Decision of the Competition and Markets Authority

Supply of groundworks products to the construction industry

Case 50415

17 December 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 [✂].

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 Names have been replaced by a general descriptor of the individual's role.

Contents

1. INTRODUCTION AND SUMMARY

1.1 By this Decision (the '**Decision**'), the Competition and Markets Authority ('**CMA**') has concluded that each of the undertakings listed at paragraph 1.2 (each a '**Party**', together the '**Parties**') has infringed the prohibition imposed by section 2(1) of the Competition Act 1998 (the '**Competition Act**') (the '**Chapter I prohibition**') and Article 101(1) of the Treaty on the Functioning of the European Union ('**TFEU**') ('**Article 101**').

1.2 This Decision is addressed to:

(a) M.G.F. (Trench Construction Systems) Limited ('**MGF**') and its parent company MGF Limited (together, '**MGFL**');

(b) Vp plc ('**Vp**'); and

(c) Mabey Hire Limited ('**MHL**') and its parent companies Mabey Engineering (Holdings) Limited and Mabey Holdings Limited (together, '**Mabey'**).

1.3 The CMA has concluded that:

(a) between at least 23 September 2011 and 4 October 2011 ('**Relevant Period 1**') MGFL and Vp infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement;

(b) between at least 14 February 2014 and 16 July 2014 ('**Relevant Period 2(a)**') and between 17 July 2014 and at least 24 November 2014 ('**Relevant Period 2(b)**'), (together, '**Relevant Period 2**'), MGFL and Vp infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement;

(c) during Relevant Period 2(a) Mabey infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement;

(d) between at least 12 November 2015 and 28 November 2016 ('**Relevant Period 3**') MGFL and Vp infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement; and

(e) in the cases of MGFL and Vp, the single continuous infringements described above in each of Relevant Period 1, Relevant Period 2 and Relevant Period 3 together formed a single repeated infringement,

in each case through an agreement or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the

supply, by way of hire, of groundworks products[1] used to provide temporary support solutions for below ground excavations and the provision of associated design and transport services in the UK (the '**Infringement**').

1.4 The Infringement took the form of the coordination of commercial behaviour (in particular pricing practices) which was aimed at reducing competition on price and strategic uncertainty, in order to maintain or increase pricing levels in the market, including through the sharing of confidential competitively sensitive pricing and strategic information, between:

(a) MGF and Vp during Relevant Periods 1, 2 and 3; and

(b) MGF, Vp and MHL during Relevant Period 2(a).

1.5 As set out in further detail in this Decision, the CMA has concluded that the arrangements were, in particular, discussed and reinforced in the following ways:

(a) during Relevant Period 1, MGF and Vp monitored the prices each other were quoting to customers and emailed each other examples of what they considered to be low quotes;

(b) during Relevant Period 2(a), MGF, Vp and MHL challenged each other in relation to low quotes and the actions of 'rogue' sales staff, discussed the introduction of design charges and discussed transport charges, including at two tripartite meetings between them;

(c) during Relevant Period 2(b), MGF and Vp communicated by telephone and email in relation to price reviews they were both carrying out, with both MGF and Vp subsequently increasing their hire rates; and

(d) during Relevant Period 3, MGF and Vp communicated by telephone and email in relation to hire and rebate rates during a tender process for a particular customer (Balfour Beatty) and also discussed the introduction of design charges.

1.6 By this Decision the CMA imposes financial penalties under section 36 of the Competition Act.

1.7 Annex A includes a table of abbreviations and defined terms used in this Decision.

[1] As defined in paragraph 2.3 of this Decision.

2. FACTUAL BACKGROUND

A. Industry overview

Groundworks products

2.1 The term 'groundworks' describes the work done to prepare sub-surfaces for the start of construction work.[2] Groundworks are usually the first stage of a construction project and may include a variety of excavation types, from small pits or trenches to large-scale basement excavations and water-retaining cofferdams (that is, excavations which hold back a body of water).

2.2 Excavating is by its nature unsafe: excavations of all sizes may collapse, causing death or serious injury to construction workers,[3] or undermining existing structures in or around the excavation.[4]

2.3 The construction industry has sought to minimise the risk of excavations collapsing through the use of specialist techniques and equipment which provide temporary support to excavations.[5] The types of equipment which are employed on a temporary basis to make excavations stable and safe include, but are not limited to: trench boxes;[6] trench sheets;[7] drag boxes/drag shields;[8] walers;[9] bracing systems;[10] props;[11] hydraulic shoring equipment;[12] Larssen sheet piles (also referred to as steel sheet piles);[13] and ancillary products

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[2] Guidance published by the Shoring Technology Interest Group ('**STIG**') defines the term 'groundworks' as: 'A general term covering open excavations for drainage, foundations and underground structures, but not covered works such as tunnels' (Shoring Technical Information Note 201). All STIG publications referred to in this document can be found at: https://www.cpa.uk.net/shoring-technology-interest-group-stig-publications/

[3] STIG, Management of Shoring in Excavations Part 1 – Management Processes ('Be Safe – Shore'), STIG 13/01, Published June 2013 (Revised February 2016). See foreword of HM Chief Inspector for construction noting that typically around two people every year die in excavations.

[4] STIG notes that even relatively shallow excavations may pose a danger of collapse and that routine consideration should be given to the need for excavation support: See pages 4 and 8, STIG, Management of Shoring in Excavations Part 1 – Management Processes ('Be Safe – Shore'), STIG 13/01, Published June 2013 (Revised February 2016).

[5] Within the construction industry, such products may be commonly referred to as 'shoring' (the use of a temporary support, usually a form of prop, to make a structure stable and safe) or 'piling' (which involves the insertion of long, slender 'piles' (typically made of steel or concrete) deep into the ground, in order to support excavations). The emphasis on excavation safety is also reflected in law: The Construction (Design and Management) Regulations 2007, replaced by The Construction (Design and Management) Regulations 2015 (see regulation 22); The Management of Health and Safety at Work Regulations 1999 (employers' obligation to employees on construction sites); The Confined Spaces Regulations 1997; The Work at Height Regulations 2005.

[6] A steel box used to support (or act as a shield to) the sides of a deep, narrow excavation.

[7] Used to support the ground at the sides of trenches and excavations.

[8] A steel box that can be dragged through the ground by an excavator to assist in laying pipes.

[9] A steel horizontal support used for retaining the trench sheeting or piles which line the sides of an excavation.

[10] Used to support the ground around foundation excavations to control deformation of adjacent structures, utilities and soil.

[11] Struts and load monitoring.

[12] Light, medium and heavy duty frames.

[13] A type of hot-rolled steel pile with an interlocking section which can prevent water ingress.

used in conjunction with these types of equipment (for example, safety equipment (such as edge protection products)[14] and products used for installing, securing and extracting the equipment), (together, '**groundworks products**').

2.4 Groundworks products are (i) typically supplied to customers for hire, although they may also be sold either new or used, (ii) typically delivered and removed from construction sites by the supplier, and (iii) often supplied alongside a design, provided by the supplier, that will specify the types of groundworks products needed and the manner in which they should be employed.

2.5 The Infringement concerns the supply, by way of hire, of groundworks products used to provide temporary support solutions for below ground excavations and the provision of associated design and transportation services (the '**Products**') to customers in the UK.

2.6 Typical customers for the Products include civil engineering companies, construction companies, suppliers to the construction industry, and utilities providers – including small local or regional construction firms that work primarily in the housing sector, nationwide companies such as Balfour Beatty that work in a wide variety of sectors, and water companies (that may require the Products to facilitate improvements to underground pipe networks).

2.7 MGF, Vp and MHL are the three main operators supplying the Products for hire in the UK, with estimated combined market shares of around 75%[15] and the total value of the groundworks market in the UK estimated to be in the region of £125-135 million.[16]

2.8 As set out in Chapter 4, the CMA finds that the Products were the subject of an unlawful arrangement between MGF and Vp (during Relevant Periods 1, 2 and 3) and MGF, Vp and MHL (during Relevant Period 2(a)): they were the products in respect of which competitively sensitive information was exchanged and the Parties held discussions.

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[14] Barrier systems which attach to trench boxes, trench sheets and steel sheet piles to guard the perimeter of an excavation and prevent falls from height.
[15] See MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 5 (page 28), URN 3873, which sets out estimated market shares for the UK shoring market (excluding Larssen Piles and Northern Ireland). See also: the comment reported to have been made by [MGF Employee 1] regarding MGF's market share as being 'generally a third', referred to in paragraph 4.75; Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, paragraph 6.1, URN 3835.
[16] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, paragraphs 5.1 and 6.1, URN 3835.

2.9 For the avoidance of doubt, the CMA does not make any finding that the supply of products for the following purposes was part of the Infringement:

(a) formwork equipment;[17]

(b) equipment used only for providing permanent support;[18] and

(c) certain equipment used for undertaking work within or around an already supported excavation.[19]

Pricing

2.10 A number of factors influenced the hire rate for the Products during the Relevant Periods, including: the capital cost of any particular product (the initial purchase cost of the product); utilisation (the amount of time that the product spends on hire); the expected life span of the product; expected degradation; inspection; repair and maintenance costs; adjustments to account for the availability of substitute products within a company's product range; adjustments to account for the fact that certain products will need to be used in combination with other complementary products; negotiations with customers; and the route to market.[20]

2.11 During the Relevant Periods, MGF, Vp and MHL typically charged customers for the transportation of the Products to construction sites (whether or not the transportation was provided 'in-house' or contracted out to third party transport providers).[21] Transport charges were influenced by a number of factors, including: location (in particular, the distance from the relevant depot); the vehicle type required; traffic conditions (for example, toll roads and congestion around London); and customer negotiation.

2.12 Over recent years, the Products have increasingly been supplied as part of a designed 'solution', where a supplier's engineers recommend a bespoke combination of equipment to suit the specific nature of a customer's

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[17] Formwork involves the use of support structures and moulds into which concrete or similar materials are poured to create structures.
[18] For example, piling products that are solely used in permanent support works and ancillary products typically used in conjunction with this type of equipment (such as pile croppers, hydraulic piling vibrators (including Excavator Mounted Vibrators), and quick-hitch adaptors).
[19] For example: culvert pullers, pipe lifters; pipe pushers.
[20] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 13 (pages 32 to 33), URN 0802; Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 11 (pages 7 to 8, paragraphs 11.1 to 11.7), URN 0763.
[21] However, MGFL, Vp and Mabey have all submitted that transport charges [✂]: MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 8 (pages 14 to 15), URN 0802; Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 6 (page 5, paragraph 6.1), URN 0763; Mabey's response dated 12 January 2018 to the CMA's information request dated 24 November 2017, question 5 (page 7, paragraph 5.3), URN 0783.

excavation.[22] However, during the Relevant Periods, MGF, Vp and MHL imposed a discrete design charge for this work only rarely.[23]

Routes to market

2.13 The needs of customers for the Products vary according to a number of factors, including: the size, duration and complexity of the excavation; the prevailing ground conditions; the knowledge and experience of the customer; and the legal, insurance or regulatory needs of the construction project. These factors affect the manner in which suppliers are engaged.

2.14 A customer may liaise with suppliers of the Products over a number of weeks, seeking bids based on bespoke, engineered designs, each of which will have different cost implications for the customer.[24]

2.15 Alternatively, a customer may simply ring suppliers to obtain quotations for specific items of equipment without needing or requesting any engineering or design work to be undertaken (the desired equipment may then be supplied within 48 hours).[25]

2.16 The Products are sometimes sold to larger customers under preferred supplier and/or national framework agreements, whereby a single supplier, or a limited number of suppliers, would be appointed (further to a tender exercise), to supply the Products for all the customer's construction projects. Such agreements are fixed price agreements for a specified period of time –

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[22] For instance, MGFL notes that it went from 'almost no engineering drawings being produced or provided to customers in 2002 (estimated in the very low hundreds)' to a number in the low thousands being produced in 2015/16. MGFL attributes this change to 'the gradual shift away from the provision of simple "plant hire" services to the industry originally undertaken by the MGF Group to the "solutions provision" that it is now engaged in'. See MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 5 (page 8), URN 0802; Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2 (page 6, paragraphs 2.1 and 2.2) and question 4 (page 8, paragraph 4.1), URN 3835; Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2 (page 3, paragraphs 2.1 and 2.2), URN 3837; MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 4 (pages 24 to 25), URN 3873.

[23] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 10(a) (page 18), URN 0802; Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 8 (page 6, paragraph 8.1), URN 0763; Mabey's response dated 12 January 2018 to the CMA's information request dated 24 November 2017, question 7 (page 8, paragraph 7.1), URN 0783.

[24] URN 3700, paragraph 25 (page 4). See also transcript of an interview with [MGF Employee 3] held on 9 January 2018, page 40 ('most customers will want to go for three quotations, three designs … that's what civil engineering contractors do, they want to go for three prices so they'll, they'll look at our design, they'll look at the other designs and they'll look at the quotations and basically they've got to decide on one'), and page 88 ('… the bigger specialist equipment, they've come to us weeks in advance so we can do a design, we can talk to them about it and give them a solution'), and see also page 84, URN 2806.

[25] Vp's response dated 11 June 2018 to the CMA's information request dated 18 May 2018, question 5 (page 7, paragraph 5.4), URN 3571; Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 11 (page 8, paragraph 11.3), URN 0763.

[✂].[26]

Cross-hire and cross-supply

2.17 Most customers demand a wide range of groundworks products for the purposes of any given construction job. Suppliers, however, do not always stock the full range of products required by any given customer because, for example, it is not cost effective or practical to do so.[27]

2.18 In such circumstances, suppliers may source those products that they do not hold themselves from their competitors, rather than risk losing the entire order or compromising their relationships with their customers. Such products would typically be sourced by way of hire ('**cross-hire**'), but could also be sourced by way of purchase ('**cross-supply**').[28]

2.19 There were cross-hire and cross-supply relationships between MGF and Vp throughout the Relevant Periods, and separately, between MGF and MHL from around July 2015. Between 2011 and 2017, the total value of the cross-hire and cross-supply trading between MGF and Vp (including, but not limited to, the Products) was around [✂],[29] with cross-hire representing approximately [✂]% of this amount,[30] while the total value of cross-hire and cross-supply trading between MGF and MHL (including, but not limited to, the Products) was [✂] (for the years 2015 and 2016).[31]

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[26] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 8(a) (page 15), URN 0802; Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 6 (page 6, paragraph 6.3), URN 0763; Mabey's response dated 12 January 2018 to the CMA's information request dated 24 November 2017, question 10 (page 10, paragraph 10.6), URN 0783.
[27] MGFL's response dated 18 June 2018 to the CMA's information request dated 18 May 2018, question 2(a) (pages 2 to 4), URN 0966.
[28] MGFL's response dated 18 June 2018 to the CMA's information request dated 18 May 2018, questions 2 and 3 (pages 2 to 8), URN 0966; Vp's response dated 11 June 2018 to the CMA's information request dated 18 May 2018, questions 2 and 3 (pages 2 to 5), URN 3571. See also, for example: transcript of an interview with [MGF Employee 2] held on 11 January 2018, page 51, URN 2807; transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 136 to 137, URN 3833.
[29] The [✂] of this total value, derived from MGF cross-supplying or cross-hiring equipment to Vp. Exhibit [✂], page 39, to the first witness statement of [MGF Employee 2] dated 8 October 2019, URN 4541; URN 0966 (pages 34, 36, 43); Vp's response dated 11 June 2018 to the CMA's information request dated 18 May 2018, paragraphs 2.5, 2.6 and 3.4 to 3.6 (pages 3 and 4), URN3571, and Annex 16 (URN 0944), Annex 17 (URN 0945), Annex 19 (URN 0947) and Annex 21 (URN 0949).
[30] URN 0966 (pages 34, 36, 43); URN 3821; Vp's response dated 11 June 2018 to the CMA's information request dated 18 May 2018, paragraphs 2.5, 2.6 and 3.4 to 3.6 (pages 3 and 4), URN3571, and Annex 16 (URN 0944), Annex 17 (URN 0945), Annex 19 (URN 0947) and Annex 21 (URN 0949).
[31] Being Mabey spend with MGFL of £[✂] in 2015 and £[✂] in 2016; Exhibit [✂], page 39, to the first witness statement of [MGF Employee 2] dated 8 October 2019, URN 4541.

B. The Parties

MGFL

2.20 M.G.F. (Trench Construction Systems) Limited (MGF) is a limited liability company registered in England and Wales, with company number 01546198. It was incorporated on 18 February 1981. Its registered address is Grant House, South Lancashire Industrial Estate, Lockett Road, Ashton-in-Makerfield, Wigan, Lancashire, WN4 8DE.[32]

2.21 MGF is a supplier of excavation safety solutions to the construction industry, providing a wide range of excavation shoring and safety equipment.[33] The products and services it supplies include: plant hire; major project hire; haulage; equipment sales; shoring damages; capital sales; Larssen hire; safety equipment hire; hire and/or sale of shoring consumables and hire and/or sale of safety consumables.[34] MGF manufactures its own products in-house (with the exception of hydraulic components, trench sheets and heavy Larssen piles), and since 2010/2011 it has been [a distributor] for trench sheets and sheet piles manufactured by [Supplier A].[35]

2.22 During Relevant Periods 1, 2 and 3, MGF supplied the Products to customers such as Balfour Beatty, Wessex Water, Esh Construction and J Murphy & Sons.[36] As noted above, MGF also engaged in some inter-company trading with Vp and MHL, for example where they did not stock the full range of products required by an end-user.[37]

2.23 MGF is, and was during Relevant Periods 1, 2 and 3 wholly owned by MGF Limited.[38]

2.24 MGF Limited is a limited liability company registered in England and Wales with company number 04156069. It was incorporated on 7 February 2001. Its registered address is Grant House, South Lancashire Industrial Estate,

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[32] M.G.F. (Trench Construction Systems) Limited listing with Companies House.
[33] MGF website.
[34] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 4 (page 5), URN 0802.
[35] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 18(2), 28 to 31, and 191, URN 4529; MGFL's response dated 26 February 2020 to the CDG's oral hearing follow-up questions dated 24 January 2020, paragraphs 19 and 22 to 25, URN 5134. [Supplier A] is a manufacturer of profiled metal sheeting [✂];
[36] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 9 (pages 16 to 17), URN 0802.
[37] MGFL's response dated 18 June 2018 to the CMA's information request dated 18 May 2018, questions 2 and 3 (pages 2 to 8), URN 0966.
[38] Annual Return forms AR01 for periods ending 31 December 2011, 31 December 2014 and 31 December 2015, and Confirmation statement CS01 dated 31 December 2019.

Lockett Road, Ashton-in-Makerfield, Wigan, Lancashire, WN4 8DE.[39]

2.25 MGF Limited is, and was during Relevant Periods 1, 2 and 3, owned by [✂].[40]

Vp

2.26 Vp plc (Vp) is a Public Limited Company registered in England and Wales with company number 00481833. It was incorporated on 5 May 1950. Its registered address is Central House, Beckwith Knowle, Otley Road, Harrogate, North Yorkshire, HG3 1UD.[41]

2.27 Vp is comprised of a number of operating divisions, providing the rental and sale of specialist products and services to a range of end markets including infrastructure, construction, housebuilding and oil and gas, both in the UK and overseas.[42]

2.28 Vp's UK trading divisions include Groundforce,[43] which supplies shoring equipment; piling equipment; pipe stoppers; air pressure testing; pump hire and sale; trenchless technology; temporary bridges and excavation territory.[44] Groundforce is segmented into four sub-divisions, (i) Groundforce Shorco; (ii) Piling; (iii) Stoppers; and (iv) Germany.[45]

2.29 Vp's other business divisions are: TPA (portable roadways services); UK Forks (materials handling); Hire Station (tools for industry, construction and DIY); Torrent Trackside (railway infrastructure services); and Airpac Bukom (Oilfield services).[46]

2.30 During Relevant Periods 1, 2 and 3, Vp supplied the Products to customers such as Balfour Beatty, Morgan Sindall, Clancy Docwra and Bam Nuttall.[47] Vp also engaged in some inter-company trading with MGF, where its inventory

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[39] MGF Limited listing with Companies House.
[40] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 1 (page 1), URN 0802; MGF Limited listing with Companies House.
[41] Vp plc listing with Companies House.
[42] Vp plc website.
[43] Witness and documentary evidence sometimes refers to Vp's 'Groundforce' division, rather than 'Vp'.
[44] Vp Groundforce website.
[45] Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 1 (page 2, paragraph 1.2), URN 0763.
[46] Vp plc website. Vp plc's Group of companies' accounts up to year ending 31 March 2017. Airpac Bukom is considered by Vp plc as part of their 'International Division' but has facilities in the UK.
[47] Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, Annex 06 (pages 5 to 7), URN 0773.

did not include all the products required to supply a particular customer.[48]

2.31 Vp is, and was during the Relevant Periods 1, 2 and 3, a 50.26% owned subsidiary undertaking of Ackers P Investment Company Limited, a limited liability company registered in England and Wales with company number 01615174. It was incorporated on 18 February 1982. Its registered address is C/O Vp, Beckwith Knowle, Otley Road, Harrogate, North Yorkshire, HG3 1UD.[49] The remaining shares in Vp are listed on the London Stock Exchange and are in public ownership.[50]

Mabey

2.32 Mabey Hire Limited (MHL) is a limited liability company registered in England and Wales with company number 06950075. It was incorporated on 1 July 2009. Its registered address is Scout Hill, Ravensthorpe, Dewsbury, West Yorkshire, WF13 3EJ.[51]

2.33 MHL's principal activity is the manufacture and supply of a range of equipment to the construction industry in the UK,[52] including the hire and sale of groundworks products in construction projects.[53]

2.34 During Relevant Period 2(a), MHL supplied the Products to customers such as Balfour Beatty, J.N. Bentley Ltd and J Murphy & Sons. MHL also engaged in some inter-company trading with MGF.[54]

2.35 MHL is, and was throughout Relevant Period 2(a), wholly owned by Mabey Engineering (Holdings) Limited.[55] Mabey Engineering (Holdings) Limited is a limited liability company registered under company number 01560295. It was incorporated on 8 May 1981. Its registered address is One Valpy, 20 Valpy Street, Reading, RG1 1AR.[56]

2.36 Mabey Engineering (Holdings) Limited is, and was throughout Relevant

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[48] Vp's response dated 11 June 2018 to the CMA's information request dated 18 May 2018, questions 2 and 3 (pages 2 to 5), URN 3571.
[49] Ackers P Investment Company Limited listing with Companies House.
[50] Vp plc website.
[51] Mabey Hire Limited listing with Companies House. MHL was known as Mabey Hire Services Limited until 3 July 2012, when it changed its name to Mabey Hire Limited.
[52] Mabey website.
[53] MHL Annual Report and Financial Statements for the Year ended 30 September 2017.
[54] MGFL's response dated 18 June 2018 to the CMA's information request dated 18 May 2018, questions 2 and 3 (pages 2 to 8), URN 0966.
[55] Annual Return forms AR01 for periods ending 1 July 2014 and 1 July 2015 and Confirmation statement CS01 dated 28 June 2018.
[56] Mabey Engineering (Holdings) Limited listing with Companies House.

Period 2(a), wholly owned by Mabey Holdings Limited.[57]

2.37 Mabey Holdings Limited is a limited liability company registered in England and Wales under company number 01892516. It was incorporated on 6 March 1985. Its registered address is One Valpy, 20 Valpy Street, Reading, RG1 1AR. Mabey Holdings Limited is, and was throughout Relevant Period 2(a), owned by multiple shareholders.[58]

C. The CMA's investigation

Mabey's leniency application

2.38 On 28 April 2016, Mabey approached the CMA with an application for Type A immunity under the CMA's leniency policy, as reflected in the CMA's guidance on penalties.[59]

2.39 The CMA signed a leniency agreement with Mabey on 4 April 2019.

The CMA's investigation

2.40 The CMA opened an investigation under the Competition Act in February 2017.

2.41 On 28 February 2017, the CMA carried out inspections under warrant at the business premises of Vp and MGF and the domestic premises of [MGF Employee 1], as well as a voluntary inspection at MHL's business premises. On 26 September 2017, the CMA carried out a further set of inspections under warrant at the domestic premises of [MGF Employee 3], [MGF Employee 2] and [Vp Employee 1].

2.42 During the course of the investigation, the CMA sent MGFL, Vp, [MGF Employee 1] and a third party, Balfour Beatty,[60] notices requiring the

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[57] Annual Return forms AR01 for periods ending 30 June 2014 and 30 June 2015 and Confirmation statement CS01 dated 28 June 2020.
[58] As per Mabey Holdings Limited's Annual Return forms AR01 for periods ending 30 June 2014 and 30 June 2015, and confirmation statements between 30 June 2016 and 30 June 2020, Mabey Holdings Limited was throughout Relevant Period 2(a), owned by the following: [✂].
[59] Under the CMA's leniency policy, the CMA will grant total immunity from financial penalties to a participant who is the first to come forward before the CMA has commenced an investigation and who satisfies the conditions of leniency; such an applicant is known as the Type A applicant. See *Applications for leniency and no-action in cartel cases* (OFT1495 dated July 2013, adopted by the CMA) and the OFT's *Guidance as to the appropriate amount of a penalty* (OFT423 September 2012, adopted by the CMA), paragraphs 3.4 and 3.13 to 3.14, which has since been replaced by the CMA's *Guidance as to the appropriate amount of a penalty (CMA73)*, paragraphs 3.4 and 3.13 to 3.14.
[60] Balfour Beatty Plc is a Public Limited Company registered in England and Wales with company number 00395826. It was incorporated on 31 May 1945. Its registered address is 5 Churchill Place, Canary Wharf, London, E14 5HU.

production of documents and information under section 26 of the Competition Act, and requests to Mabey for documents and information without recourse to the CMA's formal powers. MGFL and Vp also provided material voluntarily, in response to requests for documents and information without recourse to the CMA's formal powers.

2.43 The CMA conducted interviews on a voluntary basis with the following current and/or former employees of the Parties:

(a) MGF: [MGF Employee 3][61] and [MGF Employee 2];[62]

(b) Vp: [Vp Employee 3][63] and [Vp Employee 1];[64] and

(c) MHL: [MHL Employee 2],[65] [MHL Employee 4],[66] [MHL Employee 1],[67] and [MHL Employee 3].[68]

2.44 The CMA also conducted compulsory interviews with [MGF Employee 3][69] and [MGF Employee 2][70] of MGF.

Statement of Objections

2.45 On 9 April 2019, the CMA issued a Statement of Objections to the Parties.

2.46 Following the issue of the Statement of Objections, a Case Decision Group was appointed to decide (taking account of the facts and evidence before it and the Parties' representations) whether there was sufficient evidence to meet the legal test for establishing an infringement and, if so, the level of any financial penalty to be imposed.

2.47 On 4 June 2019, Mabey submitted limited written representations on the Statement of Objections.[71] On 27 September 2019, Vp submitted written representations on the Statement of Objections, and on 28 October 2019 it

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[61] Transcript of an interview with [MGF Employee 3] held on 9 January 2018, URN 2806. [✂].
[62] Transcript of an interview with [MGF Employee 2] held on 11 January 2018, URN 2807. [✂].
[63] Transcript of an interview with [Vp Employee 3] held on 3 May 2018, URN 0667.
[64] Transcript of an interview with [Vp Employee 1] held on 10 May 2018, URN 0666.
[65] Transcript of an interview with [MHL Employee 2] held on 23 June 2016, URN 0255; transcript of an interview with [MHL Employee 2] held on 28 June 2016, URN 2808.
[66] Transcript of an interview with [MHL Employee 4] held on 2 March 2017, URN 0273.
[67] Transcript of an interview with [MHL Employee 1] held on 6 October 2016, URN 0260; transcript of an interview with [MHL Employee 1] held on 24 November 2016, URN 0265; transcript of an interview with [MHL Employee 1] held on 5 June 2018, URN 2805; transcript of an interview with [MHL Employee 1] held on 25 February 2020, URN 5232; transcript of an interview with [MHL Employee 1] held on 19 August 2020, URN 5360; transcript of an interview with [MHL Employee 1] held on 10 September 2020, URN 5405.
[68] Transcript of an interview with [MHL Employee 3] held on 1 March 2017, URN 0270; transcript of an interview with [MHL Employee 3] held on 15 June 2018, URN 2809.
[69] Transcript of an interview with [MGF Employee 3] held on 16 and 17 January 2019, URN 3833.
[70] Transcript of an interview with [MGF Employee 2] held on 16 January 2019, URN 3832.
[71] Mabey's response dated 4 June 2019 to the CMA's Statement of Objections, URN 4792.

made oral representations on the matters referred to in its written representations.[72] On 10 October 2019, MGFL submitted written representations on the Statement of Objections, and on 6 December 2019 it made oral representations on the matters referred to in its written representations.[73]

Letter of Facts

2.48 On 19 June 2020, the CMA issued a Letter of Facts to the Parties.

2.49 On 10 July 2020, Mabey submitted limited written representations on the Letter of Facts.[74] On 7 August 2020, Vp submitted written representations on the Letter of Facts.[75] On 18 August 2020, MGFL submitted written representations on the Letter of Facts.[76]

Additional material

2.50 On 30 September 2020, the CMA provided the Parties with additional material provided to or obtained by the CMA since the Letter of Facts was issued.

2.51 On 28 October 2020, Mabey submitted limited written representations on the additional material.[77] On 23 October 2020, MGFL submitted written representations on the additional material, and on 2 November 2020 it made oral representations on the matters referred to in its written representations.[78] Vp submitted written representations on the additional material on 23 October 2020, and on 4 November 2020 it made oral representations on the matters referred to in its written representations.[79]

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[72] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, URN 4565; transcript of Vp's oral hearing held on 28 October 2019, URN 4992; Vp's response dated 22 November 2019 to the CDG's oral hearing follow-up questions dated 5 November 2019, URN 5023.
[73] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, URN 4529; transcript of MGFL's oral hearing held on 6 December 2019, URN 5003; MGFL's response dated 26 February 2020 to the CDG's oral hearing follow-up questions dated 24 January 2020, URN 5134.
[74] Mabey's response dated 10 July 2020 to the CMA's Letter of Facts, URN 5358.
[75] Vp's response dated 7 August 2020 to the CMA's Letter of Facts, URN 5308.
[76] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, URN 5310.
[77] Mabey's response dated 28 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, URN 5445.
[78] MGFL's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, URN 5438; transcript of MGFL's oral hearing held on 2 November 2020, URN 5446.
[79] Vp's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, URN 5434; transcript of Vp's oral hearing held on 4 November 2020, URN 5447; Vp's response dated 10 November 2020 to the CDG's oral hearing follow-up questions dated 4 November 2020, URN 5442.

Draft Penalty Statements

2.52 On 25 September 2020, the CMA issued Draft Penalty Statements to MGFL and Vp.

2.53 On 23 October 2020, MGFL submitted written representations on its Draft Penalty Statement, and on 2 November 2020 it made oral representations on the matters referred to in its written representations.[80] Vp submitted written representations on its Draft Penalty Statement on 23 October 2020, and on 4 November 2020 it made oral representations on the matters referred to in its written representations.[81]

D. Key individuals and their evidence

2.54 The following paragraphs set out the manner in which evidence has been provided by key individuals at the Parties. The CMA has obtained a significant amount of documentary and witness evidence during its investigation, and certain issues of fact are disputed by MGFL and Vp. As set out in Chapters 4 and 5 (see in particular, paragraphs 5.15 to 5.52), the CMA has carefully considered the appropriate weight to give particular evidence in context and, in particular, where individuals have provided conflicting accounts of events, the CMA has set out its reasons for preferring certain evidence in making its findings (including based on the consistency of individuals' accounts and the extent to which they are corroborated by documentary evidence).

MGF

[MGF Employee 1]

2.55 [✂].[82]

2.56 The CMA did not interview [MGF Employee 1] prior to issuing the Statement of Objections [✂]. On 10 October 2019, MGFL submitted a witness statement from [MGF Employee 1].[83] [MGF Employee 1] responded to a notice requiring the production of specified information under section 26 of the Competition

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[80] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5436; transcript of MGFL's oral hearing held on 2 November 2020, URN 5446.
[81] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5422; transcript of Vp's oral hearing held on 4 November 2020, URN 5447.
[82] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, questions 1(b) and 3 (pages 3 to 4), URN 0802; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 2, URN 4531; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph 2, URN 5274.
[83] First witness statement of [MGF Employee 1] dated 8 October 2019, URN 4531 and Exhibits [✂] (URN 4532), [✂] (URN 4533), [✂] (URN 4534) and [✂] (URN 4535).

Act on 22 May 2020, in lieu of attending an interview given the Coronavirus (COVID-19) pandemic.[84] On 18 August 2020, MGFL submitted a second witness statement from [MGF Employee 1].[85]

[MGF Employee 2]

2.57 [✂][86] [✂].[87] [✂].[88]

2.58 The CMA interviewed [MGF Employee 2] in January 2018 and January 2019.[89] On 10 October 2019, MGFL submitted a witness statement from [MGF Employee 2].[90] On 18 August 2020, MGFL submitted a second witness statement from [MGF Employee 2].[91]

[MGF Employee 3 / Vp Employee 2]

2.59 [✂].[92]

2.60 The CMA interviewed [MGF Employee 3 / Vp Employee 2] in January 2018 and January 2019.[93] On 10 October 2019, MGFL submitted a witness statement from [MGF Employee 3 / Vp Employee 2].[94] On 18 August 2020, MGFL submitted a second witness statement from [MGF Employee 3 / Vp Employee 2].[95]

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[84] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, URN 5274. [MGF Employee 1] was not willing to attend a virtual interview, and as set out above, the CMA instead issued a formal request for information.
[85] Second witness statement of [MGF Employee 1] dated 13 August 2020, URN 5317.
[86] [✂].
[87] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 1(b) (page 3), URN 0802.
[88] Transcript of an interview with [MGF Employee 2] held on 11 January 2018, pages 27 to 28, URN 2807.
[89] [✂].
[90] First witness statement of [MGF Employee 2] dated 8 October 2019 and Exhibits [✂], [✂], [✂], [✂] and [✂], URN 4541.
[91] Second witness statement of [MGF Employee 2] dated 17 August 2020, URN 5319 and Exhibits [✂] (URN 5320), [✂]7 (URN 5321), [✂] (URN 5322), [✂] (URN 5323), [✂] (URN 5324), [✂] (URN 5325), [✂] (URN 5326), [✂] (URN 5327), [✂] (URN 5328), [✂] (URN 5329), [✂] (URN 5330), [✂] (URN 5331), [✂] (URN 5332), [✂] (URN 5333).
[92] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 1(b) (page 3), URN 0802.
[93] [✂].
[94] First witness statement of [MGF Employee 3] dated 8 October 2019, URN 4539.
[95] Second witness statement of [MGF Employee 3] dated 17 August 2020, URN 5316.

[MGF Employee 4]

2.61 [✂].[96] [✂].[97]

2.62 On 10 October 2019, MGFL submitted a witness statement from [MGF Employee 4].[98]

Vp

[Vp Employee 1]

2.63 [✂].[99] [✂].[100]

2.64 The CMA interviewed [Vp Employee 1] in May 2018.[101]

[MGF Employee 3 / Vp Employee 2]

2.65 [✂].[102] [✂].[103] [✂].[104]

MHL

[MHL Employee 1]

2.66 [✂].[105]

2.67 The CMA interviewed [MHL Employee 1] in October 2016, November 2016 and June 2018 (prior to the issue of the Statement of Objections), and in February 2020, August 2020 and September 2020 (after the issue of the Statement of Objections).

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[96] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 1(b) (page 3), URN 0802; first witness statement of [MGF Employee 4] dated 8 October 2019, paragraph 4, URN 4537.
[97] First witness statement of [MGF Employee 4] dated 8 October 2019, paragraphs 4 to 5, URN 4537.
[98] First witness statement of [MGF Employee 4] dated 8 October 2019 and Exhibits [✂], [✂] and [✂], URN 4537.
[99] Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 1 (page 2, paragraph 1.3), URN 0763.
[100] Transcript of an interview with [Vp Employee 1] held on 10 May 2018, pages 20, 40, 41 and 49, URN 0666. Throughout the Relevant Periods, [Vp Employee 1] was also the [✂], another division of Vp.
[101] In response to a request from the CMA, on 20 June 2018 Vp's legal representatives provided limited comments on behalf of [Vp Employee 1] in relation to particular documents pertaining to Relevant Period 3; URN 1073.
[102] [✂].
[103] Transcript of an interview with [MGF Employee 3] held on 9 January 2018, page 139, URN 2806.
[104] Transcript of an interview with [MGF Employee 3] held on 9 January 2018, pages 119, 120, 133, 134 and 138, URN 2806.
[105] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 37, URN 4615. See also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 25 and 29, URN 0260.

2.68 The CMA obtained four witness statements from [MHL Employee 1]:

(a) The first witness statement confirms the accuracy of the transcripts for the interviews held with him on 6 October 2016 and 24 November 2016, and does not cover any of the content of his interviews;[106]

(b) The second witness statement confirms and consolidates his interview evidence relied upon in the Statement of Objections, as well as incorporating evidence from his interview held on 25 February 2020;[107]

(c) The third witness statement covers the circumstances around his departure from MHL in August 2014;[108] and

(d) The fourth witness statement covers his evidence regarding representations made by MGFL and Vp as to the purpose and content of the contacts and meetings between him, [Vp Employee 2] and [MGF Employee 1] (described in Relevant Period 2(a) of Section 4 below).[109]

[MHL Employee 2]

2.69 [✂].[110]

2.70 The CMA interviewed [MHL Employee 2] in June 2016.

2.71 The CMA obtained two witness statements from [MHL Employee 2]:

(a) The first witness statement confirms the accuracy of the transcripts for the interviews held with him on 23 June 2016 and 28 June 2016, and does not cover any of the content of his interviews;[111] and

(b) The second witness statement confirms and consolidates his interview evidence relied upon in the Statement of Objections.[112]

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[106] First witness statement of [MHL Employee 1] dated 14 February 2017, URN 0481.
[107] Second witness statement of [MHL Employee 1] dated 27 March 2020, URN 4615, and Exhibits [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂] and [✂], URN 4616.
[108] Third witness statement of [MHL Employee 1] dated 21 September 2020, URN 5414 and Exhibits [✂], [✂], [✂] and [✂], URN 5415.
[109] Fourth witness statement of [MHL Employee 1] dated 30 September 2020, URN 5419 and Exhibits [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂] and [✂], URN 4520.
[110] Second witness statement of [MHL Employee 2] dated 4 May 2020, paragraphs 8 and 10, URN 5229.
[111] First witness statement of [MHL Employee 2] dated 4 May 2017, URN 0477.
[112] Second witness statement of [MHL Employee 2] dated 4 May 2020, URN 5229 and Exhibits [✂] and [✂], URN 5230.

[MHL Employee 3]

2.72 [✂].[113]

2.73 The CMA interviewed [MHL Employee 3] in March 2017 and June 2018. The CMA obtained a witness statement from [MHL Employee 3] which confirms and consolidates his interview evidence relied upon in the Statement of Objections.[114]

[113] First witness statement of [MHL Employee 3] dated 8 April 2020, paragraph 12, URN 4621 and Exhibits [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂] and [✂], URN 4622. [MHL Employee 3] is also referred to by witnesses in this Decision as '[MHL Employee 3]'.
[114] First witness statement of [MHL Employee 3] dated 8 April 2020, URN 4621.

3. THE RELEVANT MARKET

A. Introduction

3.1 When applying the Chapter I prohibition and Article 101, the CMA is not obliged to define the relevant market, unless it is impossible, without such a definition, to determine whether the agreement or concerted practice under investigation had as its object or effect the appreciable prevention, restriction or distortion of competition.[115] In the present case, it is not necessary to reach a definitive view on market definition in order to determine whether there is an agreement or concerted practice which has as its object the appreciable prevention, restriction or distortion of competition.[116]

3.2 However, the CMA will still form a view of the relevant market for the purposes of establishing the level of any financial penalties that may be imposed.[117] When assessing the relevant market for these purposes, it is not necessary to carry out a formal analysis: the relevant market may properly be assessed on a broad view of the particular trade affected by the infringement in question.[118]

B. Relevant product market

3.3 As set out in paragraphs 2.3 to 2.5, the Infringement concerns the supply, by way of hire, of groundworks products used to provide temporary support solutions for below ground excavations and the provision of associated design and transportation services (the Products) to customers in the UK.

3.4 The case law provides that the relevant product market includes, 'products or services which are substitutable or sufficiently interchangeable with the product or service in question, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in

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[115] Judgment of 6 July 2000, *Volkswagen AG v Commission* T-62/98, EU:T:2000:180, paragraph 230; judgment of 21 February 1995, *SPO and Others v Commission* T-29/92, EU:T:1995:34, paragraph 74.
[116] See also *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 176, in which the CAT held that '[i]n Chapter I cases … determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement'.
[117] *CMA73,* paragraphs 2.1 and 2.3 to 2.15.
[118] *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraphs 169 to 173 and 189; *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraphs 176 to 178. The CAT held that it would be disproportionate to require the OFT (in that case) to devote resources to a detailed market analysis, where the only issue is the penalty.

question'.[119]

3.5 The CMA has therefore focused its product market analysis on the following key issues:

(a) whether the Products are all in the same product market as each other, including consideration of potential market segmentations for Larssen sheet piles, edge protection products, design services, transport services and different customer types; and

(b) whether the hire of the Products is a separate product market from the sale of the Products.

3.6 For the reasons considered below, following its analysis the CMA has found that, for the purposes of this Decision and in particular determining the level of any financial penalty, the Products all fall within the same product market and that the hire of the Products is a separate relevant market from the sale of the Products.

Are the Products all in the same product market?

3.7 From a demand side perspective, there is evidence that the level of substitution between the Products is limited and sometimes non-existent.[120]

3.8 For example, Vp has stated that the Products are either standard designs to meet specific needs or modular and used in bespoke designs, taking into account many external aspects of a job. The starting point on product selection is with the design, which delivers safe excavation support; with safety as a given, the objective is to deliver optimal operational efficiency for the contractor (that is: the maximum working space, by employing the least amount of equipment in the hole). Substitution as between the Products may be limited because substituting an alternative Product will invariably compromise the optimal solution and may depend on a different design. For example, in relation to shoring equipment:

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[119] Judgment of 12 June 1997, *Tierce Ladbroke SA v Commission* T-504/93, EU:T:1997:84, paragraph 81.
[120] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 2(i) (pages 16 to 17) (see also question 4, page 24), URN 3873; Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2(i) (page 3, paragraphs 2.1 to 2.4), URN 3837; Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, paragraphs 2.1 to 2.4, URN 3835.

(a) 2x MP 250 props and 1x MP 500 props may be interchangeable; however, the specific needs of the project may mean that in practice the level of substitution is very limited or non-existent; and

(b) substitution between different trench boxes may not be an option due to considerations such as the depth, length and loading of an excavation within the scope of the product design.[121]

3.9 Similarly, Mabey has stated that it does not consider that different types of equipment comprising the Products are interchangeable with each other as each piece of equipment has a specific purpose. Mabey instead sees the market as a 'ground shoring "solutions" market' based on a customer's specific requirements for a particular project.[122] From a demand side perspective, each project for each customer will require a different set of specific groundworks products, and is therefore, effectively, a bespoke solution.[123]

3.10 MGFL has provided a number of examples of equipment which either cannot be substituted, are complementary or (even if they could in theory be considered close substitutes) are unlikely in practice to be used as substitutes due to a number of issues, including: service and handling constraints, conductivity, safety, driveability, productivity and strength.[124] MGFL has stated that 'from the customer perspective, MGF supplies a number of distinct shoring products. Customers are unlikely to consider these products to be viable substitutes for each other, and in many cases (e.g. Waler Rails/Hydraulics and Trench Sheets) these products are instead used together'.[125]

3.11 The boundaries of the relevant product market are generally determined by reference to demand side substitution alone.[126] However, there are circumstances where the CMA may aggregate several narrow relevant markets into one broader one on the basis of considerations about the response of suppliers to changes in prices. It may do so, for example, when most of the suppliers are able to offer the various products immediately and

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[121] Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2(i) (page 3, paragraphs 2.1 to 2.4) (see also question 4, page 6, paragraph 4.2), URN 3837.
[122] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, paragraph 2(i) (page 6), URN 3835.
[123] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2(i) (page 6, paragraph 2.2) (see also question 4, pages 8 to 9, paragraphs 4.1 to 4.2), URN 3835.
[124] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 2(i) (pages 16 to 17), URN 3873.
[125] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 4 (page 24), URN 3873.
[126] *OFT403 Market Definition*, paragraph 3.18.

without a significant increase in costs or with reference to the similarity of production methods.[127]

Conditions of supply between the Products

3.12 Although the Products are not substitutable for each other on the demand side, supplying them requires a common set of assets and expertise.

3.13 As set out in paragraphs 3.8 to 3.10, an excavation will need a combination of different Products in order to suit a customer's particular requirements and fulfil design and safety requirements. MGFL has submitted that 'many of MGF's products have no real use on their own and will require other products alongside them',[128] specifically noting, for example, that trench sheets are used alongside waler rails/hydraulics; and mechanical struts are usually used in conjunction with tank braces.[129] Many of the product lines, such as trench sheets, feature incremental differences in size and specification to facilitate the varied combinations of products that might be required by different customers.[130] In the words of [MGF Employee 3], the Products are 'like a big Meccano set. You've got to have all the right bits in one place…'.[131] Mabey has similarly compared the Products to 'Lego' or 'Duplo'.[132]

3.14 Customers typically have a preference to source the Products required from one supplier.[133] As set out in paragraphs 2.17 and 2.18, MGF, Vp and MHL did not always stock the full range of products required by any given customer because, for example, it was not necessarily cost effective or practical to do so.[134] However, in such circumstances, MGF, Vp and MHL would source those products that they did not hold themselves from their competitors (by

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[127] European Commission Notice on the definition of relevant market for the purposes of Community competition law 97/C 372/03, paragraph 21. *OFT403 Market Definition*, paragraph 3.17.
[128] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 13 (pages 32 to 33), URN 0802.
[129] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 2(i) (pages 16 to 17), URN 3873.
[130] For instance, MGFL offers nine types of cold rolled steel trench sheets in a range of lengths (British Standard, FKD, KKD 6mm, KKD 8mm, FLP 3.5mm, FLP 6mm, FLP 8mm, ER and L8); MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 11(a) (page 20), URN 0802. Vp offers five types of cold rolled steel trench sheets in a range of lengths; Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, Annex 7 (page 4), URN 0774. Mabey offers nine types of cold rolled steel trench sheets in a range of lengths; Mabey website. See also: transcript of an interview with [MHL Employee 3] held on 1 March 2017, page 44, URN 0270; transcript of an interview with [MGF Employee 3] held on 9 January 2018, page 86, URN 2806.
[131] Transcript of an interview with [MGF Employee 3] held on 9 January 2018, page 100, URN 2806.
[132] URN 3700, paragraph 31 (page 5).
[133] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 4 (page 24), URN 3873; Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2(v) (page 7, paragraph 2.6), URN 3835; transcript of an interview with [MGF Employee 3] on 9 January 2018, page 156, URN 2806.
[134] MGFL's response dated 18 June 2018 to the CMA's information request dated 18 May 2018, paragraph 2(a) (pages 2 to 4), URN 0966.

way of cross-hire or cross-supply), rather than risk losing the entire order or compromising their relationships with their customers. MGFL has stated that it 'increasingly operates as a "solutions provider" rather than just offering the hire of individual pieces of equipment'.[135] This is indicative of the fact that MGF, Vp and MHL competed to provide a full range of Products to suit a customer application.

3.15 This is supported by evidence from Mabey that:

'a suite of groundwork products, and individual products, are available from a number of suppliers. The range of ground shoring solutions offered by each supplier differs, for example, the tolerance of a trench box will vary between suppliers. In Mabey's experience therefore, different suppliers will provide a different engineered ground shoring solution, with varying additional products, for a particular project, depending on the products they supply. In general, therefore, a customer will select a supplier who can provide the products it requires for its specific project, and other suppliers will have the option to purchase or cross-hire specific groundworks products that they do not otherwise have, if required by a customer'.[136]

3.16 Vp has also stated that suppliers in this space are providing bespoke solutions for customers as opposed to the supply, by way of hire, of individual products.[137]

3.17 The CMA further notes that throughout the Relevant Periods the same suppliers were broadly active across the various Products.[138] This reflects the fact that the supply of the Products requires a certain level of specialist expertise, capability and capacity,[139] including: engineering knowledge, and the ability to provide technical advice (by way of technical sales staff).[140] In the words of MGFL: 'from the supplier perspective, MGF's competitors (such as Groundforce, Mabey Hire and RMD) generally offer a similar range of shoring products to MGF. This is partly because supplying these different products for hire generally involves similar skills and expertise'.[141] Thus, the

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[135] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 4 (page 24), URN 3873.
[136] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2 (page 6, paragraph 2.3) (see also page 7, paragraph 2.6), URN 3835.
[137] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 6.3, URN 4565.
[138] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 8 (pages 29 to 30), URN 3873; Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 8 (page 7, paragraphs 8.1 to 8.2), URN 3837; Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 8 (page 10, paragraphs 8.1 to 8.2), URN 3835.
[139] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 4 (pages 24 to 25), URN 3873.
[140] Transcript of an interview with [MHL Employee 3] held on 1 March 2017, page 123, URN 0270.
[141] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 4 (page 24), URN 3873.

conditions of competition in the supply of the Products throughout the Relevant Periods were similar.

Potential segmentations

3.18 The CMA has considered potential segmentations of the market based on representations made by the Parties regarding Larssens sheet piles, edge protection, design services, transport services and different customer types.

3.19 The Infringement includes the products and services that form each of these potential segmentations. Accordingly, whether or not there are separate markets, any turnover derived from the hire of Larssen sheet piles and edge protection, design charges, transport charges and different customer types would be part of the relevant turnover for penalty purposes.

3.20 For the reasons set out below, the CMA considers that each of these potential segmentations form part of the same relevant product market as the other Products:

Larssen sheet piles

(a) Vp has made representations that Larssen sheet piles (also referred to as steel sheet piles) should be excluded as these products are typically used in permanent, rather than temporary, support works.[142] Vp has also made representations that Larssen sheet piles should be excluded from the relevant market on the basis that they are hired out by a different business unit within Vp (Piletec), which was not involved in any of the alleged events in the Statement of Objections.[143] The CMA does not consider the fact that Larssen sheet piles were hired out by a separate business unit within Vp means that they cannot be in the same market as the other Products. The CMA also notes that Larssen sheet piles are used to support the sides of excavations in a similar manner to trench sheets, and that Larssen sheet piles are hired from Vp Piletec, MGF and Mabey for the purpose of providing temporary support.[144] While the CMA

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[142] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 2.15(c), URN 5422.
[143] Vp's response dated 3 March 2020 to the CMA's section 26 notice dated 18 February 2020, URN 4550 and URN 4549; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5422.
[144] For example, a Vp quotation for temporary support (URN 1287) specified the use of Larssen sheet piles supplied by Vp Piletec. See also: Vp's response dated 10 November 2020 to the CDG's oral hearing follow-up questions dated 4 November 2020, question 1 (page 2, paragraph, 1.1), URN 5442; URN 3700, paragraph 11(a)(iii) (page 2); MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, questions 1 and 2 (pages 2 and 16), URN 3873; Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 1 (page 4, paragraph 1.13.2), URN 3835.

acknowledges that Larssen sheet piles also have uses within permanent works, the hire of Larssen sheet piles for temporary works was part of MGF, MHL and Vp's business. For example, MGFL reported revenue of [✂] from the hire of Larssen sheet piles in the year ending 30 June 2016,[145] and Vp estimated that for the year ending 31 March 2016, the split of Larssen sheet pile revenue between temporary works (hire) and permanent works (sale) was close to 50:50.[146]

Edge protection

(b) MGFL has made representations that turnover derived from the hire of edge protection products should not be included in the relevant turnover, including on the basis that edge protection is not used for installing, securing and extracting shoring and piling.[147] Edge protection products are ancillary safety equipment used in close conjunction with shoring equipment that is used to provide temporary support to excavations. While it can be hired separately, the CMA notes that Mabey considered that its range of edge protection is [✂].[148] As such, the CMA considers that edge protection is likely to be subject to the same competitive constraints as the hire of other groundworks products and so it forms part of the same market.

Design services

(c) Vp has made representations that design charges should constitute a separate market.[149] Vp stated that it is not active in this market as it does not charge for its design work as a standalone service and that Vp only charges a very small fee attributable to design services within its general quote for a project.[150] As noted at paragraph 2.12 above, design work is an important part of supplying groundworks products used by suppliers to ensure their proposals meet customers' requirements.[151] The CMA

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145 MGFL's response dated 13 March 2020 to the CMA's section 26 notice dated 28 February 2020, question 1 (page 2), URN 4569.
146 Vp's response dated 10 November 2020 to the CDG's oral hearing follow-up questions dated 4 November 2020, question 1 (page 2, paragraph, 1.1), URN 5442.
147 MGFL's response dated 13 March 2020 to the CMA's section 26 notice dated 28 February 2020, question 1 (page 2), URN 4569.
148 URN 3700, paragraph 7 (page 2).
149 Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 6.8, URN 4565.
150 Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 2.15(a), URN 5422.
151 Design has also been referred to as being the 'starting point on product selection'; Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2(i) (page 3, paragraph 2.2), URN 3837.

therefore considers it is likely to be subject to the same competitive constraints as the rest of the market for groundworks products.

Transport services

(d) MGFL and Vp have made representations that transport charges should be excluded from the relevant market. In support of this, MGFL submitted that (i) haulage is a distinct service that is sold rather than hired to customers and (ii) MGF's transport service is not a mandatory element in MGF's hire charges for groundworks products and many customers use their own vehicles or those of third parties to deliver and collect hired equipment.[152] Vp notes that it outsources its haulage to logistic providers, meaning that haulage is a cost for Vp.[153]

(e) The CMA considers that transport charges are likely to be subject to the same competitive constraints as the hire of groundworks products, because when a customer decides to hire a Product, the customer is also likely to take into account how to transport the Product. While the haulage services offered by the Parties to customers are not mandatory, there are likely to be significant advantages in terms of convenience for customers in using the Parties' haulage services (and thus being charged for transport charges). Consistent with this, Vp has submitted that generally there are no customer collections from a depot due to the physical size and weight of the Products.[154]

(f) While the Parties have different business models in terms of whether they own a fleet of vehicles or not,[155] the CMA does not consider this to be relevant to the relevant market assessment. All the Parties incurred costs when providing transportation services – whether using their own vehicles or out-sourcing to a third party haulage provider – and charged their customers for those services.

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[152] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 35(b), URN 5436; MGFL's response dated 2 April 2020 to the CMA's follow-up questions dated 19 March 2020 on the CMA's section 26 notice dated 28 February 2020, question 3 (pages 4 to 5), URN 4627.
[153] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 2.15(b), URN 5422; Vp's response dated 28 April 2020 to the CMA's follow-up questions dated 24 April 2020 on the CMA's section 26 notice dated 18 February 2020, question 3 (page 2, paragraph 3.2), URN 5225.
[154] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 6.14(f), URN 4565.
[155] Vp's response dated 23 April 2020 to the CMA's follow-up questions dated 17 April 202 on the CMA's section 26 notice dated 18 February 2020, question 2 (page 2, paragraph 2.1), URN 5219; Vp's response dated 28 April 2020 to the CMA's follow-up questions dated 24 April 2020 on the CMA's section 26 notice dated 18 February 2020, question 3 (page 2, paragraph 3.2), URN 5225.

Customer types

(g) MGFL has made representations that major projects form a different market to the core groundworks market.[156] MGFL stated that major projects tend to require larger equipment (of which not all suppliers can provide) and that the market is contested by suppliers of alternative solutions (such as fixed steel solutions).[157] Vp has also made representations that major projects represents a distinct market for the hire of its groundworks products, noting that these bespoke projects require a high level of customer engagement, detailed design and may involve higher discounts on price.[158] Additionally, Vp submitted that the market should be further segmented into different customer categories due to various differences between customers and contract types.[159]

(h) While Vp outlined differences between these customers and contract types, these differences do not necessarily mean there are different competitive conditions at play between them. The CMA considers all the customer types, including major projects, form part of the same market because suppliers' ability to meet the requirements of those major projects appear to rest on a single common set of assets and expertise that allow them to meet the requirements of each type of customer.

Conclusion on whether Products are all in the same product market

3.21 For the reasons set out above, the CMA has found that, for the purposes of this Decision and in particular determining the level of any financial penalty, the Products all fall within the same relevant product market.

3.22 The CMA notes that, in any event, defining separate markets for different Products would make no difference to the level of the financial penalties imposed in this case, given that any penalty will be calculated on the basis of turnover in relation to those Products that each Party supplied during the Relevant Periods. The total amount of relevant turnover for penalty calculation purposes would be the same even if these potential segmentations were each found to constitute a separate market.

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[156] MGFL's response dated 13 March 2020 to the CMA's section 26 notice dated 28 February 2020, question 1 (pages 2 to 3), URN 4569; MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 35(b), URN 5436.
[157] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 4 (page 25), URN 3873.
[158] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 6.10(c)(d), URN 4565.
[159] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 6.10((a),(b),(e),(f),(g),(h),(i)), URN 4565.

Is the hire of the Products a separate product market from the sale of the Products?

3.23 Customers tended to require the Products either infrequently or for time-limited use and did not typically need or wish to purchase the Products, particularly taking account of the purchase cost as compared with the cost of hire.[160] By renting the Products, customers could avoid the costs associated with maintaining a stock of the Products, including the cost of storage, upkeep and repair.[161]

3.24 Even for long duration excavations, it was uncommon for customers to buy the Products. For example, there is evidence that for lengthy projects, customers might consider a structural steel solution to be more appropriate than buying the Products.[162]

3.25 Consistent with this, Mabey stated that while Products are available for both sale and hire, it does not consider [✂], and therefore the sale of the Products is very limited.[163]

3.26 Vp explained that its approach to the sale of the Products was of an *ad hoc* nature and relied on customer requests. Often sales take place in response to a 'sacrificial need' (that is, the contractor has buried the equipment) or where a contractor damages a Product beyond repair. However, Vp (Groundforce) does not actively solicit sales of the Products.[164]

3.27 There is limited evidence of supply side responses that would suggest a single market for the hire and sale of products. Although MGFL considered there was a plausible threat that some current sellers of the Products could enter the hire market,[165] Mabey stated that it is not aware of any suppliers who currently only sell groundworks products, who would be considered likely to start hiring those products.[166]

3.28 On the basis of the evidence above, the CMA has found that the hire of the Products is a separate relevant market from the sale of the Products.

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[160] URN 2061; URN 0589. See also Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 2 (page 3, paragraph 2.5), URN 0763.
[161] URN 3700, paragraph 35 (page 5).
[162] URN 3700, paragraph 34 (page 5).
[163] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2 (page 6, paragraph 2.4) (see also page 7, paragraph 2.6), URN 3835.
[164] Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2 (page 3, paragraph 2.5), URN 3837.
[165] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 2 (vii) (page 20), URN 3873.
[166] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 2 (page 7, paragraph 2.9), URN 3835.

Conclusion on relevant product market

3.29 For the reasons set out above, the CMA finds that, for the purposes of this Decision and in particular determining the level of any penalty in this case, the relevant product market is the supply, by way of hire, of the Products to customers.

C. Relevant geographic market

3.30 In its assessment of the relevant geographic market, the CMA has considered the constraints on the supply, by way of hire, of the Products to customers in the UK, from both outside and within the UK during the Relevant Periods.

3.31 The case law defines the relevant geographic market as comprising, 'the area in which the undertakings concerned are involved in the supply and demand of products and services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'.[167]

Constraints from outside the UK

3.32 MGFL stated that, on the face of it, there is not that much direct overseas competition in the market for the hire of the Products, but that a large proportion of the equipment hired out in the shoring hire industry is purchased from overseas suppliers, which has a fundamental effect on the UK market.[168] MGFL submitted that this exerted a huge amount of competitive pressure on MGF as it produces the vast majority of its hire equipment itself, and therefore has to do so to a standard and a cost that enables it to compete effectively against those simply buying in their products from abroad.[169]

3.33 Both Vp and Mabey stated that they do not consider that any non-UK businesses exerted any competitive pressures in the market for the hire of the Products, stating that their principal competitors were UK based.[170] Vp states

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[167] Judgment of 22 October 2002, *Schneider Electric SA v Commission* T-310/01, EU:T:2002:254, paragraph 153.
[168] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, questions 8 and 9 (pages 29 to 30), URN 3873.
[169] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, questions 8 and 9 (pages 29 to 30), URN 3873. MGFL states that this influence is particularly marked in the Larssen piles hire market, as all piles ultimately originate from overseas, so the availability of these profiles ultimately drives the market prices for them.
[170] Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, questions 8 and 9 (page 7, paragraphs 8.1 to 9.1), URN 3837. Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, questions 8 and 9 (page 10, paragraphs 8.1 to 9.1), URN 3835.

that as far as it is aware, no UK based customers have hired the Products on an international basis during the Relevant Period.[171]

3.34 Given the evidence above, the CMA finds that the geographic market for the supply, by way of hire, of the Products is not wider than the UK.

Constraints from within the UK – regional segmentation

3.35 The CMA finds that, although the geographic market could be delineated along regional lines, there is evidence of national competition between the Parties and, as the Infringement concerns the supply of Products in the UK and is not limited to any particular region, it is appropriate in this case to define the relevant geographic market as UK-wide.

3.36 During the Relevant Periods, MGF and Vp supplied the Products by way of hire throughout the UK, including, albeit to a sometimes limited extent, Northern Ireland.[172]

3.37 Moreover, MGF, Vp and Mabey all publicly describe themselves as suppliers of the Products to customers in the 'UK' or as maintaining depots across the 'UK'.[173] As regards depots, the CMA notes that:

(a) depot locations were chosen with a view to ensuring [✂],[174] [✂];[175] and

(b) it was at least possible for the Parties to compete in geographic areas where they did not maintain depots. MGF has stated that, despite not operating a depot in Scotland or Northern Ireland, it has hired products to

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[170] Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 3 (page 5, paragraph 3.2), URN 3837.
[171] Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 3 (page 5, paragraph 3.2), URN 3837.
[172] Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 5 (page 5, paragraphs 5.1 to 5.2), URN 0763; Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, questions 3 and 4 (page 5, paragraphs 3.1 and 4.1), URN 3837; MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 4 (pages 25 to 26), URN 3873; MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 6(a) (pages 10 to 11), URN 0802.
[173] Groundforce Shorco: 'For over 40 years, Groundforce Shorco has been one of the UK's leading construction industry supplier of Trenching and Shoring equipment systems' and 'Groundforce Shorco operates a national sales force network from 17 strategically located depots providing UK and Ireland coverage' (see Vp website). MGF: 'MGF have been supplying the UK construction industry with shoring solutions for over 30 years' (see MGF website) and 'We provide an international service from our depot and office locations throughout the UK' (see MGF website). Mabey: 'We have the UK's widest range of temporary works equipment for hire' (see Mabey website) and 'Fast, efficient and local service from our 17 depots across the UK' (see Mabey website).
[174] URN 3700, paragraph 36 (page 5).
[175] Transcript of an interview with [MHL Employee 3] held on 15 June 2018, page 13, URN 2809.

customers in those regions 'when it has been financially viable to do so'.[176]

3.38 In addition, hire rates for groundworks products were sometimes set on a national basis;[177] and some large customers, particularly those supplied under preferred supplier agreements, demanded a single fixed delivery charge regardless of delivery location.[178] Vp notes that national accounts make up [✂] of its hire revenue.[179]

3.39 However, MGFL, Vp and Mabey all provided other evidence indicating that competition was also to a certain extent of a regional nature and both MGFL and Vp have made representations that the market was local or regional.[180]

3.40 MGFL has stated that it operated across most of the regional markets of England and Wales, but that whilst some hires were made in Scotland and Northern Ireland, they were not material.[181] Vp has stated that there are a large number of regional and local players active only in their region or area.[182]

3.41 Vp has stated that many hires of Products are done on a local basis, and that customers' uptake of its products is likely to be different based on regional preference, prevailing regional ground conditions and the type of work being undertaken at any one time in any location (for example, wind farms in Scotland; large basements in London).[183] Similarly, MGFL has noted that there is a geographical difference in large projects, with large basements,

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[176] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 6(a) (pages 10 to 11), URN 0802. Since this response, MGFL has gone on to open a depot in Scotland.
[177] Vp's response dated 11 June 2018 to the CMA's information request dated 18 May 2018, question 5 (page 6, paragraph 5.1), URN 3571; MGFL's response dated 18 June 2018 to the CMA's information request dated 18 May 2018, question 4(a) (page 8), URN 0966.
[178] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 8(a) (pages 14 to 15), URN 0802; Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 6 (page 6, paragraph 6.3), URN 0763.
[179] Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 3, (page 5, paragraph 3.3), URN 3837.
[180] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 6.14 to 6.17, URN 4565; MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 36, URN 5436; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 57 to 63, URN 4529.
[181] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 4 (pages 25 to 26), URN 3873. See also MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 6(a) (page 10), URN 0802.
[182] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 6.14(g), URN 4565, referring to slide 7 of Annex 7, URN 4611. The CMA notes that although the presentation referred to in support lists a number of regional/local companies under Non-Operated Plant, only one company (Mechplant) is listed as regional/local under groundworks.
[183] Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 3 (page 5, paragraph 3.1), URN 3837.

propping schemes and alike tending to be in the South East due to the density of buildings.[184]

3.42 Mabey has stated that it does not provide groundworks solutions to customers in [✂]. Mabey also stated that its customers vary between those operating on a national basis and those operating on a regional or local basis, and that groundworks products are hired in line with the requirements of a specific project.[185]

3.43 In addition, depot locations, and the rationale for opening new depots, suggests that there was a benefit in being closer to customers.[186]

3.44 MGFL has stated that its hire business operates on a regional basis since each of its depots has a realistic operational range of around 40 to 50 miles; beyond this distance, the ability of engineers and technical sales representatives to adequately support projects is significantly diminished, and the cost of transporting equipment to and from site often becomes prohibitive.[187] It further notes that it has only actively pursued the East Anglia and Devon and Cornwall areas since it opened depots in those areas; and that it has never targeted Scotland or Northern Ireland.[188]

3.45 Vp has stated that regardless of the customer type, operationally contracts are generally fulfilled by the depot (local business) closest to the delivery point that has availability of the required Products, and that local business is subsumed into the regions.[189] As noted above at paragraph 3.20(e), Vp has stated that there are no customer collections from a depot due to the physical size and weight of the Products.

3.46 Mabey has stated that there are regional aspects to the market for the hire of the Products as some (smaller) suppliers may not have a network of depots which enable them to service a GB-wide area.[190] Mabey also notes that in general, each depot tends to obtain an increased amount of work within

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[184] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 3(i) (page 23), URN 3873.
[185] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 3 (page 8, paragraphs 3.1 to 3.6) (see also page 9, paragraph 4.3), URN 3835.
[186] URN 3700, paragraph 36 (page 5); transcript of an interview with [MGF Employee 2] on 11 January 2018, pages 23 and 28, URN 2807.
[187] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 3 (pages 21 to 24), URN 3873.
[188] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 3 (pages 21 and 24), URN 3873.
[189] Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 3 (page 5, paragraph 3.5), URN 3837
[190] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 4 (page 9, paragraph 4.3), URN 3835.

[✂].[191] Mabey has also stated that prices will necessarily differ depending on the location of a project as the price to the customer will vary depending on [✂].[192]

3.47 There is also evidence that sales teams and price negotiations were organised along regional and local lines.[193] MGFL has stated that it has a number of operational hire depot locations to service local regions; and its prices are predominantly determined at the regional / depot level.[194] Vp notes that its non-national accounts are managed by its three regional centres.[195] Mabey has stated that it has regional managers for three geographic regions: [✂].[196]

3.48 The evidence above suggests that it is arguable that the geographic market may be narrower than the UK and could be delineated along regional lines. However, defining narrower geographic markets makes no difference to the level of the financial penalty imposed on each Party in this case as the Infringement concerns the supply of the Products in the UK and is not limited to any particular region. Thus, the penalty is calculated on the basis of the turnover in relation to the Products that the Parties supplied to their customers in the UK, and any segmented markets are covered by that penalty calculation.

3.49 The CMA does not, therefore, consider that it is necessary to come to a firm conclusion on the extent to which, or way in which, markets may be segmented along regional lines and considers that the evidence shows that, with the exception of MHL in Northern Ireland, MGF, Vp and MHL competed with each other for customers throughout the UK.

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[191] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 3, (page 8, paragraph 3.2), URN 3835.
[192] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 3 (page 8, paragraph 3.5), URN 3835.
[193] MGFL's response dated 18 June 2018 to the CMA's information request dated 18 May 2018, question 4(a) (page 8), URN 0966; Vp's response dated 11 June 2018 to the CMA's information request dated 18 May 2018, question 5 (page 6, paragraph 5.3), URN 3571; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 6.14(b), URN 4565**;** Mabey's response dated 12 January 2018 to the CMA's information request dated 24 November 2017, question 10 (page 9, paragraph 10.3), URN 0783.
[194] MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 3 (pages 21 to 24), URN 3873.
[195] Vp's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 3 (page 5, paragraphs 3.3 to 3.4), URN 3837.
[196] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 4 (page 9, paragraph 4.3), URN 3835.

Conclusion on relevant geographic market

3.50 For the reasons set out above, the CMA finds that, for the purposes of this Decision and in particular determining the level of any financial penalty in this case, the relevant geographic market is the UK.

D. Conclusion on the relevant market

3.51 In light of the evidence considered above, the CMA finds that, for the purposes of this Decision and in particular determining the level of any financial penalty in this case, the relevant market is the supply, by way of hire, of the Products to customers in the UK.

4. CONDUCT OF THE PARTIES

A. Introduction

4.1 The CMA finds that in each of the following periods:

(a) between at least 23 September 2011 and 4 October 2011 (Relevant Period 1) MGFL and Vp infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement;

(b) between at least 14 February 2014 and 16 July 2014 (Relevant Period 2(a)); and between 17 July 2014 and at least 24 November 2014 (Relevant Period 2(b)) (together Relevant Period 2) MGFL and Vp infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement;

(c) during Relevant Period 2(a) Mabey infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement;

(d) between at least 12 November 2015 and 28 November 2016 (Relevant Period 3) MGFL and Vp infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement; and

(e) in the cases of MGFL and Vp, the single continuous infringements described above in each of Relevant Period 1, Relevant Period 2 and Relevant Period 3 together formed a single repeated infringement,

in each case through an agreement or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply, by way of hire, of groundworks products[197] used to provide temporary support solutions for below ground excavations and the provision of associated design and transportation services (the Products) in the UK (the Infringement).

4.2 The Infringement took the form of the coordination of commercial behaviour (in particular pricing practices) which was aimed at reducing competition on price and strategic uncertainty in order to maintain or increase pricing levels in the market, including through the sharing of confidential competitively sensitive pricing and strategic information, between:

(a) MGF and Vp during Relevant Periods 1, 2 and 3; and

[197] As defined in paragraph 2.3 of this Decision.

(b) MGF, Vp and MHL during Relevant Period 2(a).

4.3 This Chapter sets out the evidence found by the CMA of contacts between MGF and Vp (and MHL in Relevant Period 2(a)) relating to the supply, by way of hire, of the Products during the Relevant Periods.

B. The origins of the arrangement between MGF and Vp

4.4 Until 2009, there was, in the words of [MGF Employee 2], a 'real period of price stability' in the market for the Products, without 'a great deal of price action in the marketplace'.[198] [MHL Employee 1] has said that, [✂] in 2009,[199] MHL had an 'absolute reluctance, a refusal to discount beyond the minimum price list to win an order … a lack of aggressive sales techniques, a lack of being competitive, and a refusal to offer a competitive commercial deal to win an order'.[200]

4.5 However, in late 2009, Mabey underwent a wide-ranging management restructure, and there is evidence that this led to a more aggressive business strategy within MHL: sales staff were given greater flexibility to offer discounts with the aim of winning as much business as they could, in order to 'grow the business as rapidly and aggressively as possible'.[201]

4.6 According to [MHL Employee 1], MHL's new strategy resulted in an increase in its business for around six to nine months, after which MHL's competitors (namely MGF and Vp), 'started to fight back and that had the effect of dragging all the prices down and slowing down our growth'.[202]

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[198] Transcript of an interview with [MGF Employee 2] held on 11 January 2018, page 182, URN 2807.
[199] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 20, 21 and 37, URN 4615. See also: transcript of an interview with [MHL Employee 1] held on 24 November 2016, page 44, URN 0265; transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 25 and 29, URN 0260. [✂].
[200] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 22, URN 4615. See also transcript of an interview with [MHL Employee 1] held on 24 November 2016, page 40, URN 0265. [MHL Employee 3] confirms, consistent with the evidence of [MHL Employee 1], that prior to the new strategy implemented in 2009 MHL had refused to discount below the minimum price list to win an order; first witness statement of [MHL Employee 3], paragraphs 19 to 23, URN 4621.
[201] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 23 to 24, URN 4615. See also: transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 26 (see also page 73), URN 0260; transcript of an interview with [MHL Employee 1] held on 24 November 2016, pages 40 and 41, URN 0265. [MHL Employee 3] confirms, consistent with the evidence of [MHL Employee 1], that from 2009 MHL took a more aggressive business strategy and sales staff were given greater flexibility to offer discounts to grow the business aggressively; first witness statement of [MHL Employee 3], paragraphs 20 to 22, URN 4621.
[202] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 25, URN 4615. See also: transcript of an interview with [MHL Employee 1] held on 24 November 2016, page 61, URN 0265; transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 73, URN 0260. [MHL Employee 3] confirms, consistent with the evidence of [MHL Employee 1], that MHL's sales grew initially as a result of a more aggressive business strategy, and that gradually, the cost of discounting against improving product utilisation was taken into account; first witness statement of [MHL Employee 3], paragraph 23, URN 4621.

4.7 The CMA finds that MGF and Vp responded to MHL's aggressive business strategy by entering into an arrangement with each other to coordinate their commercial behaviour, in particular their pricing practices, through the exchange of confidential competitively sensitive pricing and strategic information. In particular, the CMA finds that MGF and Vp would discuss pricing information or strategies, monitor each other's prices and challenge those which they considered to be too low, in order to maintain or increase pricing levels in the market.

4.8 In support of this, the CMA notes [MGF Employee 2's] comment in interview that, during this time, [Vp Employee 2] would, 'whinge to [him] all the time about stuff and to [MGF Employee 1]. Obviously it's on a grinding agenda of, you know, I don't know, why, why wreck the marketplace or whatever when Mabeys are going crazy, which is understandable, to a degree, probably not right … but, to a degree, understandable'.[203]

4.9 In addition, and by way of further context, the CMA notes that an email dated 20 March 2010[204] from [Vp Employee 2] to [MGF Employee 2][205] (which highlights some low quotations from MGF and appears largely to concern cross-hire rates between MGF and Vp),[206] concludes:

'[w]ith Mabey up to antics at the moment, I am keen not to get into a price war in Yo[r]ks with you'.

4.10 [MGF Employee 2] explained in interview that this email, and the comment about a price war, should be understood in the context of MHL cutting prices following Mabey's management restructure (describing the impact of MHL's strategy as being, 'enormous, we were going in for jobs and we were being ripped apart by 30, 40%' and that MHL was 'making massive waves in the industry, like massive, the price cutting was to the point whereby I'm sure it can't have been profitable … We just couldn't get anywhere near').[207] This

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[203] Transcript of an interview with [MGF Employee 2] held on 11 January 2018, page 175, URN 2807.
[204] URN 1293.
[205] On 20 March 2010, [MGF Employee 2] sent himself an email (from his personal email address to his work email address) in which he had pasted the text of an email from [Vp Employee 2] and attached two MGF quotations for Moortown Construction Ltd. [MGF Employee 2] said that he thinks the email was originally from [Vp Employee 2], and talked about it in these terms in interview; transcript of an interview with [MGF Employee 2] held on 11 January 2018, pages 57 to 76 and 105 to 121, URN 2807. In further support of this explanation, the CMA notes that the two MGF quotations attached to the email dated 20 March 2010 (URN 1293, attaching URN 1294 and URN 1295), were identical to quotations sent by [Vp Employee 4] to [Vp Employee 2] on 17 March 2010 (URN 2794, attaching URN 2795 and URN 2796).
[206] See for example: transcript of an interview with [MGF Employee 2] held on 11 January 2018, pages 60, 66, 69, 108 to 109, 114 to 121, and 134 to 136, URN 2807; transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 26 to 27, URN 3832; transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 165 to 174, URN 3833.
[207] Transcript of an interview with [MGF Employee 2] held on 11 January 2018, pages 75 to 76, URN 2807. In his first witness statement, [MGF Employee 2] stated that his comment 'We just couldn't get anywhere near' reflects

explanation was mirrored in the interview evidence of [Vp Employee 2].[208]

4.11 The CMA notes that this is also consistent with the witness evidence of [MHL Employee 1], who said that [✂] in around 2011 or 2012:

'There was, I guess, some constant feedback from the sales directors and the sales team. There was always concern that there had always been this cosy relationship between the big three companies and, now that we'd taken a step away from that, there was concern amongst the sales people that those two companies, [Vp] Groundforce and MGF, maintained that contact and that cosy relationship. The inference was, I guess, that those two companies would still be colluding together to disadvantage Mabey.

There was some suggestion that one of them would offer lower prices in one region, and the other would offer low prices in another region, so that we as a business in trying to compete with that would be hindered in both areas, whereas they would only take the hit in one or the other. So, there was always a suggestion coming to me [✂] from the sales directors that they felt that MGF and [Vp] Groundforce were working together to try and disadvantage Mabey. That was just a general feedback that I got back from people like [MHL Employee 3], and I think that would be from feedback that he was getting from his sales team'.[209]

4.12 Although there is evidence which suggests that there was some contact between MGF and Vp in relation to pricing strategies from around early 2010,[210] taking a conservative approach, the CMA finds that the arrangement

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that MGF considered MHL's pricing was 'completely unsustainable and had no effect on our strategy'. [MGF Employee 2] stated that the contacts between him and [Vp Employee 2] during this period were driven by their trading relationship, and any exchange of information between them was not in response to MHL's aggressive pricing; first witness statement of [MGF Employee 2] dated 8 October 2019, paragraphs 24 to 25, URN 4541.

[208] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 163 to 164, URN 3833. In his first witness statement, [Vp Employee 2] sets out further commentary regarding this document, explaining that around this time Vp were cross-hiring Larssen piles from MGF, and 'relations were made difficult when MGF started to target our customers with lower rates than those agreed for rehire with us'. [Vp Employee 2] stated that he was annoyed with MGF for playing what he viewed as a 'dirty trick', and this resulted in 'a number of heated exchanges' between him and [MGF Employee 2], culminating in a pause of the cross-hire arrangement between them for nine months; first witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 28, URN 4539.

[209] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 38 to 39 (see also paragraph 40), URN 4615. See also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 30 to 32, URN 0260.

[210] See, in addition to the evidence set out in this Section (The origins of the arrangement between MGF and Vp), URN 2021, URN 2022, URN 2023, URN 2024, an internal Vp email exchange on 18 March 2010 in relation to prices to be offered for work for Moortown Construction Ltd where Vp were looking to win work by pricing lower than MGF, with [Vp Employee 2] commenting: 'I am ok with these prices on this occasion. I will be raising this in certain ears I [sic] order that the onset of a price war does not begin'. Interview evidence explains that these emails reflect the threat by Vp of a price war or refusal to deal in relation to the cross-hire of products from MGF, in the face of MGF quotations to customers that Vp considered to be too low. See: transcript of an interview with [MGF Employee 2] held on 11 January 2018, pages 108 to 121, URN 2807; transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 156 to 160 (in particular, 'why would I commit to re-hiring

between MGF and Vp was in place by at least 23 September 2011, which is the first date for which there is clear documentary evidence of contact between MGF and Vp in relation to the arrangement between them.

C. Contact between MGF and Vp during Relevant Period 1

4.13 During Relevant Period 1, MGF and Vp monitored the prices each other were quoting to customers and emailed each other examples of what they considered to be low quotes, coordinating their commercial behaviour (in particular pricing practices) to reduce price and strategic uncertainty, in order to maintain or increase pricing levels in the market.

4.14 Examples of contacts between MGF and Vp that illustrate the arrangement between them during the period 23 September 2011 to 4 October 2011 are set out below. After 4 October 2011 the CMA does not have evidence of such contacts until 14 February 2014, which marks the start of Relevant Period 2.

4.15 As noted in Section 2.A, in addition to being direct competitors, there was a cross-hire and cross-supply relationship between MGF and Vp during the Relevant Periods, including Relevant Period 1. Both MGF and Vp have submitted that the contacts between them during Relevant Period 1 should be viewed in, and are explained by, the 'legitimate' context of the trading relationship between them.[211] The CMA explains below in this Section why it does not accept that the cross-hire and cross-supply relationship between MGF and Vp explains or somehow makes 'legitimate' the anti-competitive coordination between MGF and Vp in Relevant Period 1 (see also paragraph 5.117). In that regard, it is relevant context that the value of cross-hire and cross-supply from MGF to Vp in 2011 was small, both in absolute and relative terms.[212]

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piles from you on a re-hire arrangement when all you're going to do is undercut – undercut the market', page 156), URN 3833. See also: URN 1286; URN 1287; transcript of an interview with [MGF Employee 2] held on 16 January 2019, page 19 ('he's just trying to blarney it saying, "Yeah, I'm nicking the job on price, I know you won't be happy about it" and trying to cover his back, really saying, you know, "Oh, we don't always do this" … because it's not in his interest, is it, to tell me what he's trying to do out there in the marketplace? So, he's trying to say, "Oh that's not common practice"'), URN 3832.

[211] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 159 to 161, URN 4529; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.11 and 3.27, URN 4565.

[212] Based on MGF records, the total value of cross-hire and cross-supply from MGF to Vp in 2011 was [✂]; first witness statement of [MGF Employee 2] dated 8 October 2019, Exhibit [✂] (page 39), URN 4541. This level of Vp spend represented [✂] of MGF Limited's total annual turnover for the financial years ending 30 June 2011 and 30 June 2012.

Summary of events in relation to Relevant Period 1

4.16 The following table sets out an overview of the events that support the CMA's findings in relation to Relevant Period 1. Details of each event, including the relevant witness evidence, are set out below in this Section.[213]

Table 1.1: Summary of events in relation to Relevant Period 1

23 September 2011 – start of Relevant Period 1	
23 September 2011	4:04pm – email [VPE3] to [VPE2] 'MGF madness' flagging low MGF quotes
	4:12pm – email [VPE2] to [VPE3] 'I'll continue to apply pressure at the top'
26 September 2011	1:47pm – email [MGFE1] to MGF senior employees about maintaining prices
	4:36pm – phone call [MGFE1] to [VPE2]
	4:40pm – email [MGFE1] to [VPE2] forwarding his email to MGF senior employees about maintaining prices
	5:23pm – phone call [MGFE1] to [VPE2]
28 September 2011	1:26pm – phone call [MGFE1] to [VPE2]
29 September 2011	9:44am – phone call [MGFE1] to [VPE2]
30 September 2011	9:24am – phone call [MGFE1] to [VPE2]
1 October 2011	8:30am – email [MGFE2] to [MGFE1] forwarding the low quotes sent to him by [VPE2]
	8:26am – email [MGFE2] to [VPE2] saying [MGFE1] has sent out 'warning shots' and MGF will 'nip it in the bud rapidly'
	10:28am – email [MGFE1] to [MGFE2] (but addressed to [VPE2]) 'We will get to the bottom of this urgently' and 'I'll get out my big stick'
3 October 2011	12:24pm – email [MGFE1] to [MGFE2] flagging low Vp quotes
	2:11pm – email [MGFE1] to [MGFE2] flagging low Vp quotes
4 October 2011	9:01am – email [MGFE2] to [VPE2] flagging low Vp quotes. [MGFE2] says he would call [VPE2] about this and the low MGF quotes [VPE2] previously sent to [MGFE2]
4 October 2011 – end of Relevant Period 1	
5 October 2011	9:00am – email [VPE2] to [VPE3] forwarding [MGFE2's] email on low quotes. Says that as [VPE2] had 'raised the stakes' with MGF, it is important Vp maintain rates as well

Contact in relation to low quotes from MGF

4.17 In August and September 2011, [Vp Employee 2] received a number of emails from Vp staff, highlighting examples of MGF offering large discounts and/or free of charge items to customers.[214] These emails raised concerns that Vp was losing business and market share to MGF as a result, with reference to MGF pricing below Vp's minimum rates and 'cutting up the game with free kit!!'.[215]

4.18 In an email exchange in relation to one of these examples (dated 23 September 2011 and headed 'MGF Madness'), [Vp Employee 3][216] informed [Vp Employee 2] that, despite MGF offering the customer a lower rate and free equipment, Vp had managed to retain a particular order at, '£200 per

[213] In this table, '[VPE2]' means [Vp Employee 2]; '[MGFE1]' means [MGF Employee 1]; '[VPE3]' means [Vp Employee 3]; '[MGFE2]' means [MGF Employee 2].
[214] URN 2119; URN 2121; URN 2125; URN 2127; URN 2128; URN 2131; URN 2136; URN 2137.
[215] URN 2119; URN 2121; URN 2125.
[216] Transcript of an interview with [Vp Employee 3] held on 3 May 2018, page 14, URN 0667.

week more than [MGF's] quote **With no items FOC**'[217] [emphasis in original]. In response, [Vp Employee 2] stated, 'Ta, I'll continue to apply pressure at the top'.[218]

4.19 [Vp Employee 2] confirmed in interview that 'the top' in his email was a reference to [MGF Employee 2] and [MGF Employee 1], explaining that:

'what I meant, it was in this period where we were still trying to, retain relations on a supply basis … and it was still at the point where I was simply going to say to [MGF Employee 2] or even [MGF Employee 1], "There's no way we can trade with each other while – while you're continually undercutting the market".

…

The only pressure I could apply was to not – to not trade any more with them, to cut ties totally, forget your re-hire, forget the conversation about you want to manufacture for us, just totally cut ties…'.[219]

4.20 [Vp Employee 2] later stated that he was trying to maintain both a trading relationship and relations more generally with MGF as 'talks around the potential acquisition of MGF by Vp were ramping up',[220] and responses such as 'I'll continue to apply pressure at the top' were his attempt to reassure senior members of the Vp sales team such as [Vp Employee 3] 'in the knowledge that he would accept that and move on'.[221]

4.21 [Vp Employee 2] also stated that he felt 'a strong sense of frustration in the face of an increasingly aggressive approach by MGF … and I decided to make [MGF Employee 2] aware of this, via a number of emails and phone calls', but that he did not expect anything to change and was simply venting

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[217] URN 2144; see also URN 2136. The CMA is of the view that 'FOC' stands for 'free of charge'. See transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 187, URN 3833.
[218] URN 2144.
[219] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 196 to 197 (see also page 236), URN 3833.
[220] MGFL and Vp have made representations to the CMA that there is a history of discussions between Vp and MGFL in relation to the possible acquisition of MGF by Vp, and this is a plausible alternative explanation for the infringing contacts. See for example: Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 2.9, URN 4565; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraphs 7.5 to 7.6, 7.23 to 7.38, URN 5308; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 159 and 187, URN 4529; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraphs 7.5 to 7.6 and 7.28, URN 5308. [MGF Employee 1] [✂] met with [Vp Employee 1] on several occasions to discuss Vp potentially purchasing MGFL, noting that there has been 'an almost continuous series of approaches to buy us out, spanning from between 2004/5 to February 2017'. He refers to a number of letters he has received relating to offers to purchase MGFL, however the CMA notes that none of the correspondence is from Vp; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 34 to 36 and exhibit [✂], URN 4531.
[221] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 32 to 36, URN 4539.

his frustration as a customer of MGF.[222] However, it is clear from [Vp Employee 2's] statements that he did expect MGF to react to his complaints, as he explained that he told [MGF Employee 2] that 'any goodwill between the business was at serious risk … I meant the recent trading on trench sheets and the potential for hire and sale of Larssen piles … I made it clear that any thoughts we were having with regards to MGF manufacturing or supplying our equipment could also stop'.[223] Moreover, MGF did respond to his complaints, as set out in paragraph 4.29 below.

4.22 The CMA is of the view that [Vp Employee 2] 'applied pressure' to [MGF Employee 1] and [MGF Employee 2] by making threats as regards Vp's future conduct, in particular by threatening to cease trading with MGF, in order to seek to maintain prices in the market going forward and avoid a 'price war'.[224]

4.23 There is documentary evidence that [Vp Employee 2] contacted MGF regarding MGF's pricing. On 1 October 2011, [MGF Employee 2] emailed to himself[225] and [MGF Employee 1],[226] three documents containing information in relation to low prices being offered by MGF, which were received by [Vp Employee 2] from his Vp sales staff (as referred to in paragraph 4.17):

(a) an MGF quotation for the customer Lorclon dated 19 September 2011;[227]

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[222] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 37, URN 4539.
[223] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 37, URN 4539.
[224] Vp made representations that this was a reference to [Vp Employee 2] discussing with senior management within Vp some of the sales team's ideas, on the basis that there is no evidence that 'the top' is a reference to senior management at MGF, and when this email is read in conjunction with internal emails from the sales team to [Vp Employee 2] proposing solutions to Vp's losing work; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.3 to 3.6, URN 4565. The CMA does not consider this to be credible given the explanation provided in interview by [Vp Employee 2] (the author of the email) referred to in paragraph 4.19, which confirmed 'the top' was a reference to [MGF Employee 2] and [MGF Employee 1]. Vp also made representations that this email exchange is internal within Vp and therefore is not evidence of the start of the infringement. The CMA considers that the exchange is evidence of a course of action that was continuing by this point, as [Vp Employee 2] referred to his intended actions to 'continue to apply pressure at the top'.
[225] URN 1394, sent from [MGF Employee 2's] personal email account to his work email account.
[226] URN 1399, sent from [MGF Employee 2's] personal email account to [MGF Employee 1] with the comment: 'Contents of those e-mails attached FYI, I'll catch up with you about them on Monday'.
[227] URN 0580 (which is a duplicate of URN 2127 received by [Vp Employee 2] in September 2011). In interview, [MGF Employee 2] confirmed that the items in this quote would not have been subject to a cross-hire agreement; transcript of an interview with [MGF Employee 2] held on 11 January 2018, pages 149 to 151, URN 2807. See also transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 31 to 32, URN 3832, in which [MGF Employee 2] said that it was highly unlikely that trench sheets would have been subject to a cross-hire agreement.) In his first witness statement, [MGF Employee 2] said that 'Although the September/October 2011 quotes did not necessarily relate to cross hire themselves, it is important to note that the trading relationship (and its considerable potential) particularly on trench sheets was always a very big concern of ours. Therefore, the fact that the 'nip it in the bud' quotations didn't necessarily relate to cross hire should not be considered significant'; first witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 51, URN 4541. Vp made representations that it is 'factually incorrect that the two quotes would not be subject to cross hire'; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.18, URN 4565. In addition to [MGF Employee 2's] confirmation of such, Vp did not adduce evidence to support the items in this quote were the subject of a cross-hire arrangement between MGF and Vp and, in fact, information supplied by MGF and Vp in response to the CMA's information requests indicates that the items in this quotation were not

(b) an MGF quotation for the customer Ardmore dated 22 September 2011;[228] and

(c) a Word document entitled '[✂].*doc.*'[229] which set out the contents of an email sent from [Vp Employee 5] to [Vp Employee 2] on 30 August 2011,[230] along with a cover message from [Vp Employee 2] to [MGF Employee 2], which reads:

'[✂]

This is one of recent e-mails rgarding [sic] perceived issues in the Midlands. Didn't really want to send, but still a hot topic so thought it worth sharing as it stands.

I have left unedited. Clearly the recommendation in the last paragraph[231] is a concern, particularly as the writer is experienced and has a good history of keeping rates up.

May be we can discuss once you have digested.

[✂]'.

4.24 [MGF Employee 2] explained in interview that, '[Vp Employee 2] sent me an email, if not a few of them, saying "Look at what your guys are doing in the

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cross-hired between MGF and Vp at the time of this quotation; URN 3821; URN 0966; URN 0946; URN 0947; URN 0945; URN 0944.

[228] URN 0584 (which is a duplicate of URN 2137 received by [Vp Employee 2] in September 2011). In interview, [MGF Employee 2] confirmed that the items in this quote would not have been subject to a cross-hire agreement; transcript of an interview with [MGF Employee 2] held on 11 January 2018, pages 149 to 151, URN 2807. See also transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 31 to 32, URN 3832, in which [MGF Employee 2] said that it was highly unlikely that trench sheets would have been subject to a cross-hire agreement. In his first witness statement, [MGF Employee 2] said that 'Although the September/October 2011 quotes did not necessarily relate to cross hire themselves, it is important to note that the trading relationship (and its considerable potential) particularly on trench sheets was always a very big concern of ours. Therefore, the fact that the 'nip it in the bud' quotations didn't necessarily relate to cross hire should not be considered significant'; first witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 51, URN 4541. Vp made representations that it is 'factually incorrect that the two quotes would not be subject to cross hire'; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.18, URN 4565. In addition to [MGF Employee 2's] confirmation of such, Vp did not adduce evidence to support the items in this quote were the subject of a cross-hire arrangement between MGF and Vp and, in fact, information supplied by MGF and Vp in response to the CMA's information requests indicates that the items in this quotation were not cross-hired between MGF and Vp at the time of this quotation; URN 3821; URN 0966; URN 0946; URN 0947; URN 0945; URN 0944.

[229] URN 1396; URN 1401.

[230] [Vp Employee 5's] email details six specific schemes in 'the Midlands territories' where he considered MGFL to have offered large discounts. The content of this email is the same as the content of URN 2121, referenced in paragraph 4.17.

[231] In the last paragraph of the email pasted into [✂].doc., [Vp Employee 5] puts forward some recommendations for offering reduced Vp rates of 'circa -30% for boxes and commodity equipment and circa -20% for large braces and sheets etc' for certain customers/schemes.

marketplace, they're ripping the snot out of it all." So I've sent it all to myself at work and pinged it on to [MGF Employee 1]'.[232]

4.25 [MGF Employee 2] also explained that, in the '[✂].*doc*.' cover message, [Vp Employee 2] was asking why MGF was 'destroying the marketplace',[233] and that he was threatening a price war:

'[Vp Employee 2's] saying, you know, that there's been rates that have abounded in this industry for years now and you're out there slashing prices and it's causing these problems. So, either I slash rates 20, 30% or you stop messing about.'[234]

4.26 In interview, [Vp Employee 2] explained his threat as follows:

'There was continually undercutting in the market, you know, cheap prices going on … so it was..we're just not going to be able to trade with one another …'[235]

… 20% … is a big – a big discount in, in a market. And to be honest, that – that would have caused a lot of issues for the Midlands region in terms of trading profit and revenues and all sorts'.[236]

4.27 In response to this threat, on 1 October 2011, [MGF Employee 2] sent an email to [Vp Employee 2] reassuring him that, '[MGF Employee 1] has sent out warning shots on these [low MGF quotations] in the last week or so and copied me in on them … two quotes were from one salesmans area, so I am sure we can nip it in the bud rapidly'.[237] Later that same day, [MGF Employee 1] sent a reply to [MGF Employee 2's] email with the comment: '[Vp Employee

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[232] Transcript of an inerview with [MGF Employee 2] held on 11 January 2018, page 140, URN 2807.
[233] Transcript of an interview with [MGF Employee 2] held on 11 January 2018, page 152, URN 2807.
[234] Transcript of an interview with [MGF Employee 2] held on 11 January 2018, page 165 (see also pages 153 to 154), URN 2807.
[235] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 199 (see also, for example, pages 226 to 227 and 230 to 231), URN 3833.
[236] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 230, URN 3833.
[237] URN 1393. [MGF Employee 2] stated that he was seeking to placate or provide some reassurance to [Vp Employee 2], in order to prevent him from doing more damage in the market (irrespective of what MGF would ultimately decide to do as regards its prices) and that 'the phrase "nip it in the bud rapidly" was meant to be placatory, that is to say I was just trying to get [Vp Employee 2] off my back – it did not reflect any understanding with [Vp Employee 2] or Vp about our pricing or any acceptance that we had agreed not to compete aggressively on price with Vp'. [MGF Employee 2] states that he does not recall taking any steps in response to [Vp Employee 2's] complaint, but explains that [MGF Employee 1] provided him with Vp quotes that 'could be thrown back at Vp to show that they were also pricing aggressively against us'; first witness statement of [MGF Employee 2] dated 8 October 2019, paragraphs 43 and 65, URN 4541. See also: transcript of an interview with [MGF Employee 2] held on 11 January 2018, page 154, URN 2807; transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 32 to 33, URN 3832. [Vp Employee 2] stated that [MGF Employee 2] made him aware of a Vp quote with low rates, which 'did help me to calm down a little but overall I read this as MGF making the point (quite rightly) that the market was ultra-competitive'; first witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 39, URN 4539.

2] We will get to the bottom of this urgently–my apologies–I'll get out my big stick [MGF Employee 1]'.[238]

4.28 Consistent with MGF's assurances to Vp, at 1:47pm on 26 September 2011, [MGF Employee 1] had sent an email to senior MGF employees, instructing them to 'ensure that **NO** items are sent without charges' [emphasis in original] and highlighting that MGF 'will be seeking to increase [its] prices in the New Year but must achieve full stability of pricing before then'.[239]

4.29 On 26 September 2011 at 4:36pm, [MGF Employee 1] and [Vp Employee 2] had a short telephone call.[240] Four minutes later at 4:40pm, [MGF Employee 1] forwarded his earlier email to senior MGF employees (referred to above) to [Vp Employee 2's] personal email address, without commentary or explanation.[241] [MGF Employee 1] then telephoned [Vp Employee 2] again at 5:23pm.[242]

4.30 Between 28 and 30 September 2011, [MGF Employee 1] made a further three telephone calls to [Vp Employee 2].[243]

4.31 Given the proximity of the telephone calls between [MGF Employee 1] and [Vp Employee 2] on 26 September 2011 to the email [MGF Employee 1] forwarded to [Vp Employee 2] at 4:40pm, the CMA considers it likely that the content of the telephone calls related, at least in part, to the contents of [MGF Employee 1's] email, which included MGF's current and future pricing intentions. The CMA is of the view that the contact between [MGF Employee 1], [MGF Employee 2] and [Vp Employee 2] reflects the monitoring of low quotes, as well as sharing confidential competitively sensitive pricing and

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[238] URN 1402. Although [MGF Employee 1's] email was sent to [MGF Employee 2's] email address, the CMA notes that the text of the email was addressed to '[Vp Employee 2]', so the CMA considers that it was intended for [Vp Employee 2] rather than [MGF Employee 2]. It is not clear how [MGF Employee 1] obtained a copy of the original email from [MGF Employee 2], to which he was responding. In interview, [MGF Employee 2] said that he could not recall whether he had blind copied [MGF Employee 1] into the original email, but that he may have done so; transcript of an interview with [MGF Employee 2] held on 1 January 2018, pages 169 to 169, URN 2807.
[239] URN 1388.
[240] See URN 3706, Table B, row B1. The call duration was 34 seconds.
[241] URN 1389.
[242] See URN 3706, Table B, row B2. The call duration was 5 seconds, which possibly indicates it went to voicemail.
[243] [MGF Employee 1] telephoned [Vp Employee 2] on 28 September 2011 (duration 25 seconds), 29 September 2011 (duration 29 seconds) and 30 September 2011 (duration 2 minutes, 39 seconds); URN 3706, Table B, rows B3 to B5. In interview, [Vp Employee 2] was unable to recall the subject matter of these calls; transcript of an interview with [MGF Employee 3] held on 16 and 17 January 2019, pages 203 to 207, URN 3833. MGFL and Vp have made representations that the content of these telephone calls is unknown, and could relate to other matters such as their trading relationship or a potential acquisition; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.12 to 3.16 and 3.28, URN 4565; MGFL's response to the CMA's Statement of Objections, paragraphs 171 to 173, URN 4529.

strategic information, as part of the arrangement between MGF and Vp aimed at maintaining or increasing pricing levels in the market.

4.32 Moreover, in interview, [MGF Employee 2] indicated that [Vp Employee 2] and [MGF Employee 1] would have discussed such pricing issues. In relation to the email of 30 August 2011 which was pasted into '[✂].*doc*.', he said:

'now I've got a competitor, who's also a customer, and all the rest of it and also a supplier to us, really kicking off with us saying, you know, "The gloves are off here, if you carry on doing this kind of stuff there's going to be a massive price action in the market and we're gonna cripple it and cripple you." So, I referred it [✂] to [MGF Employee 1] saying, "This, this is what's happening, [MGF Employee 1]," which he'll have been well aware of 'cause, no doubt, [Vp Employee 2] will have spoken to him about it'.[244]

Contact in relation to low quotes from Vp

4.33 On 3 October 2011, [MGF Employee 1] forwarded to [MGF Employee 2] emails from MGF sales staff, highlighting examples of Vp offering customers discounts by way of email follow-up to the submission of a quotation.[245]

4.34 On 4 October 2011, [MGF Employee 2] sent one of these emails to [Vp Employee 2], stating that he would 'try and call [him] later about this one and the ones you sent through to me the other week'.[246] In interview, [MGF Employee 2] said that, 'I must have sent it on to [Vp Employee 2] for whatever reason; probably [MGF Employee 1] saying to me, "Well, he's thrown some hand grenades at us; throw these back at him"'.[247]

4.35 On 5 October 2011, [Vp Employee 2] sent [MGF Employee 2's] email to [Vp Employee 3], stating, '[n]ow that I raised the stakes with them, it is important that we are maintaining rates as well. Let's talk later on it'.[248] [Vp Employee 3] replied to this email stating, 'couldn't agree more' noting that Vp's low quote had been in reaction to an MGF quotation they had been given sight of by the customer.[249] [Vp Employee 2's] email of 5 October 2011 also shows that he believed the contact from MGF about Vp's low quotes was 'No doubt a

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[244] Transcript of an interview with [MGF Employee 2] held on 11 January 2018, page 153, URN 2807.
[245] URN 1406; URN 1404.
[246] URN 2146.
[247] Transcript of an interview with [MGF Employee 2] held on 16 January 2019, page 38 (see also page 42), URN 3832. Vp has made representations that there is no other commentary about pricing, or evidence of a telephone call between [MGF Employee 2] and [Vp Employee 2], and [MGF Employee 2] said he does not remember if he called [Vp Employee 2] or not; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.23, URN 4565.
[248] URN 2147. Vp has made representations that this email falls outside of Relevant Period 1 which is correct, however the CMA has included this as it is relevant to the contacts which fall within Relevant Period 1; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.24, URN 4565.
[249] URN 2148.

reaction to pressure I am putting them under' and that he was aware of internal discussions within MGF about Vp's pricing: 'apparently they had a fairly hard hitting meeting last week, whereby their lads made lots of claims about us discounting in the market. This is [sic] first bit of evidence they have thrown at me although they reckon they have more '.

4.36 In interview, [Vp Employee 2] explained his email to [Vp Employee 3] of 5 October 2011 as follows:

'…I suppose that's all a – a polite way of saying, what – I don't want to get into a spiral price war with MGF.

…

bearing in mind that [Vp] Groundforce had the – at this point [Vp] Groundforce had the market share in the – in particularly around London.

…

So, to maintain that, and maintain revenues that's what the focus had to be on. So, if it was going to spiral into a price war, which it was, then that – I felt it was incumbent on [Vp] Groundforce, as the market leader, to try and do their best to keep the prices up. Because if [Vp] Groundforce reduced the prices on a lot of jobs, it – it would have become – it was already a very aggressive market, because of Mabey Hire. And as you can see, MGF were doing it and, and, actually so were [Vp] Groundforce, because it was becoming very – very, very aggressive on rates.

…

Well, I suppose, what I'm trying to say is, is we – ideally, we need to – we need to keep our rates up, and it would be nice if MGF and others did that as well. I suppose that's what I'm meaning'.[250]

4.37 The CMA is of the view that the above contact between [MGF Employee 1], [MGF Employee 2] and [Vp Employee 2] reflects the monitoring of low quotes as part of the arrangement between MGF and Vp aimed at maintaining or increasing pricing levels in the market.

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[250] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 245 to 246, URN 3833. [Vp Employee 3] could not recall the exact circumstances surrounding these emails when asked in interview, but stated 'it seems fairly evident from the trail that there was conversation, or there was certainly emails between [Vp Employee 2] and others in MGF'; see transcript of an interview with [Vp Employee 3] held on 3 May 2018, pages 178, and 182 to 184, URN 0667.

Representations regarding contacts in relation to low quotes

4.38 MGFL has made representations that the interaction between [Vp Employee 2], [MGF Employee 2] and [MGF Employee 1] was an 'isolated incident that could not form the basis for any wider finding' and that while such exchanges could raise significant concerns in other competitive contexts, such a finding is not justified in the particular context.[251] The CMA does not agree that complaints of this kind by one competitor to another regarding pricing, particularly when met with a promise to 'nip it in the bud', are legitimate, especially in the context of this case where Vp and MGF were close competitors. Furthermore, the CMA does not consider this interaction was an isolated example of anti-competitive conduct, as further examples of anti-competitive conduct are set out in this Decision, forming part of the CMA's finding of a wider overall infringement by MGF and Vp.

4.39 [MGF Employee 2's] evidence, while rejecting the existence of a wider understanding, also shows that this was not an isolated incident. For example, in his first witness statement, [MGF Employee 2] explained that [Vp Employee 2] 'would complain from time to time that we were undercutting him, particularly on jobs where he was purchasing or hiring products from us', albeit that [MGF Employee 2] sought to downplay the significance of the complaints, stating that 'such complaints were not premeditated or arranged, and did not reflect any wider understanding between us' and that the fact [Vp Employee 2] made these complaints 'reflects and describes the very competitive environment in which we were all operating'.[252]

4.40 MGFL has made representations that [MGF Employee 2's] 'nip it in the bud' comment in his email to [Vp Employee 2] on 1 October 2011 should be read in the context of a highly competitive relationship between MGF and Vp and was meant to be 'placatory' only, as a means of avoiding a confrontation with a major customer without offering any assurance that MGF would not remain aggressively competitive in the market.[253]

4.41 In this regard, Vp has made representations that MGF and Vp's trading relationship should be taken into account by the CMA, and [MGF Employee 2] and [MGF Employee 1's] responses to [Vp Employee 2] are legitimate responses given the trading relationship and simply show MGF's

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[251] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 155 to 158, URN 4529. MGFL submits that [Vp Employee 2] and [MGF Employee 2] were in contact in relation to cross-supply and that there was wider evidence of aggressive competition.
[252] First witness statement of [MGF Employee 2] dated 8 October 2019, paragraphs 30 and 31, URN 4541.
[253] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 170, URN 4529.

understanding of Vp's frustration in its position as MGF's customer.[254] In particular, Vp submitted that [MGF Employee 1's] email is legitimate and standard practice within the industry, and was forwarded to [Vp Employee 2] in an attempt by [MGF Employee 1] to maintain MGF and Vp's trading arrangement.[255] Similarly, MGFL has made representations that these communications cannot be fully understood without understanding MGF's trading relationship with Vp and the potential for improving that relationship.[256]

4.42 The CMA does not consider that it is legitimate practice to forward internal emails regarding current and future pricing intentions to competitors, or to make complaints to competitors about the prices being offered to other customers, whether or not in the context of a trading relationship. Indeed, the increased opportunity for contact where such trading relationships exist means it is even more important for businesses to remain vigilant and to ensure that discussions do not stray into areas which may cross the line into anti-competitive conduct. The CMA also does not consider that it is legitimate practice to share such information about current and future pricing intentions to 'placate' a competitor in this context, or in order to maintain personal relationships with individuals working for competitors, or that such a context means there was no anti-competitive objective to the conduct (in this regard, see also paragraph 5.117). In any event, the CMA does not agree with MGFL that [MGF Employee 2's] comment was merely 'placatory', particularly given that it was made in circumstances in which [MGF Employee 1] had sent out 'warning shots' about MGF's low pricing, showing that MGF did, in fact, act on Vp's concerns.

4.43 As set out in paragraphs 5.72(e) and 5.86, there is a presumption that an undertaking will take account of information exchanged with its competitors when determining its own conduct on the market. The evidence set out in this Section shows that in Relevant Period 1, MGF and Vp took account of the information exchanged – or at the very least did not seek to distance

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[254] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.17 to 3.21 and 3.27, URN 4565. Vp has also made representations that there is no documentary evidence that these two quotes were sent by [Vp Employee 2], or if they were, whether [Vp Employee 2] sent any other quotes to [MGF Employee 2]. URN 1396 / URN 1401 contains the same content as URN 2121 which was sent by [Vp Employee 5] to [Vp Employee 2] on 30 August 2011. Therefore, the quotes were in [Vp Employee 2's] possession (see URN 2127 and URN 2137) shortly before they appear in [MGF Employee 2's] possession (see URN 0580 and URN 0584), and [MGF Employee 2] confirmed that these quotes were provided to him by [Vp Employee 2].
[255] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.8 and 3.11, URN 4565.
[256] MGFL's response dated 10 October 2019 to the CMA's statement of objections, paragraphs 159 to 161, URN 4529. MGFL has made representations that these contacts and complaints arose from time to time as a result of and in the context of an ongoing trading relationship between MGF and Vp, where [Vp Employee 2] faced internal complaints from his sales teams and on occasion passed them on to [MGF Employee 2] as his opposite number at MGF; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 161, URN 4529.

themselves publicly from it. Indeed, MGFL has confirmed that '[i]nformation of the kind provided by [Vp Employee 2], whether or not by way of complaints, could … provide a valuable source of information for MGF in respect of the activities of its sales teams, where the senior management of MGF would be able to monitor the levels of discounts that were being offered to customers'.[257] In addition, even if MGF was merely seeking to 'placate' Vp, given the nature of the assurance that [Vp Employee 2] was seeking (ie that MGF would not offer discounts or free of charge items), by informing Vp that it would no longer offer items free of charge and would be increasing its prices in the new year, MGF shared competitively sensitive information with Vp that was previously unknown and confidential, following which [Vp Employee 2] considered that 'having raised the stakes with them [MGF]' Vp should be 'maintaining rates as well'.[258] In any event, the CMA does not consider that a trading relationship justifies the exchanges between MGF and Vp set out above.

4.44 MGFL also submitted that [MGF Employee 1's] email to MGF staff on 26 September 2011 reflected MGF's own consistent policy rather than any coordinated arrangement with Vp or any other customer.[259] As explained in paragraph 5.85, the fact that the information MGF disclosed to Vp was already MGF's policy or settled future intention does not affect the fact that it was not 'legitimate' for MGF to inform Vp, as a close competitor, what MGF's policy was regarding pricing, including discounts and offering free of charge items.

4.45 Vp has made representations that [MGF Employee 1's] email to senior MGF employees at 1:47pm on 26 September 2011 is not evidence of MGF reacting to [Vp Employee 2] applying 'pressure at the top', submitting that there is no evidence of contact between [Vp Employee 2] and MGF between 23 and 26 September 2011, except for two telephone calls between [MGF Employee 1] and [Vp Employee 2] on 26 September 2011 in relation to which there is no record of the content. Vp submitted that, as [Vp Employee 2's] email to [MGF Employee 2] on 1 October 2011 is several days after [MGF Employee 1's] email to senior MGF employees on 26 September 2011, no causal link can be

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[257] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 157, URN 4529.
[258] URN 2147.
[259] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 157, URN 4529. In that regard, [MGF Employee 2] stated that '… it did not cost us anything to give this sort of general reassurance in response to complaints of low pricing. That did not mean that we were accepting any restriction on our freedom to set our own pricing policy or to bid for any contracts we wanted. For example, telling salesmen to stop giving away freebies was an easy giveaway, because it was already our corporate policy – nothing changed. But that certainly did not mean the giving of freebies was prohibited. On the ground, and in each local market in which each depot manager operated, it was still business as usual'; first witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 57, URN 4541.

established.[260]

4.46 The CMA is not persuaded by these representations. [Vp Employee 2's] email to [Vp Employee 3] on 23 September 2011 referred to him continuing to apply pressure, implying by the use of the word 'continue' that he was already applying pressure 'at the top' by that point in time. Taking into account the proximity of [Vp Employee 2's] email of 23 September 2011 to the telephone calls and email (which related to items provided free of charge, the same topic as [Vp Employee 3's] email complaints to [Vp Employee 2] on 20 and 23 September 2011),[261] between [MGF Employee 1] and [Vp Employee 2] on 26 September 2011, the CMA considers it likely that there was previous communication between senior individuals at MGF, for example [MGF Employee 1] or [MGF Employee 2], and [Vp Employee 2] in relation to this topic, either on or prior to 26 September 2011.

4.47 Both MGFL and Vp have submitted that it is relevant context to the contacts between MGF and Vp in Relevant Period 1 that at this time there were 'other conversations going on', including in relation to the possibility of Vp acquiring MGF.[262] [Vp Employee 2] explained in interview that this was a period in which he had a number of conversations with [MGF Employee 1], including for example as regards a potential acquisition of MGF by Vp.[263] [✂].[264] [MGF Employee 1] produced a number of items of correspondence that he had received expressing interest in a potential acquisition of MGF's business during the period from 2007 to 2018.[265] However, this did not include any correspondence from Vp and the CMA has not seen any documentary evidence that MGF was considering a sale to Vp in September or October 2011. While the CMA acknowledges that there may have been legitimate reasons for [Vp Employee 2] and [MGF Employee 1] to be in contact, in light of the timing of the emails and telephone calls referred to in paragraphs 4.23 to 4.30, the CMA finds that pricing strategies (including the complaints regarding low quotations) were most likely to have formed at least part of the

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[260] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.9 and 3.10, URN 4565.
[261] URN 2131; URN 2144; URN 2125; URN 2136.
[262] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 159, URN 4529; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.15, URN 4565.
[263] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 208 to 209, URN 3833.
[264] [MGF Employee 1] stated that 'in 2010, [✂] I learnt that [MGF Employee 2] and [Vp Employee 2] were fielding squabbles from their respective sales representatives in 2010/2011 I wanted it to stop … I did not want [Vp Employee 2] and [MGF Employee 2] falling out, if they were about to become colleagues … we considered that [Vp Employee 2] was somewhat irritated and I told [MGF Employee 2] to say what he needed to say to placate him'. [MGF Employee 1] explained that when he made his reference to a 'big stick', his 'only thought was to pacify people and keep the peace on an emotional/relationship level. [✂]. The issue of price(s) and their alleged manipulation was not in any way a feature of my thinking'; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 59 to 61, URN 4531.
[265] Exhibit [✂], URN 4533 to the first witness statement of [MGF Employee 1] dated 8 October 2019, URN 4531.

subject matter of the telephone discussions during this period. In any event, [✂] considering selling the MGF business to Vp does not justify the exchange of competitively sensitive pricing information that is demonstrated by the documentary evidence set out in this Section.

4.48 Accordingly, the CMA finds that the contacts between senior individuals at MGF and Vp were for the purpose of monitoring each other's prices by challenging each other in relation to low quotes and coordinating their commercial behaviour (in particular pricing practices) to reduce price and strategic uncertainty, in order to maintain or increase pricing levels in the market.

D. Contact between MGF, Vp and MHL during Relevant Period 2

4.49 As in Relevant Period 1, the arrangement throughout Relevant Period 2 involved the coordination of commercial behaviour (in particular pricing practices), which was aimed at reducing competition on price and strategic uncertainty in order to maintain or increase pricing levels in the market, including through the sharing of confidential competitively sensitive pricing and strategic information.

4.50 In particular:

(a) during Relevant Period 2(a), MGF, Vp and MHL:

(i) sought to ensure that pricing on the market was maintained by challenging each other in relation to low quotes and the actions of 'rogue' sales staff (see paragraphs 4.80 to 4.102);

(ii) discussed the introduction of design charges (see paragraphs 4.103 to 4.120); and

(iii) discussed transport charges (see paragraphs 4.125 to 4.131).

(b) during Relevant Period 2(b), MGF and Vp discussed proposed price increases (see paragraphs 4.173 to 4.189).

4.51 Meetings between Vp and MHL took place on 23 May 2013 and 29 January 2014 (see paragraphs 4.54 and 4.55), and there is also documentary evidence of MHL emailing Vp quotations to Vp on 6 February 2014 with a view to discussing them with Vp (see paragraph 4.87). However, taking a conservative approach, the CMA finds that Relevant Period 2(a) runs from at least 14 February 2014, which is the first date on which a meeting took place between all three of MGF, Vp and MHL.

Summary of events in relation to Relevant Period 2(a)

4.52 During Relevant Period 2(a), two tripartite meetings took place between MGF, Vp and MHL at which they discussed 'rogue' sales staff, design charges and transport charges, which included discussion about monitoring prices and the potential introduction of charges to customers for design work.

4.53 The following table sets out an overview of the events that support the CMA's findings in relation to Relevant Period 2(a). Details of each event, including the relevant witness evidence, are set out further in this section.[266]

Table 2.1: Summary of events in relation to Relevant Period 2(a)

Prior to Relevant Period 2	
23 May 2013	Meeting – [VPE2] and [MHLE1]
29 January 2014	Meeting – [VPE2] and [MHLE1]
31 January 2014	4:18pm – phone call [MHLE1] to [VPE2]
	4:20pm – [MHLE1] creates calendar entry entitled '[VPE2] and [MGFE1]' scheduled for 14 February 2014
14 February 2014 – start of Relevant Period 2(a)	
14 February 2014	Meeting – [MGFE1], [VPE2] and [MHLE1]
19 February 2014	Email – [MGFE1] to [MHLE1] providing his contact details
23 May 2014	4:28pm – the last in a series of 7 bilateral phone calls involving [MGFE1], [VPE2] and [MHLE1]
	4:34pm – email [MHLE1] to [MGFE1] providing his availability on particular dates
	4:42pm – email [MGFE1] to [VPE2] forwarding [MHLE1's] availability and asking what suits [VPE2]
28 May 2014	10:59am – [MHLE1] creates calendar entry entitled '[MGFE1] and [VPE2]' scheduled for 16 July 2014
	11:09pm – email [VPE2] to another Vp employee saying he had spoken to [MHLE1] that day and is due to meet him again in a few weeks
16 July 2014	Meeting – [MGFE1], [VPE2] and [MHLE1]
	1:31pm – [MHLE1] creates calendar entry entitled 'Meet [MGFE1] and [VPE2]' scheduled for 4 September 2014 (the meeting was later cancelled)
17 July 2014 – start of Relevant Period 2(b)	
[✂]	[✂]
25 September 2014	Meeting – [MGFE1] and [MHLE1] re potential job opportunities at MGF
	Meeting – [VPE2] and [MHLE1] re potential job opportunities at Vp
24 November 2014 – end of Relevant Period 2(b)	
October/November 2015	Phone call – [MGFE1] to [MHLE2] to organise bilateral meeting
2 December 2015	Meeting – [MGFE1] and [MHLE2]
15 March 2016	Text message – [MGFE1] to [VPE1] and [MHLE2] attempting to set up tripartite meeting with [MHLE2] and [VPE1]
6 May 2016	Text message – [MGFE1] to [MHLE2] attempting to set up tripartite meeting with [MHLE2] and [VPE1]

[266] In the table, '[VPE2]' means [Vp Employee 2]; '[MGFE1]' means [MGF Employee 1]; '[MHLE1]' means [MHL Employee 1]; '[MHLE2]' means [MHL Employee 2]; '[VPE1]' means [Vp Employee 1].

Origins of the involvement of MHL, and meetings prior to the start of Relevant Period 2

4.54 [MHL Employee 1] met with [Vp Employee 2] on 23 May 2013, a meeting which was instigated by [Vp Employee 2].[267] An Outlook calendar entry entitled 'Meeting [Vp Employee 2]' was found in [MHL Employee 1's] email data, scheduled for 23 May 2013, from 10:00am to 10:30am.[268] [MHL Employee 1] stated that this meeting took place at [Meeting Venue E] as both he and [Vp Employee 2] were travelling through the area.[269] Although initially [Vp Employee 2] did not recall meeting with [MHL Employee 1] at this time, he has since confirmed he met with [MHL Employee 1] at [Meeting Venue E] and he considers it likely this meeting was held on 23 May 2013.[270]

4.55 [MHL Employee 1] and [Vp Employee 2] had a further meeting on 29 January 2014. [MHL Employee 1] stated that he met [Vp Employee 2] on 29 January 2014 for coffee at [Meeting Venue C].[271] An Outlook calendar entry entitled '[Vp Employee 2]' was found in [MHL Employee 1's] email data, scheduled for 29 January 2014.[272] [Vp Employee 2] agrees he met with [MHL Employee 1] around this time.[273]

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[267] See paragraph 4.134 onwards.
[268] URN 0065. The CMA notes the Outlook calendar entry has a meeting time of 9:00am to 9:30am, however metadata obtained from Mabey (URN 5417; URN 5418) confirms the time in URN 0065 did not reflect the +1 hour time adjustment for British Summer Time, and that the meeting appointment was actually from 10:00am to 10:30am.
[269] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 48, URN 4615. See also: transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 32, 156 and 176, URN 0260; transcript of an interview with [MHL Employee 1] held on 24 November 2016, pages 92 and 93, URN 0265.
[270] In his first witness statement [Vp Employee 2] agrees that he first met with [MHL Employee 1] at [Meeting Venue E], sometime in mid/late 2013'; first witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 47, URN 4539. In his second witness statement, [Vp Employee 2] referred to mileage records he submitted to Vp and stated that, based on the record for 23 May 2013, he agrees with [MHL Employee 1] that their meeting likely took place on that date at [Meeting Venue E] and was designed to tie in with their respective travel plans; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraphs 11 and 12, URN 5316.
[271] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 52 to 53, URN 4615. In support of this, [MHL Employee 3] confirmed he was aware at this time that [MHL Employee 1] 'had a line of communication open with [Vp Employee 2]'; first witness statement of [MHL Employee 3] dated 8 April 2020, paragraphs 28 to 29, URN 4621.
[272] URN 0066. The calendar entry is scheduled from 12:00am on 29 January 2014 until 12:00am on 30 January 2014. [MHL Employee 1] explained that in instances where he did not have an exact time for a meeting he would often block out the whole 24-hour period, particularly when he was travelling and would not have been able to attend any other meetings on the same day; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 54, URN 4615.
[273] In his first witness statement [Vp Employee 2] agreed that he met [MHL Employee 1] again 'in early 2014 (my guess is February/March time) at [Meeting Venue C]. [Vp Employee 2] stated he 'cannot clearly recall that date as being the date of the meeting' and in his view 'it is plausible that [MHL Employee 1] used the outlook calendar system as a prompt to make contact or a phone call to me and that we actually met some time after that'; first witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 48, URN 4539. In his second witness statement, [MGF Employee 3] stated that, having since reviewed his Vp mileage claim records, he believes the meeting took place on either 29 or 30 January 2014; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 15, URN 5316. See also mileage claim form for [Vp Employee 2] for January 2014, page 3, URN 4159. In respect of [Vp Employee 2's] mileage records, see paragraphs 4.151 to 4.154, and 5.23 to 5.24.

4.56 [MHL Employee 1] said there was, 'never any discussion about pricing or agreements or collusion or cooperation or anything like that'[274] at his initial meeting with [Vp Employee 2] on 23 May 2013, and that the meeting 'was not of any consequence – it would have just been a coffee … just a discussion [✂] about the similar problems that they faced within the industry … just a friendly welcome chat'.[275] [MHL Employee 1] explained that the content of the second meeting on 29 January 2014 was similar to the first meeting with general discussions about the industry, and it was good for him to get the perspective of someone like [Vp Employee 2] who had been in the industry for a lot longer than he had.[276]

4.57 [Vp Employee 2] recalls the meetings differently, saying that [MHL Employee 1] instigated the meetings between them as he wanted to discuss trench sheet supply. The differences in recollections of the purpose and content of these meetings are set out in paragraphs 4.132 to 4.165 below; however, having assessed all of the evidence in the round, the CMA is of the view that [Vp Employee 2] initiated the bilateral meetings between him and [MHL Employee 1], and was involved in setting up the tripartite meetings with [MGF Employee 1], in order to enter into an arrangement to reduce competition between MGF, Vp and MHL (as set out in paragraph 4.62).

4.58 [MHL Employee 1] stated that it was during the meeting on 29 January 2014 that [Vp Employee 2] indicated that [MGF Employee 1] would 'genuinely like to meet' him, and if he was interested then [Vp Employee 2] would make the arrangements.[277] [MHL Employee 1] explained that he had:

'heard from conversations from some of the sales team who had come to join the business that [[MGF Employee 1]] was not my greatest fan, because of obviously the pricing thing and becoming more competitive and causing MGF a lot of commercial problems (because we had suddenly started taking their market share and making life difficult for them), and he saw that I was the person who had driven that. So, he blamed me for it I guess. I thought I would meet up with him and [Vp Employee 2] just really out of interest'.[278]

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[274] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 49, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 32, URN 0260.
[275] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 49 to 51, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 84 (and 85 to 86), URN 0265.
[276] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 55 to 57, URN 4615.
[277] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 58 to 59, URN 4615.
[278] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 63 and 64, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 32 to 33, URN 0260.

'I think it was something like "[MGF Employee 1] feels like there's some sort of animosity built up in some way because of everything that you've done with the business and he just wants to meet you and find out a little more about you more than anything else"'.[279]

4.59 [MHL Employee 1] also explained that he 'said yes, mainly out of curiosity because I had heard a lot about [MGF Employee 1], but I had never met or spoken to him at all'.[280]

4.60 According to [MHL Employee 1], [Vp Employee 2] contacted him by mobile phone to arrange the tripartite meeting between them and [MGF Employee 1].[281] The CMA is not in possession of any call data relating to [Vp Employee 2's] Vp mobile phone which might have confirmed whether or not he called [MHL Employee 1] around this time.[282] However, billing data for [MHL Employee 1] shows that he called [Vp Employee 2] on 31 January 2014 at 4:18pm for 1 minute and 59 seconds, and the CMA considers it is plausible that [MHL Employee 1] was returning a telephone call from [Vp Employee 2].[283] As referred to in paragraph 4.62, [MHL Employee 1] created his calendar entry for the meeting on 14 February 2014 on 31 January 2014 at 4:20pm, either during or immediately after the telephone call between him and [Vp Employee 2].[284] The CMA considers that the content of the telephone call likely consisted, at least in part, of discussion about organising a tripartite meeting between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1].

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[279] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 58, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 24 November 2016, pages 106 to 107, URN 0265. See paragraphs 4.4 to 4.6 regarding the more aggressive business strategy within MHL, following a management restructure at Mabey in late 2009.
[280] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 62 to 63, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 32, URN 0260.
[281] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 62, URN 4615.
[282] Vp was unable to provide to the CMA the mobile device used by [Vp Employee 2] whilst at Vp on account of him having left the employment of Vp some time before the CMA's investigation commenced. The CMA is therefore not in possession of any call logs for [Vp Employee 2's] Vp mobile phone which may have showed both incoming and outgoing telephone calls. Vp was also unable to provide billing data (which would record outgoing telephone calls and text messages) prior to 2015. As a result, the CMA did not obtain any records of calls made or text messages sent by [Vp Employee 2] during his employment at Vp.
[283] Itemised call records from phone belonging to [MHL Employee 1], page 13, URN 0209. Mabey was unable to provide the mobile device used by [MHL Employee 1] whilst at MHL to the CMA on account of him having left the employment of Mabey some time before the CMA's investigation commenced. The CMA is therefore not in possession of any call logs for [MHL Employee 1's] MHL mobile phone which might have showed both incoming and outgoing telephone calls. The CMA obtained itemised call records taken from mobile billing data which records [MHL Employee 1's] outgoing telephone calls and text messages, but does not contain details of calls and texts received, or the contents of text messages.
[284] URN 0067; URN 5417; URN 5418.

Contact during Relevant Period 2(a)

4.61 Examples of contacts, including two tripartite meetings, between MGF, Vp and MHL that illustrate the arrangement between them during the period 14 February 2014 to 16 July 2014 are set out below. With the exception of the contacts described in paragraphs 4.74 to 4.79, there is no evidence of such contacts involving MHL after 16 July 2014, which marks the end of Relevant Period 2(a).

14 February 2014 meeting

4.62 A tripartite meeting between [MGF Employee 1], [Vp Employee 2], and [MHL Employee 1] took place on 14 February 2014. An Outlook calendar entry entitled '[Vp Employee 2] and [MGF Employee 1]' scheduled for 14 February 2014 was found in [MHL Employee 1's] email data,[285] and [MHL Employee 1] confirmed that this referred to a meeting with [Vp Employee 2] and [MGF Employee 1].[286] [MHL Employee 1] created the calendar entry either during or immediately after a telephone call between him and [Vp Employee 2] on 31 January 2014 (see paragraph 4.60 above).

4.63 [MHL Employee 1] recalled that he arrived at around lunchtime as the meeting was in the middle of the day, and when he arrived at the meeting venue, [Vp Employee 2] met him in the car park and took him inside to introduce him to [MGF Employee 1].[287] According to [MHL Employee 1], there were empty coffee cups and plates at the table which indicated to him that [MGF Employee 1] and [Vp Employee 2] had been at the table together for a while before he arrived.[288]

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[285] URN 0067. [MHL Employee 1's] calendar entry was scheduled from 12:00am on 14 February 2014 to 12:00am on 15 February 2014, and he explained that he blocked out the entire day because at the time he created the appointment he did not know how long it would last and whether he would get back to the office afterwards or not. He recalled that he received further details of the meeting, such as the exact time and location, in written form from [Vp Employee 2] nearer to the date, but left his calendar blocked out for the 24 hour period as it being in the middle of the day effectively ruled out the rest of the day for other meetings; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 78 to 79, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 25 February 2020, page 96, URN 5232.
[286] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 77, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 177 to 180, URN 0260. The CMA notes that a calendar entry entitled '[Meeting Venue A]' for 12:00pm to 1:00pm on 14 February 2014 was found in [MGF Employee 1's] Outlook calendar; URN 3724. [MGF Employee 1] agrees he met with [MHL Employee 1] in around February 2014, but denies that [Vp Employee 2] was in attendance. [MGF Employee 1] explained he has no recollection of having lunch at [Meeting Venue A] on 14 February 2014, or what the appointment referred to; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A16, URN 5274. [Vp Employee 2] also denies attendance at this meeting; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 4, URN 5316.
[287] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 79 to 80, URN 4615; see also fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraph 60, URN 5419.
[288] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 81, URN 4615; see also fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraph 61, URN 5419.

4.64 In support of this, the CMA notes that [MHL Employee 3] was aware that [MHL Employee 1] was meeting with [Vp Employee 2] and [MGF Employee 1]. [MHL Employee 3] stated:

'I knew around 2013 or 2014 that [MHL Employee 1] was meeting with [Vp Employee 2] and [MGF Employee 1]. I did not know the full extent or full contents of the meetings, but I knew that he was going to meet them. I did not want to know when he was going to meet them. [MHL Employee 5] was aware as well, but he also said he did not want to know. [MHL Employee 1] did not tell me directly about the dates of meetings, but he mentioned afterwards that he had met with [MGF Employee 1] and [Vp Employee 2]. He would never say, "I am going to meet them". I heard about it afterwards'.[289]

4.65 [MHL Employee 1] explained that during the meeting on 14 February 2014 [MGF Employee 1] told him 'I'll send you my contact details should you ever want to get in touch'.[290] On 19 February 2014, five days after the meeting, [MGF Employee 1] sent an email to [MHL Employee 1] providing his contact details.[291]

4.66 [MHL Employee 1] was initially unsure of the name of the venue at which the first tripartite meeting between him, [MGF Employee 1] and [Vp Employee 2] took place, but later recalled it took place at the [Meeting Venue B].[292]

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[289] First witness statement of [MHL Employee 3] dated 8 April 2020, paragraphs 38 to 40, URN 4621. [✂].
[290] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 99, URN 4615.
[291] URN 1495. [MGF Employee 1] considers it likely his first meeting with [MHL Employee 1] was after he sent his contact details to [MHL Employee 1] on 19 February 2014, however the CMA is not persuaded by this, noting that [MGF Employee 1's] email contained no covering text or introduction, which seems an unlikely way to approach someone who he had never met; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 82 and 84, URN 4531; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A16, URN 5274. [MGF Employee 1] stated he does not recall how he obtained [MHL Employee 1's] email address but assumes it was via [Vp Employee 2], and that he thinks he telephoned [MHL Employee 1] and suggested meeting at either [Meeting Venue A] or his home. [MGF Employee 1] noted he regularly holds business meetings at his home, [Meeting Venue A] or the [Meeting Venue B]; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraphs A5 and A7, URN 5274.
[292] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 77 to 81, URN 4615; fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraph 60, URN 5419. [MHL Employee 1] has admitted to some confusion about the venue, acknowledging that both the [Meeting Venue B] and [Meeting Venue A] (the location of the meeting on 16 July 2014) are similar country pubs which he had not visited prior to the tripartite meetings with [Vp Employee 2] and [MGF Employee 1]. While initially unable to name the venue of the meeting on 14 February 2014, when viewing documents in relation to the job interview he attended with [MGF Employee 1] in 2018 (see paragraph 4.170) which stated the location of that interview as the [Meeting Venue B], [MHL Employee 1] explained that when he arrived at the venue he recognised it as being the place where he first met with [MGF Employee 1] and [Vp Employee 2] on 14 February 2014; transcript of an interview with [MHL Employee 1] held on 25 February 2020, pages 51 to 54, URN 5232. In a later interview, [MHL Employee 1] expressed some confusion as to the names of the venues, saying he can remember what the physical places looked like but was less certain of the names themselves now, given the passage of time; transcript of an interview with [MHL Employee 1] held on 10 September 2020, pages 54 to 56, URN 5405. [MGF Employee 1] considers [MHL Employee 1's] description of the room he met [Vp Employee 2] and [MGF Employee 1] better fits [Room within Meeting Venue A] at [Meeting Venue A] rather than the [Meeting Venue B],

16 July 2014 meeting

4.67 On 23 May 2014 the following telephone calls took place:

a) 9:24am – [MHL Employee 1] called [Vp Employee 2] (billing data indicates that the call lasted 3 seconds);[293]

b) 9:25am – [MHL Employee 1] called [MGF Employee 1] (billing data indicates that the call lasted 3 minutes and 40 seconds);[294]

c) 10:57am – [MGF Employee 1] called [Vp Employee 2] (billing data indicates that the call lasted 25 seconds);[295]

d) 4:12pm – [MGF Employee 1] called [MHL Employee 1] (billing data indicates that the call lasted 2 minutes and 39 seconds);[296]

e) 4:15pm – [MGF Employee 1] called [Vp Employee 2] (billing data indicates that the call lasted 57 seconds);[297]

f) 4:19pm – [MGF Employee 1] called [Vp Employee 2] (billing data indicates that the call lasted 3 seconds);[298] and

g) 4:28pm – [MGF Employee 1] called [Vp Employee 2] (billing data indicates that the call lasted 35 seconds).[299]

4.68 At 4:34pm, six minutes after the last telephone call, [MHL Employee 1] emailed [MGF Employee 1] referencing a conversation earlier in the day and confirming his availability on certain dates:

'[MGF Employee 1],
Good to talk to you today. Just to let you know I am available on any of the following dates
11th, 12th, 17th, 18th, 19th, 25th, 26th June
If none of those work for you please let me know
Have a good weekend
[MHL Employee 1]'.[300]

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and states that he has 'some sympathy with [MHL Employee 1] in trying to pinpoint this first meeting. [✂]; second witness statement of [MGF Employee 1] dated 13 August 2020, paragraph 5, URN 5317.
[293] Page 648 of URN 0202.
[294] Page 648 of URN 0202.
[295] Page 1167 of URN 3734.
[296] Page 1167 of URN 3734.
[297] Page 1167 of URN 3734.
[298] Page 1167 of URN 3734.
[299] Page 1167 of URN 3734.
[300] URN 1507.

4.69 At 4:42pm, eight minutes later, [MGF Employee 1] forwarded [MHL Employee 1's] email to [Vp Employee 2's] personal email account with the brief question: '[Vp Employee 2] What's best for you? [MGF Employee 1], suggesting that discussions had already taken place for a meeting to take place with all three individuals.[301] The CMA considers the content of the phone calls on 23 May 2014 likely consisted, at least in part, of discussions about organising a tripartite meeting between [MGF Employee 1], [MHL Employee 1] and [Vp Employee 2], which was ultimately held on 16 July 2014.[302]

4.70 A tripartite meeting between [MGF Employee 1], [Vp Employee 2], and [MHL Employee 1] took place on 16 July 2014 at [Meeting Venue A]. An Outlook calendar entry was found in [MHL Employee 1's] email data entitled '[MGF Employee 1] and [Vp Employee 2]', scheduled from 10:15am to 12:45pm on 16 July 2014 at [Meeting Venue A].[303] [MHL Employee 1] confirmed that this referred to a meeting with [Vp Employee 2] and [MGF Employee 1],[304] and recalled the meeting taking place in the bar at [Meeting Venue A].[305] [MHL Employee 1's] calendar entry was created on 28 May 2014 at 10:59am, the same day that [Vp Employee 2] told another Vp employee by email that he 'Had a confidential conversation with [MHL Employee 1] today and due to

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[301] URN 1508. [MGF Employee 1] initially stated that he had no recollection of the telephone calls on this date, and he could not recall forwarding [MHL Employee 1's] email regarding his availability to [Vp Employee 2], nor what [Vp Employee 2's] response was; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A9, URN 5274. [MGF Employee 1] later stated that the main reason for his attempt to set up a tripartite meeting with [Vp Employee 2] and [MHL Employee 1] was because he wanted to 'build up MGF's business as a manufacturer and supplier as a major potential source of new business' (see paragraphs 4.155 to 4.169 in relation to this representation); second witness statement of [MGF Employee 1] dated 13 August 2020, paragraph 18(b), URN 5317; see also MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraphs 80 to 81, URN 5310. [Vp Employee 2] stated that [MGF Employee 1] wanted to present MGF's manufacturing capabilities to both Vp and MHL together, but he turned this down and suggested via telephone call to [MGF Employee 1] that any such presentation should be made separately; first witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 50, URN 4539; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 40, URN 5316; transcript of an interview with [MGF Employee 3] held on 16 and 17 January 2019, pages 289 to 290, URN 3833. For the reasons set out in paragraph 4.168, the CMA does not consider this a credible explanation for the tripartite contacts.

[302] [MHL Employee 1] explained that he assumes his telephone calls with [MGF Employee 1] on 23 May 2014 were to arrange a tripartite meeting, but he did not meet with [MGF Employee 1] or [Vp Employee 2] on any of the dates set out in his email; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 102, URN 4615. See also fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraph 66, URN 5419.

[303] URN 0070. The CMA notes the Outlook calendar entry has a meeting time of 9:15am to 11:45am, however metadata obtained from Mabey (URN 5417; URN 5418) confirms the time in URN 0070 did not reflect the +1 hour time adjustment for British Summer Time, and that the meeting appointment was actually from 10:15am to 12:45pm. [MHL Employee 1] explained he was likely provided with the postcode for [Meeting Venue A], which is written in the meeting description, by either [Vp Employee 2] or [MGF Employee 1] as he did not previously know of [Meeting Venue A]'s existence; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 104, URN 4615.

[304] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 105, URN 4615.

[305] Transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 216, URN 0260. [MHL Employee 1] explained that when he arrived at [Meeting Venue A], [MGF Employee 1] and [Vp Employee 2] were already inside and appeared to have been there for some time. [MHL Employee 1] recalled that the meeting took place over a coffee and sandwich in the main bar. [MHL Employee 1] described the venue as feeling like it was [MGF Employee 1's] [✂], and said there was nobody else there at the time; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 105 to 106, URN 4615.

meet again in a few weeks'.[306] The fact that [MHL Employee 1's] calendar entry refers to a meeting with all three of [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] strongly suggests that the conversation with [MHL Employee 1] that [Vp Employee 2] refers to consisted, at least in part, of a discussion about arranging the tripartite meeting held between the three men on 16 July 2014. Furthermore, there is a record of [MGF Employee 1] having made a booking for four people at [Meeting Venue A] on 16 July 2014.[307]

4.71 [MHL Employee 1] explained that at the end of the meeting on 16 July 2014, the three men agreed they would catch up again and scheduled the next meeting for 4 September 2014 (although this meeting did not take place).[308] [MHL Employee 1] recalled that [MGF Employee 1] proposed that the next tripartite meeting take place at his office so he could 'lay his hands on more figures'.[309] An Outlook calendar entry was found in [MHL Employee 1's] email data entitled 'Meet [MGF Employee 1] and [Vp Employee 2]' at the location '[Meeting Venue D]' (the location of [MGF Employee 1's] [✂]).[310] [MHL Employee 1] created this calendar entry on 16 July 2014 at 1:31pm, consistent with his recollection that he entered it in his calendar at the end of the meeting held on 16 July 2014.[311]

4.72 The CMA notes that the existence of tripartite meetings between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] is disputed by MGF and Vp (see paragraph 4.132 onwards).

Supporting evidence of [MHL Employee 2]

4.73 The evidence of [MHL Employee 2], when viewed alongside contemporaneous documentary evidence showing [MGF Employee 1's] attempts in 2016 to organise tripartite meetings between MGF, Vp and MHL

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[306] URN 2379; URN 5417; URN 5418.
[307] URN 2788, page 23. The CMA notes that no time is specified for the booking. A meeting appointment entitled '[Meeting Venue A]l' for 9:00am to 10:00am on 16 July 2014 was also found in [MGF Employee 1's] Outlook calendar; URN 3726. See further discussion on this in paragraph 4.156.
[308] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 118, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 24 November 2016, pages 176 to 177, URN 0265; URN 3727.
[309] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 118, URN 4615.
[310] URN 0071. The CMA notes the Outlook calendar entry has a meeting time of 9:30am to 10:30am, however metadata obtained from Mabey (URN 5417; URN 5418) confirms the time in URN 0071 did not reflect the +1 hour time adjustment for British Summer Time, and that the meeting appointment was actually from 10:30am to 11:30am. [MGF Employee 1's] Outlook calendar entry shows a meeting entitled '[Meeting Venue D]' (the location of [MGF Employee 1's] [✂]) on 4 September 2014 from 1:00pm to 2:00pm but with no attendees specified; URN 3727. MGFL has made representations that the tripartite meeting scheduled for 4 September 2014 is consistent with [MGF Employee 1's] desire to present MGF's manufacture and supply services to both Vp and MHL together (see also footnote to paragraph 4.69); MGFL's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraph 18(5), URN 5438. For the reasons set out in paragraph 4.168, the CMA does not consider this to be a credible explanation for the tripartite contacts.
[311] URN 5417; URN 5418.

(see paragraphs 4.234 to 4.243), supports the fact that meetings were held between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1].

4.74 Following [MHL Employee 1's] departure from MHL, [MGF Employee 1] contacted [MHL Employee 2] in October/November 2015 to suggest that they meet up.[312] A meeting between the two of them took place on 2 December 2015 at [Meeting Venue A].[313]

4.75 [MHL Employee 2] explained that the conversation at this meeting covered the fact that [MGF Employee 1] was looking to maintain his current market share, telling him that this was 'generally a third' and he was 'happy with that'.[314] [MHL Employee 2] felt that this may have been 'essentially a shot across my bows because he was concerned that I was going to come in and pinch business off him'.[315] [MHL Employee 2] explained that [MGF Employee 1] suggested they should:

'meet on a more regular basis to discuss industry matters, perhaps twice a year or once a quarter. [MGF Employee 1] mentioned how he liked to meet without mobile phones or pads and that what would happen in the meeting would stay in the meeting. I asked [MGF Employee 1] whether he had had

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[312] [MHL Employee 2] explained how [MGF Employee 1] contacted him and organised the meeting; second witness statement of [MHL Employee 2] dated 4 May 2020, paragraphs 12 to 18, URN 5229; see also transcript of an interview with [MHL Employee 2] held on 23 June 2016, pages 19 to 20 (see also page 36), URN 0255. [MGF Employee 1] confirmed that he telephoned [MHL Employee 2] and proposed a meeting; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A29, URN 5274. Consistent with this, the evidence shows [MGF Employee 1] sent a SMS text to [MGF Employee 5] asking for [MHL Employee 2's] mobile phone number, which [MGF Employee 5] then provided at 11:39am that day (URN 3708, rows 1 and 2). Telephone records indicate that at 12:34pm and 12:35pm on 3 November 2015 [MGF Employee 1] made two calls to [MHL Employee 2's] telephone number which, in combination, lasted for 2 minutes and nineteen seconds (URN 3706, Table B, rows B19 and B20).

[313] [MHL Employee 2] explained what happened when he arrived at [Meeting Venue A], and what was discussed during his meeting with [MGF Employee 1]; second witness statement of [MHL Employee 2] dated 4 May 2020, paragraphs 19 to 41, URN 5229; see also transcript of an interview with [MHL Employee 2] held on 23 June 2016, pages 54 to 55, URN 0255. There is also evidence of this meeting in: [MGF Employee 1's] diary entry '[Meeting Venue A] [MHL Employee 2]', URN 2985; Outlook calendar entry for 2 December 2015 at 6:30pm entitled 'Drinks & Dinner - Table booked for 7.30pm' showing 'Organiser' as [MHL Employee 2] and 'Required Attendee' as [MGF Employee 1], URN 1681, URN 1680. [MGF Employee 1] confirmed that this meeting took place, and set out his recollection of the meeting, including confirming that he settled the bill for both the meal and [MHL Employee 2's] hotel room. He also stated that it was an 'extremely drunken meeting' and he found [MHL Employee 2's] attitude 'somewhat nervy and strange'; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 109 to 117, URN 4531; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A29, URN 5274. [MHL Employee 2] remarked that [MGF Employee 1] settling his bill 'was really odd and it felt very uncomfortable coming after the previous evening's events. I thought, putting two and two together, that [MGF Employee 1] probably did not want there to be any record that I had stayed there'; second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 42, URN 5229.

[314] Second witness statement of [MHL Employee 2] dated 4 May 2020, paragraphs 27 to 30, URN 5229; see also transcript of an interview with [MHL Employee 2] held on 23 June 2016, page 22, URN 0255. [MGF Employee 1] stated that 'Any reference to market share, if made, would have been factual and all part of the chit chat, for example with regard to the events at [✂] that [MHL Employee 2] mentions in his interview'; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 115, URN 4531.

[315] Second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 28, URN 5229; see also transcript of an interview with [MHL Employee 2] held on 23 June 2016, page 22, URN 0255.

similar meetings with [MHL Employee 1]. [MGF Employee 1] said yes, but he did not elaborate on what was the frequency of those meetings with [MHL Employee 1]'.[316]

4.76 According to [MHL Employee 2], [MGF Employee 1] went on to say that:

'if we kept meeting and the trust grew between us, we could get to a point where we could meet along with his [✂]. [MGF Employee 1] said that this [✂] had been with him [✂] and that [MGF Employee 1] trusted him. [MGF Employee 1] said that, when the trust had grown between us, we could share more detailed information. [MGF Employee 1] also mentioned to me that [Meeting Venue A] had a backroom which was great as there was no mobile phone reception. [MGF Employee 1] told me that the three of us, which I interpreted as [MGF Employee 1], his [✂] and me, could go to the backroom and the staff would throw some wine and food in and let us get on with it. He mentioned somewhere called '[Room within Meeting Venue A]', but I was not sure whether this was a reference to the restaurant we were then sitting in or this backroom he was talking about'.[317]

4.77 In support of [MHL Employee 2's] recollection that [MGF Employee 1] proposed meeting with his [✂] to 'share more information' once the trust had grown between them, the CMA notes [MGF Employee 1's] text message to [MHL Employee 2] on 6 May 2016 in which he suggested a tripartite meeting with [Vp Employee 1] and proposed that '[MGF Employee 2] would accompany me and present relevant data' (see paragraph 4.243). As set out in paragraph 5.44, [MGF Employee 1's] approaches to both [MHL Employee 1] and [MHL Employee 2] bear similarities, indicating a pattern of an initial meeting(s) to build trust before meeting(s) to discuss more detailed financial information.

4.78 [MHL Employee 2] informed responsible officers at Mabey of this meeting,[318] and this ultimately led to Mabey's leniency application to the CMA on 28 April 2016.[319]

4.79 After his meeting with [MHL Employee 2] on 2 December 2015, [MGF Employee 1] made attempts to set up a tripartite meeting between MGF, MHL

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[316] Second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 34, URN 5229; see also transcript of an interview with [MHL Employee 2] held on 23 June 2016, page 22, URN 0255. [MGF Employee 1] stated that he 'most certainly told [MHL Employee 2] I had met [MHL Employee 1]' and it is 'likely' that he told [MHL Employee 2] that the meetings with [MHL Employee 1] were 'in similar surroundings, and again with the objectives of selling trench sheets to Mabey'; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A29, URN 5274.
[317] Second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 36, URN 5229.
[318] Both in advance of his attending and reporting back immediately afterwards.
[319] Second witness statement of [MHL Employee 2] dated 4 May 2020, paragraphs 15 to 17 and 42 to 44, URN 5229; see also transcript of an interview with [MHL Employee 2] held on 23 June 2016, page 24, URN 0255.

and Vp (see paragraphs 4.234 to 4.246). This demonstrates a pattern of behaviour, at least on the part of [MGF Employee 1], in seeking to arrange tripartite meetings which, when considered in conjunction with [MHL Employee 2's] evidence and the contemporaneous material referred to in paragraphs 4.62, 4.65 and 4.67 to 4.71 above, is consistent with and supports [MHL Employee 1's] evidence and the CMA's finding that tripartite meetings took place between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] during Relevant Period 2(a).

Rogue sales staff and low quotes

4.80 A key aspect of the arrangement during Relevant Period 2(a) was to seek to ensure that sales staff at MGF, Vp and MHL maintained price levels in the market.

4.81 [MHL Employee 1] said that the meetings between MGF, Vp and MHL covered the actions of 'rogue sales people' who would 'offer prices that were not part of company policy to win the work'.[320] He further explained that the objective of discussing 'rogue' sales staff was part of MGF, Vp and MHL, 'all trying to push rates up because it is in everybody's interests, but we know that there are certain salesmen despite instructions who will give more discount than they are allowed'.[321]

4.82 [MHL Employee 1] explained that he would share knowledge gained from his meetings with MGF and Vp with [✂], [MHL Employee 3], reassuring him that, 'there was no desire from anybody out in the market place to absolutely slash prices to the ground',[322] and seeking to:

'try and put [MHL Employee 3's] mind at ease that he wasn't being massively undercut everywhere around the country. I was driving [MHL Employee 3] and the sales team to push hire rates up as high as they could because obviously that's a direct influencer on profits. So, I was saying "yes, we've been massively aggressive for these last few years and we've won all this business, but there's more business out there now. Be a little bit more selective. Try and push your prices up". The feedback I was getting from the sales team via [MHL Employee 3] was that it was like the Wild West out there – "they're all cutting prices left, right and centre, we can't get prices up". So, the

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[320] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 94, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 36, URN 0260.
[321] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 94 to 96, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 133, URN 0260.
[322] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 122, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 37, URN 0260; transcript of an interview with [MHL Employee 1] held on 24 November 2016, page 134, URN 0265.

conversation will have been somewhere along the lines of, “look [MHL Employee 3], I don’t think that’s the case. I happened to have a discussion with [Vp Employee 2]. The impression I got from him was that they’re not being massively aggressive in the market”, but it was all that kind of nature, it was impression’.[323]

4.83 [MHL Employee 1] described this aspect of the arrangement as an informal agreement which was intended to prevent sales staff from driving prices down, rather than an agreement under which MGF, Vp or MHL would circulate and agree actual prices: ‘It was just discussions about market value or market rate and those prices are a bit low, what the market expects to pay, that sort of thing. An informal agreement, I guess, is the best way of putting it’.[324] He described it as feeling ‘like a game of poker between three guys who were not wanting to show their hand’.[325]

4.84 In terms of the actual operation of this aspect of the arrangement, [MHL Employee 1] said that MGF, Vp and MHL agreed to let each other know if they came across ‘wildly inappropriate’ pricing in order to try to ‘control their sales people from doing that’.[326] Specifically:

‘[MGF Employee 1] and [Vp Employee 2] suggested to me at that time if I got evidence that either of their two companies were putting in ridiculous prices to let them know. Not from a point of view of us agreeing a price between us, but so that so that they could take action against the individuals who were going below company policy without their knowledge’.[327]

4.85 To this end, [MHL Employee 1] recalled that he asked [MHL Employee 3] to pass on any ‘wildly inappropriate, ridiculous quotations from either of the competition’ so that he could ‘find out whether that’s a one off or whether that’s what they’re doing’.[328] Further to this, he recalled ‘vaguely [MHL Employee 3] coming up to me and saying “look at these prices” and they were very low prices’.[329] Consistent with this, [MHL Employee 3] recalls that [MHL

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[323] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 123 and 124, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 99, URN 0260.
[324] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 96, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 24 November 2016, page 151, URN 0265.
[325] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 96, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 24 November 2016, page 153, URN 0265.
[326] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 95, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 132 to 133, URN 0260.
[327] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 95, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 36 to 37, URN 0260.
[328] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 124 (see also paragraphs 122 to 125), URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 134, URN 0260.
[329] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 126, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 135, URN 0260.

Employee 1] 'had asked me to keep him aware of any rates that looked low', and he presumed at the time that [MHL Employee 1] wanted the information to discuss at meetings with [MGF Employee 1] and [Vp Employee 2].[330]

4.86 There is documentary evidence that MGF, Vp and MHL collected examples of each other's low quotes, in order to challenge each other either in meetings or through bilateral contact.

4.87 For example, on 6 February 2014, shortly before the start of Relevant Period 2(a) but after the meetings between [Vp Employee 2] and [MHL Employee 1] on 23 May 2013 and 29 January 2014, [MHL Employee 4][331] emailed a number of Vp quotations[332] to [Vp Employee 2], saying that he hoped to 'discuss further'.[333]

4.88 On 10 February 2014 [Vp Employee 2] forwarded [MHL Employee 4's] email and attachments to [Vp Employee 6], stating:

'*[Vp Employee 6]*,
Please see attached quote sent to me by [MHL Employee 4].
The rates are significantly below minimums[334], can you explain reasoning behind this.
Also, you mentioned a Mabey quote you'd picked up in East Mids for Laing O'Rourke. Can you forward me a copy so I can put a shot across his boughs [sic].
Thanks
[Vp Employee 2]'.[335]

4.89 In an email chain dated 13 February 2014, [Vp Employee 7] sent an email to [Vp Employee 8] and [Vp Employee 2], highlighting low quotes in the market from MGF, stating:

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[330] First witness statement of [MHL Employee 3] dated 8 April 2020, paragraphs 33 to 35, URN 4621; see also transcript of an interview with [MHL Employee 3] held on 15 June 2018, pages 23 to 25, URN 2809. Vp has made representations that there is no evidence that [MHL Employee 3] collected and provided any MGF or Vp quotations to [MHL Employee 1]; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.52 to 3.53, URN 4565. However, [MHL Employee 3] confirms that he forwarded low Vp rates to [MHL Employee 1] at his request; first witness statement of [MHL Employee 3] dated 8 April 2020, paragraphs 26 to 27, 34 to 37 and 41, URN 4621.
[331] [✂].
[332] [MHL Employee 4] obtained these quotations from MHL sales staff, who had obtained the Vp quotations from customers: URN 3508.
[333] URN 2369; URN 2370.
[334] In interview, [Vp Employee 2] explained that this was a reference to the minimum rate that Vp would want to quote in the market; transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 14, URN 3833.
[335] URN 2371; URN 2372.

'Despite MGF saying they too want better rates for MP's[336] I can see no evidence of this in their pricing strategy.

…

We are doing our best to keep rates as high as possible but do not believe that there is any reciprocation from the boys in red.[337] Although there is plenty of work to chase, we have not secured any sizeable jobs for a couple of months and I am concerned that by April / May time our revenue will start to fall off'.[338]

4.90 In response, [Vp Employee 2] stated: 'This gives me some detail to discuss with MGF, which I intend to do in coming days';[339] and later in the email chain, 'I'd like to discuss the wider rates issue in the coming months, but need to try and get MGF to be more sensible'.[340]

4.91 In interview, [Vp Employee 2] explained: 'we were under a lot of pressure, in the market on major projects, which is what I meant by wider rates. And I suppose what I'm trying to say to [Vp Employee 7] there is – is, "I'll try – I'll try and make – I'll try and somehow raise it to MGF to say, you know, they continue to undercut the market on major projects"'[341] and that he would 'try and encourage [MGF] if that's the right – right word to – to – to stop undercutting the market'.[342]

4.92 On 21 February 2014 at 5:18pm, [Vp Employee 3] forwarded to [Vp Employee 2] a chain of emails highlighting an offer from MGF [✂] to the customer Tamdown Group Construction.[343] In his covering message, [Vp Employee 3] asked [Vp Employee 2]: 'Can you have a word before I offer the same to Reddingtons'. At 5:20pm [Vp Employee 2] responded: 'Yep'.

4.93 Shortly after, at 5:30pm, [MGF Employee 2] phoned [Vp Employee 2] and the two had a ten minute telephone conversation.[344] Immediately after the

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[336] The abbreviation 'MP' refers to 'major projects'; see transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 260 and 261, URN 3833.
[337] The reference to 'the boys in red' is a reference to MGF, whose products are coloured in red; see transcript of an interview with [MHL Employee 2] held on 23 June 2016, page 128, URN 0255; transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 261, URN 3833.
[338] URN 3141.
[339] URN 3142.
[340] URN 3144.
[341] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 265, URN 3833. The CMA notes that [Vp Employee 2] said that he did not think that he actually raised these issues with MGF, however the CMA is not persuaded by this statement given the evidence set out in paragraphs 4.90 and 4.92 to 4.93.
[342] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 267, URN 3833.
[343] URN 2799. [Vp Employee 3] obtained this information from [✂].
[344] URN 3706, Table A, row A7.

telephone call ended, at 5:41pm, [Vp Employee 2] sent the emails between Vp and Tamdown Group to [MGF Employee 2's] personal email address.[345] Given the proximity of the email to the telephone call, and that [Vp Employee 2's] email contained no cover text, the CMA is of the view that the telephone call between [MGF Employee 2] and [Vp Employee 2] encompassed, at least in part, a discussion about the Tamdown offer, [Vp Employee 2] having been prompted to 'have a word' by [Vp Employee 3].

4.94 In relation to the quotations [MHL Employee 4] sent [Vp Employee 2] on 6 February 2014 (see paragraph 4.87) (before the start of Relevant Period 2(a)) that he hoped to 'discuss further', [Vp Employee 2] stated that he 'coincidentally bumped into [MHL Employee 4] at a petrol filling station local to where we both live' and 'he "had a dig" at me that Groundforce had put some "very cheap" prices into North Midland Construction (NMC). At the time I paid lip service to the comment as I think I was more intent on getting home for the evening. [MHL Employee 4] then elected to email these rates to me, as if to try and prove it to me. Other than feeling quite annoyed that [MHL Employee 4] had been given our quotes by NMC, I reviewed it internally but left everything in place. I felt that [MHL Employee 4] was under pressure at the time as North Midland had been a long-standing customer for Mabey Hire and they were starting to lose out. This was purely a one-off incident but again serves to demonstrate competition between our companies and in the market-place more generally'.[346]

4.95 In interview, [Vp Employee 2] explained that, in his 10 February 2014 email to [Vp Employee 6] (see paragraph 4.88), 'all [he] was doing was, trying to find out why we'd priced them [North Midland Construction] for cheap rates';[347] downplaying the shot across the bows comment as a reflection of the very competitive market at that time, and his wish to point out to [MHL Employee 4] that 'all we're doing is … undercutting the Market … -- each, each other in the market'.[348] However, given the background against which this email was sent (noting in particular paragraph 4.84), the CMA is of the view that this email is evidence of Vp's intentions ahead of the first tripartite meeting between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1], and supports [MHL Employee 1's] account of the tripartite meetings and the arrangement between MGF, Vp and MHL.

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[345] URN 2373.
[346] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 56, URN 4539.
[347] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 17, URN 3833.
[348] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 14 to 15, URN 3833.

4.96 MGFL has made representations that at most, this email exchange evidences [Vp Employee 2] considering internal Vp prices notified to him by [MHL Employee 4], together with a desire to put a shot across the bows of MHL by giving counter-examples of aggressive MHL pricing.[349] Vp has made representations that there is no evidence that [Vp Employee 2] and [MHL Employee 4] ever discussed these quotations.[350] The CMA considers that this exchange reflects the monitoring of prices as [Vp Employee 2] took action in relation to [MHL Employee 4's] email by asking [Vp Employee 6] to explain why the rates in [MHL Employee 4's] email were low, and asked for an example of a low MHL quote to send to him in return.

4.97 Given the passage of time, [Vp Employee 2] could not recall in interview whether his telephone call with [MGF Employee 2] on 21 February 2014 was connected to the contents of this email.[351] In his first witness statement, [Vp Employee 2] stated that he revisited Vp potentially rehiring Larssen piles from MGF with [MGF Employee 2] at the start of 2014 due to continuing demand in the market, and he exchanged emails with [MGF Employee 6] in relation to this on 21 February 2014.[352] [Vp Employee 2] has stated that he now recalls [MGF Employee 2] called him 'to check that my discussions with [MGF Employee 6] had gone ok and he was aware that meetings were being set up. By coincidence, his call came 8 minutes after the email from [Vp Employee 3] ref Tamdown and after listening to [MGF Employee 2] promote MGF, I made reference to yet another example of their aggressive tactics against Groundforce customers. [MGF Employee 2] dismissed that MGF would have offered [✂], which led me to forward the email to [MGF Employee 2] in evidence. Admittedly I was annoyed at him in the moment, but I needed to make my point to him that the trading relationship was hard to develop in the face of extremely aggressive tactics in the market by MGF. If [MGF Employee 2] had not phoned me at that time, it is very likely that I would have simply fobbed [Vp Employee 3] off and never raised the point'.[353]

4.98 [MGF Employee 2] was unable to recall the detail of this matter in interview given the passage of time, but suggested that [Vp Employee 2] would have challenged him over [✂].[354] In his first witness statement, [MGF Employee 2] stated 'Given that Vp was a client, I could hardly not take his calls and not

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[349] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 209, URN 4529.
[350] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.32 to 3.34, URN 4565.
[351] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 280, URN 3833.
[352] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 57, URN 4539. In support of his statement, [Vp Employee 2] refers to an email he sent to [MGF Employee 6] on 21 February 2014 asking his availability for a meeting in Dartford on 23 or 24 April 2014 in relation to Larssen piles (see URN 1497).
[353] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 58 to 59, URN 4539.
[354] Transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 45 to 46, URN 3832.

listen to his grievances or not make soothing platitudes. However, contrary to the CMA's allegations, his calls did not change the way MGF approached the market place'.[355] [MGF Employee 2] notes that he shared an office with [MGF Employee 6] at this time, and his telephone call to [Vp Employee 2] was just over an hour after the email [MGF Employee 6] had sent about the proposed meeting to discuss Larssen piles. [MGF Employee 2] stated 'Although I still have no clear memory of the telephone call in question, it seems to me much more than likely from the documents that I have now reviewed that I was following up on [MGF Employee 6's] email by way of a courtesy call and got more than I bargained for, as [Vp Employee 2] happened to have been approached by [Vp Employee 3] with another gripe just before I called'.[356]

4.99 While the CMA accepts that there may have been legitimate reasons for the telephone call between [MGF Employee 2] and [Vp Employee 2],[357] [MGF Employee 2] and [Vp Employee 2] both acknowledge the content of the telephone call also covered discussion about MGF's quote, which the CMA considers, particularly when viewed against a history of monitoring each other's low quotes (see Relevant Period 1), was for the purpose of monitoring each other's prices as part of the arrangement between them. As set out previously, the CMA does not consider that it is legitimate practice to make complaints to competitors about the prices being offered to other customers, whether or not in the context of a trading relationship.

4.100 Vp has made representations that the telephone call between [Vp Employee 2] and [MGF Employee 2] on 21 February 2014 was legitimate contact between Vp and MGF regarding their trading relationship, and [Vp Employee 2's] frustration was understandable as he was concerned Vp may not have received the same rates as a customer of MGF.[358] The CMA does not agree, noting [Vp Employee 2's] statement above that MGF's 'aggressive tactics' against Vp customers were the focus of his complaint to [MGF Employee 2] (rather than any concern about the rates that Vp were being charged for cross-hire or cross-supply by MGF).

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[355] First witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 36, URN 4541.
[356] First witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 72, URN 4541.
[357] MGFL and Vp have made representations that the email exchange between [Vp Employee 2] and [MGF Employee 6] (see paragraphs 4.97 to 4.98) could have been the purpose and content of the telephone call between [MGF Employee 2] and [Vp Employee 2] on 21 February 2014; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.48, URN 4565; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 213, URN 4529.
[358] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.48 to 3.50, URN 4565; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraphs 7.32 to 7.33, URN 5308.

4.101 MGFL has made representations that this is an example of commercial interactions between [MGF Employee 2] and [Vp Employee 2] that have nothing to do with the CMA's findings but which then spill over into commercial complaints or 'whinges'. MGFL submit that there is no evidence that [MGF Employee 2] gave [Vp Employee 2] any assurance or that [Vp Employee 2] indicated that [MGF Employee 2] was under any obligation to do so,[359] or that MGF agreed to any change to its 'aggressive and successful commercial strategy'.[360] Vp has made similar representations that although [Vp Employee 2] states that he wanted to discuss the low quotes with MGF, there is no evidence that he wanted to do so as part of an arrangement to maintain prices.[361]

4.102 The CMA considers that, rather than this being a one-off exchange arising from the telephone call between [Vp Employee 2] and [MGF Employee 2], when viewed against [Vp Employee 2's] assurance to [Vp Employee 3] that he would 'have a word' with MGF, this reflects a pattern of MGF and Vp collecting and challenging each other's low quotes as part of an arrangement to maintain prices. Furthermore, when viewed against a history of monitoring each other's low quotes – in particular, Vp complaining about items being offered free of charge and MGF making promises to 'nip it in the bud' (see Relevant Period 1) – and the fact that MGF and Vp were close competitors, the CMA does not agree the exchange was a legitimate contact between MGF and Vp regarding their trading relationship.

Design charges

4.103 [MHL Employee 1] explained that the meetings between MGF, Vp and MHL covered issues around charges for design and engineering work, in particular, that [MGF Employee 1] wanted to introduce charges and the level of his proposed charges for such work, and if Vp and MHL would consider introducing charges also.

4.104 According to [MHL Employee 1], there was a certain amount of frustration, around the time of the February 2014 meeting between MGF, Vp and MHL, that the companies would produce 'all this engineering and all this design

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[359] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 214 to 215, URN 4529.
[360] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 209 to 210, URN 4529.
[361] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.34 to 3.36, URN 4565.

work and we are not able to charge for it'.[362] This is consistent with the witness evidence of [MGF Employee 2] who undertook some work in relation to design charges around June 2014 and said that [MGF Employee 1] was 'desperate to charge out this design stuff, because the cost of the design department was going up and up and up'.[363]

4.105 [MHL Employee 1] explained that [MGF Employee 1], 'talked about that and presented it as, "I think we should be able to charge for design work, I've worked out some rough costs as to what I think we should be able to charge for having these different design works done". Followed by, "do you think that that's something that, that could be introduced", followed by, "if I introduced it at MGF, would you follow?"'.[364]

4.106 [MHL Employee 1] said that [MGF Employee 1] 'provided me at one point with a price list of how much he intended to charge for engineering. I do not think there was any indication at the time that he was expecting me to agree or to go for that. It was almost a case of "here is what I think is a reasonable charge for engineering – what do you think". I took that information away with me thinking that is an opportunity for me to understand what is going on in the market. I at no point, to my recollection, went back and said to everybody we must do this now going forward'.[365] However, [MHL Employee 1] also said that 'the context or tone of the meetings changed towards the end to more of a case of "don't you think we should be charging for engineering, this is what I'm charging for engineering. Don't you think we don't charge enough for transport, we really ought to make an effort to push prices up"'.[366]

4.107 As regards the price list for engineering work given to him by [MGF Employee 1], [MHL Employee 1] elaborated:

'I remember vaguely [MGF Employee 1] introducing some sort of piece of paper that had on it "intended engineering charges" and him saying "that is what I think I would like MGF to be charging, what do you think?", or

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[362] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 90 (see also paragraphs 91 to 93), URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 109 to 112, URN 0260.
[363] Transcript of an interview with [MGF Employee 2] held on 16 January 2019, page 51, URN 3832; see also first witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 76, URN 4541.
[364] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 110, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 24 November 2016, pages 167 to 168, URN 0265.
[365] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 70, URN 4615; also see transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 34 and 35, URN 0260. [MHL Employee 1] identified the meeting of 16 July 2014 as being the occasion on which he was provided with that price list; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 111, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 24 November 2016, pages 164 to 167, URN 0265.
[366] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 117, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 36, URN 0260.

something like that, and it was a printout of a spreadsheet. It just had a breakdown of engineering charges that he would in an ideal world like to charge the customers for the engineering work that he was providing and the tone of the conversation was, “don’t you think we should be, I think it’s a good idea if we do, don’t you think we should[?]”’.[367]

4.108 [MHL Employee 1] noted that [MGF Employee 1] had given a copy of this document to [Vp Employee 2] before [MHL Employee 1] joined the meeting.[368]

4.109 There is documentary evidence that representatives of both MGF and Vp went to meetings with MHL well informed about design charges and that both MGF and Vp were considering design charges around the time of the tripartite meetings in February and July 2014.

4.110 Internal Vp email correspondence shows that [Vp Employee 2] was involved in, and keen to progress, work on design charges in the month prior to the tripartite meeting on 16 July 2014. On 13 June 2014, [Vp Employee 7] emailed [Vp Employee 2] in relation to design charges, saying the ‘initial flotation [sic] of the idea caused some consternation amongst the team, with everyone saying MGF may play ball but not Mabey’s. If that were the case, I guess we would need to think about whether we could take some short term pain (Mabey benefitting) and whether all parties would eventually come in line to our mutual benefit?’.[369]

4.111 In interview, [Vp Employee 2] said that design charges were a ‘problem’ insofar as:

‘if we went to a customer and said, “We’re going to – we’re going to hire this to you and we’re going to charge you for a design”, straight away their concern was, “Well that customer will just go to a competitor who will not [charge] him – perhaps charge him lower hire rates and not charging him for the design”’.[370]

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[367] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 109, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 123 to 124, URN 0260.
[368] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 116, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 127 and 128, URN 0260.
[369] URN 2388. Vp has made representations that [Vp Employee 7] concern that ‘MGF may play ball but not Mabey’s’ seems a common consideration when undertaking a risk assessment of the introduction of a potential new fee, and the potential introduction of this new fee presented a risk for Vp, which explains [Vp Employee 7’s] response to [Vp Employee 2]; Vp’s response dated 27 September 2019 to the CMA’s Statement of Objections, paragraph 3.54, URN 4565.
[370] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 311, URN 3833. The word in square brackets (‘charge’) corrects an error (‘charging’) in the transcription.

4.112 At MGF, [MGF Employee 2] prepared a two-page note headed, '[MGF Employee 1] Briefing Note Design etc', which was created on 14 July 2014.[371] This briefing note was created at [MGF Employee 1's] request,[372] shortly before his meeting with [MHL Employee 1] and [Vp Employee 2] on 16 July 2014. The first page of the briefing note contains a number of proposals in relation to 'Design Charges / Major Projects (MP)'.[373]

4.113 [MHL Employee 1] stated that the contents of the briefing note 'looks consistent with the issues we discussed at one of the meetings. I think it was at the meeting on 16 July 2014. [MGF Employee 1] was talking about we should be doing engineering charges and we should be charging. It was never something that I subscribed to or that we did, but this was his proposal about engineering charges that MGF were going to do'.[374]

4.114 A loose, annotated copy of the first page of the briefing note was found within one of [MGF Employee 1's] notebooks.[375] This notebook also contained the following handwritten note:

'Design charges – yearly sals - £[✂]p.a. – this year's review ≈ [✂]%. ✓
- First Step.'[376]

4.115 Based on its proximity in the notebook to other points that the CMA considers were discussed by MGF, Vp and MHL (covered at paragraphs 4.121 to 4.131), the CMA considers the page of [MGF Employee 1's] notebook containing the above comment is a record of the points discussed at the tripartite meeting on 16 July 2014, noting that the same page also contained

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[371] URN 1516. Transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 51 to 58, URN 3832. [MGF Employee 2] had also undertaken work in relation to design charges around in/around June 2014; URN 1816.
[372] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A17, URN 5274; MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 93, URN 5310.
[373] Including a breakdown of engineering charges by grade of engineer.
[374] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 111 (also see paragraphs 109 to 118), URN 4615; see also transcript of an interview with [MHL Employee 1] held on 5 June 2018, page 26, URN 2805. MGFL has made representations that [MHL Employee 1] could not identify the briefing note and the CMA did not locate a copy of it at either Vp's or MHL's premises; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 225 and 227, URN 4529.
[375] URN 2761, page 5.
[376] URN 2761, page 6. Some of the words in this handwritten note were noted as illegible in the Statement of Objections, however the CMA has updated this after [MGF Employee 1] set out his understanding of the comment as: 'Design charges [possibly changes, it's hard to tell] - Yearly sals [salaries] £[✂] [million] p.a. – this year's review is [I think that this is the sign for "approximately"] [✂]% - First step.'; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A18, URN 5274.

comments in relation to transport charges and Balfour Beatty (see paragraphs 4.122 and 4.127).[377]

Representations in relation to design charges

4.116 [MGF Employee 1] stated that the briefing note 'probably originated as an aide memoire … These could be my suggestions to put to seniors for sounding and feedback, or simply my thoughts on the major trends and issues facing the business'.[378]

4.117 [MGF Employee 1] confirmed that he was contemplating design costs, haulage charges and general price increases at this time in order to 'address the ever increasing losses associated with haulage (especially in the South East), design costs and inflation',[379] and stated that he asked [MGF Employee 2] to prepare data for a MGF senior management team meeting held at Astley on 17 July 2014.[380] MGFL has made representations that the briefing note was an internal MGF management document prepared by [MGF Employee 2] at [MGF Employee 1's] request.[381] Vp has made representations that there is no evidence that the briefing note was prepared with a view to [MGF Employee 1] discussing design charges or transport charges (see paragraphs 4.125 to 4.131) at the meeting on 16 July 2014.[382] Even if the briefing note had been prepared for MGF's internal purposes rather than specifically for the purpose of the tripartite meeting, this would not make the discussion around design charges that took place at the tripartite meeting on 16 July 2014 legitimate.

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[377] [MGF Employee 1] stated that 'The handwritten note is an aide memoire … a rambling list of concerns to be considered and possibly addressed. People I was interested to hire, people who had left the business, people joining competitors, BB's Project Oyster, design costs, haulage revenues and price increases. It was prepared for internal MGF purposes only'; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A19, URN 5274. MGFL has made representations that the comments in [MGF Employee 1's] notebook are 'completely irrelevant' and that the entries were for internal management purposes; MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraphs 93 to 99, URN 5310. The CMA is not convinced, noting that the comments closely accord with [MHL Employee 1's] account of issues raised by [MGF Employee 1] at the tripartite meeting on 16 July 2014 relating to design and transport charges, as well as to emails [MGF Employee 1] sent in relation to Balfour Beatty shortly after the meeting (see paragraph 4.122). Accordingly and for the reasons set out above, the CMA remains of the view that the handwritten comments on page 6 of URN 2761 are a record of the discussion which took place at the meeting between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] on 16 July 2014.
[378] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A17, URN 5274.
[379] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A21, URN 5274.
[380] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A17, URN 5274; see also MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 93, URN 5310.
[381] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 93, URN 5310.
[382] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.57 to 3.58, URN 4565.

4.118 [MGF Employee 1] stated that he considers the evidence that [MHL Employee 1] has provided in relation to design and transport charges is information he learnt during job interviews with [MGF Employee 1] (see paragraph 4.170), rather than information [MGF Employee 1] shared with him during the meetings they had whilst [MHL Employee 1] was at MHL.[383] The CMA does not find this explanation credible, viewing the evidence regarding design charges referred to in paragraphs 4.103 to 4.115 above in the round, and noting that [MHL Employee 1] stated that he did not discuss the general business environment, pricing or charges, strategy, or review any business documents with [MGF Employee 1] during the two MGF job interviews he attended.[384]

4.119 MGFL has made representations that the issue of design charges was a talking point for everyone in the groundworks industry in 2014, and it is uncontroversial for [MGF Employee 1] to have raised this topic in a discussion with other industry participants.[385] The CMA considers that, as design costs were a significant cost to MGF and its competitors (including Vp and MHL), whether to charge separately for design was clearly an important parameter of price competition in the market. Accordingly, any discussion with competitors about introducing such charges (or the amount thereof) plainly raised potential competition law risks.

4.120 Vp has made representations that [Vp Employee 2's] intention to progress work on design charges is not evidence that this work was in advance and in view of meetings with MGF and MHL at which they would discuss design charges.[386] In any event and irrespective of whether [Vp Employee 2] had prepared for such a discussion in advance, the CMA considers that, for the reasons set out above (see paragraphs 4.103 to 4.115), a discussion in

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[383] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 96, URN 4531. MGFL has made representations that it is possible [MHL Employee 1] 'had a glance' at some papers in [MGF Employee 1's] possession without [MGF Employee 1's] knowledge or approval, and refers to [MHL Employee 1's] comment in interview where he apologises for 'an old sales habit, of reading looking upside down' (transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 174, URN 0260). MGFL has made representations that this explains why [MHL Employee 1] 'has never produced a copy of the document he claims to have seen and that he seems only to have seen half of the document' and has 'only a partial recollection of seeing any of the document'; MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, footnote 11, URN 5310. Given the level of detail given by [MHL Employee 1] in relation to the briefing note and the discussion that took place about it during the meeting, the CMA is not persuaded by this representation.
[384] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 134, URN 4615.
[385] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 217 to 223, URN 4529. [MGF Employee 1] explained that design costs (along with transport costs) 'have not traditionally been fully recovered from our customers' and 'have continued to grow exponentially'; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 52 and 53, URN 4531. Similarly, [MGF Employee 2] explained that 'the general lack of design charges in the industry is a direct result of the competitive forces at play'; first witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 82, URN 4541.
[386] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.54, URN 4565.

relation to design charges took place at the tripartite meeting attended by [Vp Employee 2] on 16 July 2014.

Balfour Beatty

4.121 On 18 July 2014, [MGF Employee 1] sent emails to each of [MHL Employee 1] and [Vp Employee 2] (at his personal email address) within three minutes and in similar terms about shoring and 'Project Oyster'.[387] [MGF Employee 1] sent a similar email to [Vp Employee 1] four days later on 22 July 2014.[388]

4.122 [MGF Employee 1's] notebook contained the following handwritten note:

'– BB Tier 1 Bid – 'A' Plants approach – S Hire closed approach. ✓'[389]

4.123 [MGF Employee 1] stated that it is possible that Project Oyster was mentioned during his meetings with [MHL Employee 1] as it was a 'significant talking point in the industry' at the time. [MGF Employee 1] stated he cannot recall if he was asked to let Vp and MHL know this, or whether he 'happened to mention it to them because it was topical' and he had their contact details.[390]

4.124 Based on its proximity in the notebook to other points that the CMA considers were discussed by MGF, Vp and MHL (covered at paragraphs 4.103 to 4.120 and 4.125 to 4.131), the CMA considers the handwritten notes on this page[391] to be a record of the points discussed at the tripartite meeting on 16 July 2014. This supports the CMA's finding that there were contacts between MGF, Vp and MHL during Relevant Period 2(a), and indicates that Balfour Beatty was also a topic of discussion between MGF, Vp and MHL in Relevant Period 2(a), including at the tripartite meeting between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] on 16 July 2014.

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[387] URN 1518; URN 1519; URN 1520; transcript of an interview with [MHL Employee 1] held on 5 June 2018, pages 29 to 33, URN 2805. Project Oyster was a project initiated by Balfour Beatty to consolidate its supply chain in or around April 2013. Whilst originally shoring was in-scope, in mid-2014 Balfour Beatty decided to exclude shoring from the scope of Project Oyster and conduct a separate tender exercise for shoring equipment services (see Relevant Period 3); Balfour Beatty's response dated 13 March 2020 to the CMA's information request dated 18 February 2020, paragraph 2(a), URN 4595. [MGF Employee 1's] emails notified the recipients that shoring was out of the scope of Project Oyster. Vp has made representations that these emails (and URN 1521 and URN 1522) are entirely unrelated to the infringement as they relate to Project Oyster and the contact was 'legitimate and encouraged by a customer during a procurement process'; Vp's response dated 27 September 2019 to the CMA's Statement of Objections paragraph 3.42, URN 4565.
[388] URN 1521; URN 1522; transcript of an interview with [Vp Employee 1] held on 10 May 2018, pages 99 to 101, URN 0666.
[389] URN 2761, page 6. [MGF Employee 1] stated that he 'cannot recollect specifically what generated this but would most probably be a reminder to find out more information on Balfour Beatty's Project Oyster' as MGF had been approach by both A Plant and Speedy Hire in relation to being part of their respective bids when shoring was still in scope of Project Oyster; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A20, URN 5274.
[390] Second witness statement of [MGF Employee 1] dated 13 August 2020, paragraph 18(a), URN 5317.
[391] URN 2761, page 6.

Transport charges

4.125 [MHL Employee 1] recalled that issues around transport charges were also discussed at meetings between MGF, Vp and MHL. He noted that, in a discussion that also encompassed design charges (see paragraph 4.106), [MGF Employee 1] had:

> 'led the discussion about transport charges, that is another thing he brought up quite regularly, about transport charges particularly in London. As businesses, we were not able to recoup the cost of transport. We were being very competitive on transport, quite often giving free transport to allow us to win the order, [MGF Employee 1] was suggesting it was very difficult and it was making things uncomfortable for people. At first it was a suggestion, seeking our opinion of minimum transport rates, rather than specifically stating that this is what we should all charge for transport. Later this changed to [MGF Employee 1] saying that we should all make an effort to push prices up'.[392]

4.126 [MHL Employee 1] elaborated:

> 'At some point [MGF Employee 1] introduced his concern over transport prices, particularly in London and about how it was difficult to get round London and he felt that his company were really struggling and that there ought to be a stand made. His whole delivery in that meeting changed to one of: the customers are really working against all of us, they are forcing us to provide all this engineering for nothing, they are driving us all down on transport charges so we are all making a big loss on transport, that kind of talk'.[393]

4.127 The second page of [MGF Employee 2's] briefing note for [MGF Employee 1] (discussed at paragraph 4.112) sets out a number of proposals in relation to haulage/transport charges.[394] This page was not found loose within [MGF Employee 1's] notebook along with the first page. However, that notebook contained the following handwritten note along with the comments on design charges: 'Haulage increases (partic around M25). ✓'[395] Based on its proximity in the notebook to other points that the CMA considers were discussed by MGF, Vp and MHL (covered at paragraphs 4.103 to 4.120 and 4.121 to

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[392] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 71, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 35 to 36, URN 0260.
[393] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 107, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 123 to 124, URN 0260.
[394] URN 1516. Transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 59 to 60, URN 3832.
[395] URN 2761, page 6.

4.124), the CMA considers the handwritten notes on this page[396] to be a record of the points discussed at the tripartite meeting on 16 July 2014.

4.128 [MHL Employee 1] stated that he recognised some of the contents of the second page of the briefing note, and that it reflected discussions at one of the meetings between MGF, Vp and MHL:

'I think it was at the meeting on 16 July 2014 … [MGF Employee 1] was talking about haulage charges and the second page of the document relates to those.

I recognise the top bit of the document, the "Inside the M25 and all other areas" as what [MGF Employee 1] was proposing that he was going to do with his company from charges. That was the way it was always introduced. Never, at any point, was there a conversation of, "Shall we all do this?" It was always [MGF Employee 1] proposing, "This is what we are going to do, we think".

I do not remember the bottom bit of the document. The bottom bit seems a bit too detailed, but maybe it was in that format. I never really paid a huge amount of attention to the documentation I was given because it was not something I wanted to get into, having specific passing around of prices and things like that. It was more the intention. I am not sure if the briefing note is the exact document [MGF Employee 1] gave me, however it does look familiar and that was the kind of thing [MGF Employee 1] was talking about'.[397]

4.129 The CMA notes that [MHL Employee 1] fed back discussions on transport charges to [✂], [MHL Employee 3]; [MHL Employee 1] explained:

'…the feedback will have gone back to [MHL Employee 3] again, because [✂], so he was the direct link with our commercial face and so any, any intelligence that I could get that would allow us to shape our strategy I would give to [MHL Employee 3]. So, I'd say "they're very concerned about transport, just so you know, and they're thinking about charging for

[396] URN 2761, page 6.
[397] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 111 to 113, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 5 June 2018, pages 26 to 29, URN 2805. MGFL has made representations that [MHL Employee 1] could not identify the briefing note and the CMA did not locate a copy of it at either Vp or MHL, however the CMA is satisfied based on [MHL Employee 1's] evidence that the briefing note was given to [Vp Employee 2] and [MHL Employee 1] by [MGF Employee 1]; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 225 and 232, URN 4529.

engineering". He would feed it all back, "I know these prices are not correct", it was that sort of thing'.[398]

Representations in relation to transport charges

4.130 Vp has made representations that MGF has a different charging mechanism from other groundworks suppliers such as Vp in respect of transport charges, and to the extent MGF shared its views, this was a unilateral disclosure that did not, and could not have had (given Vp's reliance on third party transport providers), any impact on Vp's future pricing intentions or strategy.[399] Whilst Vp may organise transport in a different manner to MGF, it charges customers for transport, and the CMA therefore considers that the sharing of information in relation to transport charges reduced strategic uncertainty between the Parties as it enabled them to check – and take comfort from – the likely future conduct of their competitors on the market.

4.131 MGFL has made representations that transport charges were a common topic in the industry, and 'had these issues been the subject of general discussion in a trade association meeting, it would not have warranted a second thought'.[400] The CMA does not consider that detailed discussions with competitors on proposed charges and the exchange of documentation setting out those charges is legitimate in this context, nor would it be in a trade association meeting.

Representations in relation to the meetings between MGF, Vp and MHL

4.132 As set out in paragraph 4.72, the existence of tripartite meetings between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] is disputed by MGFL and Vp, with both [MGF Employee 1] and [Vp Employee 2] denying ever meeting with [MHL Employee 1] together. MGFL and Vp have made representations that, to the extent any meetings took place, they were bilateral between [MHL Employee 1] and either [Vp Employee 2] or [MGF Employee 1], and were in the context of MGF wanting to cross-supply to Vp and MHL.[401]

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[398] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 127 to 128, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 24 November 2016, page 174, URN 0265.
[399] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.64 to 3.65, URN 4564.
[400] See, for example: MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 230 to 231, URN 4529.
[401] See, for example: Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.31, URN 4565; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 181, 184 to 185, 190 to 192 and 195 to 196, URN 4529; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraphs 3.10 to 3.16 and 6.1 to 6.7, URN 5308; MGFL's response dated 18 August 2020 to the

4.133 The CMA notes that MGF has a direct distribution arrangement in place with [Supplier A] whereby it is [a distributor] for trench sheets manufactured by [Supplier A] (see paragraph 2.21), and [MGF Employee 1] had aspirations for MGF to cross-supply to Vp and MHL on a larger scale.[402] However, [MHL Employee 1] has consistently stated that both [Vp Employee 2] and [MGF Employee 1] were present during the meetings on 14 February 2014 and 16 July 2014, and does not recall that any discussion about MHL needing a supply of trench sheets took place.[403] The evidence submitted by MGFL and Vp in support of these representations is set out below, but in summary, the CMA does not consider these representations are supported by the available evidence.

Meetings between [Vp Employee 2] and [MHL Employee 1] in May 2013 and January 2014

4.134 [MHL Employee 1] said that he had 'bumped into [Vp Employee 2] of [Vp] Groundforce on two or three occasions at trade fairs and exhibitions' and 'sometime around 2013' [Vp Employee 2] contacted him and 'asked if I fancied meeting up for a coffee, just a general chat. So, I agreed just out of interest really to have a conversation with someone in a similar position to me within a similar business'.[404]

4.135 In his first interview [Vp Employee 2] explained that, while he had met and spoken to [MHL Employee 1] briefly at trade exhibitions and they had both been at a Shoring Technology Interest Group meeting, he had never met with

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CMA's Letter of Facts, paragraphs 28, 65 and 67, URN 5310; Vp's response dated 30 September 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraphs 4.1 to 4.21, 5.5 and 7.5, URN 5434; MGFL's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraphs 6 to 7, 11, 15 and 26 to 32, URN 5438.

[402] See for example: [MGF Employee 1's] email to [MGF Employee 6] dated 27 August 2013 that 'we should be the stockists and suppliers to GF and Mabey in the course of time'; Exhibit [✂] to the first witness statement of [MGF Employee 1], page 3, URN 4533; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A38, URN 5274.

[403] Fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraphs 55 to 65, URN 5419; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 65 to 118, URN 4615. [MHL Employee 1] mentioned meeting [Vp Employee 2] and [MGF Employee 1] together at his first interview (during his initial 'free recall' account, before he had been shown his calendar entries which refer to both [MGF Employee 1] and [Vp Employee 2]); transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 32 to 37, URN 0260. See also: transcript of an interview with [MHL Employee 1] held on 25 February 2020, pages 100 to 101, URN 5232; transcript of an interview with [MHL Employee 1] held on 10 September 2020, pages 53 to 59, URN 5405 where [MHL Employee 1] confirms that he met [Vp Employee 2] and [MGF Employee 1] together.

[404] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 41 to 43, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 31 to 32 (see also page 95), URN 0260. [MHL Employee 1] explained that he did not instigate the meeting with [Vp Employee 2] on 23 May 2013, and that [MHL Employee 4], a MHL employee who had previously worked at Vp, told him that he had spoken to [Vp Employee 2] who said he would like to meet with [MHL Employee 1] 'just for a chat and to see how things were going in the business'. [MHL Employee 1] explained that he agreed, and received a call from [Vp Employee 2] some time afterwards; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 44 to 45, URN 4615.

[MHL Employee 1], bilaterally or otherwise.[405] [Vp Employee 2's] recollection changed during his second interview, when he said that he met with [MHL Employee 1] twice (but his recollection in this respect was not entirely clear),[406] and explained that he 'first bumped into [MHL Employee 1] at an exhibition at the NEC' where [MHL Employee 1] told him he 'could do with catching up with [Vp Employee 2] at some point' because MHL's manufacturing plant at Dewsbury had 'effectively gone down.. their ability to manufacture was.. gone'.[407]

4.136 [Vp Employee 2] later recalled that, while he had exchanged introductions with [MHL Employee 1] in around 2011 or 2012 at a trade exhibition, the first 'proper contact' they had was during meetings held between Vp and MHL in around 2012 or 2013 in relation to a possible sale of Frami formwork panels. [Vp Employee 2] recalls that after this, there was no contact between them until he bumped into [MHL Employee 1] at another trade show 'at which point there was a suggestion we should catch up over a coffee'. [Vp Employee 2] said he was not particularly keen to meet with [MHL Employee 1] but saw it as an opportunity to find out why MHL did not pursue a deal for Frami formwork panels with Vp.[408] When asked if he recalled meeting [Vp Employee 2] in any capacity related to negotiations between MHL and Vp, [MHL Employee 1] recalled that, along with others from MHL, he had met with some individuals from Vp (including [Vp Employee 2]) and a third party in around 2011 or 2012 to discuss the possibility of MHL buying Frami panelling formwork system equipment from Vp. According to [MHL Employee 1], he did not speak directly to [Vp Employee 2] during the meeting or about it afterwards as he was not involved in leading the discussion or further involved in the potential deal, which MHL ultimately chose not to pursue.[409]

4.137 A meeting took place between [Vp Employee 2] and [MHL Employee 1] on 23 May 2013 (see paragraph 4.54).

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[405] Transcript of an interview with [MGF Employee 3] held on 9 January 2018, pages 259 to 272, URN 2806.
[406] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 258, 259 and 290, URN 3833.
[407] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 254, URN 3833.
[408] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 45 to 46, URN 4539. [Vp Employee 2] comments in his second witness statement that he finds it 'surprising' that [MHL Employee 1] forgot about the Frami formwork meeting, however the CMA notes that similarly, [Vp Employee 2] did not mention the Frami formwork meeting in his interviews with the CMA and only recalled it in his later witness statement; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 22, URN 5316.
[409] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 30 to 32, URN 4615. The CMA notes that while [MHL Employee 1] did not recall this meeting during his earlier interviews, he gave a full account when asked in a later interview. The CMA does not consider this impacts the reliability of [MHL Employee 1's] witness evidence, and as explained in paragraph 5.39, it is expected that his memory of certain events may be imperfect, particularly when providing free recall given the passage of time and his lack of access to records from his employment at MHL.

4.138 [MHL Employee 1] recalled that they discussed 'Issues that we would have been facing as business leaders like increasing legislation … pressure on the business, personnel issues and that kind of thing. It was genuinely just a friendly welcome chat, no discussion about pricing, manufacturing or supply, or anything along those lines'.[410] According to [MHL Employee 1], the meeting was left 'very open-ended … There was no further formal arrangement to meet again'.[411]

4.139 [Vp Employee 2] recalled that it started as a 'very frosty meeting', and he made his feelings about MHL poaching Vp employees known. [Vp Employee 2] said in an earlier interview that [MHL Employee 1] wanted to meet with him because MHL had lost its ability to manufacture equipment (see paragraph 4.135), but in his later evidence said that during the meeting there was only a 'brief mention' of this, when [MHL Employee 1] 'alluded to some issues with their trench sheet manufacturing plant and that he might need another source of sheets in the future. It was suggested that we could perhaps meet up and discuss that again early the following year'.[412] Given they did not plan to meet again until some eight months later, this suggests that the supply issues MHL were purportedly experiencing were not as urgent as [Vp Employee 2] suggests by saying that MHL had lost its ability to manufacture in 2013, and the CMA considers his recollections in this regard are inconsistent.

4.140 A meeting took place between [Vp Employee 2] and [MHL Employee 1] on 29 January 2014 (see paragraph 4.55).

4.141 According to [MHL Employee 1], he met with [Vp Employee 2] again 'because it was good to get someone else's perspective, bearing in mind I was relatively new to the industry when I joined Mabey. People like [Vp Employee 2] have been in the industry for a lot of years, they are in a similar position to the one I was in. I was struggling and wrestling with a number of issues within the business around retention of sales reps, how we trained people, how we moved people forward. I did not know who else I could talk to, in exactly the same position as me with the same issues, other than a peer in another company. I thought if I could use it to gain some information about them that would give me an advantage, absolutely'[413] (see also paragraph 4.58).

4.142 [Vp Employee 2] said that 'the trigger for this meeting from my point of view was that I was interested to see whether he had resolved his issues around

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[410] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 49, URN 4615.
[411] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 51, URN 4615.
[412] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 47, URN 4539; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 14, URN 5316.
[413] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 55 to 57, URN 4615.

trench sheet manufacture',[414] and that 'the issue of Mabey's need to source Trench Sheets was discussed in more detail … he specifically referred to some difficulties that they were having with their Trench Sheet manufacturing rolling mill in Dewsbury and that it kept breaking down during production'.[415] According to [Vp Employee 2], [MHL Employee 1] asked if Vp would sell trench sheets to MHL, and he told [MHL Employee 1] that Vp were sourcing a lot of their trench sheets from [Supplier A], via MGF.[416] [Vp Employee 2] stated that [MHL Employee 1] 'specifically mentioned that Mabey were lacking a good quality 8mm thick Trench Sheet',[417] and he told [MHL Employee 1] that he would put him in touch with [MGF Employee 1] to discuss MGF potentially supplying MHL with trench sheets as he knew [MGF Employee 1] well, and mentioned it to [MGF Employee 1] when they next spoke.[418] [MGF Employee 1] stated that 'although details surrounding the meetings are hazy', he is 'fairly confident' that the main reason he wanted to meet with [MHL Employee 1] was to see if MGF could supply MHL with trench sheets, and [Vp Employee 2] 'probably' put him and [MHL Employee 1] in touch with each other.[419]

4.143 [MHL Employee 1] could not recall this being an issue at the time or MHL needing an alternative supplier of trench sheets, and stated that he did not have any such discussion with [Vp Employee 2] at either of the meetings on 23 May 2013 and 29 January 2014.[420] [MHL Employee 1] reiterated that their conversation in these meetings was about 'general issues within the business, the challenges of customers and things like that' and said there was 'never a discussion about something so specific'. He explained: 'I do not have an engineering background, I was running the general business and I would not have even known that Mabey was lacking a good quality 8 millimetre trench sheet, so it is not a conversation that I would have had'.[421]

4.144 The CMA is not persuaded by [Vp Employee 2's] representations in this regard. Given that Vp was not in a position itself to supply trench sheets to MHL, it seems unlikely that [Vp Employee 2] would have been motivated in

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[414] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 48, URN 4539.
[415] Second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 18, URN 5316.
[416] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 48 to 49, URN 4539; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 23, URN 5316.
[417] Second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 24, URN 5316.
[418] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 48 to 49, URN 4539.
[419] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 85, 87 and 89, URN 4531.
[420] Fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraphs 51 to 52, URN 5419.
[421] Fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraphs 51 to 54, URN 5419. MGFL has made representations that it is implausible that [MHL Employee 1] would not have had an in-depth understanding of MHL's product range and in particular whether or not MHL lacked an 8 millimetre trench sheet. However, the CMA accepts [MHL Employee 1's] explanation that, [✂], he was not required to have knowledge of each individual product line and that his background was in business management rather than engineering. MGFL's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, footnote 85, paragraph 15(8), URN 5438.

the normal course of business to meet with a competitor (MHL) twice in order to assist that competitor to remedy its supply problems by purchasing products from a third competing company (MGF). Additionally, it seems unlikely that [Vp Employee 2] would need to facilitate the introduction of [MHL Employee 1] and [MGF Employee 1] for this purpose when MHL could have readily contacted MGF or [Supplier A] itself, and when in actuality, it had already done so, having been in contact with [Supplier A] prior to [Vp Employee 2's] second meeting with [MHL Employee 1] on 29 January 2014 (see paragraph 4.159), which is when [Vp Employee 2] says he offered to put [MHL Employee 1] in touch with [MGF Employee 1].

Meetings between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] in February and July 2014

4.145 Meetings between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] took place on 14 February 2014 and 16 July 2014 (see paragraphs 4.62 and 4.70).

4.146 The CMA notes that the MGFL and Vp's representations in this regard are in the context of their view that the meetings on 14 February 2014 and 16 July 2014 were attended only by [MGF Employee 1] and [MHL Employee 1], and not [Vp Employee 2].

4.147 When [MHL Employee 1] was first interviewed, he said he 'probably met [MGF Employee 1] and [Vp Employee 2] together three, maybe four, times in the entire time I was at Mabey, from sometime in 2013 I'm guessing to probably just before I left. The format was always the same, it was just an informal lunch and just a general chat about business'.[422]

4.148 [MHL Employee 1] explained that he attended the meetings with [MGF Employee 1] and [Vp Employee 2] because:

'I was using the knowledge that I got just from talking to [MGF Employee 1] and [Vp Employee 2] for my market knowledge and knowledge about the

[422] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 65, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 34, URN 0260. The CMA notes this comment was made in the early part of [MHL Employee 1's] initial interview, before he had been presented with any contemporaneous documents by the CMA. After being given the opportunity to review those documents (and other documents provided to him for review prior to subsequent interviews), as well as the benefit of additional time to reflect on the events in question, he was subsequently able to provide a fuller recollection and additional details, as set out in this Chapter. See also second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 7 to 12, URN 4615.

industry to enable Mabey to get a competitive advantage, not from a point of view of trying to fix pricing, but rather to improve Mabey's position'.[423]

'For me, it was a case of whether I could get an advantage from talking to [MGF Employee 1] and [Vp Employee 2] about what their strategy was or what problems they were facing, whether they were experiencing the same problems that I was facing within the business'.[424]

4.149 According to [Vp Employee 2], he did not meet with [MHL Employee 1] after January 2014, and the last contact they had was in late 2014 or early 2015 when [MHL Employee 1] contacted him about potential employment opportunities at Vp.[425] However, in addition to the meetings that took place on 14 February 2014 and 16 July 2014 (between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1]), text messages show that [MHL Employee 1] and [Vp Employee 2] met together on 25 September 2014 at 2:30pm at [Meeting Venue F].[426]

4.150 In light of the evidence showing that in September 2014 [MHL Employee 1] and [Vp Employee 2] exchanged text messages on familiar terms and met with each other, despite [Vp Employee 2's] statements that he did not meet [MHL Employee 1] again after January 2014, the CMA does not find [Vp Employee 2's] evidence on this point credible. The CMA considers this casts doubt on the accuracy of his recall in general (for example, in relation to the tripartite meetings on 14 February 2014 and 16 July 2014 having taken place, taking into account [MHL Employee 1's] evidence and the fact that [MHL Employee 1] created calendar entries for those meetings with [Vp Employee 2] and [MGF Employee 1] on days he spoke with [Vp Employee 2] (see paragraphs 4.60 and 4.70)).[427]

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[423] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 75, URN 4615; see also transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 32 to 33, URN 0260.
[424] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 76, URN 4615.
[425] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 54, URN 4539; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 28, URN 5316. [Vp Employee 2] stated that [MHL Employee 1] contacted him via phone or LinkedIn but there was no follow up meeting or interview that he can recall and he had 'no interest in interviewing [MHL Employee 1] for a job'; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraphs 28 to 29, URN 5316.
[426] [MHL Employee 1's] text messages show that he and [Vp Employee 2] exchanged text messages on 24 September 2014 and made arrangements for a meeting on 25 September 2014. [MHL Employee 1] also sent a text message to [Vp Employee 2] the following day, 26 September 2014, thanking him for meeting with him the previous day; fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraphs 67 to 79, URN 5419; Exhibit [✂], URN 5420, exhibited to the fourth witness statement of [MHL Employee 1] dated 30 September 2020. [MHL Employee 1] explained that they met for around half an hour for a coffee and a chat, during which [MHL Employee 1] told [Vp Employee 2] he had left MHL and was in the market for a job should something come up at Vp; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 140, URN 4615.
[427] MGFL now accept that the meeting between [Vp Employee 2] and [MHL Employee 1] on 25 September 2014 took place; MGFL's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraphs 11(3)(b), 11(7)(b) and (c) and 19(1), URN 5428.

4.151 [Vp Employee 2] refers to mileage expense claims he submitted whilst at Vp as evidence that he would have been unable to attend the tripartite meetings with [MHL Employee 1] and [MGF Employee 1]. The mileage expense claim for 14 February 2014[428] records that he made a 119 mile return trip from [✂][429] to Hull for a client meeting with 'Balfour Beatty/Birse'.[430] He stated that there is 'no way' he would have attended meetings at either the [Meeting Venue B] or [Meeting Venue A][431] on the same day as a meeting in Hull, and that [MHL Employee 1's] evidence that the meeting took place in the middle of the day means that it would have been logistically impossible for him to attend both meetings.[432] [Vp Employee 2] has been unable to recall any details of the Balfour Beatty/Birse meeting referred to in his mileage records, such as the time that the meeting took place or who it was with,[433] and Balfour Beatty was unable to identify any records indicating that [Vp Employee 2] attended this meeting.[434]

4.152 [Vp Employee 2's] mileage expense claim for 16 July 2014[435] records that he made a 123 mile return trip from [✂] to Astley[436] for a supplier meeting with MGF, a distance which [Vp Employee 2] says is consistent with him driving from his home to MGF's Astley depot and back again without any diversions. He states that he believes he attended a meeting at MGF's Astley depot to raise operational problems with [Specific Product A] that Vp had purchased from MGF, and that while he does not recall the timing of the meeting, he believes the meeting was for two to three hours in the middle of the day, and it was not his practice to try and fit in another meeting on a busy day.[437] However, [Vp Employee 2's] mileage records show that he did, on occasion, travel for a large number of miles in a single day, or have multiple meetings in

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[428] Mileage claim form for [Vp Employee 2] for February 2014, page 5, URN 4159.
[429] [✂].
[430] Balfour Beatty Plc purchased Birse Group Plc (now Birse Group Limited) and its wholly owned subsidiaries on or around 22 August 2006; Balfour Beatty's response dated 14 May 2020 to follow-up questions dated 7 May 2020 responsive to the CMA's information request dated 18 February 2020, page 2, URN 4552.
[431] [✂].
[432] Second witness statement of [MGF Employee 3] dated 17 August 2020, paragraphs 32 to 34, URN 5316.
[433] Second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 33, URN 5316.
[434] Balfour Beatty's response dated 13 March 2020 to the CMA's information request dated 18 February 2020, paragraph 3, URN 4595; Balfour Beatty's response dated 14 May 2020 to the CMA's follow-up questions dated 7 May 2020 responsive to the CMA's information request dated 18 February 2020, paragraph 2, URN 4552.
[435] Mileage claim form for [Vp Employee 2] for July 2014, page 7, URN 4159.
[436] Astley is a village in the Metropolitan Borough of Wigan, in Greater Manchester, England.
[437] Second witness statement of [MGF Employee 3] dated 17 August 2020, paragraphs 40 to 44, URN 5316. Vp has made representations that Astley was MGF's stockholding depot where their products could be physically viewed, and it is reasonable to conclude the meeting was a continuation of discussions surrounding trench sheets; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.59, URN 4565; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraph 3.39, URN 5308. The CMA notes that [MGF Employee 3's] evidence does not support Vp's representations that he met with MGF at this time to discuss trench sheets.

a day.[438] MGFL was unable to produce any contemporaneous documents or information to corroborate [Vp Employee 2's] account that he attended a meeting at MGF's Astley depot on 16 July 2014.[439] The CMA therefore considers that there is uncertainty as to whether [Vp Employee 2] did in fact attend meetings in Hull and Astley on 14 February 2014 and 16 July 2014, respectively.

4.153 Furthermore, even if [Vp Employee 2] did attend the meetings which he has identified in Hull and Astley, it would not follow that he could not also have attended the tripartite meetings on the same dates. The CMA notes that private mileage is only recorded on the mileage records by way of a monthly total and is not itemised by date, and [Vp Employee 2's] mileage record shows that he accumulated 355 miles of private mileage during February 2014, and 498 miles of private mileage during July 2014. It does not seem to have been [Vp Employee 2's] custom to itemise all of the meetings he attended on a given day in his mileage records. On the three dates when [Vp Employee 2] has acknowledged meeting with [MHL Employee 1], those meetings were not itemised in his mileage records for the respective dates.[440] Consequently, the CMA finds that [Vp Employee 2's] mileage records do not represent a complete record of his movements and activities on any given date.

4.154 The CMA considers [Vp Employee 2's] mileage records represent at best an incomplete record of his movements and activities on any given date and, in any event, regardless of whether the information contained in the records is accurate, the CMA considers that attendance at the meetings indicated in the mileage claim forms would not have precluded [Vp Employee 2] from attending the meetings with [MHL Employee 1] and [MGF Employee 1] on 14

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[438] See, for example: 16 May 2013 on which [Vp Employee 2] recorded travelling 359 miles and making three stops/meetings; 5 February 2014 on which [Vp Employee 2] recorded travelling 313 miles and making two stops/meetings; mileage claim forms for [Vp Employee 2] for May 2013 and February 2014, pages 1 and 5, URN 4159.

[439] MGFL's response dated 18 September 2020 to the CMA's information request dated 7 September 2020, Response to Part A, URN 5408. MGFL stated that while [Vp Employee 2] thinks it is likely that he met [MGF Employee 6] on that day, [MGF Employee 6] is unable to recall this specific meeting, and MGFL has not been able to identify any email correspondence or diary appointments that support such a meeting having taken place. MGFL has stated that [MGF Employee 6's] mobile phone billing does not indicate any calls or texts to [Vp Employee 2] in June and July 2014. The CMA notes that the documents produced by MGFL relating to [Specific Product A] around this time do not involve [Vp Employee 2] or mention any trip he may have made to MGF at this time. MGFL explained it does not retain visitor records or records of meeting room bookings, and does not operate a visitor parking permit system in any of its depots. MGFL demolished the site in Astley in June 2017 after building a new depot in March 2016 and considers that any historic paperwork that might have existed in 2017, including visitor records, would have been destroyed during this period.

[440] [Vp Employee 2] has acknowledged that he met with [MHL Employee 1] on 23 May 2013, 29 or 30 January 2014 and 25 September 2014 and asserts that his mileage records support the fact that these meetings took place. However, while the mileage records for these dates (URN 4159 and URN 5439) show that [Vp Employee 2] was in the correct area for the relevant meetings, the CMA notes that they do not make reference to these meetings themselves, suggesting it was not his custom to itemise all of his meetings in his mileage records.

February 2014 and 16 July 2014.[441] Overall, given the limitations of the mileage record evidence, the CMA considers that, when viewed alongside the other evidence referred to in this Section, it is of limited assistance in establishing whether or not the two tripartite meetings in Relevant Period 2(a) occurred (see also paragraphs 5.23 and 5.24).

4.155 [MGF Employee 1] initially stated that he met with [MHL Employee 1] in 'early 2014' but does not believe they met on 14 February 2014 [✂].[442] He believes the first meeting between him and [MHL Employee 1] was in [Room within Meeting Venue A] at [Meeting Venue A], 'most probably in late February 2014' after he had emailed his contact details to [MHL Employee 1] on 19 February 2014 (see paragraph 4.65).[443] [MGF Employee 1] maintains that he is 'doubtful' that he met with [MHL Employee 1] on 14 February 2014, but now accepts it would 'tie in' with his calendar entry for this day.[444] [MGF Employee 1] stated that his main reason for wanting to meet [MHL Employee 1] was to see if MGF could supply MHL with trench sheets, as MHL was having manufacturing difficulties.[445]

4.156 [MGF Employee 1] stated that he has only the 'dimmest recollection' but believes he met with [MHL Employee 1] in the bar area at [Meeting Venue A] on 16 July 2014 (maintaining that [Vp Employee 2] did not attend).[446] [MGF Employee 1] stated that he believes his booking at [Meeting Venue A] for this date (see paragraph 4.70) was for an internal MGF senior management meeting (and not a meeting with [Vp Employee 2] and [MHL Employee 1]), and he considers it likely he met with [MHL Employee 1] after the MGF meeting.[447] MGFL was unable to produce any documents or information that

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[441] Vp has made representations that the CMA has not adduced any evidence to suggest that [Vp Employee 2] was dishonest in his mileage claims; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraphs 3.25 to 3.26, URN 5308. See also: Vp's response dated 27 September 2019 to the CMA's Statement of Objections dated, paragraphs 3.38 to 3.39, URN 4565; Vp's response dated 30 September 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraph 5.4, URN 5434; MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 15(2), URN 5310.
[442] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 84, URN 4531.
[443] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A6, URN 5274.
[444] Second witness statement of [MGF Employee 1] dated 13 August 2020, paragraphs 4 and 8, URN 5317.
[445] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 85, URN 4531.
[446] [MGF Employee 1] was initially only able to say that he met with [MHL Employee 1] for a second time in 'mid 2014' and that he 'had no recollection' who he was with at [Meeting Venue A] on 16 July 2014; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 82, URN 4531; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A16, URN 5274. However, [MGF Employee 1] was able to provide further clarificatory details in his second witness statement: second witness statement of [MGF Employee 1] dated 13 August 2020, paragraphs 12 and 14, URN 5317.
[447] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A16, URN 5274; second witness statement of [MGF Employee 1] dated 13 August 2020, paragraphs 12 to 14, URN 5317. [MGF Employee 1] stated that there was a meeting of senior management at MGF's Astley offices on the following day (17 July 2014) which he did not attend, but he would have been closely involved in discussions prior to that meeting and while he cannot recall, it is possible that his calendar entry for 16 July 2014

evidence that a meeting of MGF senior management took place on 16 July 2014.[448]

4.157 According to [MGF Employee 1], the second meeting with [MHL Employee 1] was his 'attempt to push the deal home – that is selling trench sheets and, possibly Larssen piles, given the fact that things went a little quiet following the first meeting' and 'the principal topic of conversation was the supply of trench sheets'.[449]

4.158 Following [MGF Employee 1's] and [Vp Employee 2's] representations that cross-supply was the principal purpose for their contacts and meetings with [MHL Employee 1],[450] the CMA undertook additional evidence gathering and, having assessed all of the available evidence, continues to consider that there were other, anti-competitive, reasons for the meetings to take place. While MHL experienced some intermittent issues with its Dewsbury rolling mill, where it manufactured its own trench sheets,[451] the CMA considers that [MHL Employee 1] had limited knowledge of any issues with MHL's Dewsbury rolling mill at the time and the actions taken by MHL employees in relation to this (see below paragraphs). Notably, although there is evidence of some limited contact between MHL and [Supplier A] in 2013 and 2014 (see paragraphs 4.159 to 4.160), these contacts did not involve [MHL Employee 1], and MGFL and Vp have not advanced any documentary evidence to support their submissions that the supply of trench sheets by [Supplier A] was the

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was for a pre-meeting at [Meeting Venue A] to discuss issues in advance of that meeting. See also MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 84, URN 5310.

[448] MGFL explained that [MGF Employee 1] would not expect to have had any formal agenda or minutes for a meeting of this kind, and MGFL has been unable to locate any diary entries, email correspondence or other documentation specifically relating to a pre-meeting on 16 July 2014. MGFL said the likely attendees of this meeting would have been [MGF Employee 2], [MGF Employee 4], [MGF Employee 7] and/or [MGF Employee 8]. The CMA notes that [MGF Employee 2] and [MGF Employee 4] did not mention a pre-management meeting on this date in their evidence; MGFL's response dated 18 September 2020 to the CMA's information request dated 7 September 2020, Part B, URN 5408.

[449] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 94 to 95, URN 4531.

[450] See, for example: first witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 68 to 74, URN 4531; second witness statement of [MGF Employee 1] dated 13 August 2020, paragraphs 9 to 10 and 14, URN 5317; first witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 47 to 51, URN 4539; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraphs 14, 18 to 19 and 22 to 27, URN 5316; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 180 to 186, 188 and 195 to 196, URN 4529; MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraphs 49, 65(2), 67(7) and 80, URN 5310; MGFL's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraphs 5 to 9, 11(5) and (6), 15(7) and (8) and 24 to 33, URN 5428; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraphs 6.1 to 6.8 and 6.14, URN 5308; Vp's response dated 30 September 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraphs 4.3 to 4.5 and 4.7 to 4.21, URN 5434.

[451] Mabey's Dewsbury steel rolling mill was first commissioned in 1977 and worked on a full time basis until 2010 when production became more ad hoc. Mabey has never manufactured Larssen piles. Mabey noted that the issues with the Dewsbury rolling mill coincided with the start of the MHL Product Sales division, which began to actively seek orders for trench sheets; Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraphs 1.1 to 1.2, URN 5340.

subject matter of any of the discussions between [MHL Employee 1], [Vp Employee 2] and [MGF Employee 1] (bilateral or trilateral).

4.159 MHL began to experience production issues at its Dewsbury rolling mill in 2013, and subsequently sought to establish whether supplies of trench sheets were available in the market to replace the products it previously produced in-house. [Supplier A] was one of the potential suppliers identified,[452] and there was some limited contact between [Supplier A] and MHL employees [MHL Employee 6],[453] [MHL Employee 7][454] and [MHL Employee 8][455] in September 2013, during which [Supplier A] told MHL that it had a supply arrangement in place with MGF and therefore MHL would need to place any purchases through MGF rather than directly with [Supplier A]. MHL had a direct meeting with [Supplier A] to discuss its product requirements, but ultimately decided not to purchase from [Supplier A] (via MGF) and instead established a supply relationship for trench sheets with two other suppliers.[456] Temporary repairs to the Dewsbury rolling mill were commissioned during 2014 and it continued to operate, when in working order, on a more or less full time basis until August 2015.[457]

4.160 [MHL Employee 7] emailed [Supplier A Employee] on 6 August 2014 and asked what [Supplier A's] 'current position' was in relation to MHL purchasing trench sheets and if its relationship with MGF was still the same.[458] [Supplier A Employee] forwarded [MHL Employee 7's] email to [MGF Employee 6], noting that 'for the first time in a long time' MHL had contacted him about trench sheet supply, and asked how he should handle MHL's enquiry. [MGF Employee 2] responded to [Supplier A Employee] on 11 August 2014, saying that he had tried calling him earlier and that:

'we are keen that all such enquiries are directed through MGF. Furthermore, although as direct competitors we have had our differences with Mabey Hire in the past I have good reason to believe that our relationship has become far

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[452] Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraphs 1.1 to 1.2, URN 5340.
[453] [MHL Employee 6] reported to [MHL Employee 3]; MHL's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraph 7.1, URN 5340.
[454] [MHL Employee 7] reported to [MHL Employee 5]; Mabey's response dated 6 August 2020 to the CMA's information request dated 30 July 2020, paragraph 7.3, URN 5340.
[455] [✂]; Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraph 7.3, URN 5340.
[456] Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraphs 7.2 to 7.4, URN 5340.
[457] Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraphs 2.1 to 2.4, URN 5340. Mabey consulted with [MHL Employee 6] who recalled this period to respond to the CMA's information request; Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraph 7.1, URN 5340.
[458] URN 5356; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 73, URN 4531.

more cordial of late, to the extent that I believe we could happily forge a long lasting supplier arrangement with them going forward'.[459]

4.161 [Supplier A Employee] replied to [MGF Employee 2], saying that he had received his voicemail and would 'send a reply to [MHL Employee 7] and suggest that he deals with [MHL Employee 1] directly with this so that the strategy & communications is kept entact [sic]'.[460]

4.162 [MHL Employee 1] stated that he does not recall being aware that [MHL Employee 7] had been in contact with [Supplier A Employee], and does not recall having any discussion with either [MHL Employee 7] or [MHL Employee 6] about [Supplier A].[461] The CMA considers that [Supplier A Employee's] reference to [MHL Employee 1] reflects a likely reference to [MHL Employee 1] by [MGF Employee 2] in the voicemail [MGF Employee 2] left [Supplier A Employee] on 11 August 2014. The CMA considers that [MGF Employee 2's] statement that the relationship between MGF and MHL had become 'far more cordial of late' in his email to [Supplier A Employee] earlier the same day reflects the fact that the tripartite meetings referred to in Relevant Period 2(a) had taken place. The CMA notes that despite [MGF Employee 1's] representations that he met with [MHL Employee 1] to discuss cross-supply only three weeks earlier, such a meeting or discussion is not referenced in any of the emails produced by MGFL to support this representation. The CMA considers that, had [MGF Employee 1] had meetings with [MHL Employee 1] where they discussed MGF potentially supplying MHL with trench sheets (rather than the meetings including [Vp Employee 2] and encompassing anti-competitive topics), it is probable there would be explicit references to supply by [Supplier A] in the relevant documents, including documents setting up any such purported meeting.

4.163 [MHL Employee 1] explained that 'the equipment in the [Dewsbury rolling] mill was very old and was subject to maintenance issues and minor breakdowns or delays over an extended period of time' and it was 'always the case' whilst he was at MHL that 'there were small or minor breakdowns and delays for two or three days with the mill, however I do not remember there being a really

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[459] URN 1525; see also Exhibit [✂], pages 7 to 13, URN 4533 to the first witness statement of [MGF Employee 1].
[460] URN 1525.
[461] Fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraphs 46 to 49, URN 5419. [MHL Employee 1] explained he would not have been aware that [MHL Employee 7] had contacted [Supplier A] as responsibility for enquiries of this nature would have been the responsibility of [MHL Employee 7] or [MHL Employee 6], or possibly [MHL Employee 5] and [MHL Employee 3] as their managers, and his approval or decision was not required for such contact.

big, specific issue with it'.[462] He stated that he did not discuss the Dewsbury rolling mill or any issues MHL may have had with trench sheet supply at the meetings with [MGF Employee 1] and [Vp Employee 2], and [MGF Employee 1] did not offer to sell trench sheets to MHL at any of those meetings. [MHL Employee 1] does not recall any significant issues relating to the reliability of the mill being brought to his attention prior to May 2014, which is when issues with the mill are first referenced in the MHL board reports produced by Mabey.[463]

4.164 [MHL Employee 1's] recollection is corroborated by Mabey, who explained that [MHL Employee 1] would have been generally aware of the production concerns at the Dewsbury rolling mill, but that the day to day management of any issues would have rested with [MHL Employee 6], [MHL Employee 7], [MHL Employee 8] and [MHL Employee 9].[464] [MHL Employee 6's] recollection is that any information given to [MHL Employee 1] would only have been of a general nature (ie the scope of the concerns with the Dewsbury rolling mill), rather than any specific role in negotiating any alternative trench sheet supplies. [MHL Employee 1] would not typically have been copied in on day to day email exchanges on the operation of the mill or supply chain matters, and would not have had a role in negotiating with any external parties.[465] There was also a further layer of management between the procurement team and [MHL Employee 1] ([MHL Employee 7] reported to [MHL Employee 5], and [MHL Employee 6] reported to [MHL Employee 3]), and they would not on a day to day basis normally expect to copy in their line managers on general supply chain diligence.[466]

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[462] Fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraph 23, URN 5419. See also transcript of an interview with [MHL Employee 1] held on 10 September 2020, URN 5405. [MHL Employee 1] explains that the launch of the MHL Product Sales division resulted in increased demand for items such as trench sheets. [MHL Employee 1] explained that prior to the launch of the MHL Product Sales division, it was 'never really much of an issue if there was a breakdown or a delay for a couple of weeks' because MHL 'was only replenishing our own hire fleet'; fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraph 24, URN 5419.
[463] Fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraphs 55 to 58, URN 5419.
[464] Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraph 8.2, URN 5340.
[465] Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraph 8.3, URN 5340.
[466] Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraph 9.5.3, URN 5340. Mabey conducted searches to establish whether there were any contemporaneous documents that recorded consideration of issues in relation to the Dewsbury rolling mill which would have been seen by [MHL Employee 1]. Mabey identified a number of Executive Board Reports and Weekly Sales Reports which contain brief references to issues with the Dewsbury rolling mill, the earliest of which is dated May 2014, however the reports do not suggest [MHL Employee 1] was closely involved in the resolution of any issues. Mabey also identified one email in May 2014 where [MHL Employee 1] gave financial authorisation for the purchase of raw coil for the Dewsbury rolling mill, as well as one email in September 2014 where he authorised the purchase of trench sheets from an alternative supplier; Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraph 2.1, URN 5340. Mabey searched and reviewed [MHL Employee 1's] emails and did not locate any emails that related to [Supplier A] or that indicated [MHL Employee 1] may have discussed

4.165 [MHL Employee 1's] evidence is consistent with Mabey's explanation as to his awareness of any issues, and the CMA is satisfied that, while there appear to have been some concerns with MHL's Dewsbury rolling mill, [MHL Employee 1] appears to have only been aware of such concerns at a high level and was not sighted on the specific actions taken by the individuals responsible for remedying any such issues, namely [MHL Employee 7] and [MHL Employee 6].

4.166 [MHL Employee 2's] evidence supports the CMA's conclusion that the meetings between [MHL Employee 1], [MGF Employee 1] and [Vp Employee 2] (either bilateral or tripartite) were not concerned with trench sheet supply. As set out in paragraphs 4.73 to 4.79, a meeting took place between [MHL Employee 2] and [MGF Employee 1] on 2 December 2015. According to [MGF Employee 1], he contacted [MHL Employee 2] because he wanted to follow up on the opportunity for MGF to supply MHL with trench sheets and possibly Larssen piles.[467] However, [MHL Employee 2's] recollection of his meeting with [MGF Employee 1] does not involve any discussion about MGF selling trench sheets or Larssen piles to MHL.[468] Moreover, [MHL Employee 2's] recollection of his contacts and meeting with [MGF Employee 1] is corroborated by the note he made a few days after his meeting with [MGF Employee 1].[469] Accordingly, the CMA does not find [MGF Employee 1's] representations on this point credible.

4.167 MGFL has made representations that the interview evidence of [MHL Employee 2] supports [MGF Employee 1] and [Vp Employee 2's] explanations for why they met with [MHL Employee 1].[470] In that regard, [MHL Employee 2] explained that in November 2015, MHL was experiencing issues with its Dewsbury rolling mill, and was negotiating a deal to purchase trench sheets

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the supply of trench sheets to MHL with [Vp Employee 2] or [MGF Employee 1]; Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraphs 3.1 to 3.3, URN 5348. Based on the MHL Executive Board Reports and Weekly Sales Reports and the emails in which he approved financial authorisation for purchases, [MHL Employee 1] considers that, rather than the issues in the reports being caused by a breakdown of the Dewsbury rolling mill, the issues instead likely related to issues with the supply of the raw steel coil needed by the Dewsbury rolling mill to produce trench sheets, as a direct result of the increase in demand for trench sheets generated by the new MHL Sales division; fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraphs 27 to 38, URN 5419.

[467] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 109, URN 4531.

[468] [MHL Employee 2] does not recall discussing anything else with [MGF Employee 1] during their meeting on 2 December 2015 that is not recorded in either his note of the meeting (Exhibit [✂], URN 5230), his second witness statement or in his two interviews with the CMA; second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 41, URN 5229.

[469] Exhibit [✂], URN 5230 to the second witness statement of [MHL Employee 2] dated 4 May 2020.

[470] See for example: MGFL's response dated 10 October 2019 to the CMA's Letter of Facts, paragraphs 10(3), 23(4)(b), 54 and 58(2) and (3), URN 5310; MGFL's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraph 9, URN 5428. See also the second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 19, URN 5316.

from MGF.[471] However, [MHL Employee 2] was referring to a deal being negotiated in November 2015, more than a year after [MHL Employee 1] left MHL, and almost 18 months later than [MHL Employee 1's] final tripartite meeting with [MGF Employee 1] and [Vp Employee 2] in July 2014. Accordingly, the CMA does not consider that [MHL Employee 2's] evidence provides support to MGFL's submissions, particularly in light of the fact that, as set out above, [MHL Employee 2's] note of his meeting with [MGF Employee 1] on 2 December 2015 makes no reference to any discussions about either Mabey's Dewsbury rolling mill or purchasing trench sheets or Larssen piles from MGF.

4.168 Having considered the totality of the evidence in its possession, the CMA finds that MGFL's and Vp's assertions regarding the supply of trench sheets to MHL from [Supplier A] (via MGF) are not credible. The CMA is unconvinced by [MGF Employee 1] and [Vp Employee 2's] assertions that [MGF Employee 1] was seeking to arrange a tripartite meeting so that he could pitch the sale of trench sheets to both of his competitors (Vp and MHL) simultaneously (see paragraph 4.69). While it may have been the case that MGF was seeking to develop its business by selling steel products, the CMA is not persuaded that this was the reason for seeking to arrange tripartite meetings. Indeed, it is not clear to the CMA why, in the ordinary course of business, MGF would have been motivated to discuss the sale of steel products with a senior individual from each of two of its closest competitors at the same time.

4.169 In contrast, the CMA finds [MHL Employee 1's] version of events and evidence as to the matters discussed at the meetings between competitors to be credible, taking into account that it is also supported in key respects by the documentary evidence and other witness evidence. In any event, whether or not the potential for the supply of trench sheets by [Supplier A] was discussed to any degree in the tripartite meetings, the evidence indicates that this was not the principal purpose for the meetings, or the only topic discussed, and that there were other, anti-competitive reasons for those meetings to take place.

4.170 For completeness, the CMA notes that following [MHL Employee 1's] departure from MHL [✂], he contacted [MGF Employee 1] and [Vp Employee 2] separately to enquire about potential job opportunities at MGF and Vp. [MHL Employee 1] attended two job interviews with [MGF Employee 1] in

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[471] Transcript of an interview with [MHL Employee 2] held on 28 June 2016, pages 98 to 101, URN 2808. MHL has made some minor purchases of trench sheets from [Supplier A] (via MGF) on an ad hoc basis when required since July 2015; Mabey's response dated 6 August 2020 to the CMA's information request of 30 July 2020, paragraph 7.5, URN 5340. See also MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 38, URN 4529.

September 2014[472] and April 2018,[473] and one with [Vp Employee 2] in September 2014.[474]

Contact during Relevant Period 2(b)

4.171 During Relevant Period 2(b), MGF and Vp communicated by telephone and email in relation to price reviews they were each undertaking, providing comfort to each other that they would both increase their rates at similar times.

Summary of events in relation to Relevant Period 2(b)

4.172 The following table sets out an overview of the events that support the CMA's findings in relation to Relevant Period 2(b). Details of each event, including the relevant witness evidence, are set out further in this section.[475]

Table 2.2: Summary of events in relation to Relevant Period 2(b)

17 July 2014 – start of Relevant Period 2(b)	
27 August 2014	8:30am – phone call [MGFE2] to [VPE2]
2 September 2014	3:45pm – phone call [MGFE2] to [VPE2]

[472] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 131 to 133, URN 4615. [MHL Employee 1] explained that he met with [MGF Employee 1] on 25 September 2014 at [Meeting Venue A]; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 134 to 137, URN 4615. An email from [MHL Employee 1] to [MGF Employee 1] the following day confirms this meeting; URN 1536. [MGF Employee 1] confirmed he met with [MHL Employee 1] in September 2014 as [MHL Employee 1] was searching for a job after leaving MHL; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 98 to 99, URN 4531. See also MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 220 and 229, URN 4529. Following this, [MHL Employee 1] met with [MGF Employee 4] in October 2014 to further discuss potential job opportunities at MGF, but this did not progress further. [MHL Employee 1] confirmed they did not discuss any business matters or review any business documents during the meeting between him and [MGF Employee 4]; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 138 to 139, URN 4615. See also first witness statement of [MGF Employee 4] dated 8 October 2019, paragraphs 47 to 49, URN 4537.

[473] [MHL Employee 1] met with [MGF Employee 1] for a job interview on 20 April 2018 in a private meeting room at [Meeting Venue B]; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 141 to 149, URN 4615. This meeting is confirmed by documentary evidence, see Exhibits [✂] to [✂], URN 5420 of the second witness statement of [MHL Employee 1] dated 27 March 2020. [MGF Employee 1] stated that he met with [MHL Employee 1] in around April 2018 for a job interview; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 106 to 108, URN 4531. [MGF Employee 1] stated that he was unaware at the time that [MHL Employee 1] was involved in the CMA's investigation, and the CMA's investigation was not discussed during the meeting. [MHL Employee 1] stated that they did not have any wider discussions about the business or pricing structures during the meeting, and [MGF Employee 1] did not show him any business documents. [MHL Employee 1] stated that [MGF Employee 1] asked him if he had heard any rumours or been contacted by anybody about an investigation to do with the way MGF, Vp and MHL operated, to which [MHL Employee 1] responded that he had not heard anything. [MHL Employee 1] stated that [MGF Employee 1] told him words to the effect of 'Even if someone did investigate, there isn't anything they could say because everyone knows when you're doing an engineering scheme it has to be done in a certain way and that dictates the price, nothing else', and he felt that [MGF Employee 1] was 'sort of intimating – almost trying to reinforce in my mind – that there was no collusion'. [MHL Employee 1] felt that [MGF Employee 1] probably only met with him to establish if he knew anything about the CMA's investigation; second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 141 to 149, URN 4615.

[474] See paragraph 4.149.

[475] In the table, '[VPE2]' means [Vp Employee 2]; '[MGFE1]' means [MGF Employee 1]; '[VPE3]' means [Vp Employee 3]; '[MGFE2]' means [MGF Employee 2].

8 October 2014	Email – [MGFE2] to [MGFE1] and other MGF staff attaching proposed new minimum hire rates for 2015
9 October 2014	2:30pm – email [MGFE1] to [MGFE2] 'A lot of good work here- keep me posted on meeting chats with [VPE2] and when you agree I'll meet up with [Vp Employee 1] to exchange views on the industry'
	2:41pm – email [MGFE2] to [MGFE1] 'Will do'
24 November 2014	9:19am – email [VPE2] to [VPE3] and other Vp staff announcing rate increases that would be effective from 1 January 2015
	4:35pm – email [VPE3] to [VPE2] 'if we're on our own being the maverick in the market rate and hoping the others will follow, we could do untold damage to ourselves if they don't'
	5:08pm – email [VPE2] to [VPE3] 'I'll give you a call in the morning to catch up'
	5:36pm – phone call [MGFE1] to [VPE2]
24 November 2014 – end of Relevant Period 2(b)	
26 November 2014	5:17pm – phone call [MGFE2] to [VPE2]
1 January 2015	Vp implements rate increase
6 February 2015	MGF implements rate increase

2015 price increases

4.173 In mid to late 2014, both MGF and Vp were in the process of reviewing their prices for 2015. MGF was reviewing its hire rates with a view to increasing its overall hire revenue by [✂]% to [✂]%.[476] Vp was also considering a rate increase in late 2014.[477] Vp implemented its updated rates on 1 January 2015,[478] and MGF implemented its updated rates on 6 February 2015.[479]

4.174 On 8 October 2014, during the rate review process within MGF, [MGF Employee 2] sent [MGF Employee 1] and others in MGF an email attaching proposed new minimum hire rates for 2015.[480]

4.175 On 9 October 2014, [MGF Employee 1] sent [MGF Employee 2] an email with the subject line 'Rate review' stating:

'A lot of good work here- keep me posted on meeting chats with [Vp Employee 2] and when you agree I'll meet up with [Vp Employee 1] to exchange views on the industry'.[481]

4.176 [MGF Employee 2] replied, 'Will do'.[482]

4.177 The CMA considers it is relevant context to these discussions that [MGF Employee 1's] notebook, referred to at paragraphs 4.114 to 4.115, 4.122 to

[476] URN 1526; URN 1527; URN 1528; URN 1546; URN 1547.
[477] URN 2407; URN 2408; URN 2424; URN 2425.
[478] URN 2424.
[479] Exhibit [✂] to the first witness statement of [MGF Employee 4] dated 8 October 2019, page 26, URN 4537.
[480] URN 1562; URN 1563; URN 1564; URN 1565.
[481] URN 1568.
[482] URN 1569.

4.124 and 4.127 above, contained the following handwritten note along with the comments on design charges and transport charges:[483]

'- General synchronized [✂]% increase (1st since 2008/9).
- Genuine inflationary trends at present.
- All xpt boxes'.

4.178 [MGF Employee 1] has explained that he was seeking to implement a [✂]% price increase, which was MGF's first general price increase since 2008/2009.[484]

4.179 The handwritten note in [MGF Employee 1's] notebook at paragraph 4.177 supports the CMA's finding that general price increases were in contemplation at MGF during 2014. The CMA considers that the inclusion of a note relating to price increases in the briefing note (see paragraph 4.112), the contents of which the CMA considers were discussed at the meeting between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] on 16 July 2014, is evidence that the price increases taking place in Relevant Period 2(b) were already in contemplation at MGF and were an important issue for [MGF Employee 1] around the time of the tripartite meetings between MGF, Vp and MHL during Relevant Period 2(a).

4.180 Taking into account that context, the CMA finds that [MGF Employee 1's] email with the subject 'Rate review' (see paragraph 4.175) refers to contact by MGF with [Vp Employee 2] (for 'meeting chats') and [Vp Employee 1] ('to exchange views on the industry') to discuss matters relating to the state of the market, including discussions about proposed price changes in the context of MGF and Vp both seeking to increase their prices at that time for the first time in several years.

4.181 In interview, [MGF Employee 2] said that, in the email, [MGF Employee 1] was most likely saying, 'Let me know when it's clear that [Vp Employee 2] understands that we've put our prices up'.[485] When [Vp Employee 2] was

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[483] URN 2761, page 6. [MGF Employee 1] stated that i) xpt' means 'except' and that the note therefore means 'all except boxes', and ii) 'boxes' refers to MGF's range of trench support boxes, and that he did not propose to implement price increases for these boxes; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraphs A22 and A23, URN 5274.
[484] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraphs A21 to A24, URN 5274.
[485] Transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 83 to 92, URN 3832. MGFL has made representations that [MGF Employee 2] was merely speculating in interview on the meaning of the document some time after the event, and [MGF Employee 2] subsequently stated that his comment about the email from [MGF Employee 1] made during an interview with the CMA (referred to in paragraph 4.181 above) was taken out of context by the CMA, and that he is 'not at all sure that this is in fact the correct interpretation of this email, and it is just as likely that [MGF Employee 1] was not really referring to our price increase at all in the second part of the message' as [MGF Employee 2] spoke to [Vp Employee 2] regularly as part of MGF and Vp's trading relationship; first witness statement of [MGF Employee 2] dated 8 October 2019, paragraphs 86 to 87,

asked about the email in interview, he acknowledged that, 'I did have occasional contact with [MGF Employee 2] … But I don't know whether there was anything specific to – to, to that email'.[486]

4.182 In support of its finding that MGF and Vp were in contact in relation to proposed 2015 prices increases, the CMA notes the evidence of telephone contact between MGF and Vp during the period of the rate review at MGF and Vp.[487]

4.183 In particular, the CMA notes that a 2 minute and 32 second call made by [MGF Employee 1] to [Vp Employee 2] at 5:36pm on 24 November 2014,[488] was made against a background of internal email discussions within Vp throughout that same day about how to make new hire rates 'stick'.[489] The call from [MGF Employee 1] to [Vp Employee 2] was made the same day that [Vp Employee 2] emailed internally to confirm that new rates would apply from 1 January 2015 (at 9:19am), and shortly after [Vp Employee 3] had expressed a concern, by email (at 4:35pm) to [Vp Employee 2], that, 'if we're on our own being the maverick in the market rate and hoping the others will follow, we could do untold damage to ourselves if they don't', to which [Vp Employee 2] replied (at 5:08pm) that he would call [Vp Employee 3] in the morning to 'catch up'.[490]

4.184 MGFL's witnesses ([MGF Employee 3], [MGF Employee 1] and [MGF Employee 2]) have suggested alternative reasons for the telephone calls between Vp and MGF, and consider that the CMA has misinterpreted the internal discussions within MGF and Vp. [Vp Employee 2] denies that [MGF Employee 1] contacted him in relation to price increases[491] and stated that he liaised directly with [MGF Employee 2] in 2014 in relation to cross-supply and cross-hire for trench sheets and [Specific Product A]. [Vp Employee 2] could not recall in interview what was discussed on the telephone calls,[492] but now considers the telephone call on 24 November 2014 was likely to have been a

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URN 4541. The CMA does not agree. The CMA has considered this interview evidence in context, as well as considering all the available evidence in the round in reaching a finding that infringing conduct took place.

[486] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 338 to 342, URN 3833.

[487] [MGF Employee 2] made telephone calls to [Vp Employee 2] on the following dates: 27 August 2014 at 8:30am (duration 11 minutes 52 seconds); 2 September 2014 at 3:45pm (duration 17 minutes 28 seconds); 26 November 2014 at 5:17pm (duration 6 minutes 9 seconds); see URN 3706, Table A, rows A8, A9 and A10. [MGF Employee 1] made a telephone call to [Vp Employee 2] on 24 November 2014 (duration 2 minutes 32 seconds), see paragraph 4.183.

[488] URN 3706, Table B, row B18.

[489] URN 2434.

[490] URN 2424, URN 2425; URN 2434 (including [Vp Employee 2's] reply to [Vp Employee 3] at 5:08pm: 'I'll give you a call in the morning to catch up. Bit stuck in HO stuff last few days').

[491] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 64, URN 4539.

[492] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 338 to 340 and 352 to 355, URN 3833.

call in which [MGF Employee 1] apologised for issues with [Specific Product A] that MGF had sold to Vp.[493] [MGF Employee 2] also considers it unlikely that the telephone calls between him and [Vp Employee 2] (referred to at paragraph 4.182) had anything to do with the fact that MGF were planning a price rise, and that it is more likely that they were about trading matters, possibly in relation to [Specific Product A].[494] Based on the wider evidential context of the rate reviews that were ongoing, the emails between [MGF Employee 1] and [MGF Employee 2], and the emails between [Vp Employee 3] and [Vp Employee 2] expressing concern about making rates 'stick', the CMA is not persuaded that the subject of the discussions only concerned the trading relationship between MGF and Vp, and considers it is more likely that the discussions referred to with Vp related, at least in part, to the proposed rate increases.

4.185 [MGF Employee 1] stated that 'It is difficult to clearly remember what the second part of that email refers to' (ie his statement 'keep me posted on meeting chats with [Vp Employee 2] and when you agree I'll meet up with [Vp Employee 1] to exchange views on the industry'), but noted MGF and Vp were 'friendly rivals' who had 'regular discussions about the possible acquisition of MGF by Vp and about the industry more generally'. [MGF Employee 1] also explained there was an issue with [Specific Product A] Vp had purchased from MGF at the time, and 'although I cannot clearly recall it is likely that the "meeting chats" related to that'. He further stated 'I do not recall ever discussing hire rates with [Vp Employee 2] (or [Vp Employee 1] of Vp) and do not believe that I would have done so, although there would be a slim chance something might have been discussed in the context of cross-hire, but only in general terms as [MGF Employee 2] would have been on top of that detail, not me'.[495] [MGF Employee 1] also explained that he 'would also have been interested to see if [Vp Employee 1] had heard anything by way of industry gossip' concerning [MHL Employee 1's] departure from MHL, and he believes 'those would have been the matters I was interested in discussing with [Vp

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[493] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 42 to 43 and 65 to 67, URN 4539, referring to emails between [Vp Employee 9] and [MGF Employee 6], copying in [Vp Employee 2] regarding a Pipe Lifter demonstration provided by MGF on 12 November 2014, URN 1599 and 1600. See also: MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 239, URN 4529; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraph 6.16 and 7.34 to 7.36, URN 5308; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.72 and 3.80, URN 4565; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 121, URN 4531.
[494] First witness statement of [MGF Employee 2] dated 8 October 2019, paragraphs 89 to 95, URN 4541. See also: MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 239, 250, 253 and 257, URN 4529; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 239, 245(7), 253, 257, URN 4529; transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 84 to 92, URN 3832.
[495] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 121, URN 4531.

Employee 1] at the time and not any thought of trying to co-ordinate our respective (and extremely complicated) hire rates'.[496]

4.186 Taking into account the plain reading of the emails between [MGF Employee 2] and [MGF Employee 1] with the subject 'Rate review' (see paragraphs 4.175 to 4.176), along with the context that both MGF and Vp were reviewing their prices at around this time and seeking to increase them for the first time for several years, the CMA does not find [MGF Employee 1's] explanations convincing. Moreover, [MGF Employee 1] has explained that he regarded the phrase 'exchange views on the industry' to be a shorthand expression for discussions of high-level strategic issues in relation to the state of the market that he wanted to have with [Vp Employee 1] and others.[497] While recognising that [MGF Employee 1] also stated that the possible sale of MGF to Vp is an example of a 'strategic issue', the CMA considers that this evidence supports the CMA's findings that [MGF Employee 1's] email refers to contact with Vp to discuss strategic issues relating to the state of the market, rather than, for example, any issues with [Specific Product A]. The CMA therefore considers that the statements 'keep me posted on meeting chats' and 'exchanging views on the industry' are more likely to have referred to discussions about the proposed rate review, and also demonstrate the nature of the discussions [MGF Employee 1] had with MGF's competitors.

Representations on the 2015 price increases

4.187 Vp has made representations that the issues raised by [Vp Employee 3] to [Vp Employee 2] are legitimate concerns and form part of general business discussions.[498] While the concern raised by [Vp Employee 3] (ie whether implementing new rates could be detrimental to Vp if its competitors did not take a similar approach) may have been a legitimate one, the CMA does not accept that this means the subsequent contact between [Vp Employee 2] and [MGF Employee 1] set out at paragraph 4.183 was legitimate, taking into account the plain reading and wider context of the emails between [Vp Employee 3] and [Vp Employee 2]. Such contact reduced strategic uncertainty and allowed [Vp Employee 2] to gain comfort in relation to MGF's future pricing intentions.

4.188 MGFL notes that Vp had decided to increase rates by 24 November 2014 (ie before the call between [MGF Employee 1] and [Vp Employee 2] later the

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[496] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 122, URN 4531.
[497] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A26, URN 5274.
[498] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.80, URN 4565.

same day) and to implement the change from 1 January 2015, and has made representations that this is inconsistent with the CMA's case.[499] The CMA does not agree, noting that the fact that Vp had announced internally its intention to increase rates does not mean that the phone call later the same day between [MGF Employee 1] and [Vp Employee 2] would not have encompassed discussion about rate reviews, taking into account the plain reading and wider context of the emails between [Vp Employee 3] and [Vp Employee 2], along with [MGF Employee 1's] email to [MGF Employee 2] on 9 October 2014 referencing [Vp Employee 2] and [Vp Employee 1]; indeed, the fact that [Vp Employee 2] had sent an email to staff confirming Vp would be increasing its rates earlier the same day suggests that this is likely to have been mentioned during that conversation. In addition, while Vp may have internally decided to increase its rates by 24 November 2014, it did not implement such increases until 1 January 2015, and it was therefore open to Vp to reverse its decision if it did not obtain comfort as to MGF's future pricing intentions, namely that MGF would also be increasing its rates in early 2015.

4.189 Finally, MGFL has made representations that any attempt to coordinate price increases would have required lengthy and involved discussions by way of telephone calls or meetings, and numerous documentary records to have had any meaningful effect, and there is no evidence to support such activities having taken place.[500] The CMA disagrees. The CMA has not found, and does not allege, that MGF and Vp specifically engaged in price fixing; rather, the CMA has found that the sharing of information in relation to rate increases reduced strategic uncertainty between MGF and Vp as it enabled them to check – and take comfort from – the likely future conduct of their competitors.

E. Contact between MGF and Vp during Relevant Period 3

4.190 The CMA finds that an arrangement involving MGF and Vp with the same objective as the arrangements during Relevant Periods 1 and 2 was also in operation during Relevant Period 3, that is, from 12 November 2015 to 28 November 2016.

4.191 As in Relevant Periods 1 and 2, the arrangement during Relevant Period 3 involved the coordination of commercial behaviour, including in relation to pricing strategies, through the exchange of confidential competitively sensitive

[499] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 249(2), URN 4529.
[500] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 243 and 255(c), URN 4529.

pricing and strategic information, which reduced uncertainty about future conduct.

4.192 Evidence of the arrangement and contact between MGF and Vp during Relevant Period 3 is set out below. In particular, MGF and Vp:

(a) coordinated their strategy as regards certain hire and rebate rates in relation to a proposed national framework/preferred supplier arrangement with Balfour Beatty (see paragraphs 4.196 to 4.223); and

(b) discussed potential levels of design charges (see paragraphs 4.224 to 4.233).

4.193 MGF also attempted to organise tripartite meetings between MGF, Vp and MHL during Relevant Period 3.

Balfour Beatty

4.194 In March 2015, Balfour Beatty launched a tender exercise seeking to appoint two 'co-exclusive' suppliers of shoring equipment (meaning that, unless specific exemptions applied, Balfour Beatty would source its shoring requirements only from either of the appointed co-exclusive suppliers).[501] While other suppliers submitted bids, Balfour Beatty ultimately awarded the framework agreements to MGF and Vp on a co-exclusive basis, and the contracts for the framework agreements were finalised in August 2016.[502]

Summary of events in relation to Balfour Beatty in Relevant Period 3

4.195 The following table sets out an overview of the events that support the CMA's findings in relation to Balfour Beatty in Relevant Period 3. Details of each event, including the relevant witness evidence, are set out further in this Section.[503]

Table 3.1: Summary of events in relation to Balfour Beatty in Relevant Period 3

Prior to Relevant Period 3	
End 2014/early 2015	MGF and Vp undertake rate reviews and increase hire rates (see Relevant Period 2(b))

[501] Or in some cases from both. There were some specific exemptions whereby the equipment might not be sourced from either of the successful co-exclusive suppliers; Balfour Beatty's response dated 10 March 2020 to the CMA's information request dated 18 February 2020, paragraphs 4, 4(a) and 5(b), URN 4577. This is explained further in Balfour Beatty's response dated 13 March 2020 to the CMA's information request dated 18 February 2020, paragraph 2(a), URN 4595.
[502] When MGF and Vp sent signed framework agreements to Balfour Beatty: Balfour Beatty's response dated 10 March 2020 to the CMA's information request dated 18 February 2020, paragraphs 4, 5(a), 5(b), 5(c), URN 4577.
[503] In this table, '[VPE2]' means [Vp Employee 2]; '[MGFE1]' means [MGF Employee 1]; '[MGFE4]' means [MGF Employee 4]; '[MGFE7]' means [MGF Employee 7]; '[VPE1]' means [Vp Employee 1]; 'BB' means Balfour Beatty.

16 December 2014	Vp submits initial trading proposal to BB (prior to formal launch of tender exercise) at increased 2015 hire rates (as opposed to the lower rates charged in the previous year)
March 2015	BB launches formal tender exercise
March/April 2015	MGF submits initial proposal to BB at increased 2015 hire rates (as opposed to the lower rates charged in the previous year)
21 September 2015	MGF and Vp resubmit hire rate proposals to BB, costing specific designs at increased 2015 hire rates
11 November 2015	BB asks MGF to provide a comparison of its increased 2015 hire rates against the lower rates charged in the previous year
	BB asks Vp to provide a comparison of its increased 2015 hire rates against the lower rates charged in the previous year
12 November 2015 – start of Relevant Period 3	
12 November 2015	11:39am – text [VPE2] to [MGFE4] 'BB, we're in at 2015 rates so perhaps we both move back to previous year's to keep Mabey away'
	11:52am – text [MGFE4] to [VPE2] 'Yes, I think that's the most sensible course of action given their current behaviour. Will do that today. Thanks'
13 November 2015	MGF and Vp submit updated proposals to BB at the lower hire rates charged in the previous year (as opposed to the earlier proposal of increased 2015 rates)
[✂]	[✂]
25 November 2015	1:49pm – email [MGFE7] to [MGFE4] saying Vp's proposed rebate rates to BB are more generous than MGF's
26 November 2015	11:56am – email [MGFE4] to [MGFE2] and [MGFE1] forwarding [MGFE7's] email, saying 'Could do with some info on this one!'
	11:57am – phone call [MGFE4] to [MGFE2]
	12:35pm – phone call [MGFE2] to [MGFE4]
	12:42pm – phone call [MGFE2] to [VPE2]
	2:02pm – email [VPE2] to BB providing Vp's proposal
	2:14pm – phone call [MGFE2] to [MGFE1]
	2:31pm – phone call [MGFE2] to [MGFE7]
	3:03pm – phone call [VPE2] to [MGFE2]
	3:28pm – text [MGFE4] to [MGFE1] '[MGF Employee 2] has already done the deed (I asked him) Vp doing [✂] max. The higher figure are Mabey's probably'
4 December 2015	MGF submits revised rebate rates to BB
17 December 2015	7:41am – phone call [MGFE2] to [VPE1]
	8:04am – text [MGFE2] to [MGFE1] 'We need to be at a flat [✂]% for balfour beatty .... contact made, meeting in January'
August 2016	MGF and Vp framework agreements with BB finalised
28 November 2016 – end of Relevant Period 3	

Hire rates

4.196 As set out in paragraph 4.173, both MGF and Vp undertook price reviews in mid to late 2014 which led to increased rates in early 2015. Both MGF and Vp's initial tender proposals to Balfour Beatty were made at these increased 2015 prices.[504] As part of the tender exercise, [Balfour Beatty Employee]

[504] Vp submitted its initial trading proposal to Balfour Beatty on 16 December 2014, submitting rates at its increased 2015 rates; email from [Vp Employee 2] to [Balfour Beatty Employee] and copied to [Vp Employee 1], URN 4554 and attached proposal document, URN 4613. See also first witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 70, URN 4539. Balfour Beatty was unable to identify any records indicating an invitation to tender was issued to Vp prior to Vp submitting its proposal on 16 December 2014; Balfour Beatty's response dated 13 March 2020 to the CMA's information request dated 18 February 2020, paragraph 4(c)(i), URN 4595. MGF submitted its initial proposal to Balfour Beatty in March/April 2015. This proposal document has not been provided to the CMA by MGF or Balfour Beatty, but [MGF Employee 4] confirmed that MGF's initial

requested that both MGF and Vp submit designs and hire rates based on existing Balfour Beatty projects to assist Balfour Beatty in comparing prices between potential suppliers.[505] On 21 September 2015, both MGF[506] and Vp[507] submitted costings for this specific design project using their respective increased 2015 prices.

4.197 On 11 November 2015, [Balfour Beatty Employee] sent an email to [Vp Employee 2] in response to Vp's submission of 21 September 2015 asking him to, 'cost these designs (and the Mabey ones) using your previous pricing – so that I can see the difference in total costs'.[508] At the same time on 11 November 2015, [Balfour Beatty Employee] also sent a request in similar terms to [MGF Employee 7].[509]

4.198 On 12 November 2015, [Vp Employee 2] sent a text message to [MGF Employee 4] reading: 'BB, we're in at 2015 rates so perhaps we both move back to previous year's to keep Mabey away'.[510] [MGF Employee 4] responded by text: 'Yes, I think that's the most sensible course of action given their current behaviour. Will do that today. Thanks'.[511] This exchange followed a telephone call between [MGF Employee 4] and [Vp Employee 2] on 11 or 12 November 2015 in which they had discussed the Balfour Beatty tender.[512]

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proposal to Balfour Beatty was made using its increased 2015 rates which had been introduced on 6 February 2015; first witness statement of [MGF Employee 4] dated 8 October 2019, paragraphs 30 and 36 and Exhibit [✂] (page 26), URN 4537.

[505] Emails between 27 August 2015 and 11 September 2015 show [Balfour Beatty Employee] liaising with [Vp Employee 2] regarding details of existing Balfour Beatty/Vp projects for provision to MGF and MHL to enable the comparison exercise (URN 2540 and attachments URN 2541 and URN 2542); email from [Balfour Beatty Employee] to [MGF Employee 7] dated 18 August 2015 (Exhibit [✂] to the first witness statement of [MGF Employee 4] dated 8 October 2019, page 31, URN 4537). See also first witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 71 to 72, URN 4539.

[506] Email from [MGF Employee 7] to [Balfour Beatty Employee] dated 21 September 2015; Exhibit [✂] to the first witness statement of [MGF Employee 4] dated 8 October 2019, page 36, URN 4537. During 2015 MGF charged Balfour Beatty what it referred to as '[✂]', which had remained unchanged since 2009; first witness statement of [MGF Employee 4] dated 8 October 2019, paragraphs 30, 31, 36 and Exhibit [✂] (pages 36, 64 and 76), URN 4537. On 21 September 2015, MGF provided costings for the designs requested by Balfour Beatty at the increased 2015 rates (shown in the column 'BB RFP Apr 15'), and a comparison of the proposed increased 2015 rates against MGF's then current pricing (shown in the column '[✂]') as requested by Balfour Beatty; first witness statement of [MGF Employee 4] dated 8 October 2019, paragraph 36 and Exhibit [✂] (page 36 ([Balfour Beatty Employee's] email to [MGF Employee 7] on 14 September 2015 and [MGF Employee 7's] reply on 21 September 2015), page 64 (costings for Calverton Road site) and page 76 (costings for Tangmere Drive site), URN 4537.

[507] Email from [Vp Employee 2] to [Balfour Beatty Employee] dated 21 September 2015, URN 3739 and attachments URN 3740 and URN 3741. See also second witness statement of [MGF Employee 3] dated 17 August 2020, paragraphs 84 and 86, URN 5316.

[508] URN 3266. See also first witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 71 to 73, URN 4539.

[509] Exhibit [✂] to the first witness statement of [MGF Employee 4] dated 8 October 2019, page 77, URN 4537.

[510] URN 3703, row 13.

[511] URN 3703, row 14; see also transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 88 to 93, URN 3833.

[512] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 77, URN 4539; first witness statement of [MGF Employee 4] dated 8 October 2019, paragraph 40, URN 4537.

4.199 On 13 November 2015, both MGF and Vp submitted their costings to Balfour Beatty.[513] Vp and MGF's submissions to Balfour Beatty on 13 November 2015 were consistent with the approach discussed by [Vp Employee 2] and [MGF Employee 4] in their exchange of text messages the day before (namely, to move back to the previous year's rates which were lower than the 2015 rates). Specifically:

(a) emails from [Vp Employee 2] to [Balfour Beatty Employee] highlight that the 'Revised Rates' in Vp's submissions use 'rates before [Vp] reviewed [its] overall hire rates as a business in January';[514] and

(b) an email from [MGF Employee 7] to [Balfour Beatty Employee] states that MGF had 'chosen not to increase the rates from 2009'.[515]

4.200 The text exchange between [MGF Employee 4] and [Vp Employee 2] concerning the rates which MGF and Vp were planning to offer therefore took place while the Balfour Beatty tender was ongoing. The CMA finds that, in doing so, [MGF Employee 4] and [Vp Employee 2] coordinated MGF and Vp's strategies as regards certain Balfour Beatty hire rates, which reduced strategic uncertainty.

Representations on the contacts in relation to hire rates

4.201 [Vp Employee 2] explained that during a conversation he had with [MGF Employee 4] on 11 or 12 November 2015, [MGF Employee 4] 'mentioned the Balfour Beatty framework as they were under the misguided impression that they may be losing it', and he felt he 'needed to do the right thing by both Vp and MGF' by sending his text message to [MGF Employee 4]. He went on to say that if he had not already accepted the role as MGF's [✂], he 'would never have told [MGF Employee 4] or anyone at MGF what Groundforce was

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[513] For MGF: see email from [MGF Employee 7] to [Balfour Beatty Employee] at 3:53pm (URN 4588) and attachment providing costings (URN 4589). At 4:14pm, [MGF Employee 7] emailed [MGF Employee 4] to confirm that revised rates had been submitted to Balfour Beatty (URN 3273) and that the previously submitted 2015 rates would, in [MGF Employee 7's] view, have made MGF the most expensive bid if these had not been changed; first witness statement of [MGF Employee 4] dated 8 October 2019, paragraphs 38 and 39, URN 4537. For Vp: see emails from [Vp Employee 2] to [Balfour Beatty Employee] at 10:13am (URN 3267, including attachments URN 3743 and URN 3744 providing costings) and at 10:19am (URN 3268, including attachments URN 3269, URN 3270, URN 3271, and URN 3272 providing costings).
[514] URN 3267; URN 3268. See also second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 88, URN 5316.
[515] URN 4588; URN 4589. On 13 November 2015, [MGF Employee 7] provided [Balfour Beatty Employee] with a revised set of costings for the Calverton Road and Tangmere Drive sites (URN 4589) where MGF's proposed hire rates to Balfour Beatty (shown in column 'BB RFP Rates April 15') had reduced from those submitted on 21 September 2015 (see pages 64 and 76 of URN 4537). MGF's proposed hire rates to Balfour Beatty were now indicated to be at the same level as MGF's 2009 rates (which were largely the same as MGF's [✂] rates then in use for Balfour Beatty).

considering doing on a live tender opportunity'.[516] He added that 'This placed me in an awkward and unique (albeit short term) position in as much as I was caught between the interests of both companies'.[517]

4.202 [MGF Employee 4] confirmed that he spoke with [Vp Employee 2] and asked him 'where Vp were up to with the BB tender', and acknowledged that, had [Vp Employee 2] not been joining MGF, he 'certainly would not have discussed the BB tender with him or anyone else at Vp' as 'it was in these circumstances and not otherwise that I thought it was OK to ask [Vp Employee 2] where Vp were up to with the BB tender'. According to [MGF Employee 4], while [Vp Employee 2's] text message 'offered a glimmer of comfort', MGF would have reduced the rates it offered to Balfour Beatty regardless as its actions were driven by [Balfour Beatty Employee] asking MGF to reduce its rates.[518]

4.203 MGFL has made representations that the contact between [MGF Employee 4] and [Vp Employee 2] in relation to the Balfour Beatty hire rates was a 'one-off exchange arising out of the particular circumstances prevailing at that time'.[519] Vp has also made representations that this was a 'single, one-off exchange' where the contacts between [Vp Employee 2] and [MGF Employee 4] indicate a breach of [Vp Employee 2's] duties of confidence and employment to Vp, rather than Vp's participation in the arrangement.[520] Whether or not an employee from one undertaking may be joining another, the CMA does not consider that this justifies exchanges of confidential information between competing businesses. Furthermore, the CMA does not accept that this interaction was an isolated example of anti-competitive conduct, as evidenced by the other examples of anti-competitive conduct between MGF and Vp set out in this Decision, which together form part of the CMA's finding of a wider overall infringement.

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[516] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 77 to 78, URN 4539. [Vp Employee 2] stated that he formally resigned from Vp on [✂], remained in post for one week afterwards and was then put on [✂] gardening leave by Vp before officially joining MGF [✂]; first witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 83, URN 4539; [MGF Employee 2] explains that he met with [Vp Employee 2] on 17 June 2015 and proposed that he join MGF [✂]; first witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 103, URN 4541. [MGF Employee 4] stated that he met with [Vp Employee 2] on 22 July 2015 following which there was a sequence of meetings and conversations until October 2015, with the formal contract sent to [Vp Employee 2] on 13 November 2015; first witness statement of [MGF Employee 4] dated 8 October 2019, paragraphs 33 to 34, URN 4537.
[517] Second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 94, URN 5316.
[518] First witness statement of [MGF Employee 4] dated 8 October 2019, paragraphs 35 to 36 and 40 to 42, URN 4537.
[519] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 264, URN 4529; see also MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 23(4)(c), URN 5310.
[520] Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraph 8.2, URN 5308.

4.204 Vp has made representations that it prepared its submission for Balfour Beatty on 11 November 2015 and therefore had made its decision on the hire rates it would offer Balfour Beatty prior to the contact between [Vp Employee 2] and [MGF Employee 4] on 12 November 2015, and this contact therefore had no impact on Vp's submission.[521] However, Vp did not submit its proposal to Balfour Beatty until 13 November 2015, which was after the contact between [Vp Employee 2] and [MGF Employee 4] on 12 November 2015 where they communicated about moving back to the lower hire rates charged in previous years. The CMA considers that this exchange of sensitive commercial information reduced commercial uncertainty between MGF and Vp as it enabled them to check – and take comfort from – the likely future conduct of each other as competitors.

Rebate rates

4.205 As part of the tender exercise, MGF and Vp also submitted rebate rate proposals to Balfour Beatty.

4.206 On 25 November 2015, [MGF Employee 7] sent an email to [MGF Employee 4] (and others within MGF) regarding potential rebate rates for MGF's proposal to Balfour Beatty. [MGF Employee 7's] email explained that he had received a call from [Balfour Beatty Employee] who had explained Balfour Beatty was looking to appoint MGF and Vp as 'co-executive suppliers', but there was an issue with MGF's proposed rebate structure as Vp's was more generous and [Balfour Beatty Employee] wanted 'no commercial advantage' between MGF and Vp.[522]

4.207 [MGF Employee 7's] email set out both MGF and Vp's proposed rebate structures, including a maximum rebate of [✂]% for spend over £[✂] from Vp compared to a maximum rebate of [✂]% for spend over £[✂] from MGF. The email goes on to state:

'[[Balfour Beatty Employee]] has told me he is waiting to speak to GF [Vp] to confirm their offer and get clarity on a few points and will call me on Friday evening [27 November 2015], [✂].

…

Not going to committee [sic] to anything on Friday but would be good to get where we are sat on this figure of [✂]%.

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[521] Vp's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraphs 6.4 to 6.7, URN 5434.
[522] URN 3275.

Comments welcome.'

4.208 On 26 November 2015 at 11:56am, [MGF Employee 4] forwarded [MGF Employee 7's] email to [MGF Employee 1] and [MGF Employee 2], stating: 'Could do with some info on this one!'.[523] Following this:

(a) at 11:57am, [MGF Employee 4] called [MGF Employee 2]. Billing data indicates that the call lasted 28 seconds;[524]

(b) at 12:35pm, [MGF Employee 2] called [MGF Employee 4]. Billing data indicates that the call lasted six minutes and six seconds;[525]

(c) at 12:42pm, [MGF Employee 2] called [Vp Employee 2]. Billing data indicates that the call lasted 26 seconds;[526]

(d) at 2:02pm, [Vp Employee 2] emailed Vp's proposal to Balfour Beatty;[527]

(e) at 2:14pm, [MGF Employee 2] called [MGF Employee 1]. Billing data indicates that the call lasted 22 seconds;[528]

(f) at 2:31pm, [MGF Employee 2] called [MGF Employee 7]. Billing data indicates that the call lasted three minutes and two seconds;[529]

(g) at 3:03pm, [Vp Employee 2] called [MGF Employee 2]. Billing data indicates that the call lasted eight minutes and 56 seconds;[530]

(h) at 3:28pm, [MGF Employee 1] replied to [MGF Employee 4's] 11:56am email, asking [MGF Employee 2] to find out whether its contents were correct because in his view, 'on [✂] GF would be giving [✂] more discount' (meaning, that on a spend of [✂], Balfour Beatty would receive a more generous rebate rate from Vp than from MGF under the proposals set out in [MGF Employee 7's] email);[531] and

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[523] URN 3278.
[524] URN 3706, Table C, row C1.
[525] URN 3706, Table A, row A11.
[526] URN 3706, Table A, row A12.
[527] URN 3280 and URN 3281.
[528] URN 3706, Table A, row A12A.
[529] URN 3706, Table A row A12B.
[530] URN 3706, Table D, row D1. Given the passage of time, in interview, [MGF Employee 2] was unable to confirm with certainty what was discussed during these calls, but said that he would assume that they related to [MGF Employee 4's] request for more information; transcript of an interview with [MGF Employee 2] held on 16 January 2019, page 112, URN 3832.
[531] URN 3289.

(i) at 3:35pm, [MGF Employee 4] sent an iMessage to [MGF Employee 1] stating: '[MGF Employee 2] has already done the deed (I asked him) Vp doing [✂] max. The higher figure are Mabey's probably'.[532]

4.209 On 4 December 2015, [MGF Employee 7] submitted MGF's revised rebate proposal to Balfour Beatty, which offered a more generous rebate than MGF's initial proposal.[533]

4.210 Given the context and timing of the above telephone calls, email and messages, the CMA is of the view that [MGF Employee 2] and [Vp Employee 2] communicated in relation to Vp's proposed rebate proposal for Balfour Beatty. The CMA considers that [MGF Employee 4's] iMessage reflects that [MGF Employee 2] obtained details of Vp's '[✂]% max' rebate rate during his telephone calls with [Vp Employee 2]. The CMA considers this contact enabled MGF to check – and take comfort from – the likely future conduct of Vp, in this instance, in relation to rebate rates. [MGF Employee 4] has confirmed that he instructed [MGF Employee 2] to obtain clarification from [Vp Employee 2] as to whether Balfour Beatty was being accurate in representing Vp's rebate rate proposal.[534]

4.211 [MGF Employee 2] stated that he was 'given an instruction from [MGF Employee 4] to ask [Vp Employee 2] for his views and I felt obliged to get on with it' and had been 'asked to try and determine if [Balfour Beatty Employee] was telling us the truth or playing us off against each other'. He stated that 'nobody wanted to "lean on" [Vp Employee 2], but with the desire to keep Balfour Beatty's work and the fact that [Vp Employee 2] would soon benefit as MGF's [✂], it did not seem such a silly idea at the time'.[535] In interview, [MGF Employee 2] explained:

'I think what I've said to [[Vp Employee 2]] is, after being asked to, obviously, as you can see through all this lot, I've probably said something along the lines of, "What's the maximum discount VP'll give? Just tell me what the rebate is maximum that you'll give". And I'm guessing he said to me, "We'd never doing anything over [✂]%". And I've relayed that back'.[536]

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[532] URN 3707, row 10. See also transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 114 to 115, URN 3832.
[533] Exhibit [✂] to the first witness statement of [MGF Employee 2] dated 8 October 2019, URN 4541; URN 3373.
[534] First witness statement of [MGF Employee 4] dated 8 October 2019, paragraphs 42 to 44 and 55, URN 4537.
[535] First witness statement of [MGF Employee 2] dated 8 October 2019, paragraphs 107 to 109, 111, 113, URN 4541; see also transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 107 to 108, URN 3832.
[536] Transcript of an interview with [MGF Employee 2] held on 16 January 2019, page 115, URN 3832.

4.212 In reference to [MGF Employee 2's] evidence, [Vp Employee 2] stated that: 'Having read [MGF Employee 2's] witness statement on the point, and on the basis that I cannot now recall matters with any specificity, I believe that [MGF Employee 2] probably did play it the way he has outlined, in general terms to which I probably supplied an off the cuff general response without giving the matter a great deal of thought'.[537]

4.213 Vp has made representations that [Vp Employee 2's] impending move to MGF is a plausible alternative explanation for the telephone calls between him and [MGF Employee 2] on 26 November 2015.[538] In light of the evidence set out above and in particular [MGF Employee 2's] and [Vp Employee 2's] evidence as to the content of their discussions, the CMA does not consider this explanation credible.

4.214 MGFL has made representations that the information [Vp Employee 2] provided to [MGF Employee 2] in relation to Vp's rebate rate was actually incorrect, and therefore the information from Vp was inaccurate and of no commercial effect.[539] [MGF Employee 2] and MGF did not know at the time that the information given by [Vp Employee 2] was incorrect, and in any event, the CMA does not consider this negates the anti-competitive nature and object of this contact.

4.215 Following [Vp Employee 2's] resignation from Vp in [✂], internal Vp documents and email correspondence between [Vp Employee 1] and Balfour Beatty indicate that [Vp Employee 1] liaised with Balfour Beatty on behalf of Vp, with [Vp Employee 2] providing [Vp Employee 1] with an email briefing on Balfour Beatty shortly after his resignation, and [Vp Employee 1] emailing [Balfour Beatty Employee] on 14 December 2015 with rates in an excel format and an update on progress: 'Still working on quantities. That will take a little longer'.[540]

4.216 On 17 December 2015 at 7:41am, [MGF Employee 2] called [Vp Employee 1]. Billing data indicates that the call lasted 21 minutes and 55 seconds.[541] At 8:04am (shortly after this call concluded), [MGF Employee 2] sent a text

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[537] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 81, URN 4539.
[538] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, Table 1 (page 38), URN 4565.
[539] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraphs 42 and 44, URN 5310; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 265, URN 4529.
[540] Email from [Vp Employee 2] to [Vp Employee 1] dated 25 November 2015, providing an update on key customers including Balfour Beatty, following [Vp Employee 2's] resignation on [✂], URN 3277; Email from [Vp Employee 1] to [Balfour Beatty Employee] dated 14 December 2015, URN 3294.
[541] URN 3706, Table A, row A13.

message to [MGF Employee 1] regarding Balfour Beatty, stating: 'We need to be at a flat [✂]% for balfour beatty .... contact made, meeting in January'.[542]

4.217 The CMA notes that, in fact, the text message accurately reflects Vp's proposed [✂]% rebate for Balfour Beatty at this time.[543] Thus, the CMA is of the view that [MGF Employee 2] and [Vp Employee 1] discussed MGF's and Vp's rebate proposals for Balfour Beatty during their telephone call on 17 December 2015, and [MGF Employee 2] then communicated that to [MGF Employee 1].

4.218 In interview, [MGF Employee 2] explained that in his text message, he was advising [MGF Employee 1] on an appropriate level of rebate for Balfour Beatty, and that rather than offering a tiered rebate system, MGF should instead offer a [✂]% flat rebate:

'I think that was my advice to [MGF Employee 1] as to what I would do for Balfour's on that rebate as in … sod all this tiered-rate stuff. If you're unsure as to what to do, just offer them [✂]% flat across the, the lot, and hopefully you'll nail it … I think I'd been on the phone to [Vp Employee 1] while [MGF Employee 1] had rung me. Left me a voicemail asking me a, a myriad of things, as he quite often will do first thing in the morning. And instead of having yet another phone call, I'm trying to get out, out the door and get to work – I've just sent him a text message saying, "For Balfour's we need [✂]%, and we have made contact with [Vp Employee 1]. I'm meeting him in January"'.[544]

4.219 [MGF Employee 2] stated that his text message was a two-part message, where he was advising [MGF Employee 1] that MGF should accrue internally for the Balfour Beatty rebate at a flat [✂]%, and separately, that he had contacted [Vp Employee 1] in an effort to 'mend fences' and preserve MGF and Vp's trading relationship following [Vp Employee 2's] move to MGF.[545] [MGF Employee 2] stated that he contacted [Vp Employee 1] at [MGF

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[542] URN 3705, row 3. Contents of the text message are as in the original.
[543] URN 3277. On 26 November 2015, [Vp Employee 2] sent an email to [Balfour Beatty Employee], attaching a spreadsheet containing Vp's current and proposed hire rates, and noting that 'the rebate will be accrued in addition' URN 3280; URN 3281. See also transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 104 to 105 and 108 to 111, URN 3833.
[544] Transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 120 to 121, URN 3832.
[545] First witness statement of [MGF Employee 2] dated 8 October 2019, paragraphs 117 and 119, URN 4541; second witness statement of [MGF Employee 2] dated 17 August 2020, paragraph 42, URN 5319. Vp notes regarding this contact that '[Vp Employee 1] believes that he wanted to discuss MGF's recruitment of [Vp Employee 2], which had only recently happened, and also to explore the possibility of [MGF Employee 2] joining Vp'; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, Table 1 (page 39), URN 4565.

Employee 1's] request, and does not believe he discussed the level of rebate with [Vp Employee 1] during their telephone call.[546]

4.220 MGFL has made representations that the purpose of the telephone call between [MGF Employee 2] and [Vp Employee 1] on 17 December 2015 was to try and safeguard the trading relationship with Vp, and that [MGF Employee 2] had no reason to discuss the Balfour Beatty tender with [Vp Employee 1] as MGF had already submitted its rates by this point.[547] Neither Balfour Beatty nor MGFL were able to provide evidence that Balfour Beatty accepted a rebate proposal submitted by MGF on 4 December 2015, and as such, the CMA is not persuaded by this representation.[548] The CMA also notes that the MGF/Balfour Beatty Framework Agreement signed by MGF in August 2016 contains rebate rates which were different to those which MGF proposed to Balfour Beatty on 4 December 2015.[549] The CMA is not persuaded that the subject of the telephone call between [MGF Employee 2] and [Vp Employee 1] only concerned the trading relationship between MGF and Vp, and considers, based on the proximity of [MGF Employee 2's] text message to [MGF Employee 1] to the telephone call, that the telephone call between [MGF Employee 2] and [Vp Employee 1] encompassed, at least in part, a discussion about the level of rebate rates for Balfour Beatty.

Representations on the contacts in relation to hire/rebate rates and on the contacts more generally

4.221 Vp has made representations that it understood itself to be a 'tier 1' supplier and MGF a 'tier 2' supplier (ie that Vp would be the main supplier of shoring equipment to Balfour Beatty, if necessary sourcing items from other 'tier 2' suppliers to complete orders), and the above contacts between them in

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[546] First witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 118, URN 4541.
[547] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 269 to 272, URN 4529 which asserts that MGF's rebate rate submitted on 4 December 2015 (see paragraph 4.209) was verbally accepted and formally accepted in writing by Balfour Beatty on 14 December 2015.
[548] Balfour Beatty was unable to locate records of internal approval decisions in relation to the hire rates and rebate rates. Balfour Beatty explained that its understanding is that the specific terms of the rebate were still in the process of being negotiated with MGF up until 2 August 2016; Balfour Beatty's response dated 10 March 2020 to the CMA's information request dated 18 February 2020, paragraph 5(d), URN 4577. [MGF Employee 2] stated that MGF's rebate rates were agreed by Balfour Beatty at the latest via email from [Balfour Beatty Employee] to [MGF Employee 7] on 14 December 2015, and points to URN 3367 and URN 3373 as evidence of such; first witness statement of [MGF Employee 2] dated 8 October 2019, paragraph 115, URN 4541. The CMA is not persuaded by the content of the relevant URNs that they constitute acceptance of MGF's proposed rebate rates by Balfour Beatty.
[549] URN 4583, page 69, paragraph 3. [MGF Employee 2] stated that the rebate rates in the signed Framework Agreement were likely inserted in error; second witness statement of [MGF Employee 2] dated 17 August 2020, paragraph 40, URN 5319. The CMA notes the information provided by [MGF Employee 2] shows that, on at least one occasion, MGF paid the Balfour Beatty rebate at the rates set out in the August 2016 signed Framework Agreement, and on other occasions at the rates set out in MGF's proposal of 4 December 2015; second witness statement of [MGF Employee 2] dated 17 August 2020, paragraphs 24 to 44, URN 5319.

relation to Balfour Beatty were therefore legitimate, as in order to satisfy its contract with Balfour Beatty, Vp would be required to cross-hire certain products from MGF (at no extra cost to Balfour Beatty).[550]

4.222 The CMA is not persuaded by Vp's representation that contacts were legitimately made in the context that it was tendering for tier 1 supplier status. This is not consistent with a plain reading of the contemporaneous documentary evidence referred to above, or the explanation provided by individuals directly involved in the contact (see paragraphs 4.201 to 4.202 and 4.211 to 4.212 above). In addition, Balfour Beatty's preference, as set out in its Request for Proposal,[551] was to appoint two co-exclusive suppliers for shoring (although bidders could present alternative proposals).[552] In a letter MGF sent to Balfour Beatty on 24 March 2015, it confirmed it intended to bid for the Balfour Beatty tender as a direct supplier of shoring products (ie not as a 'tier 2' supplier, as suggested by Vp).[553] [Vp Employee 2's] evidence also does not support Vp's representation as to it tendering for tier 1 status; he stated that his 'understanding from discussions with Balfour Beatty both at the start of the process and in November 2015 was that they were looking at appointing two "co-exclusive" bidders out of Vp, MGF and Mabey'.[554] MGFL accepts that Vp and MGF were rival bidders for the tender and makes no reference to a possible tier 1/tier 2 relationship with Vp in its representations.

4.223 [✂]. [✂].[555] [✂].

Design charges

4.224 In addition to the discussions regarding design charges between MGF, Vp and MHL during Relevant Period 2(a) (see paragraphs 4.103 to 4.120), there was also contact between MGF and Vp during Relevant Period 3 in respect of

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[550] See for example: Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.87 to 3.90, URN 4565; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraphs 8.3, 8.9, 8.21 to 8.22, URN 5308.
[551] URN 4578, page 5, paragraph 2.5.
[552] Balfour Beatty's response dated 10 March 2020 to the CMA's information request dated 18 February 2020, paragraphs 4(a), 4(b), 5(a) and 5(b), URN 4577; Balfour Beatty's response dated 13 March 2020 to the CMA's information request dated 18 February 2020, paragraphs 4(c)(i), 4(c)(ii), 4(d)(i) and 4(d)(ii), URN 4595; URN 4600, page 5, paragraph 2.6.
[553] URN 4599 attached to URN 4598. The CMA notes that on 18 August 2015 [Balfour Beatty Employee] asked MGF to present a design and costs based on a previous project in order to compare the costs submitted by the shortlisted suppliers, being MGF, Vp and MHL, making it clear that there were multiple parties competing with each other for this tender (MGF and Vp were unaware at that point that the information [Balfour Beatty Employee] provided about MHL competing was inaccurate); Exhibit [✂] to the first witness statement of [MGF Employee 4] dated 8 October 2019, URN 4537. [Balfour Beatty Employee] sent a similar email to [Vp Employee 2] on 11 September 2015; URN 2540. See also first witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 71 to 72, URN 4539.
[554] Second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 83, URN 5316.
[555] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraphs 15(5), 23(4)(c) and 45, URN 5310, referring to the second witness statement of [MGF Employee 2] dated 17 August 2020, paragraphs 52 to 53, URN 5319.

design charges. In particular, [MGF Employee 3] provided [Vp Employee 1] with a copy of rates that MGF was considering charging customers for design work. By way of context, the possibility of introducing design charges had also been considered and discussed extensively within MGF from mid-2016 to early 2017.[556]

4.225 In that regard, on 6 September 2016, [MGF Employee 3] emailed [Vp Employee 1], stating:

'Ref our wider conversation, I am working on a few suggestions/design charging mechanics, which we should be able to discuss further early October'.[557]

4.226 Later emails show efforts to arrange a meeting between [MGF Employee 3] and [Vp Employee 1]; within this correspondence (in an email on 21 October 2016),[558] [MGF Employee 3] stated that it, '[w]ould be good to catch up with the way the market is moving, AMP6,[559] competitors, design etc'.[560] There is evidence that a meeting eventually took place between [MGF Employee 3] and [Vp Employee 1] on or around 10 November 2016.[561] The CMA is of the view that this contact concerned discussions in relation to design charges to be applied by MGF to its customers more generally.

4.227 In support of this finding, the CMA notes that the CMA found hard copies of the following MGF documents in the office of [Vp Employee 1]:

(a) MGF 'Internal Memo' with the subject 'Design Charges' from [MGF Employee 3] and dated 'November 2016'.[562] This document set out MGF's new design charges, to be applied immediately, and included [Vp Employee 1's] handwritten annotation: 'Discuss opportunity with [Vp Employee 10]';[563]

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[556] URN 1815; URN 1816; URN 1817; URN 1818; URN 1819; URN 1820; URN 1821; URN 1833; URN 1834; URN 1835; URN 1843; URN 1844.
[557] URN 2638.
[558] URN 2639; URN 2646; URN 2640; URN 2646; URN 2647.
[559] In relation to regulated water companies, AMP6 refers to the sixth asset management plan period which runs from 2015 and 2020. AMPs outline the water companies' proposed investment programmes over five year periods. Towards the conclusion of these plans, the Water Services Regulation Authority (OFWAT) assesses the water companies' performance against them as part of its five-year price review cycle. See also transcript of an interview with [Vp Employee 1] held on 10 May 2018, page 168, URN 0666.
[560] URN 2646.
[561] Transcript of an interview with [Vp Employee 1] held on 10 May 2018, page 150, URN 0666.
[562] URN 2740. [Vp Employee 1] confirmed in interview that this document was on top of a pile of documents in his window; transcript of an interview with [Vp Employee 1] held on 10 May 2018, pages 160 to 161, URN 0666; see also URN 1073. The CMA also notes that [MGF Employee 3] had sent an electronic version of this memo to his own personal email account on 14 October 2016; URN 1843; URN 1844.
[563] [Vp Employee 1] confirmed that this was his handwriting and explained that [Vp Employee 10] refers to [Vp Employee 10]. However, he stated that in any conversation with [Vp Employee 10] he would have 'reiterated to

(b) MGF 'Internal Memo' with the subject 'Design Charges' from MGF's Operations Board dated 12 October 2015.[564] This document possesses an electronic watermark that reads: 'CONSISTENTLY BEING APPLIED'; and

(c) MGF 'Internal memo' with the subject 'MP Design Charges' from MGF's Operations Board dated 22 October 2015.[565] This document possesses an electronic watermark that reads: 'NOT ENFORCED - WHERE WE ARE BEING USED AS PRICE CHECK!'.

4.228 The MGF Internal Memos dated 12 October 2015 and 22 October 2015 were in Vp's possession by at least 31 May 2016, when they were circulated by internal email to [Vp Employee 10][566] and [Vp Employee 8][567] on behalf of [Vp Employee 1] with the message: 'Can we discuss when we next meet.' signed '[✂]'.[568] [Vp Employee 1] confirmed that he wished to discuss the subject of design charges with others internally at Vp.[569]

4.229 [Vp Employee 1] explained in interview that he met with [MGF Employee 3] in August 2016 and November 2016, and [MGF Employee 3] gave him a 'set of design charges' (being one of the documents in paragraph 4.227).[570] [Vp Employee 1] explained:

'I didn't ask for them, I didn't say "Right well I'm gonna put design charges in". That was it. We hadn't got design charges in, we'd done nothing with them, we actually I think I had a conversation with [Vp Employee 10] to say "Go and find out whether we can use them to win some business?" Cause if the design charges are going in and in then we've got some opportunity to win some business with some key customers. I'm in a competitive old world and I want to win'.[571]

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him we're not putting design charges in, no intention of doing so'; transcript of an interview with [Vp Employee 1] held on 10 May 2018, pages 158 to 159, URN 0666.

[564] URN 2742. On 14 September 2016 and 10 October 2016, [MGF Employee 3] had by email received this same MGF internal memo – minus the electronic watermark – from [MGF Employee 2] (see URN 1819; URN 1821; 1833; URN 1834).

[565] URN 2743. On 14 September 2016 and 10 October 2016, [MGF Employee 3] had by email received this same MGF internal memo – minus the electronic watermark – from [MGF Employee 2] (see URN 1819; URN 1820; URN 1833; URN 1835).

[566] [✂]; transcript of an interview with [Vp Employee 3] held on 3 May 2018, page 21, URN 0667.

[567] [✂]; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.97, URN 4565.

[568] URN 2614 and URN 2615. The email was sent on behalf of [Vp Employee 1] by his assistant, [Vp Employee 11]; URN 1073.

[569] URN 1073.

[570] Transcript of an interview with [Vp Employee 1] held on 10 May 2018, pages 135 to 138, 154 to 155 and 157, URN 0666.

[571] Transcript of an interview with [Vp Employee 1] held on 10 May 2018, pages 156 to 157 (see also pages 158 to 162), URN 0666.

4.230 On 28 November 2016, [MGF Employee 3] emailed [Vp Employee 1], stating: 'Just so you know, the design charges have been rolled out. Usual bits of resistance from sales team but we'll drive via management'.[572] [MGF Employee 3] said in interview that he was informing [Vp Employee 1] that design charges had been rolled out internally in MGF, and that MGF 'could support [Vp] if need be on the design'.[573] However, the CMA is not convinced by this explanation, noting that, in interview, [Vp Employee 1] did not corroborate [MGF Employee 3's] explanation that this was in the context of MGF providing Vp with support on design. [Vp Employee 1] explained:

'He's telling me that he's putting them in. Well good luck, I'm not. Yeah, what should I have done, I should have probably pushed it back but reality is I'm thinking "Great okay go and make a few bob here. I can" … So if he's out there winning some major projects or big contracts we can go and make sure that we've got a decent price and we can win the work'.[574]

4.231 [MGF Employee 3] confirmed that he provided [Vp Employee 1] with a copy of an internal MGF memo that related to design charges (although he asserts that this was in the context of offering MGF's support on bespoke design work to Vp). However, [MGF Employee 3] stated that he only recalls sharing one memo with [Vp Employee 1] and cannot recollect having seen the two memos containing watermarks.[575]

Representations on design charges

4.232 MGFL submitted that there was no anti-competitive arrangement between MGF and Vp regarding design charges in Relevant Period 3, relying on the witness evidence of [MGF Employee 3] that MGFL submitted with its representations.[576] [MGF Employee 3] stated that he contacted and met with [Vp Employee 1] in relation to outstanding [✂] after his move from Vp to MGF, and recalls a meeting between the two of them at some time between June and August 2016 where [Vp Employee 1] mentioned Vp were 'struggling for engineering resource having lost quite a few design engineers'.[577] [MGF Employee 3] stated that he 'needed to find a way to engage with [Vp Employee 1] in order to encourage him to finalise the [✂]' so he 'tried to "dangle a carrot" by offering MGF support on bespoke design work'.[578]

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[572] URN 2650.
[573] Transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, page 68, URN 3833.
[574] Transcript of an interview with [Vp Employee 1] held on 10 May 2018, pages 171 to 172, URN 0666.
[575] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 89 and 91, URN 4539.
[576] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 274, URN 4529.
[577] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraphs 82 to 87, URN 4539; see also transcript of an interview with [MGF Employee 3] held on 16 to 17 January 2019, pages 35 to 36, URN 3833.
[578] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 88, URN 4539.

According to [MGF Employee 3], his email to [Vp Employee 1] on 28 November 2016 was 'a subtle pre Christmas reminder' concerning the [✂] which he had not yet received, and, had he been able to get [Vp Employee 1] interested in MGF supplying Vp with design engineering resource, it would have provided a platform to rebuild the trading relationship between MGF and Vp which had 'completely broken down' since he left Vp.[579] However, the CMA is not convinced by this explanation and is of the view that this contact concerned discussions in relation to design charges to be applied by MGF to its customers more generally. In particular, the plain reading of [MGF Employee 3's] emails to [Vp Employee 1] on 6 September 2016 and 28 November 2016 do not support [MGF Employee 3's] explanation. The email on 6 September 2016 refers to 'design charging mechanics, which we should be able to discuss further early October' within the context of a previous 'wider conversation' between [MGF Employee 3] and [Vp Employee 1],[580] and the email on 28 November 2016 specifically informs [Vp Employee 1] that 'the design charges have been rolled out'.[581] Neither of these statements is consistent with [MGF Employee 3's] explanation that he was merely offering design support to Vp, and, as noted above, is contradicted by [Vp Employee 1's] evidence (see paragraphs 4.229 to 4.230).

4.233 Vp has made representations that [Vp Employee 1] already had the 'MGF Internal memo' with the subject 'MP Design Charges' in his possession in May 2016 (although he is unsure how or when he obtained it), and that the information was not competitively sensitive.[582] Vp also submitted that, to the extent MGF made known to Vp its own position, this was a unilateral disclosure by MGF that had no impact on Vp's future pricing intentions or strategy.[583] The CMA is not persuaded by this argument. Vp has not provided evidence that [Vp Employee 1] sought to distance himself publicly from the receipt of MGF's information in relation to design charges, and [Vp Employee 1] agrees he intended to discuss the memo received from [MGF Employee 3] with other Vp employees (see paragraph 4.228). Sharing and discussing this information provided an opportunity for Vp to confirm MGF's proposed charges relating to design work, and for both MGF and Vp to gain a better understanding of their competitor's strategy and future conduct. Accordingly, the sharing of this information reduced strategic uncertainty between MGF

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[579] First witness statement of [MGF Employee 3] dated 8 October 2019, paragraph 90, URN 4539.
[580] URN 2638.
[581] URN 2650.
[582] 'MGF Internal memo' with the subject 'MP Design Charges' is URN 2743. Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.97, URN 4565.
[583] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.85 and 3.92 to 3.93, URN 4565; Vp's response dated 7 August 2020 to the CMA's Letter of Facts paragraphs 7.11 to 7.12, URN 5308.

and Vp as it enabled them to check – and take comfort from – the likely future conduct of their competitors, in this instance in relation to design charges.

Continued contact and attempts to organise tripartite meetings between MGF, Vp and MHL during Relevant Period 3

4.234 After his meeting with [MHL Employee 2] on 2 December 2015 (referred to in paragraphs 4.73 to 4.79), [MGF Employee 1] made attempts in March and July 2016 to set up a tripartite meeting between MGF, MHL and Vp.[584]

4.235 [MGF Employee 1] contacted [MHL Employee 2] and [Vp Employee 1] on 15 March 2016 in relation to setting up a tripartite meeting, which [MHL Employee 2] declined. There was continued contact between MGF and Vp during Relevant Period 3, and a meeting between [MGF Employee 1] and [Vp Employee 1] took place on 5 May 2016.[585] Following this meeting, [MGF Employee 1] contacted [MHL Employee 2] again in relation to setting up a tripartite meeting with [Vp Employee 1] to 'exchange views on the industry'.[586]

4.236 On 4 January 2016, [MGF Employee 1] sent a text message to [MGF Employee 2] asking when he would be meeting with [Vp Employee 1], to which [MGF Employee 2] replied 'no date yet, but I'd expect him to be in touch sooner rather than later'. [MGF Employee 1] responded that:

'I've had more contact over the break with Mby - to keep it warm id like an industry meeting Asap with all parties and new delegates
[MGF Employee 1]'.[587]

4.237 On 15 March 2016, [MGF Employee 1] sent the following text message to [MHL Employee 2] and [Vp Employee 1]:

'[Vp Employee 1] & [MHL Employee 2]
Could we please meet to discuss mutual matters of concern in our industry- the private [Room within Meeting Venue A] at [Meeting Venue A]?- possible dates are-6,7,19,20 or 21 April for lunch or dinner?- only [MGF Employee 2] would accompany me and present relevant data.
Best regards

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[584] URN 3705, rows 4 to 6, 16, 17, 20; URN 3709, rows 1 to 4; URN 5222, rows 1 to 2; URN 3711, rows 1 to 30; transcript of an interview with [MHL Employee 2] held on 23 June 2016, page 25, URN 0255; URN 1749; URN 1750.
[585] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A34, URN 5274.
[586] See paragraph 4.243.
[587] URN 3705, row 6.

[MGF Employee 1]'.[588]

4.238 [MGF Employee 1] then forwarded his text message to [MGF Employee 2],[589] to which [MGF Employee 2] responded that he had 'sent all the info I promised to [Vp Employee 1] last Thursday so he should have it now. Fingers crossed'.[590]

4.239 [MHL Employee 2] responded the same day saying that he was 'away for the whole of April',[591] which [MGF Employee 1] then forwarded to [Vp Employee 1]. In response to [MHL Employee 2], [MGF Employee 1] said he would 'keep in touch after [Vp Employee 1] makes contact'.[592] [MHL Employee 2] did not respond.[593]

4.240 On 14 April 2016 [Vp Employee 1] sent a text message to [MGF Employee 2] saying 'we were going to get together with [MGF Employee 1]' and asking if he had any dates.[594]

4.241 [MGF Employee 2] responded that '[MHL Employee 2] is away for the whole of April, so we were going to wait until he returns and suggests some dates'.[595]

4.242 [MGF Employee 2] and [Vp Employee 1] subsequently agreed that [Vp Employee 1] would meet with [MGF Employee 1] in a private room at the [Meeting Venue B] on 5 May 2016, a meeting which [MGF Employee 1] confirms took place.[596]

4.243 On the following day, 6 May 2016, [MGF Employee 1] sent the following text

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[588] URN 3709, row 1; URN 5222, row 1. In interview, [Vp Employee 1] said that the meeting did not take place and he was unsure what 'mutual matters of concern' or '[MGF Employee 2] would accompany me and present relevant data' meant; transcript of an interview with [Vp Employee 1] held on 10 May 2018, pages 120 and 123 to 124, URN 0666.
[589] URN 3705, row 16.
[590] URN 3705, row 17. [MGF Employee 2] confirmed that his reference to '[Vp Employee 1]' was to [Vp Employee 1]; transcript of an interview with [MGF Employee 2] held on 16 January 2019, pages 144 to 145, URN 3832.
[591] [MHL Employee 2] explained that he did not know who '[Vp Employee 1]' referred to, but assumed [MGF Employee 2] was the '[✂]' [MGF Employee 1] spoke about during their meeting on 2 December 2015. [MHL Employee 2] discussed [MGF Employee 1's] text message with MHL's legal representatives, and it was decided that he should send a holding position to [MGF Employee 1]; second witness statement of [MHL Employee 2] dated 4 May 2020, paragraphs 46 to 47, URN 5229.
[592] URN 3709, rows 2 to 3; URN 5222, row 2.
[593] [MHL Employee 2] explained that this was the first time he received the full name of [Vp Employee 1], who he later understood to be [✂]; second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 47, URN 5229.
[594] URN 3711, row 13.
[595] URN 3711, row 12.
[596] URN 3711, rows 1 to 11. [MGF Employee 1] stated that this meeting was a 'difficult and tense affair, being the first time I had met [Vp Employee 1] since taking [MGF Employee 3] from Vp' and that he 'wanted to continue the trade between the two companies' and 'wanted [Vp Employee 1] on side [✂]. It was all about making the peace and re-establishing good relations'; [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A36, URN 5274.

message to [MHL Employee 2]:

'[MHL Employee 2]
I had lunch yesterday with [Vp Employee 1] of Vp plc- he asked if I'd make contact with you to arrange a lunch or dinner and exchange views on the industry - early July?
Best regards
[MGF Employee 1]'.[597]

4.244 [MGF Employee 1] explained that his text message to [MHL Employee 2] on 6 May 2016 was another attempt to instigate a trading relationship with MHL.[598] The CMA notes that [MGF Employee 1] also used the phrase 'exchange views on the industry' when MGF and Vp were in contact in relation to proposed 2015 prices increases during Relevant Period 2(b), when he told [MGF Employee 2] that he would 'meet up with [Vp Employee 1] to exchange views on the industry' (see paragraph 4.175).[599] [MGF Employee 1] explained that he uses this phrase as a shorthand expression to refer to high level strategic issues, and in this context it meant a possible supply arrangement from MGF to both Vp and MHL.[600] [MGF Employee 1] further explained that the phrase covers 'confidential / private matters such as supply / trading discussions or the possible sale of the business', but on this occasion he believes it was 'simply a euphemism for gossip' in relation to [MHL Employee 1].[601] The CMA considers it unlikely that, had [MGF Employee 1] genuinely wanted to discuss cross-supply or [MHL Employee 1] with [MHL Employee 2], he would have used such an ambiguous phrase. Rather, the CMA considers [MGF Employee 1] uses the phrase as a cover for his intentions to have discussions of an anti-competitive nature during any meeting with MGF's competitors. Furthermore, as set out in paragraph 4.168, while MGF may have been seeking more generally to develop its business by selling steel products, the CMA is not persuaded that this was the reason for seeking to arrange tripartite meetings, and it is not clear to the CMA why, in the ordinary course of business, MGF would have been motivated to discuss the sale of steel products with a senior individual from each of two of its closest competitors at the same time.

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[597] URN 3709, row 4.
[598] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A38, URN 5274; second witness statement of [MGF Employee 1] dated 13 August 2020, paragraph 18(b), URN 5317.
[599] URN 1568.
[600] [MGF Employee 1's] response dated 22 May 2020 to the CMA's information request dated 27 April 2020, paragraph A38, URN 5274; second witness statement of [MGF Employee 1] dated 13 August 2020, paragraph 18(b), URN 5317.
[601] Second witness statement of [MGF Employee 1] dated 13 August 2020, paragraph 18(c), URN 5317.

4.245 Given that [MGF Employee 1] sent his text message to [MHL Employee 2] on 6 May 2016, the day after he met with [Vp Employee 1], and that the language in [MGF Employee 1's] text message indicates that [Vp Employee 1] wanted [MGF Employee 1] to arrange a tripartite meeting with [MHL Employee 2], the CMA considers it likely that [MGF Employee 1] and [Vp Employee 1] discussed holding a tripartite meeting with [MHL Employee 2] during their meeting on 6 May 2016, similar to the tripartite meetings held in Relevant Period 2(a). [MHL Employee 2] did not attend any tripartite meetings with [MGF Employee 1] and [Vp Employee 1], given Mabey's application to the CMA for leniency in April 2016.

4.246 When considered in the context of the tripartite meetings that took place in Relevant Period 2(a) and the anti-competitive nature of those meetings, the CMA considers that, following the departure of [MHL Employee 1] from MHL and [Vp Employee 2] from Vp, [MGF Employee 1's] attempts at setting up tripartite meetings with [MHL Employee 2] and [Vp Employee 1] reflected an attempt, at least on the part of [MGF Employee 1], to continue the arrangement between MGF, Vp and MHL to reduce competition. This is, in particular, supported by the reference in [MGF Employee 1's] text message to [MGF Employee 2] dated 4 January 2016 to 'new delegates' (in the context of [MGF Employee 1] wanting to set up an 'industry meeting Asap with all parties and new delegates' having 'had more contact over the break with Mby'), which indicates different 'delegates' had been present at previous 'industry meetings' (such as those in Relevant Period 2(a) between [MGF Employee 1], [Vp Employee 2], and [MHL Employee 1]).[602] The contacts outlined above also evidence there was ongoing contact between MGF and Vp throughout Relevant Period 3, in respect of which see paragraph 5.144.

F. The end of the arrangement

4.247 It is not clear from the evidence precisely when the arrangement between MGF and Vp came to an end. However, there is little evidence of the arrangement after 28 November 2016. Given the scarcity and quality of the evidence after this date, the CMA has not extended the duration of its finding of an infringement involving MGF and Vp after this date.

4.248 As regards MHL, the CMA has found no evidence of MHL's involvement in an arrangement with MGF and Vp after 16 July 2014, noting that, when [MHL Employee 2] was contacted by and met with [MGF Employee 1] in late

[602] URN 3705, row 6.

December 2015, he reported the matter internally, and Mabey shortly afterwards applied to the CMA for leniency.

5. LEGAL ASSESSMENT

A. Introduction

5.1 This Chapter sets out the CMA's legal assessment of the conduct set out in Chapter 4, in light of the factual background set out in Chapters 2 and 3. The key legal principles, including references to the relevant case law and primary and secondary legislation, are also included in this Chapter.

5.2 The CMA has assessed the evidence in this case by reference to the civil standard of proof, namely whether it is sufficient to establish, on the balance of probabilities, that an infringement occurred.[603]

5.3 The CMA has considered the totality of the evidence in its possession in the round, taking all the relevant factors into proper consideration. The CMA finds that the evidence shows that MGFL and Vp were party to the arrangement throughout all Relevant Periods, that Mabey was also party to the arrangement in Relevant Period 2(a), and that the evidence is sufficient to establish on the balance of probabilities that an infringement occurred.

B. Key provisions of the UK and EU competition rules

5.4 The CMA's findings are made by reference to the following provisions of the UK and EU competition rules:

(a) the Chapter I prohibition[604] prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. This prohibition applies unless an applicable exclusion is satisfied or the agreement, decision or concerted practice in question is exempt in accordance with the provisions of the Competition Act. References to the UK are to the whole or part of the UK;[605] and

(b) Article 101 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the EU,

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[603] *Tesco Stores and others v OFT* [2012] CAT 31, paragraph 88. In respect of the legal test regarding the standard of proof, see Section C (Burden and standard of proof) below.
[604] Section 2(1) of the Competition Act.
[605] Sections 2(1) and (7) of the Competition Act.

unless they are exempt in accordance with Article 101(3).

5.5 When applying the Chapter I prohibition to agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States within the meaning of Article 101, the CMA must also apply Article 101 to such agreements, decisions or concerted practices.[606]

5.6 Under the European Union (Withdrawal Agreement) Act 2020, section 2(1) of the European Communities Act 1972 (under which EU law has effect in the UK's national law) remains in force until the end of the transition period that runs from 31 January 2020 (the date of the UK's exit from the European Union) until 11:00pm on 31 December 2020 (the Transition Period).[607] This means that directly applicable EU law, including Articles 101 and 102 TFEU and the Modernisation Regulation, continues to apply in the UK during the Transition Period.

5.7 For the reasons set out below, the CMA has found that MGFL, Vp and Mabey have infringed the Chapter I prohibition and Article 101.

C. Burden and standard of proof

5.8 This Section sets out the legal framework for the assessment of the evidence in the case, and whether or not the Infringement has been proven to the requisite standard.

Burden of proof

5.9 The burden of proving an infringement of the Chapter I prohibition and/or Article 101 falls on the CMA.[608] The standard is the balance of probabilities,

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[606] Article 3(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 4.1.2003 (the '**Modernisation Regulation**'). In addition, section 60 of the Competition Act provides that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to UK competition law should be dealt with in a manner which is consistent with the treatment of corresponding questions under EU competition law. Further, the CMA (i) must act (so far as it is compatible with the provisions of Part I of the Competition Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU, the Court of Justice of the European Union (the '**Court of Justice**') and the General Court of the European Union (the '**General Court**') (together, the '**European Courts**') and any relevant decision of the European Courts; and (ii) must have regard to any relevant decision or statement of the European Commission.

[607] Section 1A, European Union (Withdrawal) Act 2018 (as introduced by section 1, European Union (Withdrawal Agreement) Act 2020). See further: *Guidance on the functions of the CMA under the Withdrawal Agreement (CMA113)*.

[608] This has been established by the Modernisation Regulation, the European Courts and the CAT. In particular, Article 2 of the Modernisation Regulation provides that '*in any national or Community proceedings for the application of Articles 101 and 102 of the Treaty, the burden of proving an infringement of Art 101(1) or 102 shall rest on the party or the authority alleging the infringement*'. See, for example, also judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92 P, EU:C:1999:356, paragraph 86; *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, paragraph 100; *AH Willis and*

as set out above. Once the CMA has established to that standard an infringement of the Chapter I prohibition and/or Article 101, the burden is on the undertaking to establish an exemption under section 9 of the Competition Act and/or Article 101(3) TFEU.

The standard of proof

5.10 The CMA has assessed the evidence in this case by reference to the 'civil' standard of proof, meaning that it is sufficient to establish on the balance of probabilities (ie whether it is more likely than not) that an infringement occurred.[609]

5.11 In reaching a conclusion on whether or not the Infringement occurred, it is necessary for the CMA to assess whether the body of evidence viewed as a whole (referred to by the Competition Appeal Tribunal (the '**CAT**') as the 'totality of the evidence') meets the required standard of proof, rather than every item of evidence being required to meet that standard.[610]

5.12 Vp made representations that the presumption of innocence applies to parties under investigation and that, given the serious nature of allegations of an infringement under the Competition Act, the CAT held in *Napp Pharmaceuticals Holdings v Office of Fair Trading* that 'strong and compelling evidence' is required, and that 'the position is in fact more nuanced than a simple balance of probabilities test'.[611] Also citing *Napp*, MGFL made representations that 'the CMA's burden of proof must be discharged on the basis of strong and compelling evidence'.[612]

5.13 It is correct that any doubt as to whether an infringement of the Chapter I prohibition and Article 101 is established on the balance of probabilities operates to the advantage of the undertaking.[613] However, insofar as Vp or MGFL submit that there is a 'heightened standard' of civil proof, that is

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Sons Limited v OFT [2011] CAT 13, paragraph 45; and *Tesco Stores Limited and others v OFT* [2012] CAT 31, paragraph 88.

[609] The standard of proof in competition proceedings is governed by the national laws of each Member State. See Recital 5 of the Modernisation Regulation and *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, paragraph 100.

[610] *Agents' Mutual Ltd v Gascoigne Halman Ltd* [2017] CAT 15, paragraph 203. The principle that it is sufficient if the body of evidence relied on, viewed as a whole, meets the required standard of proof has been repeatedly stated by the European Courts, eg judgment of 25 January 2007, *Sumitomo Metal Industries Ltd v Commission* C-403/4 P etc, EU:C:2007:52, paragraph 42; and judgment of 24 September 2019, *HSBC Holdings plc v Commission* T-105/17, EU:T:2019:675, paragraph 203.

[611] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.1 to 4.6, URN 4565.

[612] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, Annex A, Note on burden and standard of proof, paragraph 10, URN 5436.

[613] *Tesco Stores Limited and others v OFT* [2012] CAT 31, paragraph 88.

incorrect: 'there is only one civil standard of proof',[614] including in respect of infringements of competition law.[615]

5.14 Vp made representations that the evidence in the case is limited and that the CMA may therefore 'only assume anti-competitive coordination and contacts where there is no alternative plausible explanation for contact between the Parties'.[616] MGFL made representations that there is 'no (alternatively insufficient) documentary evidence to underpin the CMA's case theory' and asserts that MGFL has put forward 'evidence that provides alternative, plausible and innocent explanations for those meetings and contacts'.[617] The standard of proof which the CMA has applied is the English civil standard, as explained above. In applying that standard, the CMA has had regard to the totality of the evidence, including the evidence suggesting anti-competitive coordination as well as any evidence said by MGFL and Vp to support an alternative explanation. In any event, as set out further below, the CMA has found that, taking into account the totality of the evidence, the alternative explanations advanced by MGFL and Vp are not more likely than the conclusions the CMA has reached in respect of the existence of the Infringement based on its assessment of the evidence as a whole.[618]

D. The evidence the CMA has obtained

5.15 This section sets out the main categories of evidence on which the CMA relies in this case and explains the CMA's approach to the evaluation of evidence in its possession.

Documentary evidence

5.16 The CMA is in possession of a body of documentary evidence including emails, text messages, calendar entries, telephone records, metadata, briefing notes and annotations, charges and quotations, and records of internal discussions and meetings.

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[614] *Re B (Children)* [2009] 1 AC 11, paragraph 13. The court went on to state at paragraph 70 that: '*neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.*' In respect of that case, see also *S-B Children* [2009] UKSC 17, paragraphs 11 and 12.
[615] *AH Willis and Sons Limited v OFT* [2011] CAT 13, paragraphs 45 to 47.
[616] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.11 to 4.14, URN 4565.
[617] Annex A to MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 16 and 17, URN 5436.
[618] In respect of the alternative explanations submitted by the parties, see paragraphs 5.92 to 5.97.

5.17 Many of these documents clearly support the CMA's finding of infringing conduct between the Parties on a plain reading – taking into account the author and addressee(s), the facts and reasons surrounding the document's creation, and whether the document appears reliable[619] (for example, see direct email contact between MGF and Vp as described in paragraph 4.27). The CMA possesses other items where the probative value of each individual document may be less clear on its face, but where the documents corroborate and support the CMA's findings of an infringement when considered in the round alongside other documentary and witness evidence.

5.18 This documentary evidence establishes a pattern of contacts between broadly the same key individuals in all periods, at senior levels in each company.[620] The CMA finds that there is evidence that these contacts provided MGF and Vp (and MHL in Relevant Period 2(a)) with the opportunity to share confidential information relating to current and future pricing and to alert one another to 'rogue' pricing practices, such as low quotes and 'free of charge' items, in order to reduce strategic uncertainty as to future pricing (for example, see paragraphs 4.18, 4.23, 4.27, 4.29, 4.33, 4.34, 4.35, 4.87 to 4.90, 4.183, 4.198, 4.208, 4.216, 4.225).

5.19 Considered together with the witness evidence described below, the contemporary documentary evidence supports the CMA's finding of a consistent and coherent pattern of infringing conduct throughout all of the Relevant Periods.

Documentary evidence in respect of Relevant Period 2(a)

5.20 MGFL and Vp made representations that the CMA's allegations regarding Relevant Period 2(a), when tripartite meetings took place between MGF, Vp and MHL, 'rely on vague and unsubstantiated evidence from [MHL Employee 1] or [MHL Employee 2]' and that '[MHL Employee 1's] evidence is

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[619] In *Tesco,* the CAT stated that '*the Tribunal's approach has been to give each document what appears to be its natural meaning, and accord it such weight as appears appropriate, taking into account when, and the circumstances in which, it was prepared, the identity of the author, whether it contains hearsay or multiple hearsay and any other factors likely to affect its reliability*'. *Tesco Stores Ltd v OFT* [2012] CAT 31, paragraph 125. See also the analysis of the value of documentary records of meetings in the form of contemporaneous notes and reports (and therefore by analogy the value of other documentary evidence) by AG Versterdorf in the European Courts who, giving his Opinion in *Rhône-Poulenc v Commission*, stated that '*in assessing the evidential value of a reporting document regard should be had first and foremost to the credibility of the account it contains. Regard should be had in particular to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed, and whether, on its face, the document appears sound and reliable*'. Opinion of AG Vesterdorf of 10 July 1991, *Rhône-Poulenc and Others v Commission* joined cases T-1/89, etc, EU:T:1991:38, section I.E.4 II-955.

[620] [Vp Employee 2] left Vp in [✂] and joined MGF [✂] after a period of gardening leave. The CMA notes that, following [Vp Employee 2's] departure from Vp, contacts continued between individuals from MGF and [Vp Employee 1].

uncorroborated by documentary or other evidence'.[621] As described above, the CMA is in possession of a body of evidence that supports its finding of an infringement. To the extent that the direct documentary evidence gathered by the CMA is more limited in relation to Relevant Period 2(a), this is to be expected due to the fact that certain discussions took place at meetings, and due to the clandestine nature of cartel activity and the desire to keep documentation of any unlawful anti-competitive contacts to a minimum.[622] Furthermore, the passage of time, and the fact that key individuals moved to new employment following this period, have had an impact on the volume and nature of evidence available regarding Relevant Period 2(a) in particular.[623]

5.21 The meetings in Relevant Period 2(a) are nonetheless clearly evidenced in [MHL Employee 1's] Outlook calendar entries.[624] Further, in the case of [MHL Employee 1's] Outlook calendar entries, metadata confirms instances where calendar entries for the dates of future meetings (indicating the names of key individuals as intended participants) were entered into the calendar close in time to when telephone contacts between those individuals took place, which indicate it is likely the meeting arrangements were discussed during those contacts (see, for example, paragraphs 4.62 and 4.70, and also 4.71 where a proposed future meeting was scheduled at the end of, or immediately after, the meeting on 16 July 2014).

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[621] See for example: MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 61, URN 4529; Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraph 3.45, URN 5308.
[622] According to [MHL Employee 2], at a meeting during Relevant Period 3 on 2 December 2015 between him and [MGF Employee 1], '[MGF Employee 1] mentioned how he liked to meet without mobile phones or pads and that what would happen in the meeting would stay in the meeting'; second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 34, URN 5229. Further, the individuals involved sometimes communicated via their personal email accounts. See, for example, [MGF Employee 1] forwarding an email from [MHL Employee 1] to [Vp Employee 2's] personal email address in Relevant Period 2(a) (URN 1508) and an email from [MGF Employee 2's] personal email address to [Vp Employee 2's] personal email address in Relevant Period 1 (URN 1393). [Vp Employee 2] also reported in an internal email to a colleague at Vp that he 'had a confidential conversation with [MHL Employee 1] today and due to meet again in a few weeks', indicating the secretive nature of contacts (see URN 2379).
[623] [MHL Employee 1] [✂] and the laptop, iPad and mobile phone he used at MHL were no longer available for investigation by the CMA. However, billing data for [MHL Employee 1's] mobile phone and iPad were available. This billing data indicates when outgoing calls were made and text messages were sent, but does not contain details of incoming calls and texts received, or the contents of text messages. Likewise, [Vp Employee 2] was placed on gardening leave from Vp in [✂] and the mobile phone and other devices he used at Vp, along with the Outlook calendar entries for his Vp email account, were no longer available for investigation. Billing data was also not available for the mobile phone [Vp Employee 2] used at Vp. As a result, the CMA did not obtain any records of calls made or text messages sent by [Vp Employee 2] during his employment at Vp. In [Vp Employee 2's] case, the lack of access to his Vp mobile phone records is relevant to all periods from the start of Relevant Period 1 up until [Vp Employee 2] left Vp during Relevant Period 3 in [✂]. From [✂], [Vp Employee 2] began to use an MGF supplied mobile phone which was made available to the CMA for investigation.
[624] See paragraphs 4.62 and 4.70. In addition, [MGF Employee 1's] calendar entry supports that he had a lunchtime meeting planned for 14 February 2014 (however the location is different to [MHL Employee 1's] recollection); URN 3724. [MGF Employee 1's] calendar entry supports that he was at [Meeting Venue A] prior to the tripartite meeting held there on 16 July 2014; URN 3726.

5.22 Although the CMA did not discover minutes or reports of the two tripartite meetings that took place in Relevant Period 2(a), a briefing note[625] was found at MGF's premises which had been prepared two days before the meeting on 16 July 2014 (see paragraph 4.112). In addition, an annotated copy of the first page of this briefing note[626] was found at MGF's premises inserted loose in [MGF Employee 1's] notebook, which also contained his handwritten notes on points relating to those set out in the briefing note,[627] as described at paragraphs 4.114 and 4.127. The contents of that briefing note, and of the handwritten notes in [MGF Employee 1's] notebook, closely accord with [MHL Employee 1's] account of issues raised by [MGF Employee 1] at the tripartite meeting on 16 July 2014 relating to design and transport charges (see paragraphs 4.113 and 4.128). [MHL Employee 1] described the contents of this briefing note in his first interview in 2016[628] before being shown a copy of it by the CMA at his third interview in 2018,[629] at which point he confirmed that he recognised the contents of the document and confirmed it looked 'consistent with the issues we discussed at one of the meetings' (see paragraph 4.113). This briefing note and [MGF Employee 1's] handwritten notes, when considered together with [MHL Employee 1's] witness evidence, and the emails that [MGF Employee 1] sent to each of [Vp Employee 2] (at his personal email address) and [MHL Employee 1] two days later on 18 July 2014,[630] provide strong and credible evidence to support the CMA's findings as to the content of discussions at that tripartite meeting, as described in paragraphs 4.115, 4.124 and 4.127.

5.23 As set out in Chapter 4, MGFL and Vp made representations that mileage expense claims submitted by [Vp Employee 2] during his employment at Vp (in respect of which, see paragraphs 4.151 to 4.154) are contemporaneous records that prove [Vp Employee 2] did not attend the tripartite meetings on 14 February 2014 and 16 July 2016. These records indicate that [Vp Employee 2] claimed for expenses for travel to a meeting at Balfour Beatty/Birse in Hull on 14 February 2014 and to a supplier meeting at MGF in

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[625] URN 1516.
[626] URN 2761, page 5.
[627] URN 2761, page 6.
[628] Transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 34 and 35, URN 0260. See also second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 70, URN 4615. The CMA notes that the interview with [MHL Employee 1] on 6 October 2016 took place before the CMA conducted inspections at MGF's premises in February 2017, and therefore before the CMA was itself in possession of the document described by [MHL Employee 1].
[629] Transcript of an interview with [MHL Employee 1] held on 5 June 2018, pages 26 to 29, URN 2805. See also second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 111, URN 4615.
[630] See paragraphs 4.121 to 4.124 in relation to emails sent by [MGF Employee 1] to each of [Vp Employee 2] and [MHL Employee 1], and later to [Vp Employee 1], regarding Balfour Beatty's Project Oyster. Balfour Beatty's Project Oyster is also mentioned in [MGF Employee 1's] handwritten notes alongside other issues that the CMA considers were discussed at the tripartite meeting on 16 July 2014 (see paragraph 4.122).

Astley on 16 July 2014, but they do not itemise any other meetings on those days.

5.24 MGFL and Vp have not submitted any direct evidence to support [Vp Employee 2's] attendance at the meetings listed in his mileage records for 14 February 2014 and 16 July 2014, and Balfour Beatty was unable to identify any records indicating that [Vp Employee 2] attended this meeting. Taking into account the lack of other evidence of [Vp Employee 2] attending meetings with Balfour Beatty/Birse in Hull and MGF in Astley on 14 February 2014 and 16 July 2014 respectively, the CMA considers that there is uncertainty as to whether [Vp Employee 2] did in fact attend such meetings. Considered alongside the evidence that [Vp Employee 2] did not itemise all the meetings he attended on any given date in his mileage expense claims, the CMA's view is that the mileage records cannot be treated as a complete record of [Vp Employee 2's] movements on any given date. In any event, regardless of whether the information contained in the records is accurate, the CMA concludes that attendance at the meetings indicated in the mileage claims would not have precluded [Vp Employee 2] from also meeting with [MGF Employee 1] and [MHL Employee 1] on the same dates.[631] Overall, given the limitations of the mileage record evidence the CMA considers it should be given limited weight, when considered alongside the other evidence referred to above, in establishing whether or not the two tripartite meetings in Relevant Period 2(a) occurred.

Witness and leniency evidence

5.25 The CMA is in possession of a large body of witness and interview evidence, including from certain key individuals at each of MGF, Vp and MHL during the Relevant Periods, some of whom are no longer employees of MGF, Vp and MHL respectively. This evidence is particularly significant in respect of Relevant Period 2(a), where the direct documentary evidence is more limited, as might be expected due to the secret nature of the tripartite meetings that took place in that period (see paragraph 5.20 above). Consequently, the CMA's findings in Relevant Period 2(a) are evidenced to a greater extent by

[631] The CMA notes that when [Vp Employee 2] met with [MHL Employee 1] on both 29 January 2014 and on 25 September 2014, the evidence indicates that he intended to attend more than one meeting on each of those respective dates, but that his meetings with [MHL Employee 1] on those dates were not itemised in his mileage records. In that regard, although the strength of the evidence is to be weighed and assessed on a case by case basis, the CMA also notes that in *FMC Foret* the General Court confirmed the European Commission's finding that the existence of a taxi receipt for a journey taken by an individual in Barcelona (Spain) on the same date as a cartel meeting in Königswinter (Germany) did not preclude the individual from having attended that cartel meeting, as attested to in witness evidence provided by other attendees at that meeting. Judgment of 16 June 2011, *FMC Foret, SA v Commission* T-191/06, EU:T:2011:277, paragraph 226.

the witness evidence of the key individuals, and in particular former employees of MHL, than in other periods.

5.26 The CMA acknowledges that the witness and interview evidence in its possession is subjective in nature, and to some extent inconsistent (both internally over time, and between different witnesses), but considers this to be expected given that:

(a) some individuals may have had, to a greater or lesser extent, an incentive to seek to minimise the CMA's view of their role in the conduct after it was discovered and subject to investigation; and

(b) events occurred several years before the dates of the interviews, so recollections may have diminished over time (particularly where individuals have given a free recall of events in interview without the benefit of reference to documentary records).

5.27 When considering the strength of witness evidence, the CMA has taken into account guidance from the CAT and the European Courts. In that regard, the CAT stated in *Claymore Dairies* that 'the oral evidence of a credible witness, if believed, may in itself be sufficient to prove an infringement, depending on the circumstances of a particular case. Of course, if the OFT is relying primarily on a witness rather than on documents, it will no doubt look for support in the surrounding circumstances, for example, the dates and timing of price increases. It will no doubt ask itself whether there is reason to believe that the witness may be untruthful or mistaken but, as at present advised, we do not think there is any technical rule that precludes the OFT from accepting an oral statement of a witness at face value if it thinks it right to do so'.[632]

5.28 The CAT went on to state in *JJB Sports* when considering the relative strength of witness evidence (as also cited by Vp in its representations[633]), that 'our general approach to the witness evidence, whether given on behalf of the OFT, or on behalf of the appellants, is to be cautious, and to look for corroboration, whether from context, documents, or other witnesses, wherever possible'.[634] This approach was endorsed in *Tesco* where the CAT stated that 'in seeking to resolve disputes of fact, we have looked for support for a

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[632] *Claymore Dairies Limited v OFT* [2003] CAT 18, paragraph 8. The Office of Fair Trading ('**OFT**') was the UK's consumer and competition authority (and therefore responsible for the enforcement of the Chapter I prohibition of the Competition Act) prior to the establishment of the CMA in 2013.
[633] Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraph 3.45, URN 5308.
[634] *JJB Sports plc v OFT* [2004] CAT 17, paragraph 294.

witness's account, whether from the documents, other witnesses or surrounding circumstances'.[635]

5.29 In respect of Relevant Period 2(a), evidence provided in the context of the leniency application by Mabey (in the form of witness statements and interview evidence provided by former MHL employees, [MHL Employee 1] and [MHL Employee 2], and current employee [MHL Employee 3])[636] is particularly important. Vp states in this regard that 'the CMA relies heavily on evidence provided by the leniency beneficiary in circumstances where it has not sufficiently corroborated those statements with other evidence' and MGFL submitted that the evidence of the leniency witnesses is 'self-serving'.[637]

5.30 In *Quarmby*, the CAT dismissed as 'unsubstantiated' a claim that evidence provided by a witness 'was "tainted" because it was given in the context of [a] leniency application'. The CAT noted that, as a condition of leniency, the undertaking providing the underlying evidence to the OFT and the witness commenting on that evidence were under a duty of continuous and complete cooperation and were aware of the criminal sanctions which they faced if they provided false or misleading information to the OFT.[638]

5.31 In assessing the evidential value of statements made by or on behalf of an undertaking applying for leniency, it is also useful to note relevant EU case law, as summarised in *FMC Foret*, stating that:

(a) 'the mere fact that the information was submitted by an undertaking which made an application for leniency does not call in question its probative value', although exercising some caution as to evidence provided voluntarily is understandable;[639]

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[635] *Tesco Stores Limited and others v OFT* [2012] CAT 31, paragraph 128.
[636] [✂].
[637] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.8 to 4.10, URN 4565. The CMA notes that MGFL has submitted that the evidence of the leniency witnesses is '…self-serving evidence offered by witnesses seeking to support a leniency application…', MGFL's response to the CMA's Statement of Objections, paragraph 101, URN 4529. The CMA does not consider that this witness evidence is particularly self-serving and overall appears to provide a clear reflection of the individuals' recollections of the events in question. In addition, as set out in this section, the CMA has considered the leniency witness evidence in the round with other witness and documentary evidence.
[638] *Quarmby Construction Company Limited v OFT*, [2011] CAT 11, paragraph 114.
[639] Judgment of 16 June 2011, *FMC Foret SA v Commission* T-191/06, EU:T:2011:277, paragraph 115. There is no general principle that prohibits the Commission from relying on statements made by one incriminated undertaking against another. Judgment of 20 April 1999, *Limburgse Vinyl Maatschappij and Others v Commission* T-305/94, EU:T:1999:80, paragraph 512. A cautious approach to leniency evidence is understandable as participants 'might tend to play down the importance of their contribution to the infringement and maximise that of others'. However, seeking to benefit from an application for leniency 'does not necessarily create an incentive to submit distorted evidence as to the other participants in the cartel. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the undertaking, and thereby jeopardise its chances of benefiting fully under the Leniency Notice'. Judgment of 16 June 2011, *FMC Foret SA v Commission* T-191/06, EU:T:2011:277, paragraph 117; citing judgment of 16

(b) ‘it must be concluded that where a person admits that he committed an infringement and thus admitted the existence of facts going beyond those whose existence could be directly inferred from the documentary evidence, that implies, a priori, in the absence of special circumstances indicating otherwise, that that person had resolved to tell the truth. Thus, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence’;[640]

(c) nonetheless, ‘a statement by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings which have been similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence’;[641]

(d) ‘that rule can be qualified in a case where the statement from the undertaking which cooperates is particularly reliable, since, in those circumstances, a lesser degree of corroboration is required, both in terms of precision and depth’ and therefore ‘if a body of consistent evidence makes it possible to corroborate the existence and certain specific aspects of the collusion referred to in the statement made in the context of cooperation, that statement may in itself be sufficient to evidence other aspects of the contested decision’;[642] and

(e) it is also the case that, ‘even if the statement of an undertaking is not corroborated in terms of the specific facts to which it attests, it may have a certain probative value in corroborating the existence of the infringement, as part of a body of consistent evidence used by the Commission. Insofar as a document contains specific information corresponding to that

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November 2006, *Peróxidos Orgánicos* v *Commission* T-120/04, EU:T:2006:350, paragraph 70; and judgment of 8 July 2008, *Lafarge* v *Commission* T-54/03, EU:T:2008:255, paragraph 58.

[640] Judgment of 16 June 2011, *FMC Foret SA v Commission* T-191/06, EU:T:2011:277, paragraph 118; citing judgment of 8 July 2004, *JFE Engineering and Others* v *Commission* T-67/00, EU:T:2004:221, paragraphs 211 and 212; judgment of 26 April 2007, *Bolloré and Others* v *Commission* joined cases T-109/02, T-118/02, T-122/02, T-125/02 and T-126/02, T-128/02 and T-129/02, T-132/02 and T-136/02, EU:T:2007:115, paragraph 166; and judgment of 8 July 2008, *Lafarge* v *Commission* T-54/03, EU:T:2008:255, paragraph 59.

[641] Judgment of 16 June 2011, *FMC Foret SA v Commission* T-191/06, EU:T:2011:277, paragraph 120; citing judgment of 8 July 2004, *JFE Engineering and Others* v *Commission* T-67/00, EU:T:2004:221, paragraph 219; judgment of 25 October 2005, *Groupe Danone* v *Commission* T-38/02, EU:T:2005:367, paragraph 285; judgment of 26 April 2007, *Bolloré and Others* v *Commission* joined cases T-109/02, T-118/02, T-122/02, T-125/02 and T-126/02, T-128/02 and T-129/02, T-132/02 and T-136/02, EU:T:2007:115, paragraph 167; judgment of 8 July 2008, *Lafarge* v *Commission* T-54/03, EU:T:2008:255, paragraph 293; and judgment of 14 May 1998, *Enso-Gutzeit OY* v *Commission* T-337/94, EU:T:1998:98, paragraph 91.

[642] Judgment of 16 June 2011, *FMC Foret SA v Commission* T-191/06, EU:T:2011:277, paragraphs 124 and 125; citing judgment of 8 July 2004, *JFE Engineering and Others* v *Commission* T-67/00, EU:T:2004:221, paragraphs 220 and 334.

contained in other documents, it must be considered that those items of evidence reinforce each other'.[643]

5.32 The CMA considers these principles regarding the evidential value of statements given by leniency applicants, deriving both from judgments of the CAT and from the European courts, provide relevant guidance when considering the evidence obtained from Mabey and its former and current employees in the context of the present case.

5.33 It follows that, contrary to the submissions of MGFL and Vp, it would not be appropriate to dismiss, exclude or ignore clearly relevant witness or interview evidence in this case. Such evidence forms part of the total body of evidence that must be considered by the CMA in the round.

5.34 The CMA, following the approach of the CAT (and also taking into account the approach of the European courts as set out above), has therefore carefully assessed the evidence of former and current employees of MHL, in conjunction with the evidence of other witnesses and documentary evidence. In doing so, the CMA has considered the extent to which the evidence is corroborated by and consistent with other evidence in assessing its reliability. The CMA has also considered the witnesses' motives and independence, and the overall probability that their accounts are accurate in respect of the key aspects of their evidence as explained further below.

Witness evidence in Relevant Period 2(a)

5.35 The CMA has obtained a significant volume of witness evidence in respect of Relevant Period 2(a), as described in 5.25 above. The witness evidence in Relevant Period 2(a) consists of:

(a) witness statements provided following voluntary CMA interviews with current and former employees of the leniency applicant, MHL;

(b) witness evidence obtained by the CMA in voluntary interviews with individuals from Vp and in both voluntary and compulsory interviews with individuals from MGF (in the form of interview transcripts);

(c) witness statements of individuals from MGF submitted by MGFL in response to the Statement of Objections and Letter of Facts; and

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[643] Judgment of 16 June 2011, *FMC Foret SA v Commission* T-191/06, EU:T:2011:277, paragraph 126; citing judgment of 8 July 2004, *JFE Engineering and Others* v *Commission* T-67/00, EU:T:2004:221, paragraph 275.

(d) a written response from [MGF Employee 1] to questions put to him by the CMA in a formal written information request.[644]

Witness evidence of MHL

5.36 As set out in paragraph 2.43(c), the CMA conducted interviews with several individuals who are current or former employees of MHL, and obtained witness statements from [MHL Employee 1] and [MHL Employee 2].[645] Vp asserted that certain witness evidence, in particular [MHL Employee 1's] evidence in respect of the contacts in Relevant Period 2(a), is 'vague and inconsistent'[646] and 'directly contradicted by other witness evidence'.[647] MGFL also questioned the 'general vagueness and confused nature of the evidence of [MHL Employee 1] in particular',[648] and asserted that there are 'clear inconsistencies in his evidence' and that his 'confused recollections should have been rigorously tested by reference to the other evidence in the CMA's possession'.[649] These assertions relate, for example, to issues such as the fact that the accounts of [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] differ regarding the existence and content of meetings between the three individuals. MGFL has submitted in this regard that the CMA failed 'to investigate or critically assess the credibility and incentives of the leniency witnesses put forward by Mabey',[650] in particular in relation to [MHL Employee 1's] and [MHL Employee 2's] evidence.

[MHL Employee 1]

5.37 [MHL Employee 1] voluntarily cooperated with the CMA throughout its investigation [✂].[651] While there are incentives for such cooperation, in terms of benefiting under the CMA's leniency policy from immunity from prosecution for the cartel offence or disqualification as a director, this needs to be balanced against the potential consequences of providing false or misleading information in terms of criminal sanctions and the loss of immunity if cooperation is not full and continuous (see paragraph 5.30). The CMA finds that [MHL Employee 1's] evidence is internally consistent on key issues and

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[644] The CMA did not interview [MGF Employee 1] prior to issuing the Statement of Objections [✂]. Subsequently, [MGF Employee 1] was not willing [✂] to attend a virtual interview during the Coronavirus (COVID-19) pandemic and the CMA instead issued a request for information on 27 April 2020. [MGF Employee 1] responded on 22 May 2020; URN 5274.
[645] See paragraphs 2.66 to 2.73 of this Decision.
[646] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.31, URN 4565.
[647] Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraph 2.3, URN 5308.
[648] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 16, URN 5310.
[649] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 19(3), URN 5310.
[650] MGFL's response to the Letter of Facts, dated 18 August 2020, paragraph 19, URN 5310.
[651] In respect of the evidence obtained from [MHL Employee 1], see paragraphs 2.66 to 2.68 of this Decision.

is, in significant respects, corroborated by items of contemporaneous documentary evidence, both those provided by the leniency applicant Mabey and those found on the premises of MGF and Vp (see, for example, paragraphs 5.21 and 5.22 above), as well as by other witness evidence.

5.38 Vp and MGFL stated that [MHL Employee 1's] recollection is 'imprecise and vague'[652] and 'at best confused'.[653] MGFL made further representations that '[MHL Employee 1's] evidence is wholly unreliable on disputed issues of fact'[654] [✂].[655] Vp also submitted that [MHL Employee 1's] witness evidence should be 'discarded in its entirety'[656] [✂]. [✂].[657] The CMA is satisfied that the circumstances [✂] do not undermine the credibility of his account of contacts with [Vp Employee 2] and [MGF Employee 1] in Relevant Period 2(a).

5.39 [MHL Employee 1's] memory of certain events has been imperfect at times, for example when providing free recall of specific locations and dates of events, although this may be explained to some extent by the passage of time and his lack of access to records from the period of his employment at MHL.[658] Nonetheless, the CMA considers that he has sought to provide a clear recollection of events, together with additional commentary where relevant, when questions and documents have been put to him, and is consistent on key issues and, in significant respects, corroborated by other evidence, as noted in paragraph 5.37. In addition, [MHL Employee 1] was able to produce documentary evidence from his personal records of a meeting with [Vp Employee 2] on 25 September 2014[659] (that had previously been disputed by [Vp Employee 2], see paragraph 4.149) and in relation to the context of his second job interview with [MGF Employee 1] in April 2018.[660]

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[652] Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraph 2.3(b), URN 5308.
[653] MGFL's response to the Letter of Facts, dated 18 August 2020, paragraph 13, URN 5310.
[654] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 68, URN 5310.
[655] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 119, URN 5310.
[656] Vp's response to the Letter of Facts dated 7 August 2020, paragraph 2.5, URN 5308.
[657] [✂]
[658] See for example, the fact that, when providing his free recall of events in his first interview the day after he was initially approached by the CMA, [MHL Employee 1] stated that 'I probably met [MGF Employee 1] and [Vp Employee 2] together three maybe four times'. Later, with the benefit of more time to reflect, recourse to his Outlook calendar entries and emails from his employment at MHL, [MHL Employee 1] was able to identify that he had in fact met with [MGF Employee 1] and [Vp Employee 2] together twice, and with [Vp Employee 2] separately twice, during his time at MHL; transcript of an interview with [MHL Employee 1] held on 6 October 2016, page 34, URN 0260. See also second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 11,12 and 65, URN 4615.
[659] Fourth witness statement of [MHL Employee 1] dated 30 September 2020, paragraphs 67 to 79, URN 5419 and Exhibit [✂], URN 5420.
[660] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraphs 141 to 148, URN 4615 and Exhibits [✂] to [✂], URN 4616.

5.40 As explained in paragraph 5.38 above, the CMA has investigated [✂]. The CMA is satisfied that these do not call into question the credibility or reliability of his evidence in respect of Relevant Period 2(a). Furthermore, in the CMA's view and contrary to MGFL and Vp's representations, [MHL Employee 1] does not appear to harbour animosity toward his former employer, to MGF or Vp, or to any of the individuals involved, and has been employed in senior business roles outside the groundworks sector since January 2015.[661] Moreover, [MHL Employee 1] was not employed by MHL at the time it made its leniency application in April 2016 and was not aware of the CMA's investigation until the CMA approached and interviewed him in October 2016.

5.41 MGFL and Vp have both made representations that the purpose of arranging the meetings [MHL Employee 1] attended with [Vp Employee 2] alone and with [MGF Employee 1] and [Vp Employee 2] together (albeit that MGFL and Vp dispute the occurrence of such tripartite meetings) was the potential sale of trench sheets to MHL by [Supplier A] (via MGF) in order to address production issues at MHL's Dewsbury rolling mill. The CMA has explored this issue with [MHL Employee 1's] former employer, MHL, and with [MHL Employee 1], in respect of which see paragraphs 4.142 to 4.144 and 4.157 to 4.169. Having considered the totality of the evidence in its possession, as set out in Chapter 4, the CMA finds that MGFL and Vp's assertions that the purpose of the meetings was to discuss the supply of trench sheets to MHL from [Supplier A] (via MGF) are not credible, and is satisfied that these representations do not call into question the credibility or reliability of [MHL Employee 1's] evidence in respect of Relevant Period 2(a).

[MHL Employee 2]

5.42 As set out in paragraphs 2.69 to 2.71, the CMA obtained witness evidence from [MHL Employee 2]. In respect of [MHL Employee 2's] evidence, Vp and MGFL questioned his credibility in terms of the account [MHL Employee 2] provided of his meeting with [MGF Employee 1],[662] while also seeking to rely on his evidence to support their alternative explanation that contacts between

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[661] MGFL represented that the CMA failed properly to investigate and assess the credibility of [MHL Employee 1's] evidence [✂]; MGFL's response dated 18 August 2020 to the Letter of Facts, paragraph 19, URN 5310. Having put these issues to [MHL Employee 1] in interview, and obtained further information from Mabey, the CMA is satisfied that these issues did not motivate or influence [MHL Employee 1's] witness evidence regarding Relevant Period 2(a) [✂].

[662] See for example, MGFL's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraph 36(3), URN 5438. MGFL submitted that the circumstances in which [MHL Employee 2] left MHL [✂] cast doubt on his honesty as a witness. The CMA asked Mabey to confirm the reasons for [MHL Employee 2] leaving MHL, [✂]. The CMA has carefully considered all of the information it obtained on this issue, as well as the parties' representations, and is satisfied that the reasons for [MHL Employee 2's] departure from MHL do not lead to the conclusion that his evidence regarding his contacts with [MGF Employee 1] should not be relied upon.

the Parties related to the supply of trench sheets to MHL by [Supplier A] (via MGF)[663] (see paragraphs 4.166 and 4.167).

5.43 The existence of a meeting between [MGF Employee 1] and [MHL Employee 2] on 2 December 2015 (see paragraph 4.74) is not in dispute. The CMA notes that [MHL Employee 2] prepared a detailed note of his meeting with [MGF Employee 1] a few days after the meeting took place.[664] The evidence that [MHL Employee 2] provided to the CMA in his subsequent interviews and second witness statement is consistent with that note, and his account is corroborated to some extent by other witness evidence and contemporary documentary evidence, see paragraphs 4.73 to 4.79 and 4.234 to 4.246.

5.44 Notably, [MHL Employee 2's] account of his meeting with [MGF Employee 1] during Relevant Period 3 also bears similarities to [MHL Employee 1's] account of his own meetings with [MGF Employee 1] in Relevant Period 2(a). Both [MHL Employee 1] (on each of 14 February 2014 and 16 July 2014) and [MHL Employee 2] (on 2 December 2015) travelled to meet [MGF Employee 1] at venues of [MGF Employee 1's] choice, close to [✂] and where [✂].[665] At [MGF Employee 1's] first meetings with each of [MHL Employee 1] and [MHL Employee 2], [MGF Employee 1] settled the bill.[666] [MHL Employee 2] recalled that [MGF Employee 1] suggested a second meeting at [Meeting Venue A] as it 'had a backroom which was great as there was no mobile phone reception'.[667] [MHL Employee 1] also noted that 'there was no phone signal' at that venue.[668] [MHL Employee 2] recalled that [MGF Employee 1] suggested that he could bring '[✂]' to the suggested second meeting 'to share more detailed information'.[669] Similarly, in relation to the proposed meeting between [MGF Employee 1], [Vp Employee 2] and [MHL Employee 1] on 4 September 2014 (which did not ultimately take place), [MHL Employee 1] recalled that [MGF Employee 1] suggested that the venue for that meeting should be his office [✂] so that he could 'lay his hands on more figures'.[670] This indicates that when meeting with his peers at MHL, first with [MHL Employee 1] and later with [MHL Employee 2], [MGF Employee 1] intended

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[663] See for example: Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraph 5.11 regarding the supply of steel sheets, and paragraph 5.28(b) regarding [MHL Employee 2's] credibility concerning the circumstances of his departure from Mabey, URN 5308; MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraphs 9(3), 19(4), 54 and 58(1) to 58(3), URN 5310.
[664] Exhibit [✂], URN 5230 to the second witness statement of [MHL Employee 2] dated 4 May 2020.
[665] [✂].
[666] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 86, URN 4615; second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 42, URN 5229.
[667] Second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 36, URN 5229.
[668] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 105, URN 4615.
[669] Second witness statement of [MHL Employee 2] dated 4 May 2020, paragraph 36, URN 5229.
[670] Second witness statement of [MHL Employee 1] dated 27 March 2020, paragraph 118, URN 4615.

that the meetings would continue over time and that the discussions would become more detailed 'as the trust grows'.[671]

5.45 MGFL has not supplied any alternative contemporaneous documentary evidence (such as a report, agenda, notes or minutes) of what was discussed at the meeting with [MGF Employee 1] to cast doubt on [MHL Employee 2's] report, although [MGF Employee 1] submitted that it had been a drunken encounter and that this was, in his view, due in part to [MHL Employee 2] 'acting strangely' and not being forthcoming with information.[672] [MGF Employee 1] also stated that the meeting with [MHL Employee 2] related to cross-supply between MGF and MHL,[673] as MGF made some sales of trench sheets to MHL around that time (as [MHL Employee 2] recalled in interview),[674] but MGFL has not submitted any direct evidence to substantiate that this was the purpose for the meeting and [MHL Employee 2's] contemporary report and later witness evidence do not mention this subject having been discussed at the meeting (see paragraphs 4.166 to 4.167).

5.46 As described above, the CMA has carefully considered the reliability of [MHL Employee 2's] evidence and investigated questions raised as to its credibility. The CMA is not aware of any reason for [MHL Employee 2] to have been untruthful when preparing the detailed contemporaneous note of his meeting with [MGF Employee 1] (in the course of his employment at MHL) or later in his interviews with the CMA. [MHL Employee 2] left MHL [✂] and has been employed outside the groundworks sector since then. He has cooperated with the CMA's investigation and no direct evidence has been submitted that he has an 'axe to grind' with MGF, Vp or MHL. The CMA is therefore satisfied that, along with [MHL Employee 1], [MHL Employee 2] is a credible witness.

[MHL Employee 3]

5.47 As set out in paragraphs 2.72 to 2.73, the CMA obtained witness evidence from [MHL Employee 3]. In respect of [MHL Employee 3's] evidence, MGF stated that there is 'some reason to question his incentives given the fact that he was also refused a job at Vp by [Vp Employee 2].[675] The CMA notes that [MHL Employee 3] stated in his witness statement that he met [Vp Employee 2] in March 2015 to discuss a potential sales and marketing opportunity at

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[671] Exhibit [✂], page 2, URN 5230 to the second witness statement of [MHL Employee 2] dated 4 May 2020.
[672] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 19(4), URN 5310.
[673] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 109, URN 4531.
[674] Transcript of an interview with [MHL Employee 2] held on 28 June 2016, pages 98 to 101, URN 2808.
[675] MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 19(5), URN 5310.

Vp.[676] However, the CMA does not have any evidence that [MHL Employee 3] bears any grudge against Vp and does not consider that what appears to have been discussed at that informal meeting calls into question his credibility as a witness to the investigation.

5.48 The CMA considers that it has carefully evaluated all of the witness evidence provided by current and former MHL employees, including considering the surrounding circumstances. The CMA has tested the veracity of this oral evidence with Mabey, particularly where individuals have since left MHL, and against other evidence in the CMA's possession; considered inconsistencies between witness accounts and the possible motivations and incentives of witnesses; and conducted additional interviews and investigations where necessary. Taking all of this into account, the CMA is satisfied that the witness evidence provided by MHL's current and former employees is credible and reliable.

Witness evidence of MGFL

5.49 As set out in paragraphs 2.55 to 2.62, and 5.35(b) and 5.35(c), the CMA is in possession of witness evidence from key individuals from MGF ([MGF Employee 1], [MGF Employee 3],[677] [MGF Employee 2] and [MGF Employee 4]). [MGF Employee 3] and [MGF Employee 2] both attended voluntary[678] and compulsory interviews with the CMA prior to the Statement of Objections being issued, and the CMA prepared transcripts of those interviews which were referred to in the Statement of Objections. MGFL later submitted witness statements to the CMA for all four of these individuals in response to the Statement of Objections, and further witness statements of [MGF Employee 1], [MGF Employee 3] and [MGF Employee 2] in response to the Letter of Facts. Additional documentary evidence was also submitted by MGFL alongside the witness statements of these individuals from MGF. [MGF Employee 1] has not been interviewed by the CMA, but he submitted written witness evidence in May 2020 in response to a formal information request issued by the CMA, as described in paragraph 5.35(d) above.

5.50 The documents submitted by MGFL in support of these witness statements do not on the whole corroborate the key assertions made in the witness

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[676] First witness statement of [MHL Employee 3] dated 8 April 2020, paragraph 46, URN 4621. [MHL Employee 3] recalls this discussion in his interview evidence; transcript of an interview with [MHL Employee 3] held on 1 March 2017, pages 106 to 107, URN 0270.
[677] [MGF Employee 3 / Vp Employee 2's] interview and witness statement evidence, although pertaining in major part to his employment at Vp, was obtained and prepared during his employment at MGF without recourse to certain records and materials that would have been accessible had he still been employed by Vp.
[678] [✂].

statements. For example, these documents do not provide corroboration in respect of MGFL's assertion that meetings held between [MGF Employee 1] and each of [MHL Employee 1] and [MHL Employee 2] had the principal purpose of seeking to cross-supply MHL via [Supplier A] (see paragraphs 4.155, 4.157 and 4.158 to 4.169),[679] or MGFL's assertion that when communicating with Vp, [MGF Employee 1] and others at MGF were seeking to maintain a cordial relationship with MGF's competitor with a view to the potential sale of MGF's business to Vp at an unspecified future date (see footnote to paragraph 4.47).

5.51 The key individuals from MGF tended to distance themselves personally from the alleged conduct in their witness statements (and also, in the case of [MGF Employee 3 / Vp Employee 2] and [MGF Employee 2], their interviews). Despite this, their witness statements were helpful to some extent in providing further context, and by clarifying and developing previous interview evidence and MGFL's written submissions on certain issues. However, [MGF Employee 1's] witness statements, insofar as they provide evidence relating to the tripartite meetings that took place in Relevant Period 2(a), relate principally to [MGF Employee 1's] stated intended purpose for attending the meetings and do not explain in detail (beyond the suggestion of some broad themes) the content of the discussions that actually took place during the meetings. As discussed above at 5.35(d), the CMA was not able to test [MGF Employee 1's] evidence in interview (see also paragraph 2.56). Furthermore, there are notable inconsistencies in the MGF witness evidence over time, which suggest that the witness evidence of at least certain MGF witnesses may not be entirely reliable.[680]

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[679] First witness statement of [MGF Employee 1] dated 8 October 2019, paragraphs 84 to 97, URN 4531; Exhibit [✂], URN 4533 to the first witness statement of [MGF Employee 1] dated 8 October 2019.

[680] By way of example, [MGF Employee 1] recalled in his first witness statement that he had not met [MHL Employee 1] prior to sending him his contact details on 19 February 2014. In his second witness statement, although he states that he is still doubtful that the first meeting took place on 14 February 2014 (a few days before sending his contact details), he acknowledges that that date would 'tie in' with the entries in both his and [MHL Employee 1's] diaries; first witness statement of [MGF Employee 1] dated 8 October 2019, paragraph 84, URN 4531; second witness statement of [MGF Employee 1] dated 13 August 2020, paragraph 8, URN 5317. Similarly, in his first interview, [Vp Employee 2] did not recall any of the three occasions on which he now admits that he met [MHL Employee 1] on his own in 2013 and 2014, stating that they had only met briefly at a trade association meeting and two trade fairs; transcript of an interview with [MGF Employee 3] held on 9 January 2018, pages 257 to 272, URN 2806. [Vp Employee 2] later stated that he had 'no recollection of ever meeting [MHL Employee 1] after January 2014' and that 'in particular, I have no clear recollection of meeting him at [Meeting Venue F] … around September 2014'; second witness statement of [MGF Employee 3] dated 17 August 2020, paragraph 28, URN 5316. However, text messages were later discovered and disclosed to the parties, evidencing a meeting between [MHL Employee 1] and [Vp Employee 2] on 25 September 2014. MGFL now seems to accept that this meeting took place, without making further comment on why [MGF Employee 3 / Vp Employee 2] had not recalled it previously; MGFL's response dated 23 October 2020 to the CMA's disclosure of additional material dated 30 September 2020, paragraph 17(c), URN 5438.

Witness evidence of Vp

5.52 [Vp Employee 1] attended a voluntary interview with the CMA prior to the issuing of the Statement of Objections, as described in paragraph 2.64.[681] The CMA considers that, in interview, [Vp Employee 1] tended to distance himself from the alleged conduct. However, his evidence provided useful context and was consistent with certain documentary and other witness evidence. Vp did not submit any further witness evidence from [Vp Employee 1] in the form of a witness statement.

Application in this case

5.53 The CMA concludes that there is a significant body of evidence to support its conclusions in this case, including:

(a) in relation to Relevant Periods 1 and 3, contemporaneous documentary evidence in the form of emails and text messages between senior representatives of each company, charges and quotations, along with records of telephone calls between senior representatives of each company that are proximate in time to relevant written communications (for example, see paragraphs 4.18, 4.23, 4.27, 4.29, 4.30, 4.33, 4.34, 4.35, 4.208, 4.216, 4.225 and 4.226);

(b) in relation to Relevant Period 2, contemporaneous documentary evidence in the form of internal and external emails, notes, and records of telephone calls between senior representatives of each company that are proximate in time to relevant written communications (for example, see paragraphs 4.62, 4.65, 4.67. 4.68, 4.69, 4.92, 4.93, 4.110, 4.112, 4.114, 4.173 to 4.177, 4.183);

(c) in relation to Relevant Period 2(a), pricing quotations, calendar entries and the corresponding metadata (for example, see paragraphs 4.62, 4.70, 4.71, 4.74, 4.86 to 4.93); and

(d) in relation to all Relevant Periods, witness evidence which supplements or supports the documentary evidence. This is particularly significant in relation to the tripartite meetings in Relevant Period 2(a), where witness evidence is corroborated by documentary evidence and also, at least to some extent, independently by other witnesses in respect of the main elements of the conduct.

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[681] In response to a request from the CMA, on 20 June 2018 Vp's legal representatives provided limited comments on behalf of [Vp Employee 1] in relation to particular documents pertaining to Relevant Period 3; URN 1073.

5.54 The CMA has also obtained documentary material from Balfour Beatty, a customer of MGF and Vp, in relation to Relevant Period 3 (see paragraphs 4.194 to 4.223).

5.55 MGFL and Vp made representations that the CMA 'infers anti-competitive behaviour from scant evidence'[682] and has 'exaggerated the significance of the limited evidence on which it relies'.[683] The CMA considers there is a substantial body of evidence to establish the Infringement as described above. Nonetheless, it is also the case that both the CAT and the European courts have acknowledged that the activities of those participating in infringements of competition law are often, by their nature, secret or clandestine[684] and that, consequently, evidence explicitly showing unlawful conduct 'will normally be only fragmentary or sparse, so that it is often necessary to reconstitute certain details by deduction'.[685]

5.56 Competition authorities are therefore entitled to infer the existence of an anti-competitive agreement or concerted practice from fragmentary evidence. The Court of Justice has made clear that such inference can be made by reference to a 'number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules',[686] even in cases where there is an absence of direct evidence. In this regard, Vp made representations relating specifically to inferences the CMA draws in relation to the subject matter of the calls identified in the telephone records in the CMA's possession that provide evidence of contacts between key individuals during the Relevant Periods. Vp submitted that there is no record of the matters that were discussed on the telephone calls and that there are legitimate reasons for those telephone calls (for example, discussions relating to trading relationships between MGF and Vp, a possible acquisition of MGF by Vp and matters relating to [MGF Employee 3 / Vp Employee 2's] move from Vp to MGF).[687] As set out above, it may be necessary to draw inferences from fragmentary evidence and to 'reconstitute certain details by deduction'. In the

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[682] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 1.16, URN 4565.
[683] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 20, URN 4529.
[684] See for example the CAT in *Claymore Dairies* stating that 'Chapter I cases will often concern cartels that are in some way hidden or secret; there may be little or no documentary evidence; what evidence there may be may be quite fragmentary; the evidence may be wholly circumstantial or it may depend entirely on an informant'. *Claymore Dairies Limited v OFT*, [2003] CAT 18, paragraph 3. See also judgment of 7 January 2004, *Aalborg Portland and Others v Commission* C-204/00 P etc, EU:C:2004:6, paragraph 55.
[685] Judgment of 7 January 2004, *Aalborg Portland and Others v Commission* C-204/00 P etc., EU:C:2004:6, paragraphs 55 to 56.
[686] Judgment of 7 January 2004, *Aalborg Portland and Others v Commission* C-204/00 P etc., EU:C:2004:6, paragraph 57.
[687] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 2.5 to 2.12, URN 4565.

absence of specific documents recording the matters actually discussed, the CMA has drawn reasonable inferences as to the matters it considers are likely to have been discussed during certain telephone calls between the individuals involved in the Infringement, taking into account the wider context and evidence overall.

5.57 The CAT has approved the approach to evidence in *Durkan*, stating that 'because anti-competitive agreements are usually arrived at covertly, the OFT may have to rely on circumstantial evidence to establish the facts'.[688] Further, in *JJB Sports* the CAT held that 'wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard'[689] and in *Claymore Dairies* that 'indirect evidence and circumstantial evidence generally, may well have a powerful role to play in the factual matrix of a case'.[690] This circumstantial evidence can include, for example, records of telephone calls. Where telephone calls took place close in time to written evidence being produced, that written evidence may be relied upon to infer the content of those calls. In this case, emails between key individuals were sent close in time to telephone calls between them, indicating that the matters raised by email were likely also discussed on the calls, regardless of whether other legitimate topics may also have formed part of the discussions (for example, the emails and telephone calls between [MGF Employee 1] and [MHL Employee 1] in the context of attempting to arrange a tripartite meeting between themselves and [Vp Employee 2] described in paragraphs 4.67 to 4.69, and the emails and calls between [MGF Employee 1] and [Vp Employee 2] described in paragraphs 4.29 to 4.31). It follows that, where meetings took place between the Parties, evidence in the form of emails, call records and other documents created around the time of those meetings will be relevant to the assessment of the likely content of discussions at the meetings.

5.58 The CMA is not therefore required to produce documents expressly attesting to the infringing conduct, but 'the fragmentary and sporadic items of evidence which may be available' to the CMA should 'be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted.'[691] On this issue, the CAT noted in *Claymore Dairies* that 'the OFT may well be entitled to draw inferences or presumptions from a given set of circumstances, for example, that the undertakings were present at a

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[688] *Durkan Holdings Limited v OFT* [2011] CAT 6, paragraph 96.
[689] *JJB Sports v OFT* [2004] CAT 17, paragraph 206.
[690] *Claymore Dairies Limited v OFT* [2003] CAT 18, paragraph 9.
[691] Judgment of 25 October 2011, *Aragonesas Industrias y Energia, SAU v Commission* T-348/08, EU:T:2011:621, paragraph 97.

meeting with a manifestly anti-competitive purpose, as part of its decision-making process'.[692] Ultimately, as set out by the CAT in *Quarmby*, it is for the CMA to establish that 'the totality of evidence, viewed as a whole, must be sufficient to convince the Tribunal in the circumstances of the particular case'.[693]

E. Undertakings

Legal principles

5.59 For the purposes of the Chapter I prohibition and Article 101, the term 'undertaking' covers 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[694]

5.60 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'.[695]

5.61 The term 'undertaking' also designates an economic unit, even if in law that unit consists of several natural or legal persons.[696]

Application in this case

5.62 During the Relevant Periods, MGF, Vp and MHL were engaged in an economic activity, including, in particular, the supply, by way of hire, of the Products to the construction industry.

5.63 The CMA therefore concludes that each of MGF, Vp and MHL constitute undertakings for the purposes of the Chapter I prohibition and Article 101. As discussed in Section N (Attribution of liability):

(a) MGF Limited is considered to form part of the same undertaking as, and to be jointly and severally liable for the conduct of, MGF; and

(b) Mabey Engineering (Holdings) Limited and Mabey Holdings Limited are considered to form part of the same undertaking as, and to be jointly and

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[692] *Claymore Dairies v OFT* [2003] CAT 18, paragraph 10.
[693] *Quarmby Construction Company Limited v OFT* [2011] CAT 11, paragraph 86.
[694] Judgment of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH* C-41/90, EU:C:1991:161, paragraph 21.
[695] Judgment of 16 June 1987, *Commission v Italian Republic* C-118/85, EU:C:1987:283, paragraph 7.
[696] Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission* C-97/08 P, EU:C:2009:536, paragraph 55 and the case law cited.

severally liable for the conduct of, MHL.

F. Agreements between undertakings and concerted practices

Legal principles

5.64 The Chapter I prohibition and Article 101 apply to agreements between undertakings and concerted practices.[697]

5.65 It is not necessary, for the purpose of finding an infringement, to distinguish between agreements and concerted practices, or to characterise conduct as exclusively an agreement, a concerted practice or a decision by an association of undertakings.[698] Nothing turns on the precise form taken by each of the elements comprising the overall agreement or concerted practice. As explained by the Court of Justice, 'it is settled case-law that, although Article [101] distinguishes between "concerted practice", "agreements between undertakings" and "decisions by associations of undertakings", the aim is to have the prohibitions of that article catch different forms of coordination between undertakings of their conduct on the market … and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct'.[699]

Agreements

5.66 The Chapter I prohibition and Article 101 are intended to catch a wide range of agreements, including oral agreements and 'gentlemen's agreements'.[700] 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

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[697] Section 2(1) of the Competition Act and Article 101(1).
[698] *Argos Limited and Littlewoods Limited v OFT* and *JJB Sports plc v OFT* [2006] EWCA Civ 1318, 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 SpA* 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), in which the conduct of the undertakings was found to be an agreement as well as a decision of an association.
[699] 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, *Limburgse Vinyl Maatschappij and Others v Commission* T-305/94 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'.
[700] Judgment of 15 July 1970, *ACF Chemiefarma v Commission* C-41/69, EU:C:1970:71, paragraphs 106 to 114.

enforcement mechanisms.[701]

5.67 An agreement may consist of either an isolated act or a series of acts or a course of continuous conduct.[702] 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'.[703]

5.68 While it is essential 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.[704]

Concerted practices

5.69 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.[705]

5.70 In some cases the concepts of 'agreements' and 'concerted practices' may overlap. Indeed, it may not even be possible to draw such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other.[706]

5.71 The Court of Appeal has noted that, 'concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for [the] purpose' of determining whether there is consensus between the undertakings said to be party to an

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[701] *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).
[702] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92 P, EU:C:1999:356, paragraph 81.
[703] Judgment in *Dresdner Bank v Commission* cases T-44/02 etc, EU:T:2006:271, paragraph 55; citing 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.
[704] 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).
[705] Judgment of 4 June 2009, *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* C-8/08, EU:C:2009:343, paragraph 23; see also judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92, EU:C:1999:356, paragraph 131; and *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, 206(ii).
[706] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92 P, EU:C:1999:356, paragraph 81.

agreement or a concerted practice.[707]

5.72 For present purposes, the following key points arise from the case law on the concept of a concerted practice:

(a) a concerted practice is 'a form of coordination between undertakings which without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.[708] The Court of Justice has also stated 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';[709]

(b) the concept of a concerted practice must be understood in the light of the principle that each economic operator must determine independently the policy it intends to adopt on the market, including the choice of the persons and undertakings to which it makes offers or sells;[710]

(c) the requirement of independence for economic operators precludes 'any direct or indirect contact' between undertakings which has the object or effect of influencing the conduct on the market of an actual or potential competitor,[711] thereby creating conditions of competition which do not correspond to the normal conditions of the market in question;[712]

(d) it follows that, 'a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive

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[707] *Argos Limited and Littlewoods Limited v OFT* and *JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 22.
[708] Judgment of 14 July 1972, *ICI v Commission* C-48/69, EU:C:1972:70, paragraph 64. See also Judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 26; and *JJB Sports plc v OFT* [2004] CAT 17, paragraphs 151 to 153.
[709] Judgment of 14 July 1972, *ICI v Commission* C-48/69, EU:C:1972:70, paragraph 65. See also *JJB Sports plc v OFT* [2004] CAT 17, paragraph 151.
[710] Judgment of 16 December 1975, *Suiker Unie and Others v Commission* joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1975:174, paragraph 173. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(iv).
[711] Judgment of 16 December 1975, *Suiker Unie and Others v Commission* joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1972:70, paragraph 174. See also judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 33; and *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(v). The case law provides that a concerted practice also arises in the situation in which the object or effect of the direct or indirect contact is to disclose to a competitor the course of conduct which the disclosing party has decided to adopt or contemplates adopting on the market (judgment of 16 December 1975, *Suiker Unie*, paragraph 174).
[712] Judgment of 14 July 1981, *Züchner v Bayerische Vereinsbank* C-172/80, EU:C:1981:178, paragraph 14; judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92 P, EU:C:1999:356, paragraph 117; and judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 33. The CAT has held that 'the strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all', *Balmoral Tanks Limited v CMA* [2017], CAT 23, paragraph 41.

practices, and a relationship of cause and effect between the two'. However, that does not necessarily mean that the conduct should produce the concrete effect of restricting, preventing or distorting competition;[713] and

(e) where an undertaking participating in a concerted practice remains active on the market, there is a presumption that it will take account of information exchanged with its competitors when determining its own conduct on the market.[714] The burden is on the parties concerned to adduce evidence to rebut this presumption.[715]

5.73 The European Courts have emphasised that in a properly functioning competitive market, competitors should not know how their competitors are likely to behave, and that a reduction in that uncertainty is a key part of the concept of a concerted practice.[716] In that regard, it is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, significantly reduced uncertainty as to the conduct to expect of the other on the market.[717]

5.74 The General Court has held, in *British Sugar*, that by exchanging information about the prices which they intended to adopt, undertakings not only pursue the aim of eliminating in advance uncertainty about the future conduct of their competitors but also could not fail to take into account, directly or indirectly, the information obtained in the course of meetings in order to determine the policy which they intended to pursue on the market; and it was not relevant that the information in question was already known to customers and could be gathered by competitors on the market.[718]

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[713] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92 P, EU:C:1999:356, paragraphs 118 and 124. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(ix) and case law cited and paragraph 206(xi).
[714] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92 P, EU:C:1999:356, paragraph 121; judgment of 8 July 1999, *Hüls AG v Commission of the European Communities* C-199/92, EU:C:1999:358, paragraph 162; and judgment of 15 March 2000, *Cimenteries CBR SA and Others v Commission of the European Communities* T-25/95*,* EU:T:2000:77, paragraphs 1865 and 1910. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraph 206(x) (followed in *Makers UK Limited v OFT* [2007] CAT 11, paragraph 103(x)). Judgment of 4 June 2009, *T-Mobile Netherlands BV and others v NMa,* C-8/08, EU:C:2009:343, paragraphs 58 to 59, where the ECJ held that this presumption of a causal connection applies even where the concerted action was the result of a meeting held by the participating undertakings on a single occasion.
[715] Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, Case C-286/13 P, EU:C:2015:184, paragraph 127.
[716] Judgment of 15 March 2000, *Cimenteries CBR SA and Others v Commission of the European Communities* T-25/95*,* EU:T:2000:77, paragraphs 1849 and 1852.
[717] Judgment of 17 December 1991, *BASF v Commission* T-4/89, EU:T:1991:73, paragraph 242.
[718] Judgment of 16 July 2001, *Tate & Lyle* T-202/98 etc, EU:T:2001:185, paragraph 60. See also judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, Case C-286/13 P, EU:C:2015:184, paragraph 295, in which the court found that 'even if information about various topics discussed could be

Participation and implementation

5.75 It is settled case law that it is sufficient that the party concerned participated in meetings in which anti-competitive arrangements were concluded, to prove to the requisite standard that the undertaking participated in the arrangement, unless there is evidence that the party had publicly distanced itself from those anti-competitive arrangements. This is because a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery.[719]

5.76 The Court of Justice has held that this principle applies in situations where a party receives the information regarding the anti-competitive arrangements via email, rather than in the context of a meeting:

> 'Article 101(1) TFEU must be interpreted as meaning that, where the administrator of an information system … sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped … those economic operators may - if they were aware of that message - be presumed to have participated in a concerted practice within the meaning of that provision, unless they publicly distanced themselves from that practice, reported it to the administrative authorities or adduce other evidence to rebut that presumption, such as evidence of a systematic application of a discount exceeding the cap in question'.[720]

5.77 The fact that a party may have played only a limited part in setting up an agreement or concerted practice, 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 party to the agreement or concerted practice.[721]

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obtained from other sources, … the competitors' views about them, exchanged in bilateral discussions, could not'.

[719] Judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission*, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 142 and 143; judgment of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 31; judgment of 30 May 2013, *Quinn Barlo v Commission*, C-70/12P, EU:C:2013:351, paragraph 29.

[720] Judgment of 21 January 2016, *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba*, C-74/14, EU:C:2016:42, paragraph 50.

[721] OFT's Guidance on Agreements and Concerted Practices (*OFT401*, December 2004), adopted by the CMA Board, paragraph 2.8. See also, for example, judgment of 15 March 2000, *Cimenteries CBR v Commission* T-25/95, EU:T:2000:77, paragraphs 1389 and 2557 (this judgment was upheld on liability (although the fine was reduced) by the Court of Justice in judgment of 7 January 2004, *Aalborg Portland and Others v Commission* joined cases C-204/00 P etc., EU:C:2004:6); and judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* Case C-49/92 P, EU:C:1999:356, paragraphs 79 and 80.

5.78 Parties may show varying degrees of commitment to the common plan: the fact that a party does not abide by the outcome of meetings or does not act on or subsequently implement the agreement or concerted practice does not preclude the finding of its liability or relieve that undertaking of responsibility for it.[722] In addition, the fact that a party comes to recognise that it can 'cheat' on the agreement or concerted practice at certain times does not preclude the finding of an infringement.[723]

5.79 Further, where an agreement or concerted practice has the object of restricting competition, parties cannot avoid liability for the resulting infringement by arguing that the agreement or concerted practice was never put into effect.[724]

Application in this case

5.80 On the basis of the facts and evidence set out in Chapter 4, the CMA finds that there was a concurrence of wills sufficient to amount to an agreement or a concerted practice within the meaning of the Chapter I prohibition and Article 101:

(a) as between MGF and Vp:

(i) between at least 23 September 2011 and 4 October 2011 (Relevant Period 1);

(ii) between at least 14 February 2014 and 16 July 2014 (Relevant Period 2(a)); and between 17 July 2014 and at least 24 November 2014 (Relevant Period 2(b)) (together Relevant Period 2); and

(iii) between at least 12 November 2015 and 28 November 2016 (Relevant Period 3).

(b) as between MGF, Vp and MHL, between at least 14 February 2014 and 16 July 2014 (Relevant Period 2(a)).

5.81 In each of the Relevant Periods, the arrangement involved the coordination of conduct by the relevant Parties, in particular pricing practices, through the exchange of confidential competitively sensitive pricing and strategic

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[722] Judgment of 15 March 2000, *Cimenteries CBR v Commission* T-25/95, EU:T:2000:77, paragraph 1389; judgment of 11 January 1990, *Sandoz v Commission* C-277/87, EU:C:1990:6, paragraph 3.
[723] Judgment of 14 March 2013, *Dole Food and Dole Germany v Commission* T-588/08, EU:T:2013:130, paragraph 484.
[724] See, for example, judgment of 1 February 1978, *Miller International Schallplatten v Commission*, C-19/77, ECR, EU:C:1978:19, paragraph 7; judgment of 21 February 1984, *Hasselblad (GB) Limited v Commission*, Case 86/82, ECR, EU:C:1984:65, paragraph 46; judgment of 11 January 1990, *Sandoz v Commission* C-277/87, EU:C:1990:6, paragraph 3.

information (as set out in Chapter 4) in order to maintain or increase prices. This conduct resulted in reduced uncertainty between MGF and Vp – and between MGF, Vp and MHL in Relevant Period 2(a) – as regards the operation of the market and the relevant Parties' commercial strategy and future conduct, in particular in relation to price levels.

5.82 Specifically, the evidence shows a common understanding between MGF and Vp in each of the Relevant Periods (and between MGF, Vp and MHL in Relevant Period 2(a)) that they would coordinate their commercial behaviour (in particular pricing practices) with the aim of reducing competition on price and strategic uncertainty and to maintain or increase prices by the following means:

(a) between MGF and Vp (during Relevant Periods 1, 2(b) and 3):

(i) in Relevant Period 1, monitoring prices in the market and challenging each other when prices were considered to be too low (including when discounts were considered to be too high) (see, for example, paragraphs 4.17 to 4.48);

(ii) in Relevant Period 1, MGF reassuring Vp as regards pricing practices going forward (see paragraphs 4.27 to 4.32);

(iii) in Relevant Periods 2(b) and 3, the disclosure and discussion of strategic information in relation to prices, including future pricing practices (which included hire and rebate rates) (see paragraphs 4.173 to 4.189 and 4.196 to 4.223); and

(iv) In Relevant Period 3, through the disclosure and discussion of strategic information in relation to design charges (see paragraphs 4.224 to 4.233).

(b) between MGF, Vp and MHL (during Relevant Period 2(a)):

(i) monitoring prices in the market and challenging each other when prices were considered to be too low, (see paragraphs 4.80 to 4.102);

(ii) the disclosure and discussion of strategic information in relation to design charges (see paragraphs 4.103 to 4.120); and

(iii) the disclosure and discussion of strategic information in relation to transport charges (see paragraphs 4.125 to 4.131).

5.83 The arrangements between MGF and Vp (and MHL in Relevant Period 2(a))

were deliberate,[725] related to coordinating their commercial behaviour (in particular pricing practices) and took place over a significant period of time, including by way of bilateral communications or, during Relevant Period 2(a), tripartite meetings.

5.84 Information shared and discussed by MGF and Vp (and MHL in Relevant Period 2(a)) included that relating to future pricing intentions, including MGF reassuring Vp about proposed price increases (see paragraphs 4.27 to 4.294.32 and paragraphs 4.173 to 4.189), MGF and Vp discussing information regarding pricing for a particular customer during Relevant Period 3 (see paragraphs 4.196 to 4.223) and regarding design charges (see paragraphs 4.103 to 4.120 and paragraphs 4.224 to 4.233) and transport charges (see paragraphs 4.125 to 4.131). Furthermore, where historic or current pricing was discussed and shared between them, it was referred to on the basis that the prices quoted were too low and should not be repeated in the future (see paragraphs 4.17 to 4.48, and 4.80 to 4.102).

5.85 Thus, the CMA finds that the contact between MGF and Vp (and MHL during Relevant Period 2(a)), and the information discussed and shared during each of the Relevant Periods, created conditions which did not correspond to the normal conditions of competition in the market, reducing uncertainty about future conduct. This was the case even where the information discussed was already known by customers, such as each other's quotes, and could, therefore, in principle be gathered on the market, or where it related to settled company policy. The information shared and discussed provided an opportunity for the relevant Parties to confirm their understanding of what prices were being charged directly by their competitors, and to gain a better understanding of their competitors' strategies and future conduct.[726] Accordingly, the sharing of this information reduced strategic uncertainty as between MGF and Vp (and MHL during Relevant Period 2(a)) as it enabled them to check – and take comfort from – the likely future conduct of their competitors on the market (for example, as between MGF and Vp in relation to the rebate charged to Balfour Beatty (see paragraphs 4.196 to 4.220)).

5.86 As noted in paragraph 5.72(e), there is a presumption that information shared between undertakings was taken into account. There is no evidence to suggest that any of the Parties expressed any reservations or objections to

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[725] As set out in Chapter 4, the various contacts between the parties were deliberate. For example, there is documentary evidence of information being sent and commented on between senior individuals by email (see, for example, paragraphs 4.23 to 4.29).
[726] Judgment of 16 July 2001, *Tate & Lyle and Others v Commission* joined cases T-202/98 etc, EU:T:2001:185, paragraph 60; and judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission* C-286/13 P, EU:C:2015:184, paragraph 295. See also the Commission's guidelines on the applicability of Article 101 to horizontal co-operation agreements, OJ (2011) C11/1, paragraph 92.

each other about such collaboration during the Relevant Period or Periods in which they participated in the Infringement, or that they otherwise sought to distance themselves publicly from the conduct. Indeed, the different aspects of the conduct, as highlighted in paragraph 5.82, show that during their participation in the Infringement, MGF and Vp sought to challenge each other as regards prices that were perceived to be too low (see, for example, paragraphs 4.17 to 4.48), and reassured each other about the approach they would take going forward (see paragraphs 4.27 to 4.29). Moreover, there is evidence that contact between the relevant Parties did have an impact on their actions (see, for example, paragraph 4.27 ([MGF Employee 2's] email to [Vp Employee 2] where he says 'i am sure we can nip it in the bud rapidly' in respect of low quotes by MGF staff), paragraph 4.28 ([MGF Employee 1's] email to MGF employees instructing that 'no items are sent without charges' and MGF 'will be seeking to increase [its] prices in the New Year…', which he later forwarded to [Vp Employee 2]), followed by [Vp Employee 2] commenting that Vp should be 'maintaining rates as well' (paragraph 4.35), as well as [MHL Employee 1's] recollection that he would share knowledge gained from the meetings in Relevant Period 2(a) at MHL (see paragraph 4.82), and that the three participants agreed to let each other know about 'wildly inappropriate pricing' (see paragraph 4.84).

5.87 In relation to design charges in Relevant Period 2(a), Vp made representations that the evidence does not show that Vp discussed design charges with MGF and MHL and, to the extent that MGF shared its views on design charges, Vp submitted this was a unilateral disclosure that had no impact on Vp's future pricing intentions or strategy given that Vp did not introduce design charges itself.[727] Similarly, MGFL made representations that the CMA has not alleged that either [Vp Employee 2] or [MHL Employee 1] gave any indication that they agreed with [MGF Employee 1's] suggestions or gave him any assurance they would act in any particular way.[728] However, the CMA finds that [Vp Employee 2] attended the tripartite meetings with [MGF Employee 1] and [MHL Employee 1] on 14 February 2014 and 16 July 2014 at which design charges were discussed. The fact that only one of a number of competing undertakings reveals its intentions is not sufficient to exclude the possibility of a concerted practice.[729]

5.88 In this case, at the very least MGF disclosed to Vp and MHL the conduct it had decided to adopt or contemplated adopting on the market in relation to

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[727] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 3.56 and 3.62, URN 4565.
[728] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 217 to 223, URN 4529.
[729] Judgment of 16 July 2001, *Tate & Lyle and Others v Commission*, Cases T-202/98 etc., EU:T:2001:185, paragraphs 54 to 56.

design charges. As set out in paragraphs 5.72(e) and 5.86 above, there is a presumption that the meeting participants each took account of the information shared by their competitors when determining their own future conduct on the market. The CMA does not consider that any of the Parties have adduced evidence that rebuts that presumption, nor that Vp sought to distance itself publicly from the receipt of MGF's information. Similarly, in respect of the MGF design charge memos that [Vp Employee 1] had in his possession and the discussions the CMA finds took place in Relevant Period 3 (see paragraphs 4.224 to 4.233), Vp has not provided evidence that [Vp Employee 1] sought to distance himself publicly from the receipt of MGF's information in relation to design charges, and [Vp Employee 1] agrees he intended to discuss the memo received from [MGF Employee 3] with other Vp employees (as set out in paragraph 4.228).

5.89 In respect of transport charges, Vp made representations that, to the extent MGF shared its views, this was a unilateral disclosure by MGF and that it had no impact on Vp's future pricing intentions or strategy, given its reliance on third party transport providers.[730] Similar to the position in respect of design charges, at the very least MGF disclosed to Vp and MHL the conduct it had decided to adopt or contemplated adopting on the market in relation to transport charges. Vp has not provided evidence that rebuts the presumption the information was taken into account, nor has Vp provided evidence it sought to distance itself publicly from the information. Whilst Vp may organise transport in a different manner to MGF, it was still the case that Vp charged customers for transportation and therefore the sharing of information in relation to transport charges reduced strategic uncertainty between the Parties as it enabled them to check – and take comfort from – the likely future conduct of their competitors on the market.

5.90 MGFL and Vp made representations that the contacts between MGF and Vp in Relevant Period 3 concerning the Balfour Beatty tender had no commercial or strategic impact on either party, and that each of them made its own decisions in relation to hire and rebate rates.[731] The CMA does not consider that MGF or Vp have adduced evidence that rebuts the presumption that information exchanged was taken into account, and in fact the evidence shows that the information received from Vp was discussed internally by senior individuals within MGF in the context of deciding on the rebate to offer to Balfour Beatty. In respect of this conclusion, the CMA notes that the individuals at MGF who received and discussed information about Vp's

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[730] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 3.65, URN 4565.
[731] See, for example: Vp's response dated 7 August 2020 to the CMA's Letter of Facts, paragraphs 8.3 and 8.8, URN 5308; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraph 268(6,7), URN 4529; MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraph 39, URN 5310.

proposed rates were involved in preparing MGF's proposals to Balfour Beatty. Therefore, the CMA finds that the contacts between MGF and Vp reduced strategic uncertainty as they enabled them to check, and take comfort from, the hire and rebate rates they were each proposing to Balfour Beatty.

5.91 Although MGF and Vp from time to time may have sought to circumvent the agreement or concerted practice, for example by submitting low quotes (see, for example, the low quotes from February 2014, described at paragraphs 4.88 and 4.89), as also noted in paragraph 5.78, the fact that a party comes to recognise that it can 'cheat' on the agreement or concerted practice, does not preclude the finding of an infringement. As noted in paragraph 5.86 above, the different aspects of the conduct, as highlighted in paragraph 5.82, show that MGF and Vp (and MHL in Relevant Period 2(a)) would take steps to challenge each other as regards prices that were perceived to be too low, and reassure each other about the approach that would be taken going forward. The CMA does not consider that the arrangement eliminated competition between MGF and Vp (and MHL in Relevant Period 2(a)) altogether, rather that it created conditions that did not correspond to the normal conditions of competition.

Alternative explanations put forward by MGFL and Vp

5.92 Vp has made representations that the evidence in the case is limited and that the CMA may therefore 'only assume anti-competitive coordination and contacts where there is no alternative plausible explanation for contact between the Parties'.[732] MGFL has represented that there is 'no (alternatively insufficient) documentary evidence to underpin the CMA's case theory' and asserts that MGFL has put forward 'evidence that provides alternative, plausible and innocent explanations for those meetings and contacts'.[733]

5.93 MGFL has made representations proposing alternative explanations for the contacts between MGF and Vp (and MHL in respect of Relevant Period 2(a)), including that:

(a) [MGF Employee 1] wanted to meet with [MHL Employee 1] with a view to supplying trench sheets to MHL using MGF's manufacturing arrangement with [Supplier A]. MGFL asserts that the main reason for [MGF Employee 1] wanting to meet [MHL Employee 1] during Relevant Period 2(a) was to see if MGF could supply MHL with trench sheets, as MHL was having

[732] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.11 to 4.14, URN 4565.
[733] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, Annex A, 'Note on burden and standard of proof', paragraphs 16 and 17, URN 5436.

manufacturing difficulties at MHL's Dewsbury rolling mill, and that this was the 'principal topic of conversation' (see paragraphs 4.155 to 4.157); and

(b) any discussion about design or transport charges would only have occurred in the context of [MHL Employee 1's] job interviews with MGF (see paragraph 4.118), and the briefing note in respect of design and transport charges was prepared for the purpose of a MGF management meeting that took place after [MHL Employee 1] met [MGF Employee 1] on 16 July 2014 (whether or not [MHL Employee 1] saw the memo at the meeting) (see paragraph 4.117).

5.94 Vp has made representations proposing alternative explanations that:

(a) there is no record of the matters that were discussed on telephone calls between individuals during the Relevant Periods, and that there are legitimate reasons for those telephone calls (for example, discussions relating to trading relationships between Vp and MGF, a possible acquisition of MGF by Vp and matters relating to [MGF Employee 3 / Vp Employee 2's] move from Vp to MGF);[734] and

(b) during Relevant Period 3, in respect of the Balfour Beatty tender process, Vp considered it was tendering as a 'tier 1 supplier' who would supply Balfour Beatty directly and source some products from MGF (MGF being a 'tier 2 supplier'), and so the contacts between Vp and MGF were legitimate in this context (see paragraphs 4.221 to 4.222).

5.95 Both MGFL and Vp have made representations that:

(a) various contacts between MGF and Vp related to the cross-hire and cross-supply that the parties engaged in with each other, and that certain communications were to 'pacify' or 'placate' in order to maintain the trading relationship (in respect of which see, for example, paragraphs 4.40 to 4.43);

(b) [MGF Employee 1] had contact with [Vp Employee 1] due to a possible acquisition of MGF by Vp at various points prior to and during the Relevant Periods, and in respect of Relevant Period 1, MGFL asserted that [MGF Employee 1] wanted to maintain personal relationships in respect of a possible acquisition of MGF by Vp (in respect of which, see for example paragraph 4.47); and

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[734] Vp has submitted: 'the CMA is not justified in reaching its conclusions about as to the subject matter of any phone calls between the parties'; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 4.14, URN 4565. In respect of this representation, see paragraph 5.56.

(c) certain contacts between [Vp Employee 2] and key individuals at MGF shortly before the time [Vp Employee 2] left Vp and moved to MGF related to the arrangements for this move, and that the significance of these contacts should be evaluated in the context of two competitors who were about to become colleagues (see, in this respect, paragraph 4.203). In addition, MGFL made representations that there was no anti-competitive arrangement in Relevant Period 3, relying on the witness evidence of [MGF Employee 3 / Vp Employee 2] submitted by MGF with its representations. [MGF Employee 3] stated that his contact with [Vp Employee 1] related to outstanding [✂] following his departure from Vp, and the discussions were an opportunity to rebuild the trading relationship between MGF and Vp (see, in this respect, paragraph 4.232).

5.96 The CMA's assessment of these alternative explanations is set out in Chapter 4. In summary:

(a) the CMA acknowledges that MGF and Vp (and MHL during Relevant Period 2(a)) may have had some legitimate reasons to contact each other, for example in relation to their trading relationship (see paragraph 4.15) and in respect of the cross-hire or cross-supply of the Products,[735] or the movement of personnel (such as [MGF Employee 3 / Vp Employee 2]). However, the evidence relied upon to support the CMA's findings does not fall into any category of legitimate contact between competitors, and any legitimate reasons for contact that may exist do not excuse or explain the anti-competitive conduct and objectives in question (see paragraphs 4.40 to 4.43 in respect of MGFL's and Vp's representations and the CMA's conclusions on these; see also, for example, paragraph 4.32 regarding [MGF Employee 2's] acknowledgement that Vp was 'a competitor, who's also a customer' in respect of challenging each other on pricing issues);

(b) regarding the movement of personnel, the CMA does not consider that the impending movement of [MGF Employee 3 / Vp Employee 2] from Vp to MGF in Relevant Period 3 explains particular conduct (see paragraph 4.213), justifies anti-competitive contact between competitors or removes obligations or liability under competition law (in respect of MGFL and Vp's representations on this, see paragraphs 4.201 to 4.203). It is clearly established in case law that the fact the person who entered into an agreement or concerted practice did not have authority to do so does not

[735] See, for example, transcript of an interview with [MGF Employee 3] held on 9 January 2018, pages 152 to 156 and 202 to 203, URN 2806.

mean that the undertaking that employs him or her is not liable.[736] The circumstances do not alter the fact that there was communication about commercially sensitive hire and rebate rates between MGF and Vp in relation to the Balfour Beatty tender (as set out in paragraphs 4.198 to 4.200). In respect of [MGF Employee 3's] contact with [Vp Employee 1] after [MGF Employee 3 / Vp Employee 2] joined MGF, the CMA is not persuaded that this is explained by outstanding [✂] or the opportunity to rebuild the trading relationship between MGF and Vp (in respect of which, see paragraph 4.232);

(c) in respect of a potential acquisition of MGF by Vp, the CMA notes it has not seen documentary evidence that MGF was considering a sale to Vp at the relevant point in time when there were contacts between them, and such circumstances would not, in any event, justify the exchange of competitively sensitive pricing information (in respect of which, see paragraph 4.47);

(d) in respect of [MGF Employee 1's] explanation that he wanted to supply trench sheets to MHL (via [Supplier A]) and that this was the main reason for his contact with [MHL Employee 1], the CMA is not persuaded that this explains the contacts when considered in their wider context or taking into account [MHL Employee 1's] recollection of the topics discussed during Relevant Period 2(a) (in respect of which, see paragraphs 4.158 to 4.169);

(e) regarding Relevant Period 2(a) and the suggestion that certain matters may have been discussed during job interviews, this does not accord with [MHL Employee 1's] witness evidence, and the CMA considers it is not a realistic or substantiated alternative explanation (in respect of which, see paragraph 4.118); and

(f) regarding Relevant Period 3, the submission that Vp considered it was tendering as a 'tier 1' supplier does not fully explain or justify the interactions between MGF and Vp in respect of the Balfour Beatty tender, and in any event the evidence from MGF and Balfour Beatty does not support Vp's submission (in respect of which, see paragraphs 4.221 to 4.222).

5.97 As set out in paragraphs 5.10 to 5.13, the standard of proof which the CMA has applied is the English civil standard. In applying that standard, the CMA has had regard to the totality of the evidence, including the evidence

[736] For example, see judgment of 21 July 2016, *VM Remonts and Others v Konkurences padome* C-542/14, EU:C:2016:578, paragraphs 23 and 24.

indicating anti-competitive coordination as well as any evidence said to support an alternative explanation. Considering all the evidence in the round, the CMA considers that the alternative explanations submitted by MGFL and Vp are not supported by evidence such that they refute the CMA's conclusions on the balance of probabilities, and the CMA finds that they do not provide an alternative explanation of the conduct that is more compelling than the explanation relied on by the CMA to establish the Infringement, based on the evidence and the inferences drawn by the CMA from it.

5.98 The CMA finds that the evidence above that demonstrates MGF and Vp (and MHL in Relevant Period 2(a)) did not determine their conduct on the market independently of each other; instead they had a shared understanding of how they would behave in the market, and by their actions were aware that there would be less downward pressure on prices than would otherwise be expected. Through their contacts MGF and Vp (and MHL in Relevant Period 2(a)) reduced uncertainty as to their intended conduct, and knowingly substituted practical cooperation in respect of their commercial strategy (in particular their pricing) for the risks of competition.

G. Object of preventing, restricting or distorting competition

Legal principles

5.99 The Chapter I prohibition and Article 101 prohibit agreements 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.[737]

5.100 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 regarded, by their very nature, as being harmful to the proper functioning of normal competition.[738] The Court of Justice has characterised as the 'essential legal

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[737] See, respectively: judgment of 13 July 1966, *Consten & Grundig v Commission* C-56/64, EU:C:1966:41, paragraph 343; judgment of 8 November 1983, *IAZ and Others v Commission* joined cases 96-102, 104, 105, 108 and 110/82, EU:C:1983:310, paragraph 25; judgment of 20 November 2008, *Competition Authority v Beef Industry Development Society*, C-209/07, EU:C:2008:643, paragraphs 32 to 33.

[738] 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 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204,

criterion' for a finding of anti-competitive object that the coordination between undertakings 'reveals in itself a sufficient degree of harm to competition' such that there is no need to examine its effects.[739]

5.101 The object of an agreement is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives and the legal and economic context of which it forms part.[740] 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.[741] Where appropriate, the way in which the coordination (or collusive behaviour) is implemented may be taken into account.[742]

5.102 The object of an agreement or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it.[743] 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.[744]

5.103 Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of

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paragraphs 49 and 57; judgment of 11 September 2014, *MasterCard and Others v Commission* C-382/12 P, EU:C:2014:2201, paragraph 184; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission* C-286/13 EU:C:2015:184, paragraph 113). It went on to state that that case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraph 50; judgment of 11 September 2014 *MasterCard and Others v Commission* C-382/12 P, EU:C:2014:2201, paragraph 185).

[739] Judgment of 11 September 2014, *Groupement des cartes bancaires v Commission* C-67/13 P, EU:C:2014:2204, paragraphs 49 and 57; and judgment of 20 January 2016, *Toshiba* v Commission C-373/14 P, EU:C:2016:26, paragraph 26.

[740] 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 14 October 2011, *Football Association Premier League and Others* C-403/08, EU:C:2011:631, paragraph 136; judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13, EU:C:2015:184, paragraph 114.

[741] 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.

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

[743] 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.

[744] Judgment 0f 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.

the Chapter I prohibition and Article 101, even if the agreement or concerted practice had other objectives.[745]

5.104 The fact that an agreement pursues other legitimate objectives does not preclude it from being regarded as having a restrictive object.[746]

5.105 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.[747]

Reducing price competition and the sharing of competitively sensitive information

5.106 Article 101(1)(a) and section 2(2)(a) of the Competition Act expressly identify agreements or concerted practices that directly or indirectly fix purchase or selling prices or any other trading conditions as among those that would infringe Article 101 and the Chapter I prohibition.

5.107 The European Courts and the European Commission have found on numerous occasions that agreements or concerted practices which involve the sharing amongst competitors of pricing or other information of commercial or strategic significance restrict competition by object.[748] The UK courts have also held that such agreements or concerted practices restrict competition by object and the CAT has stated that '[t]he European Courts have emphasised that one key aspect of the concept of a concerted practice is that in a properly functioning competitive market, competitors should not know how their competitors are likely to behave'.[749]

5.108 The Court of Justice has also held that the exchange of information between competitors is liable to be incompatible with Article 101 (and EU Member States' equivalent national competition laws) if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.[750] In particular, an

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[745] For example, judgment of 8 November 1983, *NV IAZ International Belgium and others v Commission* joined cases 96-102, 104, 105, 108 and 110/82, EU:C:1983:310, paragraphs 22 to 25.
[746] 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.
[747] 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.
[748] See for example: judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission* C-286/13 P, EU:C:2015:184, paragraphs 113 to 127; judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343. See also *Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements*, OJ C 11, 14.1.2011, p. 1–72; and *Article 101(3) Guidelines*, paragraphs 72 to 74.
[749] Judgment in *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 39 (upheld on appeal: see *Balmoral Tanks Limited v CMA* [2019] EWCA Civ 162).
[750] Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission* C-286/13 P, EU:C:2015:184, paragraph 121; judgment of 2 October 2003, *Thyssen Stahl v Commission* C-194/99 P,

exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anti-competitive object.[751]

5.109 The CAT has stated that '[t]he strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all'[752] and has previously held that '[t]he fact of having attended a private meeting at which prices were discussed and pricing intentions disclosed, even unilaterally, is in itself a breach of the Chapter I prohibition, which strictly precludes any direct or indirect contact between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions'.[753]

Application in this case

5.110 The CMA finds that the Infringement took the form of an agreement or concerted practice between:

(a) MGF and Vp during Relevant Periods 1, 2 and 3; and

(b) MGF, Vp and MHL during Relevant Period 2(a),

that amounted to coordination of their commercial behaviour (in particular pricing practices) with the aim of reducing competition on price and strategic uncertainty in relation to the supply, by way of hire, of the Products, in order to maintain or increase pricing levels in the market. Having considered the content and objectives of the agreement or concerted practice, and when viewed in the legal and economic context of which it formed part, the CMA finds that such conduct was, by its very nature, harmful to the proper functioning of normal competition and therefore had the object of restricting competition.

EU:C:2003:527, paragraph 81; judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 35.

[751] Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission* C-286/13 P, EU:C:2015:184, paragraph 122. See also opinion of AG Kokott of 11 December 2014, *Dole Food* C-286/13 P, EU:C:2014:2437, paragraph 113: 'It is in fact sufficient for a finding of an anti-competitive object that information is exchanged between competitors about factors relevant to their respective pricing policy or — more generally — to their conduct on the market'; judgment of 4 June 2009, *T-Mobile Netherlands and Others* C-8/08, EU:C:2009:343, paragraph 41.

[752] Judgment in *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 41.

[753] Judgment in *JJB Sports plc v OFT* [2004] CAT 17, paragraph 873 (cited with approval by the CAT in *Balmoral Tanks Limited v CMA* [2017] CAT 23, paragraph 41).

Content of the agreement or concerted practice

5.111 The CMA finds that the content of the agreement or concerted practice that formed the basis of the Infringement was a common understanding to coordinate MGF's and Vp's (and MHL's in Relevant Period 2(a)) commercial behaviour, in particular pricing practices. As set out at paragraph 5.82, the evidence shows that the common understanding included, at various times, monitoring prices in the market and challenging each other when prices were considered to be too low (see paragraphs 4.17 to 4.48 and paragraphs 4.80 to 4.102), as well as the disclosure and discussion of confidential competitively sensitive pricing and strategic information, including in relation to proposed price increases (see, for example, paragraphs 4.27 to 4.29 and paragraphs 4.173 to 4.189), hire and rebate rates for a particular customer (see paragraphs 4.196 to 4.223), charges relating to design costs (see, for example, paragraphs 4.103 to 4.120 and paragraphs 4.224 to 4.233), and charges for transport costs (see, for example, paragraphs 4.125 to 4.131).

Objectives of the agreement or concerted practice

5.112 The CMA finds that the objective of the agreement or concerted practice between MGF and Vp (and MHL in Relevant Period 2(a) was to restrict competition on price, to reduce strategic uncertainty and to seek to maintain or increase prices for the supply, by way of hire, of the Products (see, for example, paragraphs 4.8 to 4.10, 4.23 to 4.32, 4.81 to 4.85, 4.88 to 4.96, 4.106, 4.125).

5.113 The agreement or concerted practice was initially put in place by MGF and Vp against a background of strong competition (in particular from MHL), with the intention of maintaining or increasing prices (see paragraphs 4.4 to 4.11). MHL became involved in the agreement or concerted practice during Relevant Period 2(a), against a background in which MGF and Vp were 'working together' to MHL's disadvantage as regards prices (see paragraph 4.11).

5.114 The objective of MGF's and Vp's common understanding (and MGF, Vp and MHL's common understanding in Relevant Period 2(a)) was to maintain or increase price levels in the market. In order to achieve that objective, at various times:

(a) MGF and Vp (and MHL in Relevant Period 2(a)) monitored prices in the market and challenged each other when prices were considered to be too low. Examples of this include [Vp Employee 2's] email of 1 October 2011 to himself, [MGF Employee 2] and [MGF Employee 1] in relation to low quotes offered by MGF (see paragraphs 4.23 to 4.27) and [MGF Employee 2's] email of 4 October 2011 to [Vp Employee 2] highlighting

examples of Vp offering discounts to customers (see paragraphs 4.33 to 4.34), as well as [MHL Employee 1's] evidence that the objective of discussing 'rogue sales people' was part of MGF, Vp and MHL, 'all trying to push rates up because it is in everybody's interests' (see paragraph 4.81);

(b) MGF, Vp and MHL sought to coordinate their commercial behaviour in relation to charges relating to design costs and transport charges. Examples of this include [MHL Employee 1's] evidence regarding [MGF Employee 1] talking about the frustration of not being able to charge for design work and whether 'If I introduced it at MGF, would you follow?' (see paragraphs 4.103 to 4.105), and – as regards coordination between MGF and Vp in Relevant Period 3 – [MGF Employee 3] informing and discussing with [Vp Employee 1] plans to introduce design charges (see paragraphs 4.224 to 4.233). In respect of transport charges see, for example, [MHL Employee 1's] recollection of discussions at the tripartite meetings with MGF and Vp about MGF's proposals in respect of transport charges (paragraphs 4.125 to 4.129);

(c) MGF and Vp sought to coordinate their commercial behaviour in relation to prices charged to customers, including in relation to price increases. See, for example, paragraphs 4.27 to 4.29 regarding information forwarded to [Vp Employee 2] from [MGF Employee 1] that MGF 'will be seeking to increase [its] prices in the New Year…' and the evidence that MGF and Vp were in contact in relation to proposed 2015 price increases towards the end of 2014 (see paragraphs 4.173 to 4.189); and

(d) MGF and Vp sought to coordinate their commercial behaviour in relation to hire and rebate rates for a particular customer. In this regard, see paragraph 4.198 where [Vp Employee 2] sent information about the rates Vp was proposing for a tender to [MGF Employee 4] by text message, and paragraphs 4.206 to 4.210 in respect of the telephone and email exchanges on 25 and 26 November 2015, during which the CMA finds MGF and Vp communicated in relation to Vp's proposed rebate proposal for the customer.

5.115 As set out further in paragraph 5.108, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anti-competitive object. It follows that, as explained above in paragraph 5.79, where an agreement or concerted practice has the object of restricting competition, parties cannot avoid liability for the resulting infringement by arguing that the agreement or concerted practice was never put into effect. In

this regard, MGFL made representations that the contacts between MGF and Vp regarding the Balfour Beatty tender in Relevant Period 3 did not have any effect on either party's proposal to Balfour Beatty because Balfour Beatty was in a strong bargaining position and 'in substance dictated the approach that MGF and Vp would both adopt' as part of their proposals.[754] The CMA rejects these assertions, finding instead that competitors tendering for a contract should not enter into discussions about the rates they are intending to charge to their mutual customer, as these discussions clearly have a restrictive object. Once discussions have taken place, which have as their object the prevention, restriction or distortion of competition, there is no need to take account of the actual effects of the agreement or concerted practice (as explained at paragraph 5.105). As such, even if MGF and Vp subsequently did not act on the information they shared or were unable to capitalise on it in the face of a strong customer, this would not mean that there was no infringement, particularly in circumstances where neither MGF nor Vp took steps to distance themselves publicly from the information.

5.116 While not a necessary factor for a finding that the object of the conduct was anti-competitive, the CMA has concluded that the evidence also shows that MGF's and Vp's (and MHL's in Relevant Period 2(a)) subjective intention in coordinating their behaviour was to restrict competition. Examples of such subjective intention include:

(a) in Relevant Period 1, [Vp Employee 2] emailing MGF quotes to [MGF Employee 2] (paragraphs 4.23 to 4.26) and [MGF Employee 2's] email response 'I am sure we can nip it in the bud rapidly' (paragraph 4.27);

(b) in Relevant Period 1, [MGF Employee 2] emailing examples of Vp offering customer discounts to [Vp Employee 2] and [Vp Employee 2] commenting in an email to [Vp Employee 3] that '[n]ow I have raised the stakes with them, it is important that we are maintaining rates as well…' (paragraphs 4.33 to 4.35);

(c) regarding Relevant Period 2(a):

(i) [MHL Employee 1's] evidence that the objective of discussing 'rogue sales people' was part of MGF, Vp and MHL 'all trying to push rates up because it is in everybody's interests…' (paragraphs 4.81 to 4.85);

(ii) [Vp Employee 2's] comments in emails with colleagues at Vp that, following receipt of low quotes by MGF, 'This gives me some detail to

[754] See, for example, MGFL's response dated 18 August 2020 to the CMA's Letter of Facts, paragraphs 23(4)(c), 38(5,7), 39 to 40 and 50, URN 5310.

discuss with MGF, which I intend to do in coming days' and 'I'd like to discuss the wider rates issue… but need to try to get MGF to be more sensible' (paragraphs 4.90 to 4.91); and

(iii) [MHL Employee 1's] recollection of [MGF Employee 1] talking about the frustration of not being able to charge for design work and whether 'If I introduced it at MGF, would you follow?' as well as the evidence that [MGF Employee 1] provided [MHL Employee 1] with 'a price list for how much he intended to charge for engineering' (paragraphs 4.104 to 4.107).

(d) regarding Relevant Period 3, [MGF Employee 3's] email to [Vp Employee 1] in which [MGF Employee 3] stated it '[w]ould be good to catch up with the way the market is moving, AMP6, competitors, design etc' (paragraph 4.226).

5.117 During the course of the investigation, the meetings between MGF, Vp and MHL were described by [MHL Employee 1] as being 'generic' and 'scene setting' in nature, and therefore not 'inappropriate'.[755] MGFL and Vp also made representations that the meetings and other contacts taking place between them in the Relevant Periods related to one or more of the following legitimate objectives: cross-hire and cross-supply arrangements; potential supply of trench sheets to MHL by MGF, the potential acquisition of MGF by its competitor, Vp; and the movement of personnel between companies (in respect of which, see paragraphs 5.92 to 5.97 and the references to Chapter 4 therein). Even if such legitimate reasons for contact existed, the CMA considers that there were nonetheless also anti-competitive objectives for the tripartite meetings and other contacts that constitute the Infringement.

5.118 Therefore, having regard to the principles set out in paragraphs 5.99 to 5.109, in particular the fact that an agreement pursues legitimate objectives does not preclude it from having a restrictive object, and also noting the relevant Parties' subjective intentions (as highlighted in paragraph 5.116), the CMA has concluded that these considerations do not carry weight for the purposes of assessing the 'object' of the agreement or concerted practice.

Context of the agreement or concerted practice

5.119 In assessing whether the agreement or concerted practice that formed the basis of the Infringement had the object of restricting competition, the CMA has had regard to its actual context, including the Products affected by the

[755] See, for example, transcript of an interview with [MHL Employee 1] held on 6 October 2016, pages 119, 120, 130 and 131, URN 0260.

Infringement, the conditions of the functioning and structure of the market, and the relevant legal and economic context.

5.120 During the Relevant Periods, MGF and Vp (and MHL in Relevant Period 2(a)) competed in the supply, by way of hire, of groundworks products[756] used to provide temporary support solutions for below ground excavations and the provision of associated design and transport services to customers in the UK. MGF, Vp and MHL are the three main operators supplying the Products for hire in the UK.[757] As set out in paragraphs 2.13 to 2.16, although the Products were supplied to customers in different ways, in each case it was customary for customers to negotiate with and seek bids or quotations based on bespoke, engineered designs from more than one of the Parties before concluding a supply agreement.[758] The price for the supply, by way of hire, of the Products, including whether and how much to charge customers for design and transportation, was therefore a key parameter of competition between MGF and Vp during the Relevant Periods (and between MGF, Vp and MHL during Relevant Period 2(a)).

5.121 Within that legal and economic context, the common understanding reached between MGF and Vp (in Relevant Periods 1, 2 and 3) and between MGF, Vp and MHL (in Relevant Period 2(a)), in the form of the agreement or concerted practice described above, reduced uncertainty regarding their intended conduct, including in respect of pricing. The common understanding and information exchanged was therefore both useful and of practical value in the context of determining their strategy in relation to the price competition between them. At the very least, the information exchanged provided an indication of each other's likely future conduct, market trends and the development of prices, as set out in paragraph 5.114, thereby reducing uncertainty as to how each of them would behave in the market at the relevant time. Furthermore, the agreement or concerted practice meant that MGF and Vp (and MHL in Relevant Period 2(a)) were aware that there would be less downward pressure on prices than would otherwise be expected absent the coordination.

5.122 Accordingly, the conduct of MGF and Vp (and MHL in Relevant Period 2(a)) created conditions of competition which did not correspond to the normal conditions of the market because they were able to set their commercial

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[756] As defined in paragraph 2.3 of this Decision.
[757] As set out in paragraph 2.7 of this Decision.
[758] As set out in paragraphs 2.10 to 2.12, the Products were typically supplied by the Parties to customers as part of a designed 'solution', where the supplier's engineers recommended a bespoke combination of equipment to suit the specific nature of a customer's requirements. During the Relevant Periods it was rare for any of the Parties to impose a discrete design charge. The hire rate charged by the Parties was influenced by a number of factors and transportation costs were typically charged to the customer (whether or not the transportation was provided 'in-house' or contracted out to third party transport providers).

strategy with the benefit of knowledge of how their rivals were likely to behave in the market. This included by reducing uncertainty about the prices charged to customers for hiring the Products including in relation to price increases in the future (see paragraphs 4.27 to 4.29 and paragraphs 4.173 to 4.189), hire and rebate rates for a particular customer (see paragraphs 4.196 to 4.223), charges relating to design costs (see, for example, paragraphs 4.103 to 4.120 and paragraphs 4.224 to 4.233), and charges for transport costs (see, for example, paragraphs 4.125 to 4.131). Accordingly, the customers of MGF and Vp (and MHL during Relevant Period 2(a)) did not benefit from normal competitive conditions between MGF and Vp (and MHL in Relevant Period 2(a)), who had knowingly substituted practical cooperation for the risks of competition, in particular in order to maintain or increase pricing levels in the market.

Conclusion on the object of restricting competition

5.123 For the reasons set out above, and in line with the principles set out in paragraphs 5.99 to 5.109, the CMA concludes that, having regard to its content, objectives and legal and economic context, the agreement or concerted practice that was the subject of the Infringement had the object of preventing, restricting or distorting competition.

5.124 It follows that, for the purposes of establishing whether there has been an infringement of the Chapter I prohibition and Article 101 in the present case, there is no need for the CMA to show that the agreement or concerted practice had an anti-competitive effect.

H. Single and continuous infringement

Legal principles

5.125 An infringement of the Chapter I prohibition and Article 101 need not be based on a single, isolated act, but may operate through a pattern of conduct involving a series of agreements and concerted practices entered into over a period of time. Such an infringement may be viewed as a single and continuous infringement or (where there has been an interruption) a single repeated infringement where the practices at issue are interlinked in terms of pursuing a common anti-competitive objective.

5.126 The European Courts have established three conditions that need to be satisfied in order that an undertaking's liability for a single and continuous infringement is established, namely:

(a) the existence of a series of efforts made by the undertakings in pursuit of a common objective, or single economic aim;

(b) the intentional contribution of the undertaking to the common objectives pursued by all the participants; and

(c) the undertaking's awareness of the offending conduct of the other participants in pursuit of the same objectives, or that it could have reasonably foreseen it and was prepared to take the risk.[759]

5.127 The concept of a single and continuous infringement can be applied to cartels involving a range of different types of conduct or separate actions over a period of time. The concept requires the behaviour to be classified not as a series of individual breaches, but as operating through a pattern of conduct involving a series of agreements or concerted practices over a period of time where 'it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices'.[760]

5.128 Accordingly, 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 an overall plan in pursuit of a single economic aim.[761] Nor is the characterisation of a 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.[762]

5.129 It therefore must be demonstrated that what might otherwise appear to be different conduct has an 'identical' purpose or object to the anti-competitive aims being pursued, so that the various concerted practices and agreements detected can be considered to have been 'part of a series of efforts made by

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[759] Judgment of 16 June 2011, *Team Relocations and Others v Commission* T-204\08, EU:T:2011:286, paragraph 37; judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49\92 P, EU:C:1999:356, paragraph 197.
[760] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49\92 P, EU:C:1999:356, paragraph 82. Further the General Court has held that where the Commission has objective reasons for finding a single continuous infringement it does not have discretion as to whether to instead conclude theat there were a series of separate infringements. See judgment of 16 September 2013, *Villeroy & Boch GmbH and Others v Commission* T-373/10, EU:T:2013:455, paragraph 36.
[761] Judgment of 24 October 1991, *Rhône-Poulenc v Commission* T-1/89, EU:T:1991:56, paragraph 126.
[762] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* 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.

the undertakings in question, in pursuit of a single economic aim'.[763] However, while the single aim of the practices in issue cannot be so broad as to refer to a general distortion of competition, the objectives should not 'be so precise that it de facto prevents it from including in that same infringement different forms of conduct'.[764]

5.130 Several criteria have been identified in the case-law as relevant for assessing whether there is a single infringement, namely the identical nature of the objectives of the practices at issue, the goods or services concerned, the undertakings which participated in the infringement, and the detailed rules for its implementation.[765] Furthermore, whether the natural persons involved on behalf of the undertakings and the geographical scope of the practices are identical are also factors which may be taken into consideration.[766]

5.131 In respect of considering whether there is a single objective to distort the normal pattern of competition, the Court of Justice has held that it is necessary to ascertain whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the conduct in fact implemented by other participating undertakings does not have an identical object or identical anti-competitive effect.[767]

5.132 When establishing that an undertaking was involved in a single continuous infringement it is necessary to show that: '… the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk'.[768] Where an undertaking is not involved in every aspect of the anti-competitive conduct that has taken place, it has been established by the European Courts that the undertaking may only be found liable in respect of the conduct in

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[763] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49\92 P, EU:C:1999:356, paragraph 82.
[764] Judgment of 24 September 2019, *HSBC Holdings plc v Commission* T-105/17, EU:T:2019:675, paragraph 224.
[765] Judgment of 17 May 2013, *Trelleborg Industrie v Commission* T-147 and 148/09 EU:T:2013:259, paragraph 60. The CMA notes these are factors that flow from the particular facts of the cases that have considered the issue of a single and continuous infringement, and are factors that are relevant in making the assessment rather than each being a necessary requirement.
[766] Judgment of 17 May 2013, *Trelleborg Industrie v Commission* T-147 and 148/09 EU:T:2013:259, paragraph 60.
[767] Judgment of 19 December 2013, *Siemens v Commission* C-239\11 P, EU:C:2013:866, paragraph 248.
[768] Judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* C-49/92 P, EU:C:1999:356, paragraph 87; judgment of 7 January 2004, *Aalborg Portland and Others v Commission* joined cases C-204/00 P etc., EU:C:2004:6, paragraph 83.

which it has participated directly.[769] In *Infineon*, the Court of Justice reiterated that the finding of the existence of a single and continuous infringement is separate from the question of whether liability for the infringement as a whole is imputable to an undertaking.[770] A change in the number or identity of the participating undertakings does not necessarily rule out that the infringement is continuing.[771] Conversely, where there is little overlap in the identity of participants to a series of anti-competitive arrangements, this may be a factor that indicates there are, in fact, separate infringements.[772]

5.133 Agreements or concerted practices may constitute a single continuous infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.[773] In examining the continuous nature of an infringement, the question of whether or not a gap in the manifestations of the infringing conduct is long enough to constitute an interruption of an infringement cannot be examined in the abstract and should be assessed in the context of the functioning of the cartel in question.[774]

5.134 In that regard, the CMA notes that, as anti-competitive agreements are known to be prohibited, it is not required to produce documents expressly attesting to contacts between the traders concerned and that the fragmentary and sporadic items of evidence which may be available should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted.[775] Furthermore, the purpose of the concept of the single continuous infringement is to enable a competition authority to

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[769] Judgment of 24 September 2019, *HSBC Holdings plc v Commission* T-105/17, EU:T:2019:675, paragraph 200. See also judgment of 26 September 2018, *Infineon Technologies AG v Commission* C-99/17 P, EU:C:2018:773, paragraph 173.
[770] Judgment of 26 September 2018, *Infineon Technologies AG v Commission* C-99/17 P, EU:C:2018:773, paragraphs 171 to 177. Infineon was part of the smart card chip cartel, alongside Samsung, Philips and Renesas but was not found to be aware of the whole of that infringement as there was no evidence establishing that Infineon was aware of the bilateral contacts among the other participants (nor was it reasonably foreseeable). While the Commission found a single and continuous infringement, it held Infineon liable only for its own infringements and not of the single and continuous infringement as a whole.
[771] See, for example, Commission Decision of 21 October 1998, *Pre-insulated Pipes Cartel*, Case IV/35.691, paragraph 134: 'Members may join or leave the cartel from time to time without it having to be treated as a new agreement with each change in participation'.
[772] See, for example, judgment of 27 September 2006, *Jungbunzlauer v Commission* T-43/02, EU:T:2006:270; judgment of 28 April 2010, *Amann & Sohne and another v Commission* T-446/05, EU:T:2010:165.
[773] Judgment of 20 March 2002, *LR AF 1998 A/S v Commission* T-23/99, EU:T:2002:75, paragraphs 106 to 109; judgment of 7 January 2004, *Aalborg Portland and Others v Commission* joined cases C-204/00 P etc., EU:C:2004:6, paragraph 260. See, for example, judgment of 7 July 1994, *Dunlop Slazenger International Ltd v Commission* T-43/92, EU:T:1994:79, paragraph 79: '…if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates'.
[774] Judgment of 2 February 2012, *Denki Kagaku v Commission* T-83/08, EU:T:2012:48, paragraph 223. See also judgment of 10 November 2017, *Icap and others v Commission* T-180/15, EU:T:2017:795.
[775] Judgment of 27 September 2006, *Dresdner Bank and others v Commission* joined cases T-44/02 OP etc. EU:T:2006:271, paragraph 64. In this regard, see also Chapter 5, Section D (The evidence the CMA has obtained).

treat different elements of anti-competitive conduct as part of a single infringement.[776]

5.135 If the participation of an undertaking in an agreement may be regarded as having been interrupted, the conduct may be categorised as a single repeated infringement (rather than a single continuous infringement) where a single objective is pursued both before and after the interruption.[777] The key difference in such cases lies in the fact that if the infringement is single and repeated, a penalty may not be imposed for the period of the interruption, whereas a penalty may be imposed for the whole period in the case of a single and continuous infringement.[778]

5.136 The General Court has held that the participation of an undertaking in an infringement 'may be categorised as repeated if – as in the case of a continuing infringement … – there is a single objective which it pursued both before and after the interruption, a circumstance which may be deduced from the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in the collusion, of the main rules for its implementation, of the natural persons involved on behalf of the undertakings and, lastly, of the geographical scope of those practices'.[779]

5.137 It is settled case law that the CMA may assume that an infringement has not been interrupted even if, in relation to a specific period, it has no evidence of the participation of the undertaking concerned in the infringement, provided that that undertaking participated in the infringement prior to and after that period, and provided that there is no proof or indicia that the infringement was interrupted so far as concerns that undertaking.[780]

Application in this case

5.138 The CMA finds that MGF and Vp's conduct within each of Relevant Period 1, Relevant Period 2 and Relevant Period 3 comprised a single and continuous infringement, and that together the three Relevant Periods formed a single

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[776] In that regard, the concept of a single continuous infringement has been characterised by Advocate General Wahl as a procedural rule which is designed to achieve efficiency and to alleviate the enforcement burden on a competition authority which would otherwise have to find and prove numerous distinct agreements: see Advocate-General Wahl's opinion of 20 October 2016, *Intel v Commission* C-413/14 P, EU:C:2016:788, paragraphs 180 to 182.
[777] Judgment of 17 May 2013, *Trelleborg Industrie v Commission* T-147 and 148/09 EU:T:2013:259, paragraph 88.
[778] Judgment of 17 May 2013, *Trelleborg Industrie v Commission* T-147 and 148/09 EU:T:2013:259, paragraph 88.
[779] Judgment of 17 May 2013, *Trelleborg Industrie v Commission* T-147 and 148/09 EU:T:2013:259, paragraph 88.
[780] Judgment of 17 May 2013, *Trelleborg Industrie v Commission* T-147 and 148/09 EU:T:2013:259, paragraph 87.

repeated infringement. The CMA also finds that MHL participated in a single and continuous infringement with MGF and Vp during Relevant Period 2(a).

5.139 In making its assessment, the CMA considered whether the Infringement should be categorised as a single and continuous infringement or single repeated infringement, or whether it should instead find a series of separate infringements, by taking into account whether the Parties pursued a single objective, both before and after any interruptions, having regard to: (i) the objectives of the conduct at issue, (ii) the products concerned, (iii) the undertakings that participated, (iv) the main rules for implementation, (v) the natural persons involved, and (vi) the geographical scope. In particular, in reaching its conclusion, the CMA has considered whether any of the various instances of conduct does not have the same object as that implemented by other participating undertakings.

5.140 The CMA finds that, in view of the requirement that there must be a sufficient basis for the finding of infringement and any reasonable doubt should be for the benefit of the undertakings involved,[781] the absence of clear evidence of contacts between the Parties in the periods between the Relevant Periods means that there may have been an interruption in participation in the Infringement. The CMA therefore has not treated MGF's and Vp's conduct from 23 September 2011 to 28 November 2016 as one single continuous infringement. However, the CMA has also not treated the anti-competitive contacts between MGF and Vp (and MHL, where relevant) during that period as a series of separate infringements.

5.141 Instead, for the reasons set out below, the CMA finds that the conduct of MGF and Vp during each of Relevant Period 1, Relevant Period 2 (including with MHL in Relevant Period 2(a)) and Relevant Period 3 amounted to three single continuous infringements, and finds that together these three single continuous infringements formed a single repeated infringement.

(a) **The objectives of the conduct and main rules for implementation**:

(i) the conduct in which MGF and Vp (and MHL in Relevant Period 2(a)) participated during each of the Relevant Periods involved the same objective in terms of the overall plan of the arrangement to restrict competition on price and to reduce strategic uncertainty in relation to the supply, by way of hire, of the Products (see paragraph 5.112);

(ii) MGF and Vp's conduct during each of the Relevant Periods (and MHL's conduct in Relevant Period 2(a)) had the same objective,

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[781] Judgment of 13 July 2011, *Unipetrol v Commission* T-45/07, EU:T:2011:359, paragraph 48.

namely to maintain or increase pricing levels in the market (see paragraph 5.114). The means by which MGF and Vp (and MHL in Relevant Period 2(a)) coordinated their commercial behaviour in each of the Relevant Periods constituted a number of anti-competitive contacts, each with the aim of reducing price competition and strategic uncertainty in relation to the supply, by way of hire, of the Products. As set out in paragraph 5.82 above, such contacts involved, at various times, the disclosure and discussion of confidential competitively sensitive pricing and strategic information regarding pricing (in respect of both current and future pricing intentions) for hire rates (and, in Relevant Period 3, rebate rates), monitoring prices in the market and challenging each other as regards prices that were considered to be too low, as well as sharing and discussing information about proposed charges relating to design and transport services in respect of the supply, by way of hire, of the Products in the UK; and

(iii) the CMA's finding regarding the aims of MGF and Vp (and MHL in Relevant Period 2(a)) in pursuing this anti-competitive objective is also supported by evidence of subjective intentions in coordinating their behaviour to restrict competition (see paragraph 5.116, and the evidence that Vp did not want to 'get into a price war'[782]), as well as by the CMA's finding that MGF and Vp responded to MHL's aggressive business strategy by entering into an anti-competitive arrangement, in respect of which see paragraph 5.113).

(b) **The products concerned and geographical scope**: the conduct comprising the Infringement related to the same products and geographical scope in each of the Relevant Periods, namely the supply, by way of hire, of the Products to customers in the UK.[783]

(c) **The entities that participated and the natural persons involved**: the conduct during each of the Relevant Periods involved both MGF and Vp, with MHL also participating in the conduct in Relevant Period 2(a). The same key individuals from MGF and Vp (namely, [MGF Employee 2], [MGF Employee 1] and [Vp Employee 2] and (following his move during Relevant Period 3, [MGF]) were involved in each of the Relevant Periods, notwithstanding that other individuals were involved, such as [Vp

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[782] See paragraph 4.9.
[783] Vp has made representations that the goods and services in question are not identical on the basis that the conduct related to different customer and contract types. The CMA is not persuaded by this representation, given the CMA's findings set out in Chapter 3 (Relevant Market); Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.35 and 4.36, URN 4565.

Employee 1] after [MGF Employee 3 / Vp Employee 2] moved from Vp to MGF.[784] The CMA considers that based on the evidence of the agreement or concerted practice, it is likely that these individuals would have known what was required of them in the circumstances and acted accordingly.

(d) **Awareness and individual contribution**: as set out at paragraphs 5.80 to 5.98, MGF and Vp (and MHL in Relevant Period 2(a)) participated in an agreement or concerted practice, which shows that they intended through their own conduct to contribute to the common objectives of the conduct pursued by the other participant(s). Furthermore, the evidence shows that each of MGF and Vp (and MHL in Relevant Period 2(a)) was aware of the other participants' contribution to the Infringement, or could reasonably have foreseen it and were prepared to take the risk.

5.142 The CMA also finds that MHL, as a party to the agreement or concerted practice with MGF and Vp, participated in a single and continuous infringement during Relevant Period 2(a).[785] In common with the conduct that took place across Relevant Period 1, Relevant Period 2 and Relevant Period 3, the agreement or concerted practice between MGF, Vp and MHL during Relevant Period 2(a) constituted a series of anti-competitive actions in pursuit of a common objective, namely to reduce price competition and strategic uncertainty in relation to the supply, by way of hire, of the Products, in order to maintain or increase pricing levels in the market.

5.143 The CMA finds that, during each of the Relevant Periods, the anti-competitive conduct of MGF and Vp (and MHL during Relevant Period 2(a)) was

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[784] Vp has made representations that the fact [Vp Employee 2] left Vp during Relevant Period 3, and that [Vp Employee 1] was not identified by the CMA as a 'key individual' in the conduct, indicates that the natural persons involved in the infringement are not identical, thus pointing away from the finding of a single and continuous infringement in Relevant Period 3. The CMA is not persuaded by this representation given the same key individuals were involved throughout the Relevant Periods, notwithstanding that other individuals were also involved at times. In addition, whether the natural persons who are involved are identical is a factor 'which may be taken into consideration' when examining whether a single and continuous infringement has occurred, rather than being a rigid requirement (per judgment of 17 May 2013, *Trelleborg Industrie v Commission* case T-147 and 148/09 EU:T:2013:259, paragraph 60). Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.39 to 4.42, URN 4565. MGFL has also made representations that Relevant Period 3 is different from the other periods because of [MGF Employee 3 / Vp Employee 2's] move from Vp to MGF; MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 288 to 300, URN 4529. The CMA is not persuaded that this event impacts on the interpretation of the conduct during Relevant Period 3. The CMA's view of the conduct in Relevant Period 3 is set out in Chapter 4, Section E (Contact between MGF and Vp during Relevant Period 3).

[785] Vp submitted that because the CMA considers MHL participated in the Infringement during Relevant Period 2(a), the undertakings that participated across the Relevant Periods are not identical, and in particular there cannot be a single continuous infringement in Relevant Period 2 or a single repeated infringement; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.37 and 4.55, URN 4565. The CMA does not agree. As set out above at paragraph 5.132, the case law is clear that although an undertaking may only be liable for the conduct in which it has participated, this does not prevent a single continuous infringement from being found to have occurred.

continuous in nature. Relevant Period 1 was short in duration and all the relevant contacts between MGF and Vp during that period contributed to and supported the objective of MGF and Vp, as described at paragraph 5.141(a) above. Similarly, the contacts between MGF and Vp during Relevant Period 2 (including MHL during Relevant Period 2(a)) contributed to and supported the same objective of maintaining or increasing price levels in the market by restricting price competition and reducing strategic uncertainty.

5.144 The CMA notes that, during Relevant Period 3, there is a 'gap' of a few months between manifestations of the Infringement specifically relating to (i) hire and rebate rates and (ii) design charges. The CMA has considered whether this gap between manifestations in Relevant Period 3 would preclude the finding of an uninterrupted single and continuous infringement, taking into account MGFL's and Vp's representations.[786] For the reasons set out below, the CMA does not consider that this 'gap' precludes such a finding. In addition to the CMA's finding that the aspects of Relevant Period 3 relating to (i) hire and rebate rates and (ii) design charges shared the same objective of maintaining or increasing price levels in the market, there was also continued contact between [MGF Employee 1] and [Vp Employee 1] from January to May 2016 (as set out in paragraphs 4.234 to 4.246). This involved attempts to arrange a further tripartite meeting between MGF, Vp and MHL during Relevant Period 3 in order to 'exchange views on the industry'. The CMA considers this reflects an attempt, at least on the part of [MGF Employee 1], to continue the arrangement between MGF, Vp and MHL to reduce competition.[787]

5.145 As explained above, in Relevant Period 3, there were contacts between MGF and Vp regarding hire and rebate rates (see paragraphs 4.196 to 4.223) and design charges (see paragraphs 4.224 to 4.233). The CMA considers that there was a continuity of method and practice between the contacts in terms of having the same objective in relation to the overall plan of the arrangement to restrict competition (as described at paragraphs 5.141 to 5.142 above). In addition, the manifestations of the infringing conduct within Relevant Period 3 involved the same undertakings (MGF and Vp), common individuals (in

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[786] For example, MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 12(7) and (8), in which MGFL notes that Relevant Period 3 included a period when [MGF Employee 3 / Vp Employee 2] was on gardening leave prior to him joining MGF in [✂], URN 4529. See also Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 5.14, URN 4565.

[787] The CMA does not allege, and has not found, that this evidence relating to attempts to set up a tripartite meeting between MGF, Vp and MHL in itself amounted to an infringement of the Chapter I prohibition or Article 101, noting that it does not appear that such a tripartite meeting took place in 2016 (as Mabey had approached the CMA with an application for immunity in April 2016). However, the CMA considers that this evidence demonstrates that contact between MGF and Vp was on-going throughout Relevant Period 3 and these repeated contacts (including during [MGF Employee 3 / Vp Employee 2's] gardening leave) support the CMA's finding that MGF and Vp's conduct during Relevant Period 3 amounted to a single continuous infringement.

particular [MGF Employee 3 / Vp Employee 2] (having moved from Vp to MGF) and [Vp Employee 1]), the same products (ie the Products), and the same geographic scope. Furthermore, there is no positive indication that MGF and Vp did not participate in the Infringement during the whole of Relevant Period 3, as neither MGF nor Vp have adduced evidence that their actions interrupted the infringing conduct within Relevant Period 3 (for example, by showing that they had distanced themselves publicly from the anti-competitive conduct).

5.146 In that regard, conduct specifically in relation to design charges had been part of the overall plan in Relevant Period 2. There is therefore continuity of objective between Relevant Periods, given that (following the contacts about rebates in November and December 2015) conduct relating specifically to design charges was also manifested through contacts between MGF and Vp in Relevant Period 3 from at least 31 May 2016, when there is evidence of two MGF Internal Memos about design charges dated 12 October 2015 and 22 October 2015 being in Vp's possession and having been circulated within Vp (see paragraph 4.228). Following that, the evidence shows that it was likely that there was contact between [MGF Employee 3] and [Vp Employee 1] regarding design charges at meetings in August 2016 and November 2016 (see paragraph 4.229). This is corroborated by the email sent by [MGF Employee 3] to [Vp Employee 1] on 6 September 2016 informing Vp that MGF was 'working on a few suggestions/design charging mechanics, which we should be able to discuss further early October' as well as referring to 'our wider conversation' on this topic (see paragraph 4.225).

5.147 The CMA considers that the evidence of the manifestations of conduct comprising the Infringement are sufficiently proximate in time within each Relevant Period for it to be reasonable to find that the Infringement continued uninterrupted during each Relevant Period, including during Relevant Period 3 (where there is evidence of continued contact between MGF and Vp from January 2016 to May 2016 as set out in paragraph 5.144 above). However, in view of the absence of clear evidence of contacts of an anti-competitive nature between any of the Parties (i) between Relevant Period 1 and Relevant Period 2 (ie from after 4 October 2011 to before 14 February 2014) and (ii) between Relevant Period 2 and Relevant Period 3 (ie from after 24 November 2014 to before 12 November 2015), the CMA accepts that there may have been a temporary suspension in the Infringement, such that there was an 'interruption' within the meaning of the case law, before the Infringement was resumed. Accordingly, the CMA has not found that the Infringement was continuing during these periods, and instead – for the reasons set out above –

has found that, in the case of MGF and Vp, the three Relevant Periods together formed a single repeated infringement.[788]

5.148 Both MGFL and Vp have made representations that there is no connection between the conduct in each of the Relevant Periods and that the CMA is precluded from finding an overall infringement. MGFL submitted that the conduct was widely separated in time and commercial context, and that there is no 'overarching arrangement' that links the various episodes.[789] Vp similarly made representations that the conduct set out in Chapter 4 in respect of Relevant Periods 2 and 3 does not form part of an overall plan that is linked by the same objective (within the periods or as between the periods).[790] Instead, Vp submitted, the conduct in Relevant Periods 2 and 3 related to separate and distinct issues and the Infringement should not be considered a single repeated infringement.[791]

5.149 The CMA is not persuaded by the representations made by MGF and Vp in this regard. The CMA considers that the different instances of infringing conduct (in respect of which see paragraphs 5.112 and 5.114) form part of the overall plan described in paragraph 5.141(a) above, both within and between each Relevant Period, and – for the reasons set out above – may be categorised as a single continuous infringement within each Relevant Period, with the three Relevant Periods together forming a single repeated infringement.

5.150 Vp made representations that there is no evidence of a set of rules implementing the common objective, and as such there can be no finding that there was a single and continuous infringement.[792] The CMA is not persuaded by this representation, given that the existence and nature of rules for

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[788] Vp has submitted that there were two meetings the CMA finds occurred during Relevant Periods 2(a) (which Vp submits were not tripartite meetings) and that there is no evidence that the infringement continued throughout Relevant Period 2(a); Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 5.3 to 5.8, URN 4565. The CMA finds that the evidence shows the Parties remained in contact and subsequent meetings were arranged after the meeting on 14 February 2014, such that the conduct continued uninterrupted during Relevant Period 2(a). Vp has submitted that Relevant Period 2(b) cannot have started on 17 July 2014 as there is no contact documented on that date; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 5.9 to 5.13, URN 4565. The CMA considers that Relevant Period 2 commenced by at least 14 February 2014 and continued after 16 July 2014 as between MGF and Vp, and that the evidence of contact between MGF and Vp during Relevant Period 2(b) is sufficiently proximate in time with the contacts during Relevant Period 2(a) to find that the contact continued uninterrupted until the end of Relevant Period 2.

[789] MGFL's response dated 10 October 2019 to the CMA's Statement of Objections, paragraphs 288 to 300, URN 4529.

[790] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.31 to 4.34, URN 4565.

[791] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.48 to 4.52, UIRN 4565.

[792] Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraphs 4.43 to 4.46, URN 4565.

implementation of an infringement is particular to the facts of a case, and is one of several factors the CMA will consider when examining the evidence.[793] In this case, the methods engaged by the Parties focused on the information they shared regarding aspects of commercial strategy and pricing in order to further the objective of maintaining or increasing price levels in the market by restricting price competition and reducing strategic uncertainty. Further, it is not surprising, in the context of an anti-competitive arrangement, that the parties involved may not have recorded or formalised in writing any agreed aspects of their arrangement or established a 'set of rules'.

Conclusion on single continuous infringement

5.151 For the reasons set out above, the CMA finds that:

(a) in each of Relevant Period 1, Relevant Period 2 and Relevant Period 3, MGF and Vp participated in conduct that comprised a single continuous infringement, and that together the three Relevant Periods formed a single repeated infringement; and

(b) during Relevant Period 2(a), MHL participated in a single continuous infringement with MGF and Vp.

I. Appreciable restriction of competition

Legal principles

5.152 An agreement or concerted practice will infringe the Chapter I prohibition and Article 101 if it has as its object or effect the prevention, restriction or distortion of competition within the UK or a part of it, or within the EU internal market, respectively. However, an agreement or concerted practice will not infringe Article 101 or the Chapter I prohibition if its impact on competition is not appreciable.[794]

5.153 The Court of Justice has clarified that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an

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[793] See, in this respect, paragraph 5.130 above. The CMA notes that the rules for implementation may be particularly relevant in cases '…where the pursuit of the agreement or concerted practice requires special positive measures', in which respect see judgment of 10 November 2017, *ICAP plc and others v Commission* T-180/15, EU:T:2017:795, at paragraph 223.
[794] Judgment of 9 July 1969, *Franz Völk v S.P.R.L. Ets J. Vervaecke* C-5/69, EU:C:1969:35. See also *North Midland Construction plc v OFT* [2011] CAT 14, paragraphs 45 and 52 to 63; and judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others* C-226/11, EU:C:2012:795, paragraph 16.

appreciable restriction on competition.[795] In accordance with section 60(2) of the Competition Act,[796] this principle also applies *mutatis mutandis* in respect of the Chapter I prohibition. Accordingly, an agreement that may affect trade within the UK and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

Application in this case

5.154 As set out in paragraph 5.123, the CMA has concluded that the agreement or concerted practice which was the subject of the Infringement had the object of preventing, restricting or distorting competition by reducing price competition and strategic uncertainty in relation to the supply, by way of hire, of the Products, including by way of the exchange of confidential competitively sensitive pricing and strategic information.

5.155 As set out in paragraphs 5.160 to 5.162, the CMA finds that the agreement or concerted practice may affect trade within the UK.

5.156 As set out in paragraphs 5.168 to 5.170, the CMA finds that the agreement or concerted practice may affect trade between Member States.

5.157 Therefore, the CMA concludes that the Infringement constitutes, by its very nature, an appreciable restriction of competition in the supply, by way of hire, of the Products in the UK for the purposes of the Chapter I prohibition and Article 101. In any event, and in the alternative, the CMA finds that the Infringement had an appreciable effect on competition in the supply, by way of hire, of the Products within the EU for the purposes of Article 101 and the UK for the purposes of the Chapter I prohibition. This conclusion is based on the findings set out at paragraphs 5.161 (in respect of the effect on trade within the UK) and at paragraphs 5.169 and 5.170 (in respect of the effect on trade within the EU).[797]

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[795] 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.

[796] Section 60(2) of the Competition Act provides that, when determining a question in relation to the application of Part 1 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.

[797] MGFL has submitted that there could not have been an appreciable effect on competition within the United Kingdom in respect of the infringement primarily because there was aggressive competition between the Parties: MGFL's response to the Statement of Objections, paragraph 122 (including footnotes 69 and 132), URN 4529. The CMA is not persuaded by these representations. As set out in this Decision, the CMA has not found that the arrangement between the Parties eliminated all competition between them, rather the CMA has found that it

J. Effect on trade within the UK

Legal principles

5.158 The Chapter I prohibition applies to agreements or concerted practices which '…may affect trade within the United Kingdom'.[798]

5.159 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.[799]

Application in this case

5.160 The CMA considers that, by its very nature, an agreement or concerted practice between competitors to coordinate their pricing behaviour and exchange confidential competitively sensitive pricing and strategic information in relation to the supply, by way of hire, of the Products is likely to affect trade within the UK.

5.161 The CMA also notes that the Products were supplied during the Relevant Periods to customers who were based across the whole of the UK, and that the agreement or concerted practice operated at the national level (see paragraphs 2.3, 2.22, 2.30, 2.34 and 3.36 to 3.38). Thus, the agreement or concerted practice was at the very least capable of altering the structure of competition in the UK by reducing competition in the supply, by way of hire, of the Products, thus altering the pattern of trade within the UK.

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

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created conditions that did not correspond to the normal conditions of competition. Having regard to the established position that the de minimis principle does not apply to restrictions by object (as reflected in the approach of the Court of Justice in judgment of 13 December 2012, *Expedia Inc. v Autorité de la concurrence and Others* C-226/11, EU:C:2012:795, and set out in the European Commission's Notice on agreements of minor importance [2014] OJ C291/01), and for the reasons set out in Sections J and K of Chapter 5, the CMA considers that the Infringement did not only have an insignificant effect on the market and therefore that the restriction of competition was clearly appreciable within the meaning of the relevant case law.

[798] By virtue of section 2(1)(a) of the Competition Act. Section 2(7) of the Competition Act provides that, for the purposes of the Chapter I prohibition, the United Kingdom includes any part of the UK where an agreement or concerted practice operates or is intended to operate.

[799] *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'.

K. Effect on trade between EU Member States

Legal principles

5.163 Article 101 applies to agreements and concerted practices which may affect trade between EU Member States. Such an effect on trade must be appreciable.[800]

5.164 For the purposes of assessing whether an agreement, decision or concerted practice may affect trade between EU Member States the CMA follows the approach set out in the European Commission's published guidance (the '*Effect on Trade Guidelines*').[801]

5.165 An effect on trade means that the agreement, decision or concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU Member States.[802]

5.166 According to settled case law, the concept of 'trade' covers agreements or practices that affect the competitive structure of the market.[803] The concept of trade is not limited to traditional exchanges of goods and services across borders but is a wider concept, covering all cross-border activity including establishment (that is, a supplier in one Member State establishing itself in another).

5.167 Trade between Member States may be affected notwithstanding that the relevant market may be national or sub-national in scope.[804] The European Courts have held in a number of cases that agreements extending over the whole territory of a Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis by hindering the economic penetration which the TFEU (and its predecessors) is designed to bring about, and as such affect trade between Member States.[805]

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[800] Judgment of 25 November 1971, *Béguelin Import Co. v S.A.G.L. Import Export* C-22/71, EU:C:1971:113, paragraph 16.
[801] European Commission *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (2004/C 101/07) (the '*Effect on Trade Guidelines*').
[802] Judgment of 30 June 1966, *Société Technique Minière v Maschinenbau Ulm GmbH* C-56/65, EU:C:1966:38.
[803] *Effect on Trade Guidelines,* paragraph 20.
[804] *Effect on Trade Guidelines,* paragraph 22.
[805] *Effect on Trade Guidelines,* paragraph 78.

Application in this case

5.168 The CMA finds that the Infringement may give rise to an effect on trade between Member States to an appreciable extent. The CMA is therefore under a duty to apply Article 101 to the Infringement.

5.169 The CMA finds that:

(a) during Relevant Periods, 1, 2 and 3, MGF and Vp; and

(b) during Relevant Period 2(a), MGF, Vp and MHL,

engaged in the coordination of commercial behaviour, in particular of pricing practices, and the sharing of confidential competitively sensitive pricing and strategic information. Such conduct amounts to a horizontal cartel within the meaning of paragraphs 78 to 80 of the *Effect on Trade Guidelines.* The CMA further finds that the relevant geographic market is the UK (see paragraph 3.50) and that the geographic scope of the Infringement was not limited in any way – it covered the whole of the UK. As noted above, horizontal cartels extending over the whole of a Member State are normally capable of affecting trade between Member States.[806]

5.170 Moreover, the CMA finds that MGF, Vp and MHL (which together are estimated to have combined market shares of around 75%, with MGF and Vp's combined market share being around 54%,[807] in the context of the total value of the groundworks market in the UK estimated to be in the region of £125-135 million[808]) sought to coordinate their commercial conduct at a national level and were able to bid and win large national tenders. For these reasons the CMA is of the view that the Infringement was capable of having an appreciable effect on trade between Member States.

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[806] *Effect on Trade Guidelines,* paragraph 78. Judgment of 19 February 2002, *Wouters and Others* C-309/99, EU:C:2002:98, paragraph 95; judgment of 17 October 1972, *Vereeniging van Cementhandelaren* v *Commission* C-8/72 EU:C:1972:84, paragraph 29; judgment of 11 July 1985, *Remia and Others* v *Commission* Case 42/84, EU:C:1985:327, paragraph 22; and judgment of 30 March 2000, *CNSD v Commission*, T-513/93, EU:T:2000:91, paragraph 48.

[807] *Effect on Trade Guidelines*, paragraph 53. See MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 5 (page 28), URN 3873, which sets out estimated market shares for the UK shoring market (excluding Larssen Piles and Northern Ireland). See also: the comment reported to have been made by [MGF Employee 1] regarding MGF's market share as being 'generally a third', referred to in paragraph 4.50; Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 6 (page 9, paragraph 6.1), URN 3835.

[808] Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, questions 5 and 6 (page 9, paragraphs 5.1 and 6.1), URN 3835.

L. Duration

5.171 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[809] (the '**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;

(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; and

(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.[810]

5.172 The CMA finds that MGF and Vp participated in single continuous infringements in each of Relevant Period 1, Relevant Period 2 and Relevant Period 3, which together formed a single repeated infringement through an agreement or concerted practice in relation to the Products with a total duration of 22 months and 7 days:

(a) the first phase of the infringement lasted from 23 September 2011 to 4 October 2011. The duration of this phase of the infringement was therefore 11 days;

(b) the second phase of the infringement lasted from 14 February 2014 to 16 July 2014; and 17 July 2014 to 24 November 2014. The duration of this phase of the infringement was 9 months and 10 days; and

(c) the third phase of the infringement lasted from 12 November 2015 to 28 November 2016. The duration of this phase of the infringement was therefore 12 months and 16 days.

5.173 The CMA finds that MHL participated in a single continuous infringement with MGF and Vp between 14 February 2014 and 16 July 2014, a duration of 5 months and 2 days.

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[809] *CMA73*.
[810] *CMA73*, paragraph 2.16.

M. Exemptions and exclusions

5.174 The Parties have not sought to establish that the arrangements entered into are exempted from the Chapter I prohibition by operation of section 9 of the Competition Act, or from Article 101 by the operation of Article 101(3).

5.175 Notwithstanding that the burden of proving that the conditions for exemption under section 9 of the Competition Act or Article 101(3) would rest with the Parties, the CMA considers it unlikely that the conditions would be met in this case. Agreements which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they neither create objective economic benefits, nor do they benefit consumers. Moreover, such agreements generally also fail the third condition (indispensability).[811] However, each case ultimately falls to be assessed on its merits.

5.176 In addition, the CMA finds that none of the exclusions from the Chapter I prohibition provided for by section 3 of the Competition Act apply.

N. Attribution of liability

Identification of the appropriate legal entity

5.177 For each Party which the CMA finds has infringed the Competition Act and Article 101, the CMA has first identified the legal entity directly involved in the Infringement. It has then determined whether liability for the Infringement should be shared with another legal entity forming part of the same undertaking, in which case each legal entity's liability will be joint and several.

5.178 The conduct of a subsidiary undertaking[812] 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.[813] Where a subsidiary is wholly owned by its parent company, the CMA is entitled to presume that the parent exercised decisive influence over the commercial policy of the subsidiary; this presumption also applies if ownership of the

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[811] *Article 101(3) Guidelines*, paragraph 46.
[812] Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission* C-97/08 P, EU:C:2009:536, paragraph 55.
[813] Judgment of 14 July 1972, *ICI v Commission* C-48/69, EU:C:1972:70, paragraphs 132 and 133; judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission* C-97/08 P, EU:C:2009:536, paragraph 58.

subsidiary is just below 100%.[814] It is for the parent company in question to rebut the presumption by adducing sufficient evidence to demonstrate that the subsidiary company acted independently on the market.[815]

5.179 Where a parent company is able to exercise decisive influence over the conduct of a subsidiary, and does in fact exercise such decisive influence, the conduct of a subsidiary may be imputed to its parent company (with joint and several liability for the subsidiary and its parent). In such circumstances, the parent company and its subsidiary form a single economic unit and, therefore, the same undertaking, for the purpose of applying the Chapter I prohibition and Article 101.[816]

5.180 Where a Party which was directly involved in an Infringement was owned by natural persons during the Relevant Period, liability for the Infringement will not extend to those individuals.

Application to the Parties

MGFL

5.181 The CMA finds that MGF was directly involved in, and is therefore liable for, the Infringement during Relevant Periods 1, 2 and 3.

5.182 The CMA finds that MGF Limited is jointly and severally liable with MGF for the Infringement. MGF Limited owns a 100% shareholding in MGF and did so during Relevant Periods 1, 2 and 3 (see paragraph 2.23); it can therefore be presumed to have exercised a decisive influence over MGF during each of the Relevant Periods, and to form part of the same undertaking.

5.183 This Decision is therefore addressed to MGF and MGF Limited (together MGFL).

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[814] Judgment of 10 September 2009, *Akzo Nobel NV and Others v Commission* C-97/08 P, EU:C:2009:536, paragraphs 60 and 61; judgment of 17 May 2011, *Elf Aquitaine v Commission* T-299/08, EU:T:2011:217, paragraphs 51 to 56 (where the presumption was held to apply in relation to a shareholding of approximately 98%); judgment of 7 June 2011, *Arkema France and Others v Commission* T-217/06, EU:T:2011:251, paragraph 53; judgment of 27 October 2010, *Alliance One International and Others v Commission* T-24/05, EU:T:2010:453, paragraphs 126 to 130. The General Court has indicated, among other things, that neither the fact that the subsidiary operates independently in specific aspects of its policy on the marketing of the products concerned by the infringement, nor the lack of any direct involvement in, or knowledge of the facts alleged to constitute, the infringement by directors of the parent company, are sufficient, of themselves, to rebut the presumption: judgment of 14 July 2011, *Total and Elf Aquitaine v Commission* T-190/06, EU:T:2011:378, paragraphs 57 and 64; judgment of 14 July 2011, *Arkema France v Commission* T-189/06, EU:T:2011:377, paragraph 65.
[815] 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.
[816] 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.

Vp

5.184 The CMA finds that Vp was directly involved in, and is therefore liable for, the Infringement during Relevant Periods 1, 2 and 3. This Decision is therefore addressed to Vp.

Mabey

5.185 The CMA finds that MHL was directly involved in, and is therefore liable for, the Infringement during Relevant Period 2(a).

5.186 The CMA also finds that Mabey Engineering (Holdings) Limited and Mabey Holdings Limited are jointly and severally liable with MHL for the Infringement during Relevant Period 2(a).

5.187 Mabey Engineering (Holdings) Limited owns a 100% shareholding in MHL and did so during Relevant Period 2(a) (see paragraph 2.35); it can therefore be presumed to have exercised a decisive influence over MHL during Relevant Period 2(a), and to form part of the same undertaking. Mabey Holdings Limited owns a 100% shareholding in Mabey Engineering (Holdings) Limited and did so during Relevant Period 2(a) (see paragraph 2.36); it can therefore be presumed to have exercised a decisive influence over Mabey Engineering (Holdings) Limited during Relevant Period 2(a), and to form part of the same undertaking.

5.188 This Decision is therefore addressed to MHL, Mabey Engineering (Holdings) Limited and Mabey Holdings Limited (together Mabey).

6. THE CMA'S ACTION

A. The CMA's decision

6.1 On the basis of the evidence set out above, the CMA has made a decision that:

(a) between at least 23 September 2011 and 4 October 2011 (Relevant Period 1) MGFL and Vp infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement;

(b) between at least 14 February 2014 and 16 July 2014 (Relevant Period 2(a)) and between 17 July 2014 and at least 24 November 2014 (Relevant Period 2(b)), (together, Relevant Period 2), MGFL and Vp infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement;

(c) during Relevant Period 2(a) Mabey infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement;

(d) between at least 12 November 2015 and 28 November 2016 (Relevant Period 3) MGFL and Vp infringed the Chapter I prohibition and Article 101 by participating in a single continuous infringement; and

(e) in the cases of MGFL and Vp, the single continuous infringements described above in each of Relevant Period 1, Relevant Period 2 and Relevant Period 3 together formed a single repeated infringement,

in each case through an agreement or concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply of certain groundworks products[817] used to provide temporary support solutions for below ground excavations and the provision of associated design and transportation services (the Products) in the UK.

B. Directions

6.2 Section 32(1) of the Competition Act provides that if the CMA has made a decision that an agreement infringes the Chapter I prohibition or Article 101, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

6.3 The CMA has decided not to impose any directions on the Parties in the

[817] As defined in paragraph 2.3 of this Decision.

circumstances of this case, as the Infringement has already come to an end.

C. Financial penalties

6.4 Section 36(1) of the Competition Act provides that, on making a decision that an agreement has infringed the Chapter I prohibition or Article 101, the CMA may require an undertaking which is party to the agreement concerned to pay the CMA a penalty in respect of the infringement. In accordance with section 38(8) of the Competition Act, the CMA must have regard to the guidance on penalties in force at the time when setting the amount of the penalty (the Penalty Guidance).[818]

6.5 The CMA has decided that it is appropriate in the circumstances of this case to exercise its discretion under section 36(1) of the Competition Act to impose a penalty on MGFL and Vp in respect of the Infringement, given the seriousness of the Infringement and in order to deter similar conduct in the future, for the reasons set out below.

6.6 Mabey approached the CMA pursuant to the CMA's leniency policy in April 2016 and was granted a marker for Type A immunity. No financial penalty will be imposed on Mabey, provided that it meets the conditions of the leniency agreement between Mabey and the CMA dated 4 April 2019. Consequently, the CMA has not calculated the level of any financial penalty that would be applied to Mabey if immunity had not been granted.

Intention/negligence

6.7 The CMA may impose a penalty on an undertaking which has infringed the Chapter I prohibition or Article 101 only if it is satisfied that the infringement has been committed intentionally or negligently.[819]

6.8 The CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent for the purposes of determining whether it may exercise its discretion to impose a penalty.[820]

6.9 The CAT has defined the terms 'intentionally' and 'negligently' as follows:

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[818] *CMA73*.
[819] Section 36(3) of the Competition Act.
[820] *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, paragraphs 453 to 457; *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 221; and *Aberdeen Journals Limited v OFT* [2003] CAT 11, paragraphs 484 and 485. See also judgment of 25 March 1996, *SPO and Others v Commission* C-137/95P, EU:C:1996:130, paragraphs 53 to 57.

'…an infringement is committed intentionally for the purposes of section 36(3) of the Competition Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition'.[821]

6.10 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'.[822]

6.11 Ignorance or a mistake of law does not prevent a finding of intentional infringement.[823]

6.12 For the reasons set out at paragraphs 5.110 to 5.124, the CMA has found that the Infringement had as its object the prevention, restriction or distortion of competition and the Parties must therefore have been aware (or could not have been unaware) that their conduct had the object or would have the effect of restricting competition, or at the very least ought to have known that their conduct would result in a restriction or distortion of competition. This is also supported by evidence that, for example:

(a) prior to the start of Relevant Period 1, MGF and Vp did not want to get into a price war between themselves, and that MGF and Vp responded to MHL's aggressive business strategy by engaging in the infringing conduct (see paragraphs 4.4 to 4.12);

(b) information shared and discussed by MGF, Vp and MHL included information relating to future pricing intentions, an important aspect of

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[821] *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 221. See also 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 Competition 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'.

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

[823] Judgment in *Ping Europe Limited v CMA* [2020] EWCA Civ 13, paragraph 117. See also the 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'.

competition between parties operating in the same market (see for example paragraphs 4.103 to 4.115, 4.173 to 4.189, and 4.196 to 4.233);

(c) the Parties contacted each other in relation to low quotes, with a view to ensuring that pricing on the market was maintained and sought to assure each other that low pricing would be addressed (see for example paragraphs 4.17 to 4.48 and 4.80 to 4.102);

(d) MGF and Vp discussed the hire rates that they would submit as part of an ongoing tender process (see for example paragraphs 4.196 to 4.204);

(e) MGF and Vp discussed rebate rates for a future preferred supplier agreement (see paragraphs 4.205 to 4.223); and

(f) the Parties took steps to conceal their conduct. For example, in respect of the meetings held during Relevant Period 2(a), at least one of the discussions took place in a private location (see paragraph 4.70), and in respect of a later bilateral meeting, [MHL Employee 2] recalled that [MGF Employee 1] 'mentioned how he liked to meet without mobile phones or pads and that what would happen in the meeting would stay in the meeting' (see paragraph 4.75). In addition, emails between the Parties relating to the arrangement were also sent to personal rather than business email addresses (see for example paragraphs 4.29, 4.69, 4.93, and 4.121).

6.13 On this basis, the CMA considers that the Parties must have been aware, or could not have been unaware, that their conduct had the object or would have the effect of restricting competition, or at the very least ought to have known that their conduct would result in a restriction or distortion of competition.

6.14 The CMA therefore concludes, for the purposes of determining whether to exercise its discretion to impose a penalty, that the Infringement was committed intentionally or, at the very least, negligently.

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

6.15 The CMA has a margin of appreciation when determining the appropriate amount of a penalty under the Competition Act, provided the penalties it imposes in a particular case are: (i) within the range of penalties permitted by section 36(8) of the Competition Act and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (the '**2000 Order**'),[824]

[824] SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

and (ii) the CMA has had regard to the Penalty Guidance in accordance with section 38(8) of the Competition Act.[825] The CMA is not bound by its decisions in relation to the calculation of financial penalties in previous cases.[826] Rather, the CMA makes its assessment on a case-by-case basis[827] having regard to all relevant circumstances and the objectives of its policy on financial penalties.

6.16 In line with statutory requirements and the twin objectives of its policy on financial penalties, the CMA will also have regard to the seriousness of the infringement and the desirability of deterring both the undertaking on which the penalty is imposed and other undertakings from engaging in behaviour that infringes the Chapter I prohibition and Article 101 (as well as other prohibitions under the Competition Act and the TFEU as the case may be).[828]

6.17 Whilst the CMA has approached the penalty assessment on the basis of its finding that the Infringement constitutes one single repeated infringement, the CMA considers its assessment properly reflects the overall nature of the conduct that took place and therefore also considers its approach is appropriate in respect of assessing the three single continuous infringements found to have taken place during Relevant Periods 1, 2 and 3.

D. Calculation of penalty

6.18 As noted at paragraph 6.4, 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.[829]

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[825] *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph 168 and *Umbro Holdings Limited and Manchester United PLC and JJB Sports PLC and Allsports Limited v OFT* [2005] CAT 22, paragraphs 102 and 103.
[826] See, for example, *Eden Brown and Others v OFT* [2011] CAT 8 ('**Eden Brown**'), paragraph 78.
[827] See, for example, *Kier Group and Others v OFT* [2011] CAT 3, paragraph 116, where the CAT noted that 'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent'. This was cited with approval by the CAT in *Ping Europe Limited v CMA* [2018] CAT 13, paragraph 233. See also Eden Brown, paragraph 97, where the CAT observed that '[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case'.
[828] Section 36(7A) of the Competition Act and paragraphs 1.3 to 1.4 of *CMA73*.
[829] See also footnote 17 of *CMA73*, which provides that 'in applying the steps to individual undertakings in multi-party cases, the CMA will observe the principle of equal treatment, which is articulated by the Court of First Instance (now the General Court) in the *Tokai Carbon* case as follows: 'The fact none the less remains that … [the Commission] must comply with the principle of equal treatment, according to which it is prohibited to treat similar situations differently and different situations in the same way, unless such treatment is objectively justified (FETTCSA, paragraph 406)'. (See Case T-236/01 *Tokai Carbon Co. Ltd and Others v* Commission [2004] ECR II-1181, at paragraph 219). In doing so, the CMA will take account of the judgment of the Competition Appeal Tribunal (the CAT) in the *Kier Construction* judgment that, '…it is perfectly rational for a bigger undertaking to receive a more severe penalty than a smaller company … However, this does not mean that penalties should be precisely proportionate to the relative sizes of the undertakings on which they are imposed … it will not necessarily be fair or proportionate to impose on a bigger company a penalty which reflects the same proportion

Step 1 – starting point

6.19 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to the relevant turnover of the undertaking, and the seriousness of the infringement and the need for general deterrence.[830]

Relevant turnover

6.20 The 'relevant turnover' is the turnover of the undertaking in the relevant product and geographic market affected by the infringement in the undertaking's 'last business year', that is the undertaking's financial year preceding the date when the infringement ended.[831]

6.21 As regards the relevant market, the Court of Appeal stated in *Argos Ltd and Littlewoods Ltd v Office of Fair Trading and JJB Sports plc v Office of Fair Trading*[832] 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'.[833]

Application in this case

6.22 The relevant market in this case is the supply, by way of hire, of the Products to customers in the UK.

6.23 The CMA has found that the Infringement came to an end on 28 November 2016.

6.24 Therefore, in the present case:

(a) the 'last business year' of MGFL is the financial year ending 30 June

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of its total worldwide turnover as a penalty imposed on a smaller company represents in relation to the latter's turnover.' (See *Kier Group plc and others v OFT* [2011] CAT 3, at [177]). See also *R (on the application of Gallaher Group Ltd and others) v CMA,* [2018] UKSC 25.

[830] *CMA73*, paragraphs 2.3 to 2.15.

[831] *CMA73*, paragraph 2.11.

[832] *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraph 169.

[833] *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, paragraphs 170 to 173.

2016, which results in a relevant turnover of £23,122,990;[834, 835] and

(b) the 'last business year' of Vp is the financial year ending 31 March 2016, which results in a relevant turnover of £25,535,590.[836]

6.25 The CMA received a number of representations regarding the calculation of the relevant turnover.

6.26 MGFL and Vp made representations that turnover derived from transport charges should not be included as relevant turnover for the purposes of calculating any penalties in this case.[837] The CMA considers that transport charges form part of the relevant market for the reasons set out in Chapter 3. Turnover derived from transport charges has therefore been included in the relevant turnover for each of MGFL and Vp.

6.27 MGFL made representations that turnover derived from major projects and edge protection should not constitute relevant turnover for the purposes of calculating any penalties in this case.[838] The CMA considers that major projects and edge protection form part of the relevant market for the reasons

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[834] The total of: £[✂] of the total turnover related to 'Groundworks Products Hire' identified by MGFL; £[✂] related to the hire of edge protection products; £[✂] categorised by MGFL as deriving from 'Major Projects Hire'; and £[✂] derived from transport charges for the supply, by way of hire, of the Products by way of hire. See: MGFL's response dated 13 March 2020 to the CMA's section 26 notice dated 28 February 2020, URN 4569; MGFL's response dated 2 April 2020 to the CMA's follow-up questions dated 19 March 2020 on the CMA's section 26 notice dated 28 February 2020, URN 4627.

[835] MGFL was unable to supply an exact figure for turnover derived from transportation charges. The CMA has therefore taken the following approach to arrive at an estimated figure: MGFL explained that total turnover for 'haulage services' was £[✂]. MGFL estimated that £[✂] of this derived from revenues associated solely with sales. The CMA considers it reasonable to assume that the remaining £[✂] was turnover from transport services associated with hire, in line with MGFL's estimate of circa £[✂]. In order to arrive at an estimated figure for turnover from transport services related to the hire of the Products (rather than all products supplied by MGFL), the CMA first calculated the ratio of turnover from the hire of products falling within the relevant market (£[✂]) to the hire of products falling outside the relevant market (£[✂]) as 93%. The CMA then applied this ratio to the turnover relating to hire (£[✂]), giving a figure of £[✂] for transport services turnover derived from the hire of the Products. See: MGFL's response dated 13 March 2020 to the CMA's section 26 notice dated 28 February 2020, question 1, URN 4569; MGFL's response dated 2 April 2020 to the CMA's follow-up questions dated 19 March 2020 on the CMA's section 26 notice dated 28 February 2020, question 3, URN 4627.

[836] The total of: £[✂] turnover identified by Vp as turnover for the supply, by way of hire, of the Products to customers in the UK (minus turnover derived from bridges, rehired equipment turnover, and other accounting adjustments for credit notes and rebates); £[✂] turnover derived from re-hired equipment related to the Products; £[✂] turnover derived from design work; £[✂] turnover derived from Larssen sheet piles; and £[✂] turnover derived from transport charges for the supply, by way of hire, of the Products by way of hire (comprising £[✂] turnover from transport charges associated with shoring products and £[✂] turnover from transportation charges associated with steel sheet piles). See: Vp's response dated 3 March 2020 to the CMA's section 26 notice dated 18 February 2020, URN 4550; Vp's response dated 13 March 2020 to the CMA's follow-up questions dated 5 March 2020 on the CMA's section 26 notice dated 18 February 2020, URN 4572; Vp's response dated 23 April 2020 to the CMA's follow-up questions dated 17 April 2020 on the CMA's section 26 notice dated 18 February 2020, URN 5219; and Vp's response dated 28 April 2020 to the CMA's follow-up questions dated 24 April 2020 on the CMA's section 26 notice dated 18 February 2020, URN 5225.

[837] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph B.35(b), URN 5436; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 2.15(b) and 2.16(e), URN 5422.

[838] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph B.35(b), URN 5436.

set out in Chapter 3. Turnover derived from major projects and edge protection has therefore been included in the relevant turnover for each of MGFL and Vp.

6.28 Vp has made representations that turnover derived from design work and Larssen sheet piles (also known as steel sheet piles) should not constitute relevant turnover for the purposes of calculating any penalties in this case.[839] The CMA considers that Larssen sheet piles form part of the relevant market for the reasons set out in Chapter 3. Turnover derived from design charges and the hire of Larssen sheet piles has been included in the relevant turnover for each of MGFL and Vp.

6.29 For the avoidance of doubt, the following products have not been included in the relevant turnover for either MGFL or Vp: ground guards, trench safes, gas detectors, breathing apparatus, rim seal stoppers, milltest stoppers, multitest stoppers, screw/cam stoppers, sava stoppers, stopper accessories, tripods, retrievers, fall arrestors, harnesses, lanyards, safety lines, rescue systems, davits, manhole installation clamps, hire safety consumables and other products, structures support systems/formwork, pile croppers, pipe lifters, piling hammers (including EMVs), quick-hitch adaptors, pilebreakers, pipe/culvert pullers, piletec ancillaries, lifting equipment, pile croppers, power croppers, multi-bars, trench cutters, CHDs, 4-Jaws, contigs, suspension units (for CFA pile cropper), CFA Links, CFA Half Links, bridges, and pipe stopper products (drain plugs, airtest stoppers, multi-tests, trelleborgs, pronals, lampe blank conicals, inflations, pressure test equipment, test gauges, pumps, blindeo protection kits, telemetry, vetter/vapo, packers, pressure plugs, flood barriers and lampe bypasses).

Seriousness

6.30 The CMA will apply a starting point of up to 30% to an undertaking's relevant turnover in order to reflect adequately the seriousness of the particular infringement (and ultimately the extent and likelihood of actual or potential harm to competition and consumers). In applying the starting point, the CMA will also reflect the need to deter the infringing undertaking and other undertakings generally from engaging in that type of infringement in the future.[840]

6.31 In making this case-specific assessment, the CMA will take into account how likely it is that the type of infringement at issue will, by its nature, cause harm

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[839] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 2.15 and 2.16, URN 5422.
[840] *CMA73*, paragraph 2.4.

to competition. As set out in the Penalty Guidance, the CMA will generally use a starting point between 21 and 30% of relevant turnover for the most serious types of infringement, that is, those likely by their very nature to harm competition. In relation to infringements of the Chapter I prohibition and/or Article 101, this includes cartel activities, such as price-fixing and market sharing and other, non-cartel object infringements which are inherently likely to cause significant harm to competition. A starting point between 10 and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect.[841]

6.32 The CMA will also consider whether it is appropriate to adjust the starting point upwards or downwards to take account of specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers.[842]

6.33 Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence.[843]

6.34 In the case of infringements involving more than one undertaking, the assessment outlined above will be consistent for each undertaking. The starting point is intended to reflect the seriousness of the infringement at issue, rather than the particular circumstances of each undertaking's unlawful conduct (which are taken into account at other steps). The CMA therefore expects to adopt the same percentage starting point for each undertaking to the infringement.[844]

Application in this case

6.35 In this case, in assessing the seriousness of the Infringement,[845] the CMA has taken into account the following factors:

(a) the Infringement took the form of the coordination of commercial behaviour (in particular pricing practices) between competitors which was

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[841] *CMA73*, paragraph 2.6.
[842] *CMA73*, paragraph 2.8.
[843] *CMA73*, paragraph 2.9.
[844] *CMA73*, paragraph 2.10, referring to Eden Brown, paragraph 80. Vp has made representations that a lower starting point percentage should be applied for the purposes of Vp's penalty calculation, on the basis that Vp's involvement in the Infringement is not comparable to the involvement of MGF; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 2.8 and 2.9, URN 5422. The CMA is not persuaded by these representations and does not consider the circumstances warrant a departure from the approach set out in the Penalty Guidance, noting that the involvement of directors or senior management has been taken into account when considering whether any adjustment to the penalty is required as part of the Step 3 adjustment for aggravating and mitigating factors; and each undertaking's role in the Infringement has been taken into account when considering whether any adjustment to the penalty is required as part of the Step 4 proportionality assessment.
[845] In making the assessment of the appropriate starting point, the CMA has considered the Infringement overall, taking into account the conduct in each of Relevant Periods 1, 2 and 3.

aimed at reducing competition on price and strategic uncertainty, in order to maintain or increase pricing levels in the market, including through the sharing of confidential competitively sensitive pricing and strategic information. The CMA considers that conduct of this kind is inherently likely to cause significant harm to competition. However, the Infringement did not involve even more serious forms of cartel activities, such as price fixing (involving an agreement to set specific prices) and market sharing; it also did not have the objective of removing competition entirely;

(b) the nature of the conduct: the arrangement included the Parties monitoring prices in the market and challenging each other when prices were considered to be too low, and seeking to coordinate their commercial behaviour (in particular pricing practices) through the disclosure and discussion of strategic information in relation to prices (including rebates), transport charges and design charges.[846] It operated through contact between senior individuals within each business, with exchanges by email (including via personal email accounts) and text messages, in telephone calls and in person.[847] The objective of the arrangement was to restrict competition on price, and to seek to maintain or increase prices for the supply, by way of hire, of the Products;

(c) infringing contacts between MGF and Vp in Relevant Period 1 were made against a backdrop of strong competition (in particular from MHL), with the intention of maintaining or increasing prices.[848] The evidence also shows that the arrangements and contacts between the Parties across the Relevant Periods were deliberate[849] and that the overall plan was to reduce competition on price and strategic uncertainty, so as to maintain or increase price levels in the market. The Parties' actions included (at various times) monitoring prices in the market and challenging each other when prices were considered to be too low; seeking to coordinate their commercial behaviour in relation to prices charged to customers; and the disclosure and discussion of confidential competitively sensitive pricing and strategic information, including in relation to proposed price increases and charges for design and transport costs. Where specific quotes were exchanged, this was with a view to highlighting where prices were seen as being too low to ensure prices were maintained, rather than an

[846] See Chapter 4.
[847] See Chapter 4.
[848] See paragraphs 4.4 to 4.11 and 5.113.
[849] See paragraph 5.83 and footnote 725.

agreement under which MGF, Vp or MHL would circulate and agree actual prices;[850]

(d) the structure of the market and coverage of the infringement: as set out in Chapter 3, although the market could be delineated along regional lines, there is evidence of national competition between the Parties and that the Parties offered the Products to customers across the whole of the UK, and the CMA considers the relevant market to be UK wide.[851] The Infringement was UK-wide. Although the Infringement did not involve all operators on the market, the three main operators (with combined market shares of around 75%)[852] were involved in Relevant Period 2(a), and two of the three main operators (MGF and Vp, with combined market shares of around 54%[853]) were involved in the other periods of the Infringement (Relevant Periods 1, 2(b) and 3).[854, 855] While certain examples of

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[850] See for example paragraphs 4.7, 4.17 to 4.48 and 4.81 to 4.84. MGFL has made representations that there is no evidence of 'hardcore' cartel behaviour and that there is no evidence that MGF, Vp or MHL ever entered into any wider arrangement in terms of common prices or terms of business; MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs B.39 and B.41, URN 5436. Vp has made representations that the facts constituting the basis for the Infringement are not sufficiently serious to warrant being characterised as an instance of the most serious types of infringement; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, see for example paragraphs 2.7 to 2.9, and paragraph 2.13, URN 5422. This Decision sets out the CMA's findings in relation to the Infringement. The CMA has based its penalty calculation (including the assessment of seriousness at Step 1) on the Infringement as set out in this Decision.

[851] See paragraphs 3.36 and 3.37. Vp has made representations that MGFL is not active in Scotland and therefore there could be no impact on customers and/or consumers in Scotland; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 5.17(b), URN 5422. The CMA is not persuaded by these representations: as set out at paragraph 3.37(b), despite not operating a depot in Scotland or Northern Ireland during the Infringement, MGFL confirmed that it hired products to customers in those nations 'when it has been financially viable to do so'. In any event, the CMA does not accept MGFL not being active in Scotland would in any event be sufficient to show that the Infringement could not have had an impact in Scotland, where Vp and MHL were active at the time of the Infringement.

[852] See MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 5 (page 28), URN 3873, which sets out estimated market shares for the UK shoring market (excluding Larssen Piles and Northern Ireland). See also: the comment reported to have been made by [MGF Employee 1] regarding MGF's market share as being 'generally a third', referred to in paragraph 4.75; Mabey's response dated 8 March 2019 to the CMA's information request dated 15 February 2019, question 6 (page 9, paragraph 6.1), URN 3835.

[853] See MGFL's response dated 15 March 2019 to the CMA's information request dated 15 February 2019, question 5 (page 28), URN 3873, which sets out estimated market shares for the UK shoring market (excluding Larssen Piles and Northern Ireland).

[854] MGFL has made representations that there was no appreciable impact on competition in any relevant market, which remained aggressive throughout; MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement, paragraph A.14(b), URN 5436. Vp has made representations that the market coverage of the Infringement was very limited; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement, dated 25 September 2020, paragraphs 2.10, 2.13, and 3.7, URN 5422. For the reasons set out in Section 5.I, the CMA has found that the Infringement constitutes, by its very nature, an appreciable restriction of competition in the supply, by way of hire, of the Products in the UK for the purposes of the Chapter I prohibition and Article 101. As set out in this Section, the CMA has taken into account the impact, structure of the market and coverage of the Infringement in setting the starting point at 22%.

[855] Vp has made representations that there are differences in customer and contract types and the competitive dynamics of the groundworks market are to a large extent local; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 2.10, URN 5422. MGFL has made representations that relevant markets should be determined by reference to corresponding regional markets said to be affected by the Infringement; MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph B.36, URN 5436. For the reasons set out in Chapter 3, the CMA

infringing conduct relate to specific customers only (for example, the exchanges in relation to Balfour Beatty in Relevant Period 3), other infringing conduct (such as the discussions at meetings in Relevant Period 2, including the sharing of information regarding transport and design charge information) was more general in nature; and

(e) the effect on competitors, customers and consumers: as the Infringement is an object infringement, the CMA is not required to make a formal assessment of the actual harm caused for the purposes of establishing an infringement[856] and the CMA may assess penalty by reference to an infringement's potential effects, rather than carrying out an effects analysis which is not required for the purposes of an infringement finding.[857] In this case, the CMA considers that the potential for harm to competition as a result of the Infringement was high: the arrangement operated at a national level, and the Parties offered the Products to customers across the UK, including large infrastructure providers such as water companies. For example, the disclosure and discussion of strategic information in relation to prices (including rebates), transport charges and design charges (with the aim of reducing price competition and strategic uncertainty in relation to the supply, by way of hire, of the Products) would have been capable of affecting all work, irrespective of geography.[858]

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has found the relevant market for the purposes of penalty calculations to be the supply, by way of hire, of the Products to customers in the UK.

[856] Judgment of 13 July 1966, *Consten and Grundig v Commission* joined cases C-56/64 and C-58/64, EU:C:1966:41, page 342. See also *Citihook Limited v OFT* [2007] CAT 18, paragraph 269.

[857] *CMA73*, paragraph 2.4.

[858] MGFL has made representations that there is no evidence of anti-competitive effects and strong evidence of ongoing aggressive competition between the Parties; MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs B.42 and B.45, URN 5436. Vp has made representations that the Infringement had no effect on customers (and therefore consumers); Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 2.12 and 5.17, URN 5422. As noted above, the CMA is not required to make a formal assessment of the actual harm caused for the purposes of establishing an infringement or for the purposes of setting a penalty. In any event, the CMA does not consider that the assertions made by MGFL and matters highlighted by Vp demonstrate that there was no effect on the market (and no impact on customers and/or consumers) as a result of the Infringement. The CMA has not found that the Infringement sought to, or did in fact, eliminate competition between the Parties completely, rather that it created conditions that did not correspond to the normal conditions of competition. The existence of competition (even if, as MGFL and Vp submit, highly aggressive) does not mean the Infringement would not have had any impact/effect on prices. For example, even if MGFL was not active in Scotland, this does not mean the Infringement could not have had any impact on customers/consumers in Scotland (where Vp and Mabey were active). Similarly, the fact that Vp may not have changed its prices as regards the low quotes identified in relation to specific customers in Relevant Period 1 and the Balfour Beatty contract in Relevant Period 3 does not show that the Infringement had no effect (as it does not address the impact on prices charged by MGF or MHL) or the fact that prices may generally have been lower in the absence of the arrangement, noting in particular that the purpose of contacting each other about low quotes was to maintain prices generally (as [Vp Employee 2] stated, 'now that I raised the stakes with [MGF], it is important that we are maintaining rates as well' (see URN 2147)). The CMA has taken into account the fact that not all players in the market were involved in setting the starting point at 22%. Where the Parties have made more targeted arguments about how particular communications between them did not result in effects, those arguments have been considered (and rejected) in Chapter 4.

6.36 The CMA has also considered the need to deter other undertakings from engaging in similar conduct,[859] particularly those businesses which may have supply relationships with competitors, not just in this market but across the wider construction industry and more broadly. Such deterrence would still appear to be necessary noting that the CMA (and its predecessor the Office of Fair Trading) has already made a number of infringement findings in the construction industry.[860]

6.37 Considering the above factors in the round and the submissions made by MGFL and Vp, the CMA considers 22% to be an appropriate starting point, reflecting both the seriousness of the Infringement and the need for deterrence.

6.38 Applying 22% to:

(a) MGFL's relevant turnover of £23,122,990 results in a penalty at Step 1 of £5,087,058 for MGFL; and

(b) Vp's relevant turnover of £25,535,590 results in a penalty at Step 1 of £5,617,830 for Vp.

Step 2 – adjustment for duration

6.39 The amount of penalty resulting from Step 1 may be increased or, in particular circumstances, decreased to take into account the duration of an infringement.

6.40 Where the total duration of an infringement is more than one year, the CMA will round up part years to the nearest quarter year, although the CMA may in exceptional circumstances decide to round up the part year to a full year.[861]

6.41 Where the total duration of an infringement is less than one year, the CMA will treat the duration as a full year for the purpose of calculating the number of

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[859] *CMA73*, paragraph 2.9. See also Judgment in *Ping Europe Limited v CMA* [2018] CAT 13, paragraph 241.
[860] For example, Case 50477 (anti-competitive arrangements in the UK roofing materials sector); Case 50299 (where suppliers of pre-cast concrete drainage products broke competition law by agreeing to fix or coordinate their prices, share the market by allocating customers and regularly exchanging competitively sensitive information); Case CE/9691/12 (involving price-fixing, bid-rigging, market-sharing /customer allocation and the exchange of competitively sensitive information in relation to the supply of galvanised steel tanks); Case CE/4327-04 (where a large number of construction firms were fined for having engaged in anti-competitive bid-rigging activities); Case CA98/04/2006 (concerning customer allocation/market sharing and price-fixing and non-compete arrangements in relation to the supply of aluminium double glazing spacer bars); and Cases CA98/01/2006, CA98/04/2005, CA98/02/2005, CA98/01/2005 and CA98/1/2004 (concerning anti-competitive conduct in the roofing materials sector).
[861] *CMA73*, paragraph 2.16.

years of the infringement. In exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year.[862]

6.42 In this case, the duration of the Infringement is as follows:

(a) Relevant Period 1 from 23 September 2011 to 4 October 2011 – 11 days;

(b) Relevant Period 2 from 14 February 2014 to 24 November 2014 – 9 months and 10 days; and

(c) Relevant Period 3 from 12 November 2015 to 28 November 2016 – 12 months and 16 days,

giving a total duration of 22 months and 7 days (ie 1 year, 10 months and 7 days).

6.43 As the duration of the Infringement is more than one year, the CMA has rounded up to the nearest quarter year, and applied a multiplier of 2 to the figure reached at the end of Step 1. The CMA has added together the duration of each Relevant Period before rounding up to the nearest quarter year, rather than rounding up the duration of each of Relevant Periods 1, 2 and 3 before adding them together.[863]

6.44 MGFL and Vp have made representations that the duration multiplier should not be more than 1 (and in the case of Vp, that it should be less than 1).[864] The CMA is not persuaded by these representations:

(a) at Step 2 the CMA takes into account the duration of the infringement, not the duration of specific elements of conduct constituting the infringement, noting that even a single exchange may impact a contract which will remain in place for a significant amount of time;[865] and

(b) the CMA does not consider that there are exceptional circumstances in this case which mean that it would be appropriate to apply a duration

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[862] *CMA73*, paragraph 2.16.
[863] This is consistent with the apparent acceptance by the General Court of the approach taken by the Commission in the *Marine Hoses* cartel case (judgment of 17 May 2013, *Trelleborg Industrie SAS and Trelleborg AB v Commission* joined cases T-147/09 and T-148/09, EU:T:2013:259), where the General Court overturned the Commission's finding of a single continuous infringement but found there was a single repeated infringement. As the penalty had already been calculated in this way to exclude periods where there was an interruption to the infringement (in that case, of 18 months), there was no impact on the amount of the penalty following the appeal.
[864] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph B.48, URN 5436; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 3.1 to 3.7, URN 5422.
[865] For example, Vp has explained that hires associated with major projects are typically of the longest duration (eg more than 40 weeks), and that the end date of the hire is unfixed; Vp's response dated 27 September 2019 to the CMA's Statement of Objections, paragraph 6.10(d), URN 4565.

multiplier of less than a full year, rather than the approach set out in the Penalty Guidance.[866]

6.45 Applying a multiplier of 2 results in a penalty at Step 2 of:

(a) £10,174,116 for MGFL; and

(b) £11,235,660 for Vp.

Step 3 – adjustment for aggravating and mitigating factors

6.46 The amount of the penalty, adjusted as appropriate at Step 2, may be increased where there are aggravating factors, or decreased where there are mitigating factors.[867] A non-exhaustive list of aggravating and mitigating factors is set out in paragraphs 2.18 and 2.19 of the Penalty Guidance.

Aggravating factor – involvement of director/senior management

6.47 The involvement of directors or senior management in an infringement can be an aggravating factor.[868]

6.48 The following people were involved in the Infringement at each of:

(a) MGFL:

(i) [MGF Employee 1] [✂];

(ii) [MGF Employee 2] [✂][869] [✂];[870]

(iii) [MGF Employee 3] [✂];[871] and

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[866] Vp made representations that Vp's very limited role in the Infringement, very limited market coverage of the Infringement and absence of customer/consumer harm constitute 'exceptional circumstances' which justify a duration multiplier of less than 1; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 3.7, URN 5422. The CMA does not accept this is an accurate representation of the Infringement and Vp's involvement, for the reasons set out in Chapters 4 and 5 and paragraphs 6.35(d) and 6.50; in any event this would not constitute 'exceptional circumstances' such as to justify a departure from the approach set out in the Penalty Guidance. These points have been taken into account at other Steps of the penalty calculation: market coverage of the infringement and the actual or potential harm caused to consumers at Step 1; the role of the undertaking in the infringement at Step 3 (as regards the involvement of directors or senior management) and at Step 4.
[867] *CMA73*, paragraph 2.17.
[868] *CMA73*, paragraph 2.18.
[869] [✂].
[870] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 1(b) (page 3), URN 0802.
[871] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, question 1(b) (page 3), URN 0802.

(iv) [MGF Employee 4] [✂].[872]

(b) Vp:

(i) [Vp Employee 2] [✂].[873] [[✂];[874] and

(ii) [Vp Employee 1] [✂].

6.49 The people listed above each held senior management positions during the Infringement. [✂].

6.50 Vp has made representations that [Vp Employee 1's] limited involvement in the Infringement,[875] and that [Vp Employee 2's] less senior role and lesser degree of involvement in the Infringement should be taken into account at this step,[876] resulting in a reduced uplift to Vp's penalty. The CMA is not persuaded by these representations, noting in particular that:

(a) the CMA has taken into account the involvement of both [Vp Employee 2] and [Vp Employee 1] in the Infringement, and does not consider that [Vp Employee 1's] role in the Infringement was so limited as to warrant a smaller uplift being applied to Vp, noting that he was directly involved in infringing conduct. For example:

(i) as set out in paragraphs 4.227 to 4.233, a copy of an MGF internal document concerning design charges was found in [Vp Employee 1's] office when the CMA inspected Vp's premises, having been provided directly to [Vp Employee 1] by [MGF Employee 3]. The CMA has seen no evidence that [Vp Employee 1] took steps to distance himself or Vp publicly from the receipt of MGF's information; [Vp Employee 1] also confirmed that he intended to discuss the memo received from [MGF Employee 3] with other Vp employees;

(ii) as set out in paragraph 4.226, contact between [MGF Employee 3] and [Vp Employee 1] at a meeting on or around 10 November 2016 did not solely relate to the finalisation of [MGF Employee 3's] [✂] following his departure from Vp, but also concerned discussions in

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[872] MGFL's response dated 19 January 2018 to the CMA's information request dated 20 December 2017, paragraph 1(b) (page 3), URN 0802; first witness statement of [MGF Employee 4] dated 8 October 2019, paragraphs 4 to 5, URN 4537.
[873] Transcript of an interview with [MGF Employee 3] held on 9 January 2018, pages 132 and 133, URN 2806; Vp's response dated 5 January 2018 to the CMA's information request dated 1 December 2017, question 1 (page 2, paragraph 1.4), URN 0763.
[874] Transcript of an interview with [MGF Employee 3] held on 9 January 2018, page 139, URN 2806.
[875] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 4.1(a), and 4.2 to 4.7, URN 5422.
[876] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 4.1(b), and 4.8 to 4.12, URN 5422.

relation to design charges to be applied by MGF to its customers more generally; and

(iii) as set out in paragraphs 4.216 and 4.217, the CMA considers that a telephone call between [MGF Employee 2] and [Vp Employee 1] on 17 December 2015 encompassed, at least in part, a discussion about the level of rebate rates for Balfour Beatty.

(b) notwithstanding that the corporate structures of Vp and MGF are non-identical, the CMA considers that [Vp Employee 2] held a senior management position in the [✂] division of Vp until his resignation on [✂]. As [✂] he [✂] reported to [Vp Employee 1].[877] The CMA does not consider that [Vp Employee 2] had a lesser degree of involvement in the Infringement such as to warrant a smaller uplift being applied to Vp, noting that he was directly involved in the infringing conduct for the period of time that he was at Vp. This included:

(i) as set out in paragraph 4.18, contacting MGF in relation to low quotes from MGF and seeking to 'apply pressure' to MGF by making threats as regards Vp's future conduct in order to maintain prices in the market going forward;[878]

(ii) as set out in paragraphs 4.62 to 4.66 and 4.70, attending two tripartite meetings with [MGF Employee 1] and [MHL Employee 1] in Relevant Period 2(a); and

(iii) as set out in paragraphs 4.198 to 4.200, sharing and discussing information about pricing intentions for a tender with [MGF Employee 4].

6.51 MGFL has made representations that any uplift at this step should be at the lower end of the scale on the basis that the evidence does not support any finding of a hardcore secret cartel.[879] The CMA is not persuaded by these representations. The Infringement concerned the coordination of commercial behaviour (in particular pricing practices) with the aim of reducing competition on price and strategic uncertainty in relation to the supply, by way of hire, of the Products, in order to maintain or increase pricing levels in the market. This infringing conduct was, by its very nature, harmful to the proper functioning of normal competition and therefore had the object of restricting competition. As

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[877] Transcript of an interview with [MGF Employee 3] held on 9 January 2018, pages 119, 120, 133, 134 and 138, URN 2806.
[878] See for example paragraphs 4.17 to 4.32.
[879] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs B.54 and B.55, URN 5436.

set out at paragraphs 6.12 and 6.13, the evidence also indicates that those involved must have been aware, or could not have been unaware, that their conduct had the object or would have the effect of restricting competition, or at least ought to have known that their conduct would result in a restriction or distortion of competition.

6.52 Given the involvement of directors and senior management in the Infringement, the CMA considers that it is appropriate to apply an uplift of 15% to the penalties of MGFL and Vp, for director and senior management involvement.

Mitigating factor – compliance

6.53 The CMA may decrease the penalty at Step 3 where an undertaking can show that adequate steps have been taken to ensure compliance with competition law.[880] To qualify, an undertaking has to provide evidence of adequate steps taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation, from the top down, together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities. The CMA will consider carefully whether evidence presented of an undertaking's compliance activities in a particular case merits a discount to the penalty of up to 10%.

6.54 Vp submitted detailed evidence regarding its compliance activities,[881] including:

(a) evidence of a commitment to competition law compliance on the part of its senior management, including its Chairman, CEO, and Group board. For example:

(i) the importance of compliance with competition law was discussed with the top forty managers of the Vp Group at Vp's annual management conference in June 2019;[882]

(ii) Vp has appointed divisional compliance champions: divisional Managing Directors have the responsibility to promote and ensure

[880] *CMA73*, paragraph 2.19 and footnote 33.
[881] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 4.17 to 4.52, URN 5422; Annexes 2 to 7, URN 5425 to URN 5430.
[882] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 4.22, URN 5422; Annex 2 of Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5425.

compliance with the law and other regulations within their division;[883] and

(iii) Vp's Corporate Social Responsibility (CSR) statement (published in its Annual Report and Accounts since the year ended 31 March 2019) includes a reference to Vp's zero tolerance policy on anti-competitive behaviour and is part of Vp's Strategic Report, which is signed by Vp's CEO on behalf of the board.[884]

(b) evidence of a clear public commitment to compliance with competition law, with public statements set out in its Annual Reports and Accounts[885] and in Vp's CSR statement. The Ethics section of Vp's website also includes a link to a competition law policy compliance statement;[886]

(c) evidence of steps taken to identify key competition law risks and the level of risks it faces as part of Vp's approach to risk management, as set out in Vp's Annual Report and Accounts.[887] Each division or department has a detailed risk register, which is reviewed annually following an internal audit;[888]

(d) Vp's competition law compliance policy, which is set out in Vp's employee handbook,[889] and which is accessible to all Vp employees from Vp's intranet;

(e) details of compliance training for staff delivered since the CMA's investigation: face to face training was provided to senior managers between December 2017 and February 2018 (the implementation and content of which was approved by Vp's CEO and Group Finance Director), who were then responsible for cascading it to sales teams and

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[883] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 4.34, URN 5422.
[884] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 4.24 to 4.26, URN 5422.
[885] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 4.24, URN 5422.
[886] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 4.28, URN 5422.
[887] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 4.36 and 4.37, URN 5422.
[888] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 4.38 to 4.41, URN 5422; Annex 4 of Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5427.
[889] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 4.29 to 4.33, URN 5422; Annex 3 of Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5426.

other employees;[890] Vp also introduced a compulsory online training tool in August 2020, which 395[891] relevant employees have completed and new recruits are required to complete; and

(f) the introduction of a whistleblowing procedure whereby employees can report any concerns, including failure to comply with a legal obligation or statutes, and improper conduct or unethical behaviour. Vp's employee handbook sets out a number of detailed options for reporting concerns.[892]

6.55 The CMA considers that Vp has provided sufficient evidence of adequate steps taken to achieve a clear and unambiguous commitment to competition law compliance throughout the organisation, from the top down, together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities to warrant a reduction in penalty. The CMA considers that a 10% reduction for compliance for Vp is appropriate in the circumstances of this case.

6.56 MGFL also submitted evidence regarding its compliance activities which the CMA has considered,[893] including the implementation of policies on competition law compliance[894] reporting and whistleblowing,[895] and the appointment of a compliance officer.[896] MGFL's competition law compliance policy forms part of MGFL's staff handbook, which is provided to all employees and made available on MGFL's intranet.[897] In terms of compliance training for staff, competition compliance training was delivered to senior management in May 2018, which was verbally cascaded by these recipients to other directors and senior employees.[898] MGFL has explained that since

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[890] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 4.44, URN 5422; Annexes 5 and 6 of Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5428 and URN 5429.
[891] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 4.45 to 4.48, URN 5422; Annex 7 of Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5430.
[892] Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 4.49, URN 5422; Annex 3 of Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5426.
[893] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5436 referring to Annex B, URN 5437; MGFL's response dated 23 November 2020 to the CMA's follow-up questions dated 17 November 2020, URN 5449 referring to Annexes 1 to 12, URN 5450.
[894] Annex B of MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5437.
[895] MGFL's response dated 23 November 2020 to the CMA's follow-up questions dated 17 November 2020, URN 5449; Annex 2, URN 5450.
[896] Annex B of MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5437; MGFL's response dated 23 November 2020 to the CMA's follow-up questions dated 17 November 2020, URN 5449.
[897] MGFL's response dated 23 November 2020 to the CMA's follow-up questions dated 17 November 2020, URN 5449; Annex 2, URN 5450.
[898] Annex B of MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5437; MGFL's response dated 23 November 2020 to the CMA's follow-up questions

September 2018 it has been developing an e-learning platform, which is intended to include a module on competition law. In November 2020, MGFL updated the compliance statement on its website to refer to its competition law compliance policy.[899]

6.57 Although MGFL has undertaken some compliance activity, the CMA does not consider that MGFL has demonstrated that adequate steps (appropriate for an undertaking the size of MGFL) have been taken to achieve a clear and unambiguous commitment to compliance throughout the undertaking. In particular:

(a) although a compliance officer has been appointed to review dealings with competitors and produce a report of interactions with competitors, the report provided by MGFL as supporting evidence records sales and purchases, and does not include any details of the level of risk involved, or the process for the compliance officer to report on these reviews (either by way of annual reports or to the CMA).[900] Although MGFL has explained that competition law compliance forms part of the agenda for senior level discussions, it has not explained how any identified risks are assessed or recorded;

(b) in terms of making a public statement regarding a commitment to compliance: although MGFL's website does refer to its competition law compliance policy, this was only added in November 2020, shortly after the CMA requested further information regarding MGFL's compliance activity;[901] and

(c) despite MGFL's competition law policy (dated September 2018) referring to it being compulsory for certain staff to attend further training and pass competition law e-learning courses, MGFL's e-learning platform has not yet been implemented and MGFL has not provided any details regarding the proposed scope or content of any competition law module. The CMA considers that the delayed timeline for the launch of the e-learning platform (even taking into account the delays caused by Coronavirus

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dated 17 November 2020, URN 5449; Annex 11 of MGFL's response dated 23 November 2020 to the CMA's follow-up questions dated 17 November 2020, URN 5450.

[899] MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, URN 5436; MGFL's response dated 23 November 2020 to the CMA's follow-up questions dated 17 November 2020, URN 5449; Annexes 7 to 10 of MGFL's response dated 23 November 2020 to the CMA's follow-up questions dated 17 November 2020, URN 5450.

[900] Annex 1 of MGFL's response dated 23 November 2020 to the CMA's follow-up questions dated 17 November 2020, URN 5450.

[901] MGFL's response dated 23 November 2020 to the CMA's follow-up questions dated 17 November 2020, URN 5449.

(COVID-19) referred to by MGFL), suggests that a clear commitment to competition law compliance is not in place.

6.58 On this basis, the CMA does not consider that MGFL has sufficiently demonstrated a clear and unambiguous commitment to competition law compliance throughout the organisation, from the top down, together with appropriate steps relating to competition compliance risk identification, risk assessment, risk mitigation and review activities.

6.59 The CMA therefore does not consider that it is appropriate for MGFL to receive a reduction in its penalty for compliance in the circumstances of this case.

Mitigating factor – cooperation

6.60 The CMA may decrease the penalty at Step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. The Penalty Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion to merit a reduction).[902]

6.61 In this case:

(a) Vp provided cooperation by making two Vp employees available for voluntary interviews. The CMA considers that this enabled the enforcement process to be concluded more effectively and speedily such that it is appropriate to apply a reduction of 5% to Vp's penalty at this step;[903] and

(b) the CMA does not consider that MGFL has provided cooperation which has enabled the enforcement process to be concluded more effectively and/or speedily, such that it would be appropriate to apply a reduction to MGFL's penalty at this step. MGFL did make two individuals available for voluntary interview in the early stages of the investigation. However, [✂], subsequent requests for individuals to be made available for voluntary

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[902] *CMA73*, paragraph 2.19 and footnote 35.

[903] Vp made representations that a discount for cooperation of at least 10% should be granted for (i) assisting the CMA in its unannounced inspection between 28 February and 3 March 2017; (ii) making witnesses available for voluntary interview; (iii) offering to pay for independent legal representation for witnesses; (iv) comprehensive and timely responses to the CMA's requests for information; and (v) assisting the CMA in improving the accuracy of its file; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 4.53 to 4.70, URN 5422. Aside from making witnesses available for voluntary interview, the other factors highlighted did not lead to significant resource savings for the CMA in the circumstances of this case, and did not enable the enforcement process to be concluded more effectively and/or speedily such as to warrant a cooperation discount of more than 5%.

interview (including the two individuals interviewed voluntarily) were refused. The CMA therefore does not consider that a discount for cooperation should be applied to MGFL's penalty at this step.[904]

Penalty after Step 3

6.62 Applying the percentage increases and decreases for the aggravating and mitigating factors, respectively, results in a penalty at Step 3 of:

(a) £11,700,233 for MGFL; and

(b) £11,235,660 for Vp.

Step 4 – adjustment for specific deterrence and proportionality

6.63 The penalty may be adjusted at this step for specific deterrence (ensuring that the penalty imposed on the undertaking in question will deter it from breaching competition law in the future) or to ensure that it is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking,[905] as well as any other relevant circumstances of the case.[906] At Step 4, the CMA will assess whether, in its view, the overall penalty is

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[904] MGFL made representations that a discount for cooperation should be granted for permitting (and suggesting) that the CMA inspect premises outside the scope of the CMA's warrant; providing detailed answers to information requests; and providing lengthy submissions and witness evidence; MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 57 to 59, URN 5436. These factors did not lead to significant resource savings for the CMA in the circumstances of this case, and did not enable the enforcement process to be concluded more effectively and/or speedily such as to warrant a cooperation discount. MGFL also made representations that it should receive a discount on the basis that any infringement had ended before the CMA's investigation was commenced. The CMA does not consider this warrants a reduction in the circumstances, noting that MGFL has provided no evidence that it sought to bring the Infringement to an end, to distance itself publicly from the infringing conduct or to bring it to the attention of the CMA prior to the start of the investigation.

[905] For the purposes of this assessment, the CMA has considered financial indicators taken from the most recent audited annual accounts for each undertaking, as well as average annual performance over the last three years. The CMA has also reviewed written representations from Vp and its recent trading update dated 6 October 2020 relating to the impact of the Coronavirus (COVID-19) pandemic on Vp's current financial position and Vp's interim results (and accompanying press release and presentation) dated 7 December 2020. Unless stated otherwise, figures for Vp are sourced from Vp's Annual Report and Accounts for the financial year ending 31 March 2020, or where a three year average is used, for the financial years ending 31 March 2020, 31 March 2019 and 31 March 2018. Unless otherwise stated, figures for MGFL relate to MGF Limited's consolidated audited financial statements, and are sourced from MGF Limited's Annual report and financial statements for the financial year ending 30 June 2020, or where a three year average is used, for the financial years ending 30 June 2020, 30 June 2019 and 30 June 2018. For the purpose of this assessment, the CMA has adjusted MGFL and Vp's financial profit indicators to exclude the impact of provisions and charges relating to potential penalty liabilities arising from the CMA's investigation. The CMA has adjusted MGFL's reported operating profit and profit after tax measures to exclude the impact of a provision of £3,773,910 in the year ending 30 June 2020, and has adjusted Vp's profit after tax to exclude a cost of £4.5 million in year ending 30 March 2020. No adjustment is required for Vp's operating profit measure, as the CMA has referenced Vp's 'Operating profit before amortisation and exceptional items' metric, which already excludes the penalty provision which was reported by Vp as an exceptional item.

[906] *CMA73*, paragraph 2.20.

appropriate in the round.[907]

6.64 Adjustment to the penalty at Step 4 may result in either an increase or a decrease to the penalty and the assessment of the need to adjust the penalty will be made on a case-by-case basis for each individual infringing undertaking.[908]

6.65 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, the CMA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the infringing activity on competition.[909]

6.66 The penalty may be increased at Step 4 for specific deterrence. Increases to the penalty at Step 4 will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market, or where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of penalty reached at the end of Step 3.[910] In considering the appropriate level 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.[911]

MGFL

6.67 The CMA first considered whether there was a need for an uplift for specific deterrence. In its last full business year, MGFL reported revenue of £37.7 million, operating profit of £4.0 million, and profit after tax of £3.6 million.[912] Excluding the impact of a provision of approximately £3.8 million relating to the potential for penalty liabilities arising from the CMA's investigation, MGFL's operating profit and profit after tax was £7.7 million and £7.4 million respectively.[913] MGFL reported a net asset position of £90.3 million in its last financial year, and paid dividends of £1.4 million.

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[907] *CMA73*, paragraph 2.24.
[908] *CMA73*, paragraph 2.21.
[909] *CMA73*, paragraph 2.24. In making this assessment in this case, the CMA has considered the Infringement overall, taking into account conduct in each of Relevant Periods 1, 2 and 3.
[910] *CMA73*, paragraph 2.21.
[911] *CMA73*, paragraph 2.23.
[912] MGF Limited's consolidated annual financial statements for the financial year ending 30 June 2020.
[913] MGFL's reported operating profit and profit after tax for the financial year ending 30 June 2020 included a provision of £3,773,910 relating to the potential for penalty liabilities arising from the CMA's investigation.

6.68 Putting the penalty at the end of Step 3 in context, a penalty of £11,700,233 therefore represents approximately:

(a) 31% of MGFL's worldwide turnover for the financial year ending 30 June 2020 and 30% of MGFL's average annual worldwide turnover;

(b) 151% of MGFL's operating profit for the financial year ending 30 June 2020 and 121% of MGFL's average annual operating profit;[914]

(c) 158% of MGFL's profit after tax for the financial year ending 30 June 2020 and 126% of MGFL's average annual profit after tax;[915] and

(d) 13% of MGFL's net assets and 12% of MGFL's adjusted net assets.[916]

6.69 The CMA does not consider that an uplift to the penalty is necessary for the purposes of specific deterrence given the size and financial position of MGFL, noting that a penalty of £11,700,233 represents approximately 30% of MGFL's most recent and three year average worldwide turnover, a large proportion of which is derived from the relevant market.[917] A penalty of this level would also represent more than 120% of MGFL's most recent and three year average operating profit and profit after tax.

6.70 The CMA also considered whether any reduction is required to ensure that the penalty is not disproportionate or excessive.

6.71 Taking into account the serious nature of the infringement (see paragraph 6.35), MGFL's direct and active involvement in that conduct (see paragraph 6.51) and the potential impact of MGFL's infringing activity on competition (see paragraph 6.35(e)) and having regard to MGFL's size and financial position across a range of financial indicators, the CMA considers that its penalty after Step 3 should be decreased by 50% to ensure that it is not disproportionate or excessive.

6.72 The CMA considers that a 50% reduction of the penalty to £5,850,116 is appropriate in the round, and results in a penalty which is sufficient to achieve

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[914] MGFL's operating profit has been adjusted to exclude the impact of a provision of £3,773,910 in the audited financial statements for the financial year ending 30 June 2020 relating to potential penalty liabilities arising from the CMA's investigation.
[915] Profit after tax metrics adjusted to exclude the impact of a provision of £3,773,910 in the audited financial statements for the financial year ending 30 June 2020 relating to potential penalty liabilities arising from the CMA's investigation.
[916] Based on net assets of £90,320,009 for the year ended 30 June 2020, adjusted to £93,721,199 to reflect dividends paid out during the financial years ending 30 June 2018, 2019 and 2020.
[917] MGFL's relevant turnover for the financial year ending 30 June 2016 represents 73% of total turnover of £31.77 million for the same financial year. The 2016 relevant turnover would equate to 61% of total turnover of £37.74 million for the current financial year.

the specific deterrence required at a level which is fair, reasonable and proportionate given the size and financial position of MGFL.[918] This figure represents approximately:

(a) 16% of MGFL's worldwide turnover for the financial year ending 30 June 2020 and 15% of MGFL's average annual worldwide turnover;

(b) 76% of MGFL's operating profit for the financial year ending 30 June 2020 and 60% of MGFL's average annual operating profit;

(c) 79% of MGFL's profit after tax for the financial year ending 30 June 2020 and 63% of MGFL's average annual profit after tax; and

(d) 6% of MGFL's net assets and adjusted net assets for the financial year ending 30 June 2020.

Vp

6.73 The CMA first considered whether there was a need for an uplift for specific deterrence. In its last full business year, Vp reported revenue of £362.9 million, operating profit before amortisation and exceptionals of £55.5 million, and profit after tax of £18.6 million. Vp reported a net asset position of £169.9 million in its last financial year, and paid dividends of £12.1 million.

6.74 Putting the penalty at the end of Step 3 into context, a penalty of £11,235,660 therefore represents approximately:

(a) 3% of Vp's worldwide turnover for the financial year ending 31 March 2020 and its average annual worldwide turnover;

(b) 20% of Vp's operating profit before amortisation and exceptional items[919] for the financial year ending 31 March 2020 and 22% of its average operating profit before amortisation and exceptional items;

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[918] MGFL has made representations that it should rarely if ever be necessary to apply the statutory cap at Step 5, in that the assessment at Step 4 should eliminate the possibility in any but the most exceptional hardcore activity (MGFL's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraph 68, URN 5436). The CMA is not persuaded by this representation and has followed the approach to the calculation of penalties set out in the Penalty Guidance, noting also that at Step 4 a penalty may be increased or reduced (it can be both uplifted for deterrence or reduced for proportionality); and that the purpose of the 10% statutory maximum at Step 5 is to act as a final cap to ensure that the final penalty imposed does not impose an excessive burden on an undertaking (not as a benchmark for seriousness, as suggested by MGFL). In any event, reductions to MGFL's penalty have been applied at both Step 4 and Step 5.

[919] Operating profit before amortisation and exceptional items is a profit metric used by Vp in its financial statements.

(c) 60% of Vp's profit after tax for the financial year ending 31 March 2020 and 46% of Vp's average annual profit after tax; and

(d) 7% of Vp's net assets for the financial year ending 31 March 2020, and 6% of Vp's adjusted net assets.[920]

6.75 While the fact that Vp has a significant proportion of its turnover outside the relevant market is a factor that may generally point to a need to increase the penalty for specific deterrence,[921] the CMA does not consider that such an uplift to the penalty is necessary in this case given the size and financial position of Vp based on other indicators, noting that a penalty of £11,235,660 represents nearly two-thirds of Vp's last year profits and nearly half of its average annual profit after tax.

6.76 The CMA has also considered whether any reduction is required to ensure that the penalty is not excessive or disproportionate. Taking into account the serious nature of the infringement (see paragraph 6.35),[922] Vp's direct and active participation in that conduct (see paragraph 6.50),[923] the potential impact of Vp's infringing activity on competition (see paragraph 6.35(e)),[924] and noting that a significant proportion of Vp's turnover is generated outside the relevant market (which, as noted above, is a situation in which the CMA would generally, if anything, be considering an increase to the penalty at Step 4), the CMA considers that a penalty of £11,235,660 is appropriate in the round, achieving the specific deterrence required at a level which is fair, reasonable and proportionate given the size and financial position of Vp.[925]

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[920] Based on net assets of £169,921,000 for the year ended 31 March 2020, adjusted to £201,812,000 to reflect dividends paid out during the financial years ending 31 March 2018, 2019 and 2020.
[921] *CMA73*, paragraph 2.21, which provides that situations where the penalty figure reached after steps 1 to 3 may be increased at Step 4 'will generally be limited to situations in which an undertaking has a significant proportion of its turnover outside the relevant market…'.
[922] Vp has made representations that a reduction of the penalty on proportionality grounds would be appropriate on the basis that the Infringement does not warrant being characterised as an instance of the most serious types of infringement; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 2.1 to 2.13; and paragraph 5.13, URN 5422. The CMA is not persuaded by these representations, for the reasons set out at paragraphs 6.35 to 6.37.
[923] Vp has made representations that a reduction of Vp's penalty on proportionality grounds would be appropriate on the basis that Vp was not directly and actively involved in the Infringement; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 5.1 to 4.15 and 5.14 to 5.15, URN 5422. The CMA is not persuaded by these representations, for the reasons set out at paragraph 6.50.
[924] Vp has made representations that a reduction of Vp's penalty on proportionality grounds would be appropriate on the basis of the minimal impact of the Infringement on customers and/or consumers; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 2.12, and 5.16 to 5.18, URN 5422. The CMA is not persuaded by these representations, for the reasons set out at paragraph 6.35(e).
[925] Vp has made representations that the financial impact of the Coronavirus (COVID-19) pandemic on Vp should be taken into account at Step 4; Vp's response dated 23 October 2020 to the CMA's Draft Penalty Statement dated 25 September 2020, paragraphs 5.4 to 5.9, URN 5422. The CMA has considered these representations as well as Vp's recent trading update dated 6 October 2020 and Vp's interim results (and accompanying press release and presentation) dated 7 December 2020. Although the CMA considers that the Coronavirus (COVID-

6.77 Therefore, the CMA does not consider it necessary to adjust Vp's penalty at Step 4 for specific deterrence or proportionality.

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

6.78 The CMA may not impose a penalty for an infringement that exceeds 10% of an undertaking's 'applicable turnover', that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA's decision or, if figures are not available for that business year, the one immediately preceding it.[926]

6.79 The CMA has assessed MGFL and Vp's penalties at Step 4 against the penalty threshold set out in the preceding paragraph.

6.80 MGFL's worldwide turnover for the year ended 30 June 2020 was £37,739,101.[927] A further adjustment is therefore required to ensure that the penalty does not exceed the statutory maximum of £3,773,910. MGFL's penalty has therefore been reduced by a further £2,076,206, to £3,773,910.

6.81 Vp's worldwide turnover for the year ended 31 March 2020 was £362,927,000.[928] No adjustment is required as the penalty does not exceed the statutory maximum of £36,292,700.

Step 6 – application of reductions for leniency, settlement or voluntary redress

6.82 The CMA will reduce an undertaking's penalty at Step 6 where the undertaking has a leniency agreement with the CMA or agrees to settle with the CMA.[929] The CMA may also apply a penalty reduction where an undertaking obtains approval for a voluntary redress scheme.[930]

6.83 Reductions for leniency, settlement or for a voluntary redress scheme are not applicable to MGFL or to Vp.

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19) pandemic may have had a near-term impact on Vp's business, the CMA is not persuaded, on the basis of the information provided to it, of a lasting impact of the Coronavirus (COVID-19) pandemic on Vp's business such that the penalty would no longer be proportionate to the size of the business. The CMA further notes that Vp (and MGFL) will have the opportunity to make a reasoned application for additional time to pay should it consider this necessary; the CMA may, on a discretionary basis, take into account any near-term impact of the Coronavirus (COVID-19) pandemic in considering any time to pay applications which are made.

[926] Section 36(8) of the Competition Act, the 2000 Order, as amended, and *CMA73*, paragraph 2.25.

[927] Page 9 of MGF Limited's Annual Report and financial statements for the year ended 30 June 2020.

[928] Page 59 of Vp's Annual Report and Accounts for the year ended 31 March 2020.

[929] *CMA73*, paragraphs 2.29 and 2.30.

[930] *CMA73*, paragraph 2.31.

Penalty

6.84 The following table sets out a summary of the penalty calculations and the penalties that the CMA requires MGFL and Vp to pay in relation to the Infringement.

Step	Description		MGFL	Vp
	Relevant turnover		£23,122,990	£25,535,590
1	Starting point		22%	22%
2	Duration multiplier		2	2
3	Adjustment for aggravating or mitigating factors	Director/senior management involvement	15%	15%
		Co-operation	N/A	-5%
		Compliance	N/A	-10%
4	Adjustment for specific deterrence and proportionality		-50%	N/A
5	Adjustment to take account of the statutory maximum penalty		-£2,076,206	N/A
	Penalty after Step 5		£3,773,910	£11,235,660
6	Leniency discount		N/A	N/A
	Settlement discount		N/A	N/A
	Penalty payable		£3,773,910	£11,235,660

E. Payment of penalty

6.85 The CMA requires:

(a) MGFL to pay a penalty of £3,773,910;

(b) Vp to pay a penalty of £11,235,660.

6.86 The penalty will become due to the CMA on 18 February 2021[931] and must be paid to the CMA by close of banking business on that date.[932]

6.87 If that date has passed and (a) the period during which an appeal against the imposition, or amount, of that financial 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, as a civil debt due to the CMA, any amount payable which remains outstanding.[933]

Chris Prevett, Senior Legal Director (Chair of the Case Decision Group)

Robin Foster, CMA Panel Member

Roland Green, CMA Panel Member

for and on behalf of the Competition and Markets Authority.

All of whom are the members of, and who together constitute, the Case Decision Group.

[931] The next working day two calendar months from the expected date of receipt of the Decision.
[932] Details on how to pay are set out in the letter accompanying this Decision.
[933] Section 37 of the Competition Act.

Annex A – Abbreviations and defined terms

Term	Definition
Article 101	Article 101 of the Treaty on the Functioning of the European Union
the Chapter I prohibition	the prohibition imposed by section 2(1) of the Competition Act 1998
the CMA	the Competition and Markets Authority
the Competition Act	the Competition Act 1998
the CAT	the Competition Appeal Tribunal
the Court of Justice	the Court of Justice of the European Union
Decision	this Decision, including Annex
the European Courts	together, the General Court and the Court of Justice of the European Union
the General Court	the General Court of the European Union
groundworks products	the products described in paragraph 2.3
the Infringement	the infringement summarised in paragraph 1.3
MGF	M.G.F. (Trench Construction Systems) Limited
MGFL	MGF and its parent company MGF Limited
MHL	Mabey Hire Limited
Mabey	MHL and its parent companies, Mabey Engineering (Holdings) Limited and Mabey Holdings Limited
the OFT	the CMA's predecessor organisation, the Office of Fair Trading
Party / Parties	the persons listed in paragraph 1.2 (each a '*Party*', together the '*Parties*')
Penalty Guidance	CMA's guidance as to the appropriate amount of a Penalty (*CMA73*, 18 April 2018)

the Products	groundworks products used to provide temporary support solutions for below ground excavations and associated design and transportation services, as described at paragraphs 2.3 to 2.5
Relevant Period 1	the period between at least 23 September 2011 and 4 October 2011
Relevant Period 2(a)	the period between at least 14 February 2014 and 16 July 2014
Relevant Period 2(b)	the period between 17 July 2014 and at least 24 November 2014
Relevant Period 2	Relevant Periods 2(a) and 2(b) together. That is: the period between at least 14 February 2014 and 24 November 2014
Relevant Period 3	the period between at least 12 November 2015 and 28 November 2016
TFEU	the Treaty on the Functioning of the European Union
UK	the United Kingdom
Vp	Vp plc, including its internal Groundforce division