], Mr Quah's response to CMA s.26 Notice sent on 3 July 2019 – page 2 [Document URN0291] and Mr Yuen's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0282].
[47] See Mr Yuen's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0282] and [✂]'s response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0285].
[48] See Mr Yuen's responses to CMA s.26 Notice sent on 3 July 2019 – page 1 and 2 [Document URN0282] and [Document URN0324] and [✂]'s response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0285].
[49] See Mr Hubbard's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0280].
[50] See Mr Yuen's response to CMA s.26 Notice sent on 3 July 2019 – pages 1 and 2 [Document URN0282] and [Document URN0324] and Transcript from CMA interview with [Spire employee] on 11 September 2019 from page 84 (line 20) [Document URN0225].

experience, qualifications and seniority are factors that have led consultants to increase their fees.[51]

3.42 Spire explained that the Hospital collects information on the level of consultants' fees so that the Hospital can generate an automatic letter with all the relevant information for patients when they book an appointment. So, as part of the onboarding process, consultants with practising rights at the Hospital confirm their fees to the Hospital.[52]

3.43 According to the information available to the CMA, the fees charged by the Ophthalmologists as at June 2017 were the following:[53] (a) Mr Desai - £180; (b) Mr Hemmerdinger - £200;[54] (c) Mr Hubbard - £200; (d) Mr Nguyen - £180; (e) Mr Quah - £200; (f) Mr Sachdev - £180; and (g) Mr Yuen - £180.

The meeting

3.44 On 24 July 2017, [Spire employee] contacted consultant ophthalmologists at the Hospital, including the Ophthalmologists, to arrange an 'Ophthalmic Consultant Speciality Dinner' on 23 August 2017 at the Legh Arms, in Prestbury Village, Macclesfield (the '**Meeting**').[55]

3.45 A further internal e-mail from [Spire employee] to [Spire employee] on 22 August 2017 confirms that they had sent a reminder about the Meeting to the consultants and had received confirmation of attendance from all the Ophthalmologists, except Mr Hubbard and Mr Hemmerdinger.[56] Mr Hemmerdinger was unable to attend the dinner but would be joining for coffee.[57]

---

[51] See [✂] response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0285] and Mr Hubbard's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0280].

[52] See Transcript from CMA interview with [Spire employee] on 11 September 2019 – page 142 (line 6) to page 143 [Document URN0225].

[53] This pricing is reflected in the Hospital's records of the Ophthalmologists' pricing at the time, as set out in an e-mail from [Spire employee], to [Spire employee] dated 29 June 2017 which attaches the consultation price lists for both new and follow-up patients, updated in May 2016. The e-mail notes that as this list was last updated in May 2016, consultants that had joined since were not included [Document URN0058]. The attached list (page 2) shows, as of May 2016, the Ophthalmologists' fees for new patients [Document URN0059].

[54] Mr Hemmerdinger's name is not included in the May 2016 price list – page 2 [URN0059] because he was granted practising rights at the Hospital in 2017. Mr Hemmerdinger confirmed in an e-mail to [Spire employee] dated 27 June 2017, prior to seeing his first patient at the Hospital, that his initial consultation fee was £200 [Document URN0221]. A subsequent undated price list, which was updated once Mr Hemmerdinger started consulting at the Hospital, contains the Ophthalmologists' fees for new patients, as shown in the May 2016 price list and, for the avoidance of doubt, at the same level, but also includes Mr Hemmerdinger's fee as £200 [Document URN0061].

[55] See, for example, e-mail provided by Mr Quah – page 1 [Document URN0222], e-mail provided by Mr Hemmerdinger – page 1 [Document URN0217].

[56] [Document URN0040] page 1.

[57] Email response from Mr Hemmerdinger – page 1 [Document URN0218].

3.46 Spire, [Spire employee] and [Spire employee] have all confirmed that both [Spire employee] and [Spire employee] were in attendance throughout the Meeting and that [Spire employee] attended the 'latter part' of the Meeting.[58]

3.47 Five Ophthalmologists have also confirmed that they attended the Meeting (Mr Desai, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen).[59] Mr Hemmerdinger confirmed that he joined the group that evening, but later after the meeting had ended[60] and Mr Hubbard confirmed that he did not attend the meeting.[61]

3.48 Spire has noted that the purpose of the Meeting was not to discuss the level of initial consultation fees and that this was not included in the agenda for the Meeting or raised with the consultants in attendance ahead of the Meeting.[62]

3.49 [Spire employee]'s e-mail to the consultants dated 24 July 2017 states that the Meeting is '*an opportunity for the Regency to provide you with valuable updates and discussions including business, clinical and service provision etc. We also look upon this engagement session as a chance for you to ask us any questions you may have specifically relation to the hospital and, together to discuss opportunities to take your speciality forward.*'[63] Several of the Ophthalmologists have also explained that it was an opportunity to meet [Spire employee].[64]

3.50 The Spire internal agenda for the Meeting also contains the following items: '*(1) welcome, (2) regency update (updates and discussion including business, clinical and service provision); (3) OPH update (any important updates relating to the Ophthalmology realm; significant ophthalmic movements around figures, trends etc.); (4) business think tank (engagement session, a*

[58] Spire response to CMA s.26 Notice sent on 3 July 2019 – page 8 [Document URN0302]. See also Transcript of CMA interview with [Spire employee] on 11 September 2019 – page 75, lines 11 – 13 [Document URN0225] and Transcript of CMA interview with [Spire employee] on 22 August 2019 – pages 41 and 42 [Document URN0224].
[59] Mr Nguyen's response to CMA s.26 Notice sent on 3 July 2019 – page 4 [Document URN0277]; Mr Quah's response to CMA s.26 Notice sent on 3 July 2019 – page 3 [Document URN0291]; Mr Sachdev's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0220]; and Mr Yuen's response to CMA s.26 Notice sent on 3 July 2019 – page 3 [Document URN0282].
[60] Mr Hemmerdinger's response to CMA s.26 Notice sent on 23 July 2019 – page 2 where Mr Hemmerdinger states, '*I can confirm that I was invited to a meeting on that date and replied to say I would attend but could only attend the end of the meeting as I have an evening NHS theatre list on Wednesday (email available). My evening list ends at 9pm so will have arrive about 20 minutes later for the end of the meeting.*' [Document URN0296]
[61] Mr Hubbard's response to Section A of the CMA s. 26 notice sent on 2 April 2020, page 1 [Document URN1055].
[62] Spire response to CMA s.26 Notice sent on 3 July 2019 – page 8 [Document URN0302]. See also Transcript of CMA interview with [Spire employee] on 11 September 2019 – page 83, line 7 [Document URN0225] and Transcript of CMA interview with [Spire employee] on 22 August 2019 – page 63, line 9 [Document URN0224].
[63] For example, e-mail sent to Mr Quah – page 2 [Document URN0222].
[64] Mr Sachdev's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0220] and Mr Yuen's response to CMA s.26 Notice sent on 3 July 2019 – page 3 [Document URN0282].

chance for you to ask us any questions you may have specifically relating to the hospital and, together, to discuss opportunities to take your speciality forward); and (5) AOB.'[65]

3.51 Spire has explained that, towards the start of the Meeting, a Spire employee, most likely to have been [Spire employee], raised the subject of initial consultation fee levels, noting that the differences in levels of initial consultation fees between the different consultant ophthalmologists practising at the Hospital was confusing for patients.[66] [Spire employee] explained in interview that they had had feedback from the customer services team that patients do not understand that consultant ophthalmologists are self-employed, and that differences in fees can therefore create doubts or concerns for patients that the quality of provision is worse if one consultant ophthalmologist's fee is less than another's.[67] [Spire employee] explained further in interview that ophthalmology patients were generally elderly and relatively price conscious and wanted to understand if a higher fee meant a better consultant, which was not necessarily the case.[68] [Spire employee] recalled that one of the Ophthalmologists had asked if it would help if they all charged the same initial consultation fee and that either [Spire employee] or [Spire employee] agreed that Spire would take a look at the issue.[69]

3.52 The fact that the topic of the Ophthalmologists' initial consultation fees was discussed at the Meeting has also been confirmed by the Ophthalmologists themselves. For example, Mr Sachdev has explained that '[t]*he topic of fees was brought up by the hospital staff that attended the meeting on the premise of patients finding it confusing about the slightly differing initial consultation fees charged by consultants and it was suggested that it would be better for patients if fees were more uniform. As I was already thinking about increasing my fees and the reason brought forward by the hospital that it was better for patients, I had no issue on the idea of a change of fee. I recall many other topics regarding Ophthalmology being discussed during this meeting and this topic being raised as a part of many things discussed about Ophthalmology services at the hospital.*'[70]

The e-mail exchange

[65] [Document URN0041] page 1.
[66] Spire response to CMA s.26 Notice sent on 3 July 2019 – page 8 [Document URN0302].
[67] Transcript of CMA interview with [Spire employee] on 11 September 2019 – page 84, lines 8 – 25 [Document URN0225].
[68] Transcript of CMA interview with [Spire employee] on 22 August 2019, page 58 (lines 25 – 27), page 59 (lines 25 – 27) and page 60 (lines 4, 8 – 10) [Document URN0224].
[69] Transcript of CMA interview with [Spire employee] on 11 September 2019 – page 86 (lines 4-6) and page 111 (lines 4 – 10) [Document URN0225].
[70] Mr Sachdev's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0220].

3.53 Two days after the Meeting, on 25 August 2017, [Spire employee 1] e-mailed nine consultant ophthalmologists from the Hospital (including the Ophthalmologists)[71] summarising the discussions at the Meeting regarding the possibility of aligning initial consultation fees for self-pay patients and suggesting that a £200 initial consultation fee should be agreed. The e-mail states '*[d]uring the Opht[h]almic dinner on Wednesday evening we discussed the possibility of aligning the cost of an initial outpatient consultation as some patients find the cost differences confusing and it can be a barrier to booking appointments. Current initial consultation fees for Ophthalmic range between £180 and £200. As the difference between fees is only small I would suggest that £200 would be a [sic] the best option. I am, of course, open to suggestions from yourselves. Please could you all let me know by Friday 1st September if you are in agreement with this? I look forward to hearing from you.*'[72]

3.54 [Spire employee] received e-mail responses to their e-mail dated 25 August 2017 from the Ophthalmologists, agreeing to the suggested £200 initial consultation level. [Spire employee] does not appear to have received an email response from one further consultant ophthalmologist, [✂]. The relevant responses from the seven Ophthalmologists are summarised below:

(a) On 25 August 2017 (at 17:42), Mr Hubbard responded by email to [Spire employee] and the eight other ophthalmologists originally included in [Spire employee]'s email that '*£200 fine with me (it's what I charge anyway).*'[73]

(b) On 25 August 2017 (at 18:48), Mr Quah responded by e-mail to [Spire employee] copying in the eight other ophthalmologists originally included in the [Spire employee] e-mail that '*£200 for initial suits me as it is what I am currently charging.*'[74]

(c) On 25 August 2017 (at 19:07), Mr Nguyen responded by e-mail to the chain copying in [Spire employee] and the eight other ophthalmologists originally included in [Spire employee] e-mail confirming, '*£200 fine with me*.'[75]

(d) On 25 August 2017 (at 19:23), Mr Hemmerdinger responded by e-mail to the chain, copying in [Spire employee] and the eight other

[71] Dr Aasheet Desai; Dr Say-Aun Quah; Dr Conrad Yuen; Dr Dan Nguyen; Dr Arun Sachdev; Dr Christopher Hemmerdinger; Dr [✂]; Dr Alan Hubbard and Dr [✂].
[72] [Document URN0030] page 3.
[73] [Document URN0938] page 1.
[74] [Document URN0034].
[75] [Document URN0037].

ophthalmologists originally included in [Spire employee] e-mail confirming, '*OK with me too.'*[76]

(e) On 25 August 2017 (at 20:53), Mr Sachdev responded by e-mail to the chain copying in [Spire employee] and the eight other ophthalmologists originally included in [Spire employee]'s e-mail confirming, '*that's okay with me.'*[77]

(f) On 26 August 2017 (at 00:44), Mr Desai responded by email to the chain, copying in [Spire employee] and the eight other ophthalmologists originally included in [Spire employee]'s e-mail confirming, '*Ok with that*.'[78]

(g) On 29 August 217 (at 12:00), Mr Yuen responded to [Spire employee] by e-mail stating, '*[t]hanks for your e-mail. I am fine with standardising the fee structure, like everyone else. I have not raised my prices in a long while, so I guess it is an opportunity to make amends? The proposed fee is also fine with me.'* Mr Yuen did not copy in anyone else in his response, which was addressed solely to [Spire employee].[79] [Spire employee] responded to Mr Yuen later that same day thanking him and stating, '*I've advised the Customer service team of the new pricing, if you could let your secretary know that would be great*.'[80]

3.55 Following [Spire employee] e-mail on 25 August 2017, one of the ophthalmologists, [✂], responded by e-mail on 26 August 2017, copying in all of the eight other ophthalmologists originally included in [Spire employee]'s e-mail dated 25 August 2017 (including the Ophthalmologists), raising concerns about the proposal that initial consultation fees be aligned. Their e-mail stated, '*hi all* [,] *sounds like i need to increase my fees* [.] *mind you, is there an issue of collusion not to be careful with here?*'[81]

3.56 In response to the concerns raised by [✂] on 26 August 2017, [Spire employee] responded to their e-mail, again copying in all nine ophthalmologists originally included in their e-mail dated 25 August 2017, stating, '*[t]hanks to everyone who has responded. The conversation we had was around how self-pay patients are led by price and how many of them select the lower end of the pricing scale for their initial consultation. By aligning the price we ensure that all consultants within the speciality have the*

[76] [Document URN0039].
[77] [Document URN0035].
[78] [Document URN0227].
[79] [Document URN0031] pages 1 and 2.
[80] [Document URN0031] page 1.
[81] [Document URN0030] page 2.

same opportunity for new self-pay patients. I'll advise the customer service girls of the new pricing – please could you updated your secretaries'.[82]

3.57 The same consultant who had raised collusion concerns on 26 August 2017, [✂], then followed up again with [Spire employee], this time without copying in any of the other Ophthalmologists, in an e-mail dated 29 August 2017. They stated that '*for the now intend to keep my fees isq if I may*[.] *collusion is one issue; competition the other – I may see more? either way I don't think it will help get more pts thru [sic] the door overall*'. [Spire employee] responded on the same day thanking the consultant and noting they would let the 'girls' (i.e. the customer service team) know.[83]

Ophthalmologists pricing after August 2017

3.58 Following the email exchange and after [Spire employee] had liaised with the Hospital's customer service team to communicate the change of fees,[84] all four Ophthalmologists (Mr Desai, Mr Nguyen, Mr Sachdev and Mr Yuen) who were charging £180 raised their prices to £200 and kept them at that rate until at least 3 July 2019 or until the last day they held practising privileges at the Hospital. The three Ophthalmologists who were already charging £200, Mr Hemmerdinger[85], Mr Hubbard[86] and Mr Quah[87], continued to do so until at least 3 July 2019.[88]

3.59 Mr Desai also emailed his Spire secretary on 25 August 2017 to say, '*Spire regency wants to standardise fees for all consultants. They have suggested £200.*'[89] Since then and during the remainder of 2017 and throughout 2018 he charged £200 for an initial consultation.[90]

---

[82] [Document URN0030] page 2.
[83] [Document URN0030] page 1.
[84] Transcript of CMA interview with [Spire employee] on 22 August 2019 – page 76, line 5 [Document URN0224] and transcript of CMA interview with [Spire employee] on 11 September 2019 – page 131, lines 19 – 20 [Document URN0225].
[85] [Document URN0039] and Mr Hemmerdinger's response to CMA s.26 Notice sent on 23 July 2019 – page 2 [Document URN0296].
[86] Mr Hubbard's response to Section A of the CMA s. 26 notice sent on 2 April 2020 – page 1 [Document URN1055].
[87] [Document URN0034, page 1] and Mr Quah's response to CMA s.26 Notice sent on 3 July 2019 – page 3 [Document URN0291].
[88] Regarding Mr Quah, see his initial consultations fees on November 2017, April 2018 and 2019 [Document URN0088, page 1, Document URN0064, page 1, and Document URN0211, page 1]. Regarding Mr Hemmerdinger, see [Document URN0052, Document URN0064 and Document URN0211]. Regarding Mr Hubbard, see [Document URN0064 and Document URN0211].
[89] [Document URN0229] page 1.
[90] Invoices provided by Mr Desai on 28 January 2020 dated 26 September 2017 [Document URN0230], 5 March 2018 [Document URN0231] and 18 June 2018 [Document URN0232].

3.60 Mr Nguyen e-mailed his Spire secretary, [✂], on 29 August 2017 to say, '*further to the e-mails below please note that my new self-pay initial consultation fee is £200*'.[91] Since then and during the remainder of 2017, throughout 2018 and at least until 3 July 2019, he charged £200 for an initial consultation.[92]

3.61 Equally, since August 2017, Mr Sachdev has raised the level of his initial consultation fees from £180 to £200, and charged this fee level during the latter part of 2017, throughout 2018 and until at least 3 July 2019.[93]

3.62 Since August 2017, Mr Yuen has raised the level of his initial consultation fees from £180 to £200, and charged this fee level during the latter part of 2017, throughout 2018 and until at least 3 July 2019.[94]

3.63 A Spire undated price list showing consultation fees for new and follow-up patients was hand-amended to reflect that the consultation fee for all of the Ophthalmologists, including Mr Hemmerdinger, should be '*all £200*.'[95] A further undated price list show that the Ophthalmologists' fees for new patients were then all changed to £200.[96]

3.64 In November 2017, the Hospital carried out a compliance exercise in respect of their obligations under the Private Healthcare Market Investigation Order 2014 to publish consultant fees and inform patients about consultation costs.

3.65 Another document, comprising three pages of price lists, respectively dated '13.12.17', '19.4.18' and '20.12.18' in manuscript at the top of each page, also shows that by December 2017 the Ophthalmologists were all charging £200 for consultations with new patients and that this level was maintained in April 2018 and December 2018.[97]

3.66 The Ophthalmologists have confirmed that at least until 3 July 2019 they were all charging £200, with the exception of Mr Desai who was charging £200 up to the date he stopped practising at the Hospital in June 2018.[98]

---

[91] [Document URN0012].
[92] [Documents URN0092, URN0064 and URN0211].
[93] [Documents URN0079, URN0064 and URN0211].
[94] [Documents URN0228, URN0064 and URN0211].
[95] [Document URN0044] page 1.
[96] [Document URN0057] page 2.
[97] [Document URN0064] pages 1-3.
[98] Mr Sachdev's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0220], Mr Yuen's response to CMA s.26 Notice sent on 3 July 2019 – page 2 [Document URN0282] and [Document URN0324], Mr Quah's response to CMA s.26 Notice sent on 3 July 2019 – page 2 [Document URN0291], Mr Hemmerdinger's response to CMA s.26 Notice sent on 23 July 2019 – page 2 [Document URN0296], Mr Nguyen's response to CMA s.26 Notice sent on 3 July 2019 – page 1 [Document URN0277] and response

D. Summary of findings of fact

3.67 In light of the findings of fact above, the CMA's view is that the Parties reached an agreement to fix initial consultation fees for self-pay patients to be charged by the Ophthalmologists at the Hospital.

provided by Mr Desai to CMA request for information on 22 January 2019 [Document URN0233] and invoice dated 18 June 2018 [Document URN0232]. Mr Hubbard's response to Section A of the CMA s. 26 notice sent on 2 April 2020 - page 1 [Document URN1055].

4. Market definition

4.1 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 in question has as its object or effect the appreciable prevention, restriction or distortion of competition.[99]

4.2 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 has been an infringement. Nonetheless, the CMA has formed a view of the relevant market in order to calculate each of the Parties' 'relevant turnover' in the market affected by the Infringement, for the purpose of establishing the level of the financial penalties that the CMA has decided to impose on the Parties.

4.3 When defining a market for these purposes, the CMA first identifies the focal product and focal area. The focal product is the product under investigation. The focal area is the geographic area in which the focal product is sold.[100] The CMA then assesses the extent to which suppliers of the focal product in the focal area are subject to competitive constraints from other products and areas, dealing with the product dimension and the geographic dimension in turn.[101]

A. The relevant product market

4.4 In this case, the Infringement concerns the provision of initial consultations by the Ophthalmologists to self-pay ophthalmology patients at the Hospital. Before assessing the competitive constraints from other products or areas, the CMA has first considered whether it should do so by reference:

(a) solely to the provision of initial consultations to self-pay ophthalmology patients; or

[99] Judgment of 6 July 2000, *Volkswagen AG v Commission*, T-62/98, EU:T:2000:180, paragraph 230, and Judgment of 21 February 1995, *SPO and Others v Commission*, T-29/92, EU:T:1995:34, paragraph 74.
[100] Market definition guidelines, paragraph 2.9.
[101] When defining the relevant market, the CMA will usually apply a framework based on the so-called hypothetical monopolist test. This asks whether a hypothetical monopolist of the focal product could profitably sustain a small but significant non-transitory increase in price (a 'SSNIP') above the competitive level. If such an increase would be profitable then the test is complete and the focal product is the relevant market. If it would not be profitable then the test is repeated by assuming that the hypothetical monopolist controls both the focal product and its closest substitute. That test is repeated until it is profitable for the hypothetical monopolist to sustain a SSNIP. The same process is applied to the focal area in order to define the relevant geographic market.

(b) to the entire patient pathway, so as to include the full package of services from the initial consultation to any subsequent treatment and follow-up care.

4.5 According to the evidence provided by the Parties and as described above, patients usually stay with the same consultant throughout their pathway of care and it would be relatively unusual to change. Spire indicated that, although there are exceptions, consultants generally carry out a patient's procedure at the same hospital in which the initial consultation took place.[102, 103] Therefore, a patient's choice of provider for an initial consultation is likely to determine the provider for the subsequent stages of the patient's pathway. This is consistent with the CMA's findings in its *Private Healthcare Market Investigation*, which also found that, as patients progress through their treatment, their ability to switch consultant reduces significantly as the costs of doing so increase.[104]

4.6 The CMA thus considers that the patient's choice of consultant for an initial consultation is likely to determine which consultant will carry out any additional follow-up treatment and the facility in which this will take place. Therefore, whilst the Infringement relates to the fixing of initial consultation fees, the CMA considers that any collusion in relation to initial consultation fees is likely to have an impact not only on a patient's initial choice of consultant, but also on the choice of consultant for subsequent treatment and the facility at which any such treatment and follow-up care is provided. The CMA, therefore, considers that for the purpose of defining the relevant market in this case, the provision of the initial consultation should be viewed as an inseparable part of the broader patient pathway, including the subsequent stages in a patient's treatment and follow-up care.

4.7 The CMA, therefore, has decided to carry out its assessment of competitive constraints for the purpose of defining the relevant market in this case by reference to the full package of ophthalmology services for self-pay patients from the initial consultation to the patient's subsequent treatment and follow-up care. This is consistent with the CMA's findings in the *Private Healthcare Market Investigation*, as well as in its 2015 decision under the Act relating to *Conduct in the Ophthalmology Sector*.[105]

---

[102] Spire response to Section B of CMA s.26 Notice sent on 10 September 2019 [Document URN0216].

[103] Spire noted that, where further treatment is required, a change from the hospital where the initial consultation took place may sometimes occur e.g. due to waiting times or hospital facilities not being suitable for a particular patient condition. Spire response to Section B of s.26 Notice sent on 10 September 2019 – page 2, paragraph 2.1 [Document URN0216].

[104] CMA Private Healthcare Market Investigation, Final Report, paragraph 7.3(b).

[105] CMA Private Healthcare Market Investigation; Conduct in the Ophthalmology Sector CMA Decision 2015 (CE/9784-13)).

Assessment of demand and supply side substitution

4.8 The CMA now considers whether the following potential substitutes for the provision of ophthalmology services to self-pay patients provide a sufficient competitive constraint to be included in the relevant market:

(a) The provision of ophthalmology services provided to privately insured patients; and

(b) The provision of ophthalmology services by the NHS.

The provision of privately insured ophthalmology services

4.9 The CMA's Private Healthcare Market Investigation defined a market for privately-funded medical treatments and did not conclude as to whether there is a distinct market for self-pay patients.[106] The CMA's previous decision under the Act relating to *Conduct in the Ophthalmology Sector* also did not find separate markets for the provision of ophthalmology services provided to privately-insured and self-pay patients.[107]

4.10 The CMA considers that the provision of ophthalmology services to insured patients is a supply side substitute for the provision of these services to self-pay patients. Should the profitability of serving self-pay patients rise, consultant ophthalmologists could reduce the number of insured patients they serve in order to compete to serve more self-pay patients. This is for the following reasons:

(a) There is no difference in the clinical services provided to a self-pay patient compared to patients covered under a PMI policy (although specific features e.g. certain premium lenses for cataract surgery will not be covered by individual PMI policies).[108]

(b) Consultants are readily able to switch between self-pay and insured patients. Once a consultant ophthalmologist has practising privileges at a given hospital and provided the consultant has obtained the necessary PMI recognition, there are no obvious barriers that would prevent that ophthalmologist from switching between self-pay and insured patients, at least for some of their patients. Indeed all the Ophthalmologists treat both

[106] CMA Private Healthcare Market Investigation, Final Report, paragraph 5.16 and paragraph 5.52a; see also Spire / St Anthony 2014 CMA Merger Decision, paragraph 4, which did not conclude, for the purposes of market definition, on whether services to self-pay and PMI form distinct product markets.
[107] CMA Private Healthcare Market Investigation; Conduct in the Ophthalmology Sector CMA Decision 2015 (CE/9784-13), paragraph 3.45.
[108] Spire response to CMA s.26 Notice sent on 22 October – page 5, paragraph 5.1 [Document URN0226].

self-pay and insured patients.[109] Moreover, it would not be necessary for a consultant to switch entirely from insured to self-pay patients for the provision of ophthalmology services to insured patients to act as a supply side substitute for the provision of these services to self-pay patients. Indeed, even modest rebalancing between PMI and self-pay patients would constitute clear substitutability.

(c) It is reasonable to conclude that a consultant ophthalmologist would give strong consideration to the PMI price they achieve across one or multiple sites, in determining what price to charge for self-pay patients. Consistent with this view, the Ophthalmologists have used PMI prices (as one of several) reference points for self-pay prices. For example, one Ophthalmologist said he set self-pay initial consultation fees in line with what PMI will reimburse and another Ophthalmologist explained that, when setting a particular level of initial consultation fees, he considered whether that price was reasonable compared to payments from PMI.[110]

4.11 On the basis of the above supply-side considerations, the CMA considers that ophthalmology services provided to privately insured patients are a supply-side substitute for ophthalmology services provided to self-pay patients.

Self-pay vs. NHS ophthalmic services

4.12 Patients may consider having their treatment funded by the NHS instead of funding it privately. Hence, in its *Private Healthcare Market Investigation,* the CMA considered whether patients of privately funded healthcare would switch to NHS-funded healthcare in the case of a small change in prices or quality of the services provided.

4.13 In its *Private Healthcare Market Investigation*, the CMA found:

(a) One-fifth of insured patients considered having their treatment on the NHS.[111] Only 3 per cent would have switched to the NHS if their chosen private hospital was unavailable.[112] Furthermore, 90 per cent of insured patients stated that a reason for choosing privately-funded healthcare was to make use of their PMI.[113] As expected, the readiness of self-pay patients to consider the NHS was significantly higher, with 68 per cent of

[109] Spire updated response to CMA s.26 Notice dated 22 October 2019 [Document URN0465], Annex 1 [Document URN0464].
[110] See Alan Hubbard's response to CMA s.26 Notice sent on 3 July 2019 – page 2 [Document URN0280]; Mr Yuen's response to CMA s.26 Notice sent on 3 July 2019 – page 1, paragraph 1 b) [Document URN0282]; and Mr Quah's response to CMA s.26 Notice sent on 3 July 2019 – page 2 [Document URN0291].
[111] CMA Private Healthcare Market Investigation, Final Report, paragraph 5.13 and footnote 182.
[112] CMA Private Healthcare Market Investigation, Final Report, paragraph 5.13 and footnote 183.
[113] CMA Private Healthcare Market Investigation, Final Report, paragraph 5.13 and footnote 184.

self-pay patients considering having their treatment on the NHS.[114] However, only 12 per cent would have switched to the NHS if their chosen private hospital was unavailable.[115]

(b) Among the reasons for choosing privately-funded healthcare, patients most commonly cited that they wanted to take advantage of the reduced waiting times (76 per cent of insured patients and 75 per cent of self-pay patients), the better comfort and quality of accommodation (54 per cent of insured patients and 37 per cent of self-pay patients), the greater availability of appointment times (55 per cent of insured patients and 35 per cent of self-pay patients), and the ability to choose a specific private consultant (39 per cent of insured patients and 42 per cent of self-pay patients).[116]

4.14 The CMA recognises that self-pay patients (as opposed to insured patients) may be more likely to view NHS provision as an attractive alternative given that they have to pay for their private procedure. However, in line with its previous decisions, the CMA considers that although the NHS provides an element of price constraint, the willingness of consumers to pay an extra charge for private healthcare is an indication that the NHS lies outside the relevant market.[117] This also applies to ophthalmology services given the large difference in prices and waiting times.[118]

4.15 The CMA thus considers that the provision of ophthalmology services by the NHS is not part of the relevant market in this case.

Conclusion on product market definition

4.16 On the basis of the above assessment, the CMA has found that the relevant product market is the supply of privately funded ophthalmology services.

B. The relevant geographic market

4.17 The CMA's Private Healthcare Market Investigation found that the relevant geographic market for private consultant and hospital services is likely to be

[114] CMA Private Healthcare Market Investigation, Final Report, paragraph 5.13 and footnote 185.
[115] CMA Private Healthcare Market Investigation, Final Report, paragraph 5.13 and footnote 186-7.
[116] CMA Private Healthcare Market Investigation, Final Report, paragraph 5.14 and footnote 188.
[117] CMA Private Healthcare Market Investigation, Final Report, paragraph 5.15 and footnote 189. See also Spire / St Anthony 2014 CMA Merger Decision, paragraph 4.
[118] For example, for cataract surgery waiting times may be much lower at private providers meaning that private patients may not see NHS provision as an attractive option. Waiting times for cataract surgery in the NHS in England are, on average, 8 weeks but the CMA understands this can vary across sites and can be longer in some cases. https://www.england.nhs.uk/statistics/statistical-work-areas/rtt-waiting-times/rtt-data-2019-20/.

local or regional. Patients prefer to travel shorter distances and choose local consultants and hospitals.[119]

4.18 In this case, the focal area is that of the Hospital for its privately funded ophthalmology services. The CMA has considered whether (i) other Spire hospitals, and (ii) other non-Spire hospitals used by the Ophthalmologists could lie within the relevant geographic market for the purpose of the penalty calculation – see paragraph 4.2 above.[120]

4.19 The CMA has looked at the extent of the overlaps in the catchment areas from which the Hospital and other nearby Spire hospitals draw their ophthalmology patients. The CMA also looked at data on the shortest distance by road from the Hospital to other nearby hospitals where the Ophthalmologists practice.

4.20 There is a degree of overlap in the catchment areas of the Hospital and (in particular) Spire Manchester, which suggests that the geographic market could be wider than just that of the Hospital to include other local hospitals. However, taking a conservative approach and for the sole purpose of determining relevant turnover for the penalty calculation in this case, the CMA has treated the geographic market as no wider than the Hospital.

Conclusion on geographic market definition

4.21 On the basis of the above assessment, the CMA has found that the relevant geographic market is the supply of privately funded ophthalmology services at the Hospital.

[119] CMA Private Healthcare Market Investigation Final Report, paragraphs 18 and 5.57.

[120] Other nearby Spire hospitals are Spire Manchester and Spire Cheshire. Other nearby private hospitals where the Ophthalmologists practice are HCA Wilmslow, Toleman Optometry, BMI Alexandra and Optegra Eye Hospital.

5. Legal Assessment

A. Introduction

5.1 This section sets out the CMA's legal assessment of the Parties' conduct in light of the factual background set out in section 3. The key legal principles, including references to the relevant case law and primary and secondary legislation, are also included in this section.

5.2 The CMA has assessed the evidence in this case by reference to the civil standard of proof, namely whether it is sufficient to establish on the balance of probabilities that an infringement occurred.[121]

B. Key provisions of UK competition rules

5.3 The CMA's findings are made by reference to the following provisions of the UK competition rules. Section 2 of the Act prohibits (among other matters) agreements between undertakings and concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. This prohibition applies unless an applicable exclusion can be relied upon or the agreement(s) in question are exempt in accordance with the provisions of Part I of the Act. References to the UK are to all or part of the UK.[122] The prohibition imposed by section 2 of the Act is referred to as '**the Chapter I prohibition**'.

5.4 Section 60 of the Act provides, broadly, that the Chapter I prohibition is to be interpreted consistently with Article 101 of the Treaty on the Functioning of the European Union ('**TFEU**').

5.5 For the reasons set out below, the CMA's findings are that each of the Parties has infringed the Chapter I prohibition through an agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition, which may have appreciably affected trade within the UK, by fixing ophthalmology initial consultation fees for self-pay patients at the Hospital during the Relevant Period.

[121] *Tesco Stores Limited and others v Office of Fair Trading* [2012] CAT 31, paragraph 88.
[122] Section 2(1) and 2(7) of the Act.

C. Undertakings

Legal principles

5.6 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.[123]

5.7 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…*'.[124]

5.8 The term 'undertaking' encompasses any natural or legal person engaged in commercial or economic activities, regardless of legal form. It therefore includes, among others, companies,[125] partnerships,[126] individuals operating as sole traders,[127] and trade associations.[128]

5.9 The term 'undertaking' also designates an economic unit, even if in law that unit consists of several natural or legal persons.[129] As such, the undertaking that committed the infringement can be larger than the legal entity whose representatives actually took part in the infringing activities.

5.10 For the reasons set out below, the CMA has found that each of the Parties are entities engaged in economic activities.

Application to the case

Spire

5.11 Throughout the Relevant Period, Spire was engaged in economic activity in the UK, namely through the provision of private medical hospital services, across many specialties, to patients funded privately (either on a self-pay or insured basis) or by the NHS (as set out in paragraphs 3.2 to 3.3 and 3.11 to 3.13). Thus, Spire engages in economic activity and is an undertaking for the purpose of the Chapter I prohibition.

---

[123] Judgment of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.
[124] Judgment of 16 June 1987, *Commission v Italian Republic*, C-118/85, EU:C:1987:283, paragraph 7.
[125] In all their corporate forms, including a limited partnership (see Judgment of 8 June 1982, *Nungesser v Commission*, 258/78, EU:C:1982:211) or a trust company (see Commission Decision of 31 January 1979 *Fides*, OJ [1979] L57/33, paragraph 34).
[126] Commission decision *Breeders' rights: Roses*, OJ [1985] L369/9.
[127] Judgment of 11 October 1983, *Demo-Studio Schmidt v Commission*, 210/83, EU:C:1983:277.
[128] Judgment of 1 May 1975, *FRUBO v Commission*, 71/74, EU:C:1975:61.
[129] Judgment of 10 September 2009, *Akzo Nobel NV v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55.

The Ophthalmologists

5.12 The Ophthalmologists are consultants active in the privately funded healthcare market offering their services as sole traders or operating through a limited company. As set out in paragraphs 3.11 to 3.13 above, they are not in the employment of Spire. The Ophthalmologists offer services to patients, who either pay for these services themselves (self-pay), or have PMI, in which case the services are paid for (wholly or partly) by PMI providers. The Ophthalmologists, as individual consultants, therefore engage in economic activity when providing private services (where they are not employees) and are undertakings for the purpose of the Chapter I prohibition. Where the Ophthalmologists perform services for the NHS they do so under their consultant contract, which generally speaking, sets out the terms and conditions under which consultants are employed by the NHS. It defines the type of services provided by consultants, including, 'Contractual and Consequential Services' – essentially the core duties a consultant performs as part of their employment (as NHS employees) and 'Private Professional Services' encompassing the diagnosis or treatment of patients by private arrangement whether for the NHS or for the independent sector. Waiting List Initiatives (WLI's) can be described as the NHS contracting with consultants privately to provide treatment to NHS patients, often within NHS facilities.

5.13 In light of the above, the CMA concludes that each of the Parties constitutes an undertaking for the purposes of the Chapter I prohibition.

D. Agreements and concerted practices

Legal principles

5.14 The Chapter I prohibition applies to agreements between undertakings and/or concerted practices.[130]

5.15 It is not necessary, for the purpose of finding an infringement of the Chapter I prohibition, to distinguish between agreements and concerted practices, or to characterise conduct as exclusively an agreement or a concerted practice.[131] As explained by the Court of Justice of the European Union (the '**Court of Justice**'), '*it is settled case-law that, although Article [101] distinguishes*

[130] Section 2(1) of the Competition Act and Article 101(1).

[131] *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24, paragraph 21. See also Judgment of 17 December 1991, *Hercules Chemicals v Commission*, T-7/89, EU:T:1991:75*,* paragraph 264; Judgment of 24 October 1991, *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:56, paragraph 127; Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 131 and 132; and also European Commission Decision 86/399/EEC of 10 July 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.371 – Roofing Felt) (OJ 1991 L 232/15) ('*Commission Decision in Roofing Felt'),* in which the conduct of the undertakings was found to be an agreement as well as a decision of an association.

between "concerted practice", "agreements between undertakings" and "decisions by associations of undertakings", the aim is to have the prohibitions of that article catch different forms of coordination between undertakings of their conduct on the market […] *and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct*'.[132]

Agreements

5.16 The Chapter I prohibition is intended to catch a wide range of agreements, including oral agreements and '*gentlemen's agreements*'.[133] An agreement may be express or implied by the parties, and there is no requirement for it to be formal or legally binding, nor for it to contain any enforcement mechanisms.[134] The key question is whether there has been '*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention*'.[135]

5.17 Although it is necessary to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, the CMA is not required to establish a joint intention to pursue an anti-competitive aim.[136] The fact that a party may have played only a limited part in setting up the agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties, does not mean that it is not a party to the agreement.[137]

---

[132] Judgment of 11 September 2014, *MasterCard and Others v Commission* C-382/12 P, EU:C:2014:2201, paragraph 63 and the case law cited. See Judgment of 20 March 2002, *HFB and Others v Commission*, T-9/99, EU:T:2002:70, paragraphs 186 to 188; Judgment of 23 November 2006, *ASNEF-EQUIFAX*, C-238/05, EU:C:2006:734, paragraph 32. See also Judgment of 20 April 1999, *LVM v Commission* joined cases T-305/94, T-306/94, etc., EU:T:1999:80, paragraph 696: '*In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty.*'

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

[134] *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24, paragraph 658; Judgment of 26 October 2000, *Bayer AG v Commission*, T-41/96, EU:T:2000:242, paragraph 71; European Commission Decision of 9 December 1998, *Greek Ferries*, Case IV/34466, paragraph 141 (upheld on appeal).

[135] Judgment of 26 October 2000, *Bayer v Commission* T-41/96, EU:T:2000:242, paragraph 69 (upheld on appeal in Judgment of 6 January 2004, *BAI and Commission v Bayer*, joined cases C-2/01 P and C-3/01 P, EU:C:2004:2, paragraphs 96 and 97) and Judgment of 17 December 1991, *Hercules Chemicals v Commission*, T-7/89, EU:T:1991:75, paragraph 256.

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

[137] *Agreements and Concerted Practices* (OFT401, December 2004), adopted by the CMA Board, paragraph 2.8. See also eg Judgment of 15 March 2000, *Cimenteries CBR and Others v Commission*, T-25/95, EU:T:2000:77, paragraphs 1389 and 2557 (upheld on liability in appeal in Judgment of 7 January 2004, *Aalborg Portland A/S*

5.18 Furthermore, the Chapter I prohibition is not directed only at parties to agreements or concerted practices who are themselves active on the markets affected by those agreements or practices.[138]

Concerted practices

5.19 The concepts of 'agreements' and 'concerted practices' are intended to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves.[139]

5.20 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.[140]

5.21 A concerted practice is 'a form of coordination between undertakings' which falls short of 'having reached the stage where an agreement properly so-called has been concluded', and where competitors knowingly substitute practical cooperation between them for the risks of competition.[141] The Court of Justice has added that, 'By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants'.[142]

5.22 The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the prices and commercial terms it offers to customers.[143] This requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, strictly preclude any direct or indirect contact between such operators by which an

and Others v Commission, joined cases C-204/00 P etc, EU:C:2004:6, although the fine was reduced); and Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 79–80.

[138] Judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 27.

[139] Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, ECLI:EU:C:2009:343, paragraph 2; see also Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 131, and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, paragraph 206(ii).

[140] *Argos and Littlewoods v OFT* and *JJB Sports v OFT* [2006] ECWA Civ 1318, at paragraph 22.

[141] Judgment of 14 July 1972, *ICI v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 64. See also Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, ECLI:EU:C:2009:343, paragraph 26 and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, paragraphs 151 to 153.

[142] Judgment of 14 July 1972, *ICI v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 65. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 151.

[143] Judgment of 16 December 1975, *Suiker Unie and Others v* Commission, C-40/73, EU:C:1975:174.

undertaking may influence the future conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.[144]

Facilitation of agreements and/or concerted practices

5.23 The conduct of an undertaking involved in the adoption of an anticompetitive agreement can infringe the Chapter I prohibition regardless of whether the undertaking is active in the market affected by the agreement.[145] The General Court has stated that '*it is apparent from the Court's well established case-law that the text of Article 101(1) TFEU refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question*'.[146]

5.24 For an undertaking to infringe the Chapter I prohibition in circumstances where it has facilitated an anticompetitive agreement and/or concerted practice, such as an agreement to fix prices, but is not itself active in supplying the product for which the price has been fixed, it is necessary to ascertain whether '*the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk*'.[147]

5.25 Where those criteria are met, the undertaking in question will itself be a party to the infringement in question.

Application to the case

5.26 On the basis of the facts set out in section 4, the CMA considers that in this case there was a concurrence of wills between the Ophthalmologists and

[144] Judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 33.
[145] Judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 27.
[146] Judgment of 10 November 2017, *Icap plc, established in London (United Kingdom), Icap Management Services Ltd, established in London, Icap New Zealand Ltd, established in Wellington (New Zealand) v Commission*, T-180/15, paragraph 103.
[147] Judgment of 10 November 2017, *Icap plc, established in London (United Kingdom), Icap Management Services Ltd, established in London, Icap New Zealand Ltd, established in Wellington (New Zealand) v Commission*, T-180/15, paragraph 100 and 106, and Judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 30 and the case-law cited.

Spire (as a facilitator – see paragraphs 5.23 to 5.25 above) to align the initial consultation fee charged to self-pay patients such as to amount to an agreement for the purposes of the Chapter I prohibition.

5.27 In any event, it is not necessary, for the purpose of finding an infringement of the Chapter I prohibition, to distinguish between agreements and concerted practices, or to characterise conduct as exclusively an agreement or a concerted practice. As such, the CMA has found that the agreement to align the initial consultation fee charged to self-pay patients amounted to an agreement and/or a concerted practice.

5.28 The Ophthalmologists each explicitly agreed and adhered to the £200 fee level proposed by Spire. The wording of the email sent by [Spire employee] on 25 August 2017 and the Ophthalmologists' replies show a meeting of minds on the alignment of prices as set out in paragraphs 3.54 above.

5.29 The Ophthalmologists' responses to [Spire employee] email were as follows: one ophthalmologist, Mr Hubbard, said '*£200 fine with me (it's what I charge anyway)*';[148] another ophthalmologist, Mr Quah, said '*£200 for initial suits me as it is what I am currently charging*';[149] a third ophthalmologist, Mr Nguyen, replied '*£200 fine with me*';[150] a fourth ophthalmologist, Mr Hemmerdinger, stated *'OK with me too*';[151] a fifth ophthalmologist, Mr Sachdev, said, '*that's okay with me*';[152] a sixth ophthalmologist, Mr Desai, said, '*Ok with that*';[153] and finally a seventh ophthalmologist, Mr Yuen, replied, '*[t]hanks for your e-mail. I am fine with standardising the fee structure, like everyone else. I have not raised my prices in a long while, so I guess it is an opportunity to make amends? The proposed fee is also fine with me*'.[154]

5.30 The CMA's view is that the emails and messages referred to in paragraphs 5.28 and 5.29 above are evidence of an agreement to align prices, in accordance with the proposal made by Spire.

[148] [Document URN0938] page 1. Mr Hubbard responds by e-mail to [Spire employee] and the eight other ophthalmologists originally included in [Spire employee] e-mail.
[149] [Document URN0034] Mr Quah responds by e-mail to [Spire employee] copying in of the eight other ophthalmologists originally included in [Spire employee] e-mail.
[150] [Document URN0037] Mr Nguyen responds by e-mail to the chain copying in [Spire employee] and the eight other ophthalmologists originally included in [Spire employee] e-mail.
[151] [Document URN0039] Mr Hemmerdinger responds by e-mail to the chain copying in [Spire employee] and the eight other ophthalmologists originally included in [Spire employee] e-mail.
[152] [Document URN0035] Mr Sachdev responds by e-mail to the chain copying in [Spire employee] and the eight other ophthalmologists originally included in [Spire employee] e-mail.
[153] [Document URN0227] Mr Desai responds by e-mail to the chain copying in [Spire employee] and the eight other ophthalmologists originally included in [Spire employee] e-mail.
[154] [Document URN0031] pages 1 and 2 – Mr Yuen responds to [Spire employee].

5.31 Spire instigated and facilitated the agreement by bringing up the topic of initial consultation fees during the ophthalmic dinner and stating that the differing consultation fees were confusing for customers, emailing the ophthalmologists proposing the alignment of initial consultation fees, and suggesting that the price be fixed at £200. It then facilitated the agreement's implementation by liaising with its customer service team.[155]

5.32 Whilst Spire did not itself supply the initial consultation services in respect of which the fee was fixed, in light of the circumstances of the Infringement, and the role of Spire described above, the CMA's conclusion is that Spire played a central role in reaching and putting into effect the Parties' common objective of fixing the Ophthalmologists' initial consultation fee at the Hospital.

5.33 Proof of implementation is not necessary for a finding that the Ophthalmologists and Spire were party to an agreement for the purpose of the Chapter I prohibition. Nevertheless, in the circumstances of this case, the CMA considers that as set out in paragraphs 3.58 to 3.66 above, and consistent with the email exchange described in paragraph 5.29, four of the Ophthalmologists increased their prices from £180 to £200 shortly after the email exchange, whilst the three remaining Ophthalmologists kept their prices at £200 throughout the Relevant Period.

5.34 In view of the foregoing, the CMA has concluded that the arrangements between the Parties constituted an agreement and/or concerted practice for the purposes of the Chapter I prohibition. In particular, the CMA has found that, during the Relevant Period, there was an agreement and/or concerted practice to fix the initial consultation fees for self-pay patients charged by the Ophthalmologists practising at the Hospital.

E. Object of preventing, restricting or distorting competition

Legal principles

5.35 The Chapter I prohibition prohibits agreements and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. The term 'object' in this regard refers to the 'aim', 'purpose', or 'objective' of the coordination between the undertakings in question. The Court of Justice has held that agreements and concerted practices that have the object of preventing, restricting or distorting competition are those forms of coordination between undertakings that can be

[155] Transcript of CMA interview with [Spire employee] on 22 August 2019 – page 76 [Document URN0224]; Transcript of CMA interview with [Spire employee] on 11 September 2019 – page 131 [Document URN0225].

regarded, by their very nature, as being harmful to the proper functioning of normal competition.[156]

5.36 The object of an agreement is to be identified primarily from an examination of the content of its provisions, its objectives and the legal and economic context of which it forms part.[157] 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.[158]

5.37 The object of an agreement and/or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it.[159] 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.[160]

5.38 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

[156] Judgment of 14 March 2013, *Allianz Hungária Biztosító* and Others, C-32/11, EU:C:2013:160, paragraph 35 and the case law cited. This has been affirmed in Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50 and Judgment of 11 September 2014, *MasterCard Inc and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 185. The Court of Justice said that it is apparent from the case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49 and 57; Judgment of 11 September 2014, *MasterCard and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 184). It went on to state that that case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50; Judgment of 11 September 2014, *MasterCard Inc and Others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 185).

[157] Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 36 and Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraph 53. See also Judgment of 6 October 2009, *GlaxoSmithKline Services Unlimited v Commission*, joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58; Judgment of 20 November 2008, *Competition Authority v Beef Industry Development Society and Barry Brothers*, C-209/07, EU:C:2008:643, paragraphs 16 and 21; Judgment of 4 October 2011, *Football Association Premier League and Others* C-403/08, EU:C:2011:631, paragraph 136.

[158] Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53 and Judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 36.

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

[160] Judgment of 14 March 2013, *Allianz Hungária Biztosító and* Others, C-32/11, EU:C:2013:160, paragraph 37 and Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 54.

other objectives.[161] The fact that an agreement pursues other legitimate objectives does not preclude it from being regarded as having as its object the restriction of competition.[162]

5.39 There is no need to take account of the actual effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.[163]

Price fixing

5.40 The Chapter I prohibition applies to agreements and concerted practices which '*directly or indirectly fix purchase or selling prices or any other trading conditions*'.[164]

5.41 There are many ways in which prices can be fixed. Price fixing may involve fixing either the price itself or the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move. Price fixing may also take the form of an agreement to restrict or dampen price competition, and an agreement may restrict price competition even if it does not entirely eliminate it.[165] It is no defence that a participant in a cartel does not always respect the agreed price increases.[166]

Application to the case

5.42 In light of the evidence set out in section 3, the CMA has found that the agreement, having regard to the content of its provisions, its objectives and the legal and economic context of which it forms part, amounted to an agreement and/or a concerted practice having as its object the prevention, restriction or distortion of competition.

Content and objectives of the agreement

---

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

[162] Judgment of 20 November 2008, *Competition Authority v Beef Industry Development Society and Barry* Brothers, C-209/07, EU:C:2008:643, paragraph 21. See also Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 70.

[163] Judgment of 13 July 1966, *Consten and Grundig v Commission*, joined cases C-56/64, C-58/64, EU:C:1966:41, page 342. See also *Cityhook Limited v OFT*, paragraph 269.

[164] Article 101(1)(a); section 2(2)(a) of the Competition Act.

[165] See OFT's Guidance on Agreements and Concerted Practices (OFT401, December 2004), adopted by the CMA Board ('*Guidance on Agreements and Concerted Practices*'), paragraphs 3.5 and 3.6.

[166] Judgment of 14 May 1998, *Cascades v Commission*, T-308/94, ECLI:EU:T:1995:33, para 230; see also Judgment of 24 March 2011, *Comap v Commission*, T-377/06, EU:T:2011:108, paragraph 99; Judgment of 14 March 2013, *Fresh Del Monte v Commission*, T-587/08, EU:T:2013:219, paragraph 459.

5.43 As set out in paragraphs 3.53, 3.54 and 3.56, the emails between [Spire employee] and the Ophthalmologists show that the content and objective of the agreement was to align the prices of initial consultation fees for self-pay patients. The Ophthalmologists agreed to this and the price of £200 proposed by Spire.

5.44 Whilst the parties' subjective intentions will not be determinative of whether the object of the agreement is anti-competitive for the purposes of the Act, the CMA notes that as regards Spire, [Spire employee] email of 26 August said that, '*By aligning the price we ensure that all consultants within the speciality have the same opportunity for new self-pay patients'*, and that this was against the background of a conversation '*around how self-pay patients are led by price and how many of them select the lower end of the pricing scale for their initial consultation.*'[167] From this it is clear that Spire's intentions in respect of the agreement included a desire to eliminate price competition amongst consultant ophthalmologists at the Hospital for initial consultations with self-pay patients.

Legal and economic context of the agreement

5.45 Section 3B above provides an overview of the UK private ophthalmology sector and in particular how self-pay patients choose where and with whom to have their initial consultation. Section 3C explains the factors that consultant ophthalmologists take into account when setting the price of initial consultation fees for self-pay patients.

5.46 The CMA considers that the legal and economic context in which private ophthalmology services are supplied means that a restriction on the price at which the relevant services can be provided restricts competition by its very nature. This is based, among other factors, on ophthalmologists being responsible for setting their own fees for initial consultations for private patients and pricing being a key factor on which ophthalmologists compete for self-pay patients.[168]

Conclusion on the object of the Agreement

5.47 For the reasons set out in paragraphs 5.43 and 5.46 above, the CMA concludes that the agreement reached between the Hospital and the Ophthalmologists had as its object the prevention, restriction or distortion of competition through the fixing of initial consultation fees for self-pay patients.

[167] [Document URN0030] page 2.
[168] [Document URN0030] page 2.

5.48 The CMA's view is that patients were sensitive to differences in prices between the consultant ophthalmologists and would take that into account when booking their initial consultation. Moreover, the Parties were aware of this. By aligning fees and confirming their pricing intentions to each other the Ophthalmologists were able to substitute the certainty of a fixed price for the uncertainty of competition, as referred to in paragraphs 3.58 to 3.66 above. As a consequence, patients were no longer able to choose between the Ophthalmologists based on differences in the price of an initial consultation.

F. Single and continuous infringement

Legal principles

5.49 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.[169] 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.[170]

5.50 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. 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.[171]

---

[169] Judgment of 24 October 1991, *Rhône-Poulenc v* Commission, T-1/89, EU:T:1991:56, paragraph 126.

[170] Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 111 to 114. See also European Commission Decision of 10 December 2003, *Organic peroxides,* Case COMP/E-2/37.857, paragraph 308.

[171] Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 113. See also Judgment of 12 December 2007, *BASF and UCB v Commission*, joined cases T-101/05 and 111/05, EU:T:2007:380, paragraph 159. See also Judgment of 16 June 2011, *Team Relocations and Others v Commission*, joined cases T-204/08 and T-212/08, EU:T:2011:286 ('Team Relocations'); Judgment of 14 May 1998, *Buchmann v Commission*, T-295/94, EU:T:1998:88.

5.51 Agreements and/or concerted practices may constitute a single continuous infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.[172]

5.52 The Court of Justice has held that this approach does not contravene the principle of personal responsibility for infringements, nor does it ignore the individual analysis of evidence or breach the rights of defence of the undertakings involved.[173]

5.53 When establishing that an undertaking was involved in a single continuous infringement it is necessary to show: '… *that the undertaking concerned intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk*.'[174]

5.54 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.[175] 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.[176]

Application to the case

5.55 The CMA has found that the conduct of Spire and the Ophthalmologists described in paragraphs 3.34 to 3.66 amounts to one or a number of acts in pursuit of a common objective, namely to avoid competition on price amongst the Ophthalmologists in respect of the initial consultation fee for the Relevant Period. By fixing the initial consultation fees and applying the fixed consultation fees since August 2017:

(a) the Parties each intended to and did contribute by their own conduct to the common objective of fixing prices during the Relevant Period (as discussed in sections E and F above); and

[172] Judgment of 20 March 2002, *LR AF 1998 A/S v Commission*, T-23/99, EU:T:2002:75, paragraphs 106-109.
[173] Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 83 to 85 and 203.
[174] Judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 30. See also Judgment of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 86 and 87, and Judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, 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, EU:C:2004:6, paragraph 8.
[175] Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 83.
[176] Judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 132.

(b) the Parties were each aware of each other's conduct contributing to this common objective throughout the Relevant Period (or, at the very least, could have reasonably foreseen such conduct throughout the Relevant Period and were prepared to accept the risk).

5.56 The CMA therefore has found that Spire and the Ophthalmologists participated in a single and continuous infringement during the Relevant Period.

G. Effect on trade within the UK

Legal principles

5.57 The Chapter I prohibition applies to agreements and/or concerted practices which '…*may affect trade within the United Kingdom*'.[177]

5.58 The CAT has held that effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of EU competition law and national competition law and that there is no requirement that the effect on trade within the UK should be appreciable.[178]

Application to the case

5.59 The CMA considers that, by its very nature an agreement between competitors to fix prices is likely to affect trade within the UK.

5.60 The CMA also notes that the relevant geographic market within which the Infringement was implemented is that of a private hospital in the Macclesfield area of the UK.

5.61 The CMA therefore has found that the requirement, within the meaning of the Chapter I prohibition, that an agreement or concerted practice may have an effect on trade within the UK, is satisfied in this case.

H. Appreciable restriction of competition

Legal Principles

5.62 An agreement or concerted practice will infringe the Chapter I prohibition and/or Article 101 TFEU if it has as its object or effect the prevention,

[177] By virtue of section 2(1)(a) of the Competition Act. For the purposes of the Chapter I prohibition, the United Kingdom includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.

[178] *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, paragraphs 459 and 460 and the case law cited. The CAT considered this point also in *North Midland Construction plc v. OFT* [2011] CAT 14, paragraphs 48 to 51 and 62 but considered that it was '*not necessary […] to reach a conclusion*'.

restriction or distortion of competition within the UK or a part of it and/or within the EU internal market. However, in order to constitute an infringement, the prevention, restriction or distortion of competition must be appreciable.[179]

5.63 The Court of Justice has clarified that an agreement that has as its object the prevention, restriction or distortion of competition will constitute, by its nature and independent of any concrete effect that it may have, an appreciable restriction on competition.[180] In accordance with section 60(2)[181], an agreement that has as its object the prevention, restriction or distortion of competition within the UK will be considered, by its nature, to appreciably restrict competition.

Application to the case

5.64 As set out in paragraph 5.47, the CMA has concluded that the agreement between the Parties, facilitated by Spire, had the object of preventing, restricting or distorting competition by fixing prices charged to patients at the Hospital.

5.65 As set out in paragraph 5.61, the CMA has found that the agreement may affect trade within the UK.

5.66 Therefore, the CMA has concluded that the agreement constitutes, by its nature, an appreciable restriction of competition.

I. Duration

5.67 The duration of the Infringement is a relevant factor for determining any financial penalties that the CMA may decide to impose in the event of a finding of infringement. The CMA's Penalty Guidance states that:

(a) penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement;

---

[179] Judgment of 9 July 1969, *Franz Völk v S.P.R.L. Ets J. Vervaecke*, 5/69, EU:C:1969:35. See also *North Midland Construction plc v OFT* [2011] CAT 14, paragraphs 45 and 52ff and *Expedia Inc. v Autorité de la concurrence and Others*, C-226/11, EU:C:2012:795, paragraph 16.

[180] Judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and* Others, C-226/11, EU:C:2012:795, paragraph 37; and European Commission Notice on agreements of minor importance [2014] OJ C291/01, paragraphs 2 and 3.

[181] Section 60(2) of the Competition Act provides that, when determining a question in relation to the application of Part I of the Competition Act (which includes the Chapter I prohibition), the court (and the CMA) must act with a view to securing that there is no inconsistency with any relevant decision of the European Court in respect of any corresponding question arising in EU law. See also *Carewatch Care Services Limited v Focus Caring Services Limited and Others* [2014] EWHC 2313 (Ch), paragraph 148.

(b) where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purposes of calculating the number of years of the infringement;

(c) where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional cases decide to round up the part year to a full year.[182]

5.68 As set out in paragraphs 5.55 to 5.56, on the basis of the evidence set out in section 3, the CMA is of the view that Spire and the Ophthalmologists participated in a single and continuous infringement of the Chapter I prohibition from 29 August 2017 to 3 July 2019, or in the case of Mr Desai from 29 August 2017 to 28 June 2018.

5.69 The Meeting was held on 23 August 2017, between [Spire employee], [Spire employee], [Spire employee] and the Ophthalmologists. [Spire employee]'s e-mail to the Ophthalmologists was sent two days later on 25 August 2017, and by 29 August 2017, all of the Ophthalmologists had confirmed to [Spire employee] that they were in agreement with the [Spire employee]'s suggestion to align initial consultation prices for self-pay ophthalmology patients at the Hospital at £200 and [Spire employee]'s had responded indicating that they would update the customer services team accordingly.

5.70 The CMA is not aware of any documentary evidence which indicates that the Ophthalmologists' or Spire understood that the price level of initial consultation fees was no longer fixed at £200 up until at least 3 July 2019. As set out in paragraphs 3.58 to 3.66 above, the Ophthalmologists were all still charging £200 with the exception of Mr Desai who stopped practising at the Hospital on 28 June 2018.

5.71 On this basis, on the balance of probabilities, and in the absence of any distancing or contrary action by the Ophthalmologists or Spire, the CMA considers that the duration of the Infringement was just under two years (i.e. from 29 August 2017 to 3 July 2019), save that in the case of Mr Desai the duration of his participation in the Infringement was just under 10 months (i.e. from 29 August 2017 to 28 June 2018).

[182] *Guidance as to the appropriate amount of a penalty* (CMA73, 18 April 2018), paragraph 2.16.

J. Exclusions and exemptions

Exclusion

5.72 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.183

5.73 The CMA does not consider that any of the relevant exclusions applies to the Parties' conduct in this case.

Exemption

Block Exemption

5.74 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.

5.75 It is for the parties wishing to rely on this provision to prove that the restrictive agreement in question benefits from a block exemption.[184]

5.76 The CMA's considers that the Infringement does not benefit from a block exemption regulation and is not, therefore, exempt from the application of the Chapter I prohibition pursuant to section 10 of the Act.

Individual exemption

5.77 Agreements which satisfy the criteria set out in section 9 of the Act are exempt from the Chapter I prohibition.

5.78 There are four cumulative criteria to be satisfied:

1. the agreement contributes to improving production or distribution, or promoting technical or economic progress;

2. while allowing consumers a fair share of the resulting benefit;

3. it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and

[183] 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.
[184] Article 101(3) Guidelines, paragraph 35.

4. it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

5.79 In considering whether an agreement satisfies the criteria set out in section 9 of the Act, the CMA will have regard to the Commission's Guidelines on the application of Article 101(3).

5.80 It is for the party claiming the benefit of exemption to prove that the conditions for exemption are satisfied.[185]

5.81 In any event, the CMA considers it unlikely that the conditions would be met in this case.

5.82 Agreements which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).[186] However, each case ultimately falls to be assessed on its merits.

5.83 In view of the above, the CMA does not consider that the conduct described in section 4 above is exempt from the application of the Chapter I prohibition pursuant to section 9 of the Act.

K. Conclusion on the application of the Chapter I prohibition

5.84 On the basis of the evidence set out in this Decision, the CMA has found that each of the Parties has infringed the Chapter I prohibition by participating in an agreement and/or a concerted practice which had as its object the appreciable prevention, restriction, or distortion of competition within the UK, by fixing ophthalmology initial consultation fees for self-pay patients at the Hospital during the Relevant Period, and that this constituted a single and continuous infringement of the Chapter I prohibition.

[185] Section 9(2) of the Act.

[186] Article 101(3) Guidelines, paragraph 46.

L. Attribution of Liability

Legal Principles

5.85 The Chapter I prohibition applies to undertakings. If an undertaking infringes the prohibition, it falls, under the principle of personal responsibility, to that undertaking to answer for that infringement.[187]

5.86 An undertaking may consist of several persons, legal or natural. Given the requirement to impute an infringement to a legal entity or entities on which fines may be imposed and to which an infringement decision is to be addressed, it is necessary to identify the relevant legal person or persons that form part of the undertaking in question.[188]

5.87 For each Party which the CMA has found to have infringed the Competition Act, the CMA has first identified the legal entity directly involved in the Infringement during the Relevant Period. It has then determined whether liability for the Infringement should be shared with another legal entity forming part of the same undertaking, in which case each legal entity's liability will be joint and several.

5.88 The conduct of a subsidiary undertaking[189] may be imputed to its parent company where, although having a separate legal personality, the subsidiary did not decide independently upon its conduct on the market, but carried out, in all material respects, the instructions of its parent company.[190] Where a subsidiary is wholly owned by its parent company, the CMA is entitled to presume that the parent exercised decisive influence over the commercial policy of the subsidiary; this presumption may also apply in circumstances where ownership of the subsidiary is below 100%, but where the parent company is in a similar situation to that of a sole owner.[191] It is for the parent

[187] Judgment of 10 September 2009, *Akzo Nobel NV v Commission*, C-97/08 P, EU:C:2009:536, paragraphs 54–56.
[188] Judgment of 10 September 2009, *Akzo Nobel NV v Commission*, C-97/08 P, EU:C:2009:536, paragraph 57.
[189] Judgment of 10 September 2009, *Akzo Nobel NV v Commission*, C-97/08 P, EU:C:2009:536, paragraph 55.
[190] Judgment of 14 July 1972, *ICI v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraphs 132 and 133; Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission* C-97/08 P, EU:C:2009:536, paragraph 58.
[191] Judgment of 10 September 2009, *Akzo Nobel NV v Commission,* C-97/08 P, EU:C:2009:536, paragraphs 60 and 61; Judgment of 17 May 2011, *Elf Aquitaine v Commission*, T-299/08, EU:T:2011:217, paragraphs 51 to 56 (where the presumption was held to apply in relation to a shareholding of approximately 98%); Judgment of 7 June 2011, *Arkema France and Others v Commission*, T-217/06, EU:T:2011:251, paragraph 53; Judgment of 27 October 2010, *Alliance One International and Others v Commission*, T-24/05, EU:T:2010:453, paragraphs 126-130. The General Court 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 4 July 2011,

company in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acted independently on the market.[192]

5.89 In such circumstances, the parent company and its subsidiary form a single economic unit, or 'undertaking', for the purpose of applying the Chapter I prohibition.[193] The conduct of the subsidiary may then be imputed to its parent company (with joint and several liability for the subsidiary and its parent).

Application to the case

Ophthalmologists

5.90 The CMA has found that the Ophthalmologists listed in paragraphs 3.4 to 3.10 were directly involved in, and are therefore liable for, the Infringement during the Relevant Period.

5.91 As regards Mr Hemmerdinger, Mr Hubbard and Mr Nguyen, who render ophthalmic care services through companies, the CMA has found Hemmerdinger Eye Care Limited, Dr A D Hubbard Ophthalmology Limited and Nguyen Vision Limited liable for the Infringement. The financial penalty which the CMA has decided to impose for the participation of Mr Hemmerdinger is therefore imposed on Hemmerdinger Eye Care Limited, the financial penalty which the CMA has decided to impose for the participation of Mr Hubbard is therefore imposed on A D Hubbard Ophthalmology Limited, and the financial penalty which the CMA has decided to impose for the participation of Mr Nguyen is therefore imposed on Nguyen Vision Limited (see Section 6C below).

Spire

5.92 The CMA has found that Spire Healthcare Limited was directly involved in the Infringement.

5.93 The CMA holds Spire Healthcare Limited and its parent company, Spire Healthcare Group plc, jointly and severally liable for the Infringement.

Total and Elf Aquitaine v Commission, T-190/06, EU:T:2011:378, paragraphs 57 and 64; Judgment of 17 May 2011 *Arkema France v Commission*, T-343/08, EU:T:2011:377, paragraph 65.

[192] Judgment of 27 November 2014, *Alstom v Commission*, T-517/09, EU:T:2014:999, paragraph 55; Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 61; Judgment of 27 October 2010, *Alliance One International and Others v Commission* T-24/05, EU:T:2010:453, paragraph 130.

[193] Judgment of 27 November 2014, *Alstom v Commission*, T-517/09, EU:T:2014:999, paragraph 55; Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 59.

6. The CMA's action

A. The CMA's decision

6.1 On the basis of the evidence set out in this Decision, the CMA has concluded that, between at least 29 August 2017 and 3 July 2019, or in the case of Mr Desai between 29 August 2017 and 28 June 2018, the Parties infringed the Chapter I prohibition by participating in a single and continuous agreement and/or concerted practice which had as its object the prevention, restriction or distortion of competition within the UK by fixing ophthalmology initial consultation fees for self-pay patients at the Hospital.

B. Directions

6.2 Section 32(1) of the Act provides that, if the CMA has made a decision that an agreement infringes the Chapter I prohibition, it may give such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. 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 points

6.3 Section 36(1) of the Act provides that, on making a decision that conduct has infringed the Chapter I prohibition, the CMA may require the undertaking concerned to pay the CMA a penalty in respect of the infringement unless they are granted total immunity from financial penalties or a reduction of 100 per cent. In accordance with section 38(8) of the Act, the CMA must have regard to its Penalties Guidance.

6.4 The CMA considers it would be appropriate to impose a financial penalty for the Infringement on Spire, and with the exception of Mr Desai (for the reasons given in paragraphs 2.3 to 2.4, the Ophthalmologists (although in the case of Mr Hemmerdinger, Mr Hubbard and Mr Nguyen the penalty is imposed on their respective companies: Hemmerdinger Eyecare Limited, A D Hubbard Ophthalmology Limited and Nguyen Vision Limited). The CMA has not calculated the level of any financial penalty that would be applied to Mr Desai if immunity had not been granted.

The CMA's margin of appreciation in determining the appropriate penalty

6.5 Provided the penalties the CMA 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,[194] and (ii) the CMA has had regard to the Penalties Guidance in accordance with section 38(8) of the Act, the CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Act.[195]

6.6 The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.[196] Rather, the CMA makes its assessment on a case-by-case basis,[197] having regard to all relevant circumstances and the objectives of its policy on financial penalties.

6.7 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 infringements and the desirability of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour that breaks the prohibition in Chapter I of the Act (as well as other prohibitions under the Act).

Small agreements

6.8 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.[198]

Intention/negligence

6.9 Under section 36(2) of the Act, the CMA may impose a penalty only if it is satisfied that the infringement was committed intentionally or negligently by the undertaking.

6.10 The CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent for the purposes of determining whether it may

[194] SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.
[195] *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, at [168] and *Umbro Holdings and Manchester United and JJB Sports and Allsports v OFT* [2005] CAT 22, at [102].
[196] See, for example, *Eden Brown and Others v OFT* [2011] CAT 8, at [78].
[197] Penalties Guidance, paragraphs 2.5 and 2.8. See, for example, *Kier Group and Others v OFT* [2011] CAT 3, at [116] where the CAT noted that 'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent'. See also *Eden Brown and Others v OFT* [2011] CAT 8, at [97] where the CAT observed that '[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case'.
[198] 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.

exercise its discretion to impose a penalty.[199] The CAT has defined the terms '*intentionally'* and '*negligently'* as follows:

'*…An infringement is committed intentionally for this purpose 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 if the undertaking ought to have known that its conduct would result in a restriction of competition.*'[200]

6.11 This is consistent with the approach taken by the Court of Justice, which has stated:

'*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*.'[201]

6.12 The circumstances in which the CMA might find that an infringement has been committed intentionally include the situation in which the agreement, concerted practice or conduct in question has as its object the restriction of competition.[202]

6.13 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.[203]

---

[199] Judgment in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 paragraphs 453 to 457; Judgment in *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 221; Judgment in *Aberdeen Journals Limited v OFT* [2003] CAT 11, paragraphs 484 and 485; See also judgment in *SPO and Others v Commission,* C-137/95P, EU:C:1996:130, paragraphs 53-57.

[200] *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 13, paragraph 117 upheld by the Court of Appeal in *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ, 13. See also judgment in *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 221 and judgment in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1 paragraph 456: '*…an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition... It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I or Chapter II prohibition'.*

[201] Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08P, EU:C:2010:603, paragraph 124.

[202] See *OFT's Guidance on Competition law application and Enforcement* (OFT407, December 2004), adopted by the CMA Board ('Guidance on Enforcement'), paragraph 5.9.

[203] *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13, paragraph 117. See also Judgment of 18 June 2013, *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others,* C-681/11, EU:C:2013:404, paragraph 38: '*…the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct*'. See also *Guidance on Enforcement*, paragraph 5.10.

6.14 For the reasons set out in section 5 above, the CMA has found that the Infringement had as its object the prevention, restriction or distortion of competition and that the Parties must therefore have been aware (or could not have been unaware) and at the very least ought to have known that their conduct was capable of harming competition.

6.15 The CMA therefore concludes that the Infringement was committed intentionally, or at the very least, negligently.

D. Calculation of the penalty

6.16 As noted at paragraph 6.3 above, 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

6.17 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, the seriousness of the infringement and the need for general deterrence.[204]

Relevant turnover

6.18 The 'Relevant Turnover' is defined in the Penalties Guidance as the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.[205] The 'last business year' is the undertaking's financial year preceding the date when the infringement ended.[206]

6.19 As set out at paragraph 4.16, the CMA has found that the relevant market affected by the Infringement is the supply of privately-funded ophthalmology services at the Hospital.

6.20 Therefore in this case, the Relevant Turnover in the financial year preceding the date when the Infringement ended for each of the Settling Parties is as follows:

---

[204] Penalty Guidance, paragraphs 2.3 to 2.15.

[205] 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, 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).

[206] Penalty Guidance, paragraph 2.11.

(a) £[✂] for the financial year ending 31 December 2018 for Spire;

(b) £[✂] for the financial year ending 31 May 2019 Mr Hemmerdinger;

(c) £[✂] for the financial year ending 31 March 2019 for Mr Hubbard;

(d) £[✂] for the financial year ending 30 June 2019 for Mr Nguyen;

(e) £[✂] for the financial year ending 5 April 2019 for Mr Quah;

(f) £[✂] for the financial year ending 5 April 2019 for Mr Sachdev;

(g) £[✂] for the financial year ending 31 October 2018 for Mr Yuen.

Seriousness of the infringement and need for general deterrence

6.21 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.[207] 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.[208]

6.22 While making its assessment of the seriousness of the infringement, the CMA will consider a number of factors.[209] 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. The CMA will also take into account the need to deter other undertakings from engaging in such infringements in the future.[210]

6.23 The assessment is made on a case-by-case basis, taking account of all the circumstances of the case.[211]

6.24 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 Infringement involved the most serious type of cartel behaviour, that is a price fixing agreement between competitors. As such it is within the category of infringements which the CMA considers are inherently likely

[207] Penalty Guidance, paragraph 2.4.
[208] Penalty Guidance, paragraphs 2.5 to 2.6.
[209] In accordance with paragraph 2.8 of the Penalty Guidance, these factors may 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.
[210] Penalty Guidance, paragraph 2.9.
[211] Penalty Guidance, paragraph 2.5.

by their very nature to cause significant harm to competition, and which will generally attract a starting point between 21 and 30% of relevant turnover.[212]

(b) Specifically, the Infringement consisted in fixing the initial consultation fees charged to self-pay patients at the Hospital. The rationale given by [Spire employee] for the Infringement was both to resolve the difficulties of the Hospital customer service team in explaining the differences in the consultant ophthalmologists' prices to patients as well as ensuring that new consultants would have the same chance of getting new patients, without having to charge lower fees. However, in order to fix the fees only a small increase of £20 was required for four of the Ophthalmologists (whilst the other three were already charging the agreed price).

(c) It is likely that the Infringement had a limited impact on customers/patients since the cost of an initial consultation only constitutes a relatively small proportion of the price of any further ophthalmic treatment and/or procedure the patient might need after the initial consultation.[213] On the other hand, as set out at paragraph 3.24, the initial consultation is a decisive step in the patient pathway as patients usually stay with the same consultant and hospital following the initial consultation; additionally, as set out in paragraph 3.51, patients for the most commonly performed ophthalmic procedure (cataract surgery) are likely to be elderly and price conscious.

(d) The impact on competitors of the Ophthalmologists is likely to have been limited, as the agreement between the Parties did not prevent the Ophthalmologists from competing on prices at other hospitals or clinics where they practise. The impact on consumers is also likely to be limited due to the minor level of the price increases and limited number of initial consultations impacted.

6.25 Furthermore, there has already been a previous CMA investigation under the Act concerning anti-competitive information exchange and pricing agreements in the private ophthalmology sector.[214] 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.

6.26 Considering the above factors in the round, the CMA considers that the appropriate starting point is 25%.

[212] Penalty Guidance, paragraph 2.6.
[213] For example, £200 for initial consultation would be part of an overall average cost of £1,000-1,200 for a self-pay cataract procedure.
[214] Conduct in the Ophthalmology Sector CMA Decision 2015 (CE/9784-13).

Step 2 – adjustment for duration

6.27 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.[215]

6.28 As set out at paragraph 5.71, the CMA has found that the Infringement for Spire, Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen lasted from 29 August 2017 to 3 July 2019 (1 year, 10 months and 4 days). For the purposes of the penalty calculation, the CMA has rounded up the duration to 2 years and therefore applied a multiplier of 2 to the starting point to reflect the duration of the Infringement.

Step 3 – adjustment for aggravating and mitigating factors

6.29 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.[216]

6.30 In the circumstances of this case, the CMA has adjusted the penalties at step 3 to take into account the factors set out below.

Aggravating factor – role of the undertaking as an instigator of the Infringement

6.31 The role of an undertaking as a leader in, or an instigator of, an infringement can be an aggravating factor.[217] The CMA has identified Spire as the instigator of the Infringement, as set out at paragraph 5.31. Spire brought up the topic of initial consultation fees during the ophthalmic dinner, stated that the differing consultation fees were confusing for customers, emailed the ophthalmologists proposing the alignment of initial consultation fees, and suggested that the price be fixed at £200.

6.32 The CMA therefore considers that an increase of 10% to Spire's penalty for the role of an instigator is appropriate.

Mitigating factor – adequate steps having been taken with a view to ensuring compliance with Chapter I and Chapter II prohibitions

6.33 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

[215] Penalty Guidance, paragraph 2.16.
[216] Penalty Guidance, paragraphs 2.17 to 2.19.
[217] Penalty Guidance, paragraph 2.18.

discount in penalty of up to 10%.[218] 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).[219]

6.34 The CMA considers that the compliance activities undertaken by Spire 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. In addition, Spire will submit a report to the CMA on its compliance activities every year, for the next three years.

6.35 The CMA therefore considers that it is appropriate to decrease the penalty by 10% for Spire to reflect that it has taken appropriate steps with a view to ensuring compliance.

Mitigating factor – cooperation which enables the enforcement process to be conducted more effectively

6.36 Cooperation which enables the enforcement process to be concluded more effectively and/or speedily can be a mitigating factor. The Penalties Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion).[220]

6.37 The CMA considers that it is appropriate to decrease Spire's penalty by 5% to reflect the fact that Spire made one witness available for interview ([Spire employee]), who was a key individual in the investigation and aided the CMA in conducting a more effective investigation.

Step 4 – adjustment for specific deterrence and proportionality

6.38 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

[218] Penalty Guidance, paragraph 2.19 and footnote 33.
[219] Penalty Guidance, paragraph 2.19 and footnote 33.
[220] Penalty Guidance, paragraph 2.19 and footnote 35.

appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case.[221]

6.39 At step 4, the CMA will assess whether, in its view, the overall penalty is appropriate in the round.[222] Adjustment to the penalty at step 4 may result in either an increase or a decrease to the penalty.

6.40 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.[223]

6.41 In considering the appropriate level of any 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.[224]

6.42 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.[225]

6.43 The CMA's consideration of step 4 in calculating the financial penalties for Spire and the Settling Ophthalmologists[226] is set out below.

Spire

6.44 The penalty for the Infringement after step 3 is £225,824. The CMA notes that the unadjusted penalty would amount to less than [✂]% of Spire's average worldwide turnover for its last three financial years; [✂]% of Spire's average profit after tax for the last financial year; [✂]% of Spire's average profit after tax for its last three financial years; less than [✂]% of Spire's adjusted net assets and [✂]% of Spire's average dividends for its last three financial years.

6.45 The CMA considers that Spire's penalty after step 3 should be increased to ensure that the level of penalty is proportionate and appropriate, having

[221] Penalty Guidance, paragraph 2.20.
[222] Penalty Guidance, paragraph 2.24.
[223] Penalty Guidance, paragraph 2.21.
[224] Penalty Guidance, paragraph 2.23
[225] Penalty Guidance, paragraph 2.24.
[226] Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen.

regard to Spire's size and financial position, whilst also taking into account its role and conduct in the Infringement.

6.46 For the purpose of assessing Spire's size and financial position at step 4, the CMA has had regard to appropriate financial indicators in the round and considers that a penalty of £1,500,000 after step 4 is appropriate in this case to act as a specific deterrent, without being disproportionate or excessive.

6.47 The adjusted penalty represents: [✂]% of Spire's average worldwide turnover for its last three financial years; [✂]% of Spire's average profit after tax for the last financial year; [✂]% of Spire's average profit after tax for its last three financial years; [✂]% of Spire's adjusted net assets and [✂]% of Spire's average dividends for its last three financial years.

The Settling Ophthalmologists

6.48 The CMA considers that the Settling Ophthalmologists' penalty after step 3 should be decreased to ensure that the level of penalty is proportionate and appropriate, having regard to their financial position, whilst also taking into account the seriousness of the Infringement, as well as their level of involvement, namely the lesser role played by the Ophthalmologists as compared to Spire.

6.49 For the purpose of assessing the Settling Ophthalmologists' individual financial position at step 4, the CMA has had regard to their appropriate financial indicators in the round, in particular the proportion that the penalty represents in relation to their most recent total turnover as well as their average total turnover for the last three financial years (in each case excluding their NHS salary).

6.50 Assessing the resulting penalty in the round, the CMA considers that the following penalties after step 4 are appropriate for the Settling Ophthalmologists in this case to act as a specific deterrent, without being disproportionate or excessive:

(a) £3,722 for Mr Hemmerdinger;

(b) £1,483 for Mr Hubbard;

(c) £2,890 for Mr Nguyen;

(d) £2,741 for Mr Quah;

(e) £4,824 for Mr Sachdev;

(f) £802 for Mr Yuen.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

6.51 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.[227]

6.52 The CMA has assessed the penalties for Spire, Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen 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

6.53 The CMA will reduce an 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.[228]

6.54 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.

Leniency

6.55 As set out at paragraphs 2.2 and 2.4 above, Mr Desai has been granted immunity under the CMA's leniency programme as set out in Mr Desai's Immunity Agreement, and, provided he continues to comply with the conditions of the CMA's leniency policy, Mr Desai will not be required to pay a financial penalty (see paragraph 6.4 above).

Settlement

6.56 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.[229]

6.57 As set out at paragraph 2.15, Spire, Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen have admitted the facts and allegations of infringement as set out in the revised draft statement of objections (subject to limited representations on manifest factual

[227] Section 36(8) of the Act and the 2000 Order, as amended. See also Penalty Guidance, paragraph 2.25.
[228] Penalty Guidance, paragraph 2.29. See also the Leniency Guidance.
[229] Penalty Guidance, paragraph 2.30.

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 the penalties of Spire, Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen by 20%.

Penalties imposed by the CMA

6.58 The total payable penalties imposed are as follows:

(a) £1,200,000 for Spire;

(b) £2,978 for Mr Hemmerdinger;

(c) £1,186 for Mr Hubbard;

(d) £2,312 for Mr Nguyen;

(e) £2,193 for Mr Quah;

(f) £3,859 for Mr Sachdev;

(g) £642 for Mr Yuen.

E. Payment of penalty

6.59 The CMA requires Spire, Mr Hemmerdinger, Mr Hubbard, Mr Nguyen, Mr Quah, Mr Sachdev and Mr Yuen to pay their respective penalties as set out at paragraph 6.58. Payment should be made by the close of banking business on 2 September 2020[230] or on such date or dates agreed in writing with the CMA.

6.60 If that date has passed and:

(a) the period during which an appeal against the imposition, or amount, of that penalty may be made has expired without an appeal having been made, or

(b) such an appeal has been made and determined,

the CMA may commence proceedings to recover from the undertaking in question, as a civil debt due to the CMA, any amount payable which remains outstanding.[231]

[230] The next working day two calendar months from the expected receipt of the Decision.
[231] Section 37(1) of the Act.

SIGNED

1 July 2020
Howard Cartlidge
Senior Director, Cartels
for and on behalf of the Competition and Markets Authority