

Competition Act 1998

Decision of the Office of Fair Trading

**Construction Recruitment Forum
Case CE/7510-06**

29 September 2009

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 [...] [C] or for example, [5-10] [C].

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1 INTRODUCTION

A Summary of the infringement and the OFT's action

- 1.1 By this decision, of which Annexes A to D form an integral part ('this Decision') the Office of Fair Trading ('the OFT') has decided that during the period from 21 October 2004 to 26 January 2006 (the 'Relevant Period') the parties listed at paragraph 1.8 below (each 'a Party', together 'the Parties') have infringed the prohibition imposed by section 2(1) ('the Chapter I prohibition') of the Competition Act 1998 ('the Act') by participating in agreement(s) and/or a concerted practice which had as their object the prevention, restriction or distortion of competition in the market for the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the United Kingdom ('UK').
- 1.2 The Construction Industry includes all those companies involved in the design, build and post-build phases of residential and commercial property construction projects, public building construction projects and civil engineering construction projects.
- 1.3 The OFT finds that these agreement(s) and/or concerted practice are elements of a single overall infringement, referred to as the 'Margin Protection Initiative', in pursuit of a common objective, and are as follows:
- An agreement between the Parties to withdraw and/or refrain from entering into contracts in which Parc UK Ltd (trading as Parc Resource Management) was acting as a Neutral Vendor for the supply of Candidates to Construction Companies in the UK, which had as its object the prevention, restriction or distortion of competition in the market for the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the UK. This agreement is referred to as the 'Collective Refusal to Supply Parc'.
 - An agreement and/or concerted practice between the Parties to fix target Fee Rates for the supply of Candidates to Neutral Vendors and certain Construction Companies in the UK, which had as its object the prevention, restriction or distortion of competition in the

market for the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the UK. This agreement and/or concerted practice is referred to as the 'Target Fee Rates Initiative'.

- 1.4 Section 36(1) of the Act provides that the OFT may impose on an undertaking, which has intentionally or negligently committed an infringement of the Chapter I prohibition a financial penalty.
- 1.5 The OFT considers that agreements and concerted practices between undertakings that directly or indirectly fix prices are among the most serious infringements of the Act.¹ In this case the infringement consisted of both price fixing and a collective refusal to supply.
- 1.6 Financial penalties are therefore being imposed on all of the Parties, subject to the operation of the OFT's policy to give lenient treatment to undertakings coming forward with information in cartel activity cases and fully co-operating with the OFT's investigation.
- 1.7 In line with this policy, HMG and BBT have been granted full immunity from penalty. CDI AndersElite, Eden Brown, Fusion People, Hays and Henry Recruitment have been granted leniency and have had their penalties reduced as a result.

B The Parties

- 1.8 This Decision is addressed to the Parties as set out below:

'CDI AndersElite'

CDI AndersElite Limited

CDI Corp

'AWA'

A Warwick Associates Limited

'BBT'

Beresford Blake Thomas Limited

Randstad UK Holding Limited

¹ Penalties Guidance at paragraph 2.4

Randstad Holding NV

'Eden Brown'

Eden Brown Limited

'Fusion People'

Fusion People Limited

'Hays'

Hays Specialist Recruitment Limited

Hays Specialist Recruitment (Holdings) Limited

Hays plc

'Henry Recruitment'

Henry Recruitment Limited

'HMG'

Hill McGlynn & Associates Limited

Randstad UK Holding Limited

Randstad Holding NV

- 1.9 A detailed description of each of the Parties is included in Section 2 of this Decision.
- 1.10 Defined terms in this Decision are in capital letters and are explained in the Glossary at Annex D.

2 THE FACTS

A The Parties

2.1 The Parties to whom this Decision is addressed are set out in paragraphs 2.12 to 2.116 below. First, they include the legal entities which the OFT considers had direct involvement in the infringing conduct that is the subject of this Decision. Secondly, they include those legal entities (if any) which the OFT considers exercised decisive influence over the aforementioned legal entities during the period of the infringement. Where more than one legal entity is named in respect of a particular Party, the OFT considers that they form part of the same undertaking and should be held jointly and severally liable for the infringement and the financial penalty imposed under section 36(1) of the Act in respect of the infringement. This Decision is therefore addressed to each of these Parties.

B Attribution of liability

2.2 In determining attribution of liability for both this Decision and the financial penalties imposed, it is necessary to identify the legal or natural person or persons who may be held responsible for the infringement by the undertaking. In this section the OFT sets out the relevant case law on attribution of liability and the OFT's decision on liability.

Relevant case law on attribution of liability

2.3 Different companies belonging to the same group can form a single economic unit and therefore an undertaking within the meaning of Articles 81 and 82 of the EC Treaty² if the companies do not independently determine their own conduct on the market.³ The mere fact that a subsidiary company has a separate legal personality is not

² And, by virtue of section 60 of the Act, Chapters I and II of the Act.

³ Case 170/83 *Hydrotherm* [1984] ECR 2999, at paragraph 11; Case T-102/92 *Viho v Commission* [1995] ECR II-17, at paragraph 50; and Case T-112/05 *Akzo Nobel v Commission*, [2007] ECR II -5049, at paragraph 58 upheld by Case C-97/08 P, *Akzo Nobel v. Commission*, 10 September 2009.

sufficient to exclude the possibility that its conduct may be attributed to its parent company.⁴

- 2.4 Where a parent company exerts decisive influence on a subsidiary company's commercial conduct at the time of an infringement of Article 81 of the EC Treaty (and by virtue of section 60 of the Act, Chapter I of the Act), that parent company can be held jointly and severally liable for the infringement committed by its subsidiary company.⁵
- 2.5 Where a parent company owns the totality (or almost the totality) of the shares of a subsidiary company it can be presumed that the parent company actually exerted a decisive influence over the subsidiary company's conduct and that the parent and subsidiary company constitute a single undertaking.⁶
- 2.6 This presumption is rebuttable. It is, however, for the parent company (or the Party) to rebut that presumption by adducing evidence demonstrating that its subsidiary company independently determined its conduct.⁷ No Party made any representation to the effect that their parent company did not exercise decisive influence over that party.

⁴ Case 48/69 *ICI v Commission* [1972] ECR 619; and Cases T-305/94 etc *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931

⁵ Joined Cases C-189/02 P etc *Dansk Rørindustri v Commission* [2005] ECR I-0000, at paragraph 117; and Case C-294/98 P *Metsä-Serla Oyj v Commission* [2000] ECR I-10065, at paragraph 27.

⁶ Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraphs 50 and 51; Case C-310/93 P *BPB Industries & British Gypsum v Commission* [1995] ECR I-865, at paragraph 11; Case T-354/94 *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, at paragraph 80; Joined Cases T-305/94 etc *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, at paragraphs 961 and 984; Case T-43/02 *Jungbunzlauer AG*, [2006] ECR II-03435, at paragraph 125; Joined Cases T-305/94 etc *LVM v Commission* [1999] ECR II-931, at paragraphs 961 and 984; Case T-203/01 *Michelin v Commission* [2003] ECR II-4371, at paragraph 290; Joined Cases T-71/03 etc *Tokai Carbon v Commission*, [2005] ECR II-00010, at paragraphs 59 and 60; and Case T-325/01 *DaimlerChrysler v Commission*, [2005] ECR II-03319, at paragraphs 217 to 221. Case T-109/02 *Bollere v Commission*, [2007] ECR II-00947, at paragraph 132, (overturned on appeal to the ECJ, Case C-322/07 P, judgment of 3 September 2009, without further discussion of this point). Case C-97/08 P, *Akzo Nobel v Commission*, 10 September 2009, at paragraphs 60 to 63

⁷ Case T-314/01 *Avebe v Commission* [2006] ECR II-0000, at paragraph 136. See also, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, at paragraph 29; and Case T-112/05 *Akzo Nobel v Commission*, [2007] ECR II – 5049, at

2.7 In the circumstances where a subsidiary is majority owned, rather than wholly owned by the parent company, the principles applicable to presuming that the parent exercised decisive influence may nevertheless apply where there is a clear ability to exercise control. Thus, where the level of shareholding, coupled with any other economic and legal organisational links are such as to allow the parent to direct the conduct of its subsidiary, the OFT is entitled to presume, in the absence of evidence to the contrary, that the parent company did in fact exercise decisive influence over its subsidiary.

OFT's approach to assessing liability

2.8 For each Party that the OFT has found to have infringed the Act, the OFT has first identified the legal entity that was directly involved in the infringement during the Relevant Period. It has then determined whether liability for the infringement should be shared with another legal entity, in which case each legal entity's liability for the conduct would be joint and several.

2.9 Where a parent company exercises decisive influence over the commercial policy of a legal entity that was directly involved in the infringement, whether directly or indirectly through other wholly owned subsidiaries, the OFT has found the parent entity and the legal entity to be jointly and severally liable for the infringement. This includes where a parent company owns the totality (or almost the totality) of the shares of its subsidiary, whether directly or indirectly through other wholly owned subsidiaries, in which case the rebuttable presumption described at paragraph 2.6 above applies.

2.10 Where a legal entity took control over another legal entity that was directly involved in the infringement during the Relevant Period, and where the new parent company exercised decisive influence over its new subsidiary company, the OFT has found the parent and subsidiary companies jointly and severally liable for the period during which decisive influence was exercised during the period where the infringement continued.

paragraphs 62 to 65 upheld by Case C-97/08 P, *Akzo Nobel v. Commission*, 10 September 2009.

2.11 Finally where a party that was directly involved in the infringement was owned by individuals during the Relevant Period of the infringement, the OFT has found only this legal entity to be liable for its participation in the infringement.

A Warwick Associates Limited

Summary

2.12 The OFT finds the following entities jointly and severally liable for the infringement that is the subject of this Decision and the penalty imposed in respect of their participation in the Margin Protection Initiative:

- a) A Warwick Associates Limited

Reasoning

2.13 A Warwick Associates Limited was directly involved in the infringement in this Decision.⁸ A Warwick Associates Limited went into liquidation on 31 October 2007. The liquidator of A Warwick Associates Limited is KSA Business Recovery. The address of the liquidator is: KSA Business Recovery, 2 Nelson Street, Southend on Sea, Essex, SS1 1EF.

2.14 A Warwick Associates Limited was a private limited company registered in England and Wales under company number 03664529.⁹ Its registered address was at 3 Guild Way, South Woodham Ferrers, Chelmsford, Essex CM3 5TG.

2.15 A Warwick Associates Limited was described as covering all aspects of professional construction recruitment.¹⁰

2.16 In the period from 12 November 2004 to 22 July 2005, two individuals, Adrian Warwick and Natasha Warwick, owned 100 per cent of the shares of A Warwick Associates Limited.

⁸ See paragraphs 4.37 to 4.43 which detail the admissions of the Parties.

⁹ AWA's Unaudited Abbreviated Accounts for the year ended 31 December 2006, File Reference: Public Documents 1.

¹⁰ See Public Document 2 taken from:

<http://www.employmentrecruitment.co.uk/content/business.search?splace=cm3+5tb&skeyword=&x=57&y=23>

- 2.17 A Warwick Associates Limited's shares were acquired on 22 July 2005 by AWA Holdings Limited. Since then, AWA Holdings Limited has owned 100 per cent of A Warwick Associates Limited.
- 2.18 AWA Holdings Limited was a private limited company registered in England and Wales under company number 05465256.¹¹ Its registered business address is 7 Chandlers Way, South Woodham Ferrers, Chelmsford, Essex CM3 5TG.
- 2.19 AWA Holdings Limited's shares were owned by four individuals.¹²
- 2.20 The Directors of A Warwick Associates Limited from 22 July 2005 to 27 September 2005 were as follows:¹³
- Mr R Coe
 - Mrs S Young
- 2.21 The Directors of AWA Holdings Limited from 22 July 2005 to 27 September 2005 were as follows:¹⁴
- Mr R Coe
 - Mrs S Young
- 2.22 Mr R Coe and Mrs S Young were on the Board of Directors of A Warwick Associates Limited and AWA Holdings Limited from 22 July 2005 to 27 September 2005.
- 2.23 The OFT considers that AWA Holdings Limited, as 100% owner of A Warwick Associates Limited and having Directors in common exercised decisive influence over A Warwick Associates Limited from 22 July 2005 to 27 September 2005.

¹¹ AWA Holdings Limited Annual Return 363a (ef) for the period ending 26 May 2007, File Reference: Public Document 3.

¹² AWA Holdings Limited Annual Return 363a (ef) for the period ending 26 May 2007, File Reference: Public Document 3.

¹³ A Warwick Associated Limited' Report and Financial Statements for the year ended 31 December 2005, File Reference: Public Document 4.

¹⁴ AWA Holdings Limited's Unaudited and Abbreviated Accounts for the year ended 31 December 2005, File Reference: Public Document 4a and AWA Holdings Limited Annual Return 363a (ef) for the period ending 26 May 2007, File Reference: Public Document 3.

- 2.24 In light of the above, A Warwick Associates Limited is solely liable for its participation in the infringement from 12 November 2004 to 22 July 2005.
- 2.25 The OFT considered that AWA Holdings Limited and A Warwick Associates Limited were jointly and severally liable for A Warwick Associates Limited's participation in the infringement from 22 July 2005 to 27 September 2005 and the penalty imposed in respect of that infringement.
- 2.26 However, AWA Holdings Limited was dissolved by the Registrar of Companies pursuant to section 652 of the Companies Act on 14 April 2009. In light of this and given the small overall size of A Warwick and Associates Limited's penalty (see paragraph 5.367) , and the proportion for which AWA Holdings Limited would be jointly and severally liable, the OFT does not consider it is in the public interest to take any action to restore AWA Holdings Limited to the Register of Companies.
- 2.27 Accordingly, this Decision is therefore addressed to A Warwick Associates Limited's liquidator (KSA Business Recovery). In so doing, the OFT notes that A Warwick Associates Limited is due to be dissolved on 21 October 2009.

Beresford Blake Thomas Limited and Hill McGlynn & Associates Limited

Summary

- 2.28 The OFT finds the following entities jointly and severally liable for the infringement that is the subject of this Decision and the penalty imposed in respect of their participation in the Margin Protection Initiative:
- a) Beresford Blake Thomas Limited
 - b) Hill McGlynn & Associates Limited
 - c) Randstad UK Holding Limited
 - d) Randstad Holding NV

Reasoning

- 2.29 Beresford Blake Thomas Limited ('BBT') was directly involved in the infringement in this Decision.¹⁵
- 2.30 Beresford Blake Thomas Limited is a private limited company registered in England and Wales under company number 02535913.¹⁶ Beresford Blake Thomas Limited's registered address is 1st Floor, Regent Court, Laporte Way, Luton, Bedfordshire, LU4 8SB. It describes itself as a provider of recruitment consultation services throughout the UK, Ireland, Dubai and Australia.¹⁷
- 2.31 Hill McGlynn & Associates Limited ('HMG') was directly involved in the infringement in this Decision.¹⁸
- 2.32 Hill McGlynn & Associates Limited is a private limited company registered in England and Wales under company number 01275025.¹⁹ Hill McGlynn & Associates Limited registered address is 1st Floor, Regent Court, Laporte Way, Luton, Bedfordshire, LU4 8SB. It describes itself as a provider of recruitment consultation services throughout the UK, Dubai and Australia.
- 2.33 Randstad UK Holding Limited is registered in England and Wales under company number 01753882.²⁰ Its registered business address is 1st Floor, Regent Court, Laporte Way, Luton, Bedfordshire, LU4 8SB. The principal activity of the group headed by Randstad UK Holding Limited is the provision of professional staffing services. Randstad UK Holding Limited was previously known as Select Appointments (Holdings) Limited. This change of name took effect on 4 September 2008.
- 2.34 At the time of the infringement, Select Appointments (Holdings) Limited held 85% of Beresford Blake Thomas Limited's ordinary shares. It

¹⁵ See paragraphs 4.37 to 4.43 which detail the Admissions of the Parties.

¹⁶ Company number 02535913: BBT's Annual Return 363a (ef) for the period ending 31 August 2007, File Reference: Public Document 5.

¹⁷ BBT's Report and Financial Statements for the year ended 31 December 2006, File Reference: Public Document 6.

¹⁸ See paragraphs 4.37 to 4.43 which detail the Admissions of the Parties.

¹⁹ Company number 01275025: HMG's Financial Statements for the year ended 31 December 2006, File Reference: Public Document 7.

²⁰ Company number 01753882: Select's Report and Financial Statements for the year ended 31 December 2006, File Reference: Public Document 8.

increased its shareholding in Beresford Blake Thomas Limited to 90% on 18 July 2006, to 93.5% on 3 April 2008, to 95% on 4 August 2008 and to 100% on 26 November 2008. The remainder of the shares were held by one individual, Peter Reynolds.²¹

- 2.35 At 19 April 2004, Select Appointments (Holdings) Limited owned 95% of Hill McGlynn & Associates Limited's ordinary shares. It increased its shareholding to 99% on 21 April 2005 and then to 100% on 6 April 2006. It continues to own 100% of the shares of HMG.²²
- 2.36 At the time of the infringement, Vedior UK Holding Limited held all but one (out of a total of 108,597,201 shares) of the shares of Select Appointments (Holdings) Limited. One share was held by Vedior NV²³ Vedior Holding UK is now known as Randstad Group UK. This change of name took effect on 4 September 2008. Randstad Group UK continues to hold all but one share of Randstad UK Holding Limited. One share is held by Randstad Holding NV.
- 2.37 Randstad Group UK is a private unlimited company registered in England and Wales under company number 03831650. Its registered business address is 1st Floor, Regent Court, Laporte Way, Luton, Bedfordshire, LU4 8SB.²⁴

²¹ BBT's Annual Return 363s for the period ending 31 August 2005, File Reference: Public Document 9; BBT's Annual Return 363a (ef) for period ending 31 August 2006, File Reference: Public Document 10; BBT's Annual Return 363a (ef) for period ending 31 August 2007, File Reference: Public Document 5; BBT's Annual Return 363a (ef) for period ending 31 August 2009

²² HMG's Annual Returns 363s for the periods ending 21 February 2005, 21 February 2006 and 21 February 2009, File Refs: Public Documents 11, 12 respectively.

²³ Select Appointment (Holdings) Limited's Annual Return 363s for the period ending 2 January 2005; Select Appointment (Holdings) Limited's Annual Return 363s for period ending 2 January 2006; Select Appointment (Holdings) Limited's Annual Return 363a (ef) for period ending 2 January 2007; Select Appointment (Holdings) Limited's Annual Return 363a (ef) for period ending 2 January 2008; Randstad UK Holding Limited's Annual Return 363a (EF) for period ending 2 January 2009; File Refs: Public Documents 14-17 respectively.

²⁴ Company number 03831650: Vedior Holding UK's Annual Return 363a (ef) for the period ending 20 August 2007, File Reference: Public Document 13; Randstad Certificate of Incorporation on Change of Name, and Randstad Group UK Annual Return 363a (ef) for the period ending 20 August 2009.

- 2.38 At the time of the infringement, the ultimate parent company of Vedior Holding UK was Vedior NV, a company that was incorporated in the Netherlands and had its registered office located at Jachthavenweg 109-H, 1081 KM, Amsterdam, the Netherlands. Thus Vedior NV indirectly owned 85% of BBT's shares and at least 95% (rising to 99%) of HMG's shares during the period of the infringement.
- 2.39 On 3 December 2007, Vedior NV and Randstad Holding NV announced their intention that a public offer be made by Randstad Holding NV in respect of all of the issued shares of Vedior NV. The public offer was made formally on 1 April 2008. On 13 May 2008, Randstad Holding NV declared the offer as unconditional and announced that 93.46% of Vedior NV shareholders had tendered their shares. Settlement took place on 16 May 2008 and at that point Randstad Holding NV owned 93.46% of the share capital of Vedior NV.
- 2.40 The OFT has been informed²⁵ that the legal merger became effective on 1 July 2008, that Vedior NV ceased to exist as of that date and that Randstad Holding NV acquired all assets, rights and liabilities of Vedior NV with effect from 1 July 2008.
- 2.41 Randstad Holding NV has its headquarters in Diemen, the Netherlands and is listed on the NYSE Euronext Amsterdam exchange.²⁶
- 2.42 The Directors of Beresford Blake Thomas Limited from 12 November 2004 to 14 November 2005 (the period of BBT's involvement in the infringement) were as follows:²⁷
- Mr P Reynolds
 - Mr B Wilkinson
 - Mr CG Reader

²⁵ Letter from Cobbetts LLP dated 19 August 2008; File Reference: Select Leniency 2115.

²⁶ <http://www.randstadholding.com/holding/corporate-information/company-information/>

²⁷ BBT's Reports and Financial Statements for the years ended 31 December 2004 and 31 December 2005 respectively, File Reference: Public Documents 24 & 23 respectively.

2.41 The Directors of Hill McGlynn & Associates Limited from 21 October 2004 to 14 November 2005 (the period of HMG's involvement in the infringement) were as follows:²⁸

- Mr B Wilkinson
- Mr C G Reader
- Mr S D Hill
- Mr S G Ware
- Mr M J Bull
- Mr P D Tonks
- Mr M Bower – appointed 1 February 2005
- Mr J Kalra - appointed 1 April 2005

2.42 The Directors of Select Appointments (Holdings) Limited from 21 October 2004 to 14 November 2005 were as follows:²⁹

- Mr CKZ Miles
- Mr B Wilkinson
- Mr C Reader

2.43 The Directors of Vedior Holding UK from 21 October 2004 to 14 November 2005 were as follows:³⁰

- Mr CKZ Miles
- Mr J R King

²⁸ HMG's Reports and Financial Statements for the years ended 31 December 2004 and 31 December 2005 respectively, File Reference: Public Documents 25 & 26 respectively.

²⁹ Select Appointments (Holdings) Limited Reports and Financial Statements for the years ended 31 December 2004 and 31 December 2005 respectively, File Reference: Public Documents 27 & 28 respectively.

³⁰ Vedior Holding UK Financial Statements for the years ended 31 December 2004 and 31 December 2005 respectively, File Reference: Public Documents 20 & 21 respectively.

- Mr C Reader

2.44 Mr B Wilkinson was on the Board of Directors of Beresford Blake Thomas Limited, Hill McGlynn & Associates Limited and Select Appointments (Holdings) Limited from 12 November 2004 to 14 November 2005. He was on the main Board of Directors of Vedior NV from May 2003³¹ up until Vedior NV ceased to exist on 1 July 2008 as a result of the legal merger with Randstad Holding NV. Following the merger he has joined the Executive Board of Randstad Holding NV.³²

2.45 Mr C Reader was on the Board of Directors of Beresford Blake Thomas Limited, Hill McGlynn & Associates Limited and Select Appointments (Holdings) Limited from 12 November 2004 to 14 November 2005. Mr Reader was, throughout the period of the infringement, Vedior NV's Mergers and Acquisition's Director³³ and was described by Vedior NV as a 'Senior Manager'.³⁴

2.46 Mr CKZ Miles was on the Board of Directors of Select Appointments (Holdings) Limited and Vedior Holding UK continuously during the period of 12 November 2004 until 14 November 2005. Mr Miles was also appointed as CEO and to the Board of Directors of Vedior NV in February 2004 and remained in this position until September 2007, and thus was in this position during the period of the infringement.

2.47 Mr J King was on the Board of Directors of Vedior Holding UK from 12 November 2004 to 14 November 2005. Mr King was also appointed as Vedior NV's Group Legal Director in October 2003 and has been described by Vedior as a 'Senior Manager'.³⁵

2.48 The Articles of Association of Beresford Blake Thomas Limited provided that, as the majority shareholder, Select Appointments (Holdings) Limited had the power to appoint and remove any directors in Beresford Blake

³¹ See Vedior NV 2007 annual report at p17; File Reference: Public Document 29.Vedior's website – www.vedior.com.

³² Letter from Cobbetts LLP dated 19 August 2008; File Reference: Select Leniency 2115.

³³ Randstad's submission to the OFT; File Reference: Select Leniency 1795.

³⁴ Vedior Presentation to Analysts and Investors, London, 19 November 2004, obtained from Vedior's website, File Reference: Public Document 30.

³⁵ Vedior Presentation to Analysts and Investors, London, 19 November 2004, obtained from Vedior's website, File Reference: Public Document 30.

Thomas Limited.³⁶ Directors of Select Appointments (Holdings) Limited, Messrs Wilkinson and Reader, made up the majority of directors of BBT. Messrs Wilkinson and Reader attended monthly board meetings of BBT.³⁷ The Chief Executive of BBT reported to Mr Wilkinson.³⁸

2.49 The Articles of Association of Hill McGlynn & Associates Limited provided that, as the majority shareholder, Select Appointments (Holdings) Limited had the power to appoint and remove any directors in Hill McGlynn & Associates Limited.³⁹ Messrs Wilkinson and Reader attended monthly board meetings of HMG.⁴⁰ The Executive Chairman of HMG reported to Mr Wilkinson.⁴¹

2.50 Operating companies of the Vedior Group were required to observe provisions contained in the Vedior Terms of Reference,⁴² which provide that certain matters of material and strategic importance must be authorised, by Vedior NV's Board of Management. These matters included approval of the annual budget.⁴³

2.51 BBT and HMG had common resources made available to them by Select Appointments (Holdings) Limited such as in-house advice and assistance regarding legal matters, health and safety, financial controls, trademark registration, prosecution and renewal services and procurement support.⁴⁴

2.52 As, during the Relevant Period, Select Appointments (Holdings) Limited held 85% of the shares in Beresford Blake Thomas Limited, had Directors in common with BBT, had the ability to appoint or remove directors to BBT, provided common resources to BBT, the OFT considers that Select Appointments (Holdings) Limited exercised decisive influence over Beresford Blake Thomas Limited in the Relevant Period of the infringement. Randstad UK Holding Limited (previously Select

³⁶ Randstad's submission to the OFT; File Reference: Select Leniency 1795.

³⁷ Randstad's submission to the OFT; File Reference: Select Leniency 1795.

³⁸ Randstad's submission to the OFT; File Reference: Select Leniency 1795.

³⁹ Randstad's submission to the OFT; File Reference: Select Leniency 1795.

⁴⁰ Randstad's submission to the OFT; File Reference: Select Leniency 1795.

⁴¹ Randstad's submission to the OFT; File Reference: Select Leniency 1795.

⁴² Randstad's submission to the OFT; File Reference: Select Leniency 1795.

⁴³ Randstad's submission to the OFT; File Reference: Select Leniency 1795.

⁴⁴ Randstad's submission to the OFT; File Reference: Select Leniency 1795.

Appointments (Holdings) Limited) made no representations to the contrary in its response to the Statement of Objections issued on 21 October 2008.

- 2.53 As, during the Relevant Period, Select Appointments (Holdings) Limited held between 95-99% of the shares in Hill McGlynn & Associates Limited, had Directors in common with HMG, had the ability to appoint or remove directors to HMG and provided common resources to HMG, the OFT considers that Select Appointments (Holdings) Limited exercised decisive influence over Hill McGlynn & Associates Limited in the Relevant Period of the Infringement. Randstad UK Holding Limited (previously Select Appointments (Holdings) Limited) made no representations to the contrary in its response to the Statement of Objections issued on 21 October 2008.
- 2.54 As, during the Relevant Period, Vedior NV, (which was the ultimate parent company of BBT, and Select Appointments (Holdings) Limited), had a director in common with BBT, had a senior manager of Vedior NV acting as a director of BBT, the Chief Executive of BBT reported to a director of Vedior NV (and Select Appointments (Holdings) Limited) and BBT was subject to the Vedior Group terms of reference (meaning that Vedior NV's board of directors had to approve certain actions of BBT), the OFT considers that Vedior NV exercised decisive influence over BBT in the Relevant Period of the infringement. Randstad Holding NV - as the economic successor to Vedior NV (see discussion below) - made no representations to the contrary in its response to the Statement of Objections issued on 21 October 2008.
- 2.55 As, during the Relevant Period, Vedior NV, (which was the ultimate parent company of HMG and Select Appointments (Holdings) Limited), had a director in common with HMG, had a senior manager of Vedior NV acting as a director of HMG, and as the Executive Chairman of HMG reported to a director of Vedior NV (and Select) and HMG was subject to the Vedior Group terms of reference (meaning that Vedior NV's board of directors had to approve certain actions of HMG), the OFT considers that Vedior NV exercised decisive influence over HMG in the Relevant Period of the infringement. Randstad Holding NV (as the legal and economic successor to Vedior NV (see discussion below)) made no representations to the contrary in its response to the Statement of Objections issued 21 October 2008.

2.56 In the light of the above, the OFT considers that it could have addressed this Decision to Vedior NV as well as Beresford Blake Thomas Limited, Hill McGlynn & Associates Limited and Randstad UK Holding Limited. However, as noted at paragraph 2.40 above, Vedior NV ceased to exist as of 1 July 2008 and Randstad Holding NV acquired all assets, rights and liabilities of Vedior NV with effect from that date. The OFT has therefore examined the position of Randstad Holding NV in terms of possible liabilities as a successor undertaking.

2.57 When examining issues related to liabilities of successor undertakings, the ECJ recently confirmed that events such as organisational changes should not enable liabilities for competition law breaches to be evaded:

*'...it must be noted that if no possibility of imposing a penalty on an entity other than the one which committed the infringement were foreseen, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes. This would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing reoccurrence by means of deterrent penalties...the legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant. Imposing a penalty for the infringement on the successor can therefore not be excluded simply because...the successor has a different legal status and is operated differently from the entity that it succeeded.'*⁴⁵

2.58 This reflects the position held by the Commission that whether an undertaking can be held liable for the past conduct of another is indeed a matter for Community law and in relation to which the Commission has determined that:

'when an undertaking committed an infringement of Article 81(1)...and when this undertaking later disposed of the assets that were the vehicle of the infringement and withdrew from the market

⁴⁵ Case C-280/06 *Autorita Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and Philip Morris*, [2007] ECR I - 10893, at paragraphs 41 and 43.

*concerned, the undertaking in question will still be held responsible for the infringement if it is still in existence.*⁴⁶

- 2.59 Vedior NV is no longer in existence. This does not however mean that any liabilities of Vedior NV in relation to its exercise of decisive influence over Beresford Blake Thomas Limited and Hill McGlynn & Associates Limited in the Relevant Period of the infringement also cease to exist.
- 2.60 The Commission has stated that the existence and extent of any successor liabilities must be decided on a case by case basis and regards the determining factor as '*whether there is a functional and economic continuity between the original infringer and the undertaking into which it was merged*'.⁴⁷ This involves considering whether the physical and human assets which were responsible for the infringement have been acquired by another entity.⁴⁸
- 2.61 Vedior NV, which exercised decisive influence over Beresford Blake Thomas Limited and Hill McGlynn & Associates Limited in the Relevant Period of the infringement, has been merged into Randstad Holding NV and the OFT has been informed that as a direct result of the merger Randstad Holding NV has now effectively replaced Vedior NV in the corporate structure which previously existed between Select Appointments (Holdings) Limited and Vedior NV.
- 2.62 As the legal merger took place approximately two and a half years after the end of the Relevant Period, no part of the Randstad Group was, during the Relevant Period, involved in the infringement that is the subject of this Decision. However, the OFT considers that there is sufficient functional and economic continuity between the undertaking which has ceased to exist, Vedior NV, and the current ultimate parent of Randstad UK Holding Limited into which Vedior NV has been merged, Randstad Holding NV, for this Decision to be addressed to Randstad Holding NV as the economic successor of Vedior NV, which exercised

⁴⁶ OJ [2003] L153/1, at paragraph 238, referring to Case T-80/89 BASF and others v Commission (polypropylene) [1995] ECR II-729, which judgement was upheld by the ECJ in Case C-49/92 *P Commission v Anic Partecipazioni SpA* [1999] ECR I-4125

⁴⁷ Commission decision in *PVC*, OJ L74, 17 March 1989, pages 1-20; Joined Cases C-40/73 and others *Suiker Unie v Commission* [1975] ECR 1663, at paragraphs 75-87.

⁴⁸ See, for example, *Anic*, at paragraphs 237-239 and *C-297/98 P SCA v Commission*, at paragraphs 24-28.

decisive influence over Beresford Blake Thomas Limited and Hill McGlynn & Associates Limited in the Relevant Period of the infringement.

- 2.63 The OFT considers that Beresford Blake Thomas Limited, Hill McGlynn & Associates Limited, Randstad UK Holding Limited, and Randstad Holding NV form part of the same undertaking. The OFT finds these entities jointly and severally liable for the penalty imposed in respect of BBT and HMG's participation in the infringement that is the subject of this Decision.
- 2.64 Randstad Holding NV was made aware of the OFT's proposed approach, and applied for (and been granted) leniency for the infringement. In its response to the Statement of Objections issued on 21 October 2008, Randstad Holding NV's only representation in respect of this approach was that the OFT made clear that Randstad Holding NV's liability arose solely from its post-infringement merger with Vedior NV.
- 2.65 This Decision is therefore addressed to Beresford Blake Thomas Limited, Hill McGlynn & Associates Limited for their participation in the infringement, Randstad UK Holding Limited which the OFT considers exercised decisive influence over BBT and HMG in the Relevant Period of the infringement and Randstad Holding NV to which liability is imputed as the economic successor of Vedior NV, which the OFT considers also exercised decisive influence over BBT and HMG in the Relevant Period of the infringement.
- 2.66 The OFT notes that from 1 October 2009, the Technical and Professional business of BBT will merge with HMG to form Randstad Construction, Property and Engineering.⁴⁹

CDI AndersElite Limited

Summary

- 2.67 The OFT finds the following entities jointly and severally liable for the infringement that is the subject of this Decision and the penalty imposed in respect of their participation in the Margin Protection Initiative:

⁴⁹ See press release on BBT's website: <http://www.bbtworldwide.com/latest-news/randstad-announces-operating-company-mergers-and-rebrands.html>

a) CDI AndersElite Limited

b) CDI Corp

Reasoning

- 2.68 CDI AndersElite Limited was directly involved in the infringement in this Decision.⁵⁰
- 2.69 CDI AndersElite Limited is a private limited company registered in England and Wales under company number 00874026.⁵¹ CDI AndersElite Limited's registered address is at 10th Floor, Capital House, Houndwell Place, Southampton, Hampshire SO14 1HU.
- 2.70 CDI AndersElite Limited describes itself as a provider of technical and managerial personnel to the construction, property and engineering industries throughout the UK.⁵²
- 2.71 CDI Corp owned at the time of the infringement and continues to own 100 per cent of CDI AndersElite Limited's shares.⁵³
- 2.72 CDI Corp is a US corporation incorporated in Pennsylvania and listed on the New York Stock Exchange. Its address of principal executive offices is at 1717 Arch Street, 35th Floor, Philadelphia, PA 19103-2768, USA. CDI Corp provides high-value engineering and information outsourcing solutions and professional staffing.⁵⁴

⁵⁰ See paragraphs 4.37 to 4.43 which detail the admissions of the Parties.

⁵¹ Company number 00874026: CDI AndersElite's Annual Return 363a (ef) for the period ending 14 October 2007, File Reference: Public Document 31.

⁵² CDI AndersElite's Directors' Report and Consolidated Financial Statement for the year ended 31 December 2006, File Reference: Public Document 32.

⁵³ CDI AndersElite Limited's Annual Return 363s for the period ending 14 October 2005; CDI AndersElite Limited's Annual Returns 363a (ef) for the periods ending 14 October 2006 and 14 October 2007, File Refs: Public Documents 33, 34 & 31 respectively.

⁵⁴ CDI Corp's 10K Annual Report for the year ended 31 December 2007, File Reference: Public Document 35.

2.73 The Directors of CDI AndersElite Limited from 12 November 2004 to 14 February 2006 were as follows:⁵⁵

- Mr R H Ballou
- Mr J Seiders
- Mr J Petersen
- Mr PJ Rushent
- Mr M Kerschner – appointed 14 October 2005
- Mr Jay G Stuart – 12 November 2004 to 31 May 2005

2.74 The Directors of CDI Corp from 12 November 2004 to 14 February 2006 were as follows:⁵⁶

- Mr R H Ballou
- Mr Michael J Emmi
- Mr Walter R Garrison
- Mr Kay Hahn Harrell
- Mr Lawrence C Karlson
- Mr Ronald A. Kozich
- Mr Barton J. Winokur
- Mr Walter E Blankley – 12 November 2004 to 24 May 2005⁵⁷
- Mr Constantine N. Papadakis - appointed 30 September 2005⁵⁸

⁵⁵ CDI AndersElite Limited's Directors' Reports and Consolidated Financial Statements for the years ended 31 December 2004, 2005 and 2006 respectively, File Reference: Public Documents 36, 37 & 32 respectively.

⁵⁶ CDI Corp's 10K Annual Report for the years ended 31 December 2004, 2005 and 2006 respectively, File Reference: Public Documents 38, 39 & 40 respectively.

⁵⁷ <http://sec.edgar-online.com/2005/04/19/0001193125-05-079401/Section7.asp>, File Reference: Public Document 41.

⁵⁸ <http://www.secinfo.com/d141Nx.z1mf8.htm>, File Reference: Public Document 42.

2.75 The Corporate Executives of CDI Corp from 12 November 2004 to 14 February 2006 were as follows⁵⁹:

- Mr R H Ballou – President, CEO
- Mr Mark A Kerschner, Executive VP and CFO - appointed 11 November 2005.⁶⁰
- Mr Jay G Stuart, Executive VP and CFO - 12 November 2004 to 31 May 2005.⁶¹
- Mr Joseph R Seiders – Senior VP, General Counsel & Secretary.⁶²
- Ms Cecilia J Venglarik – Senior VP, HR⁶³

2.76 Mr R Ballou was a Director of CDI AndersElite Limited and CDI Corp from 12 November 2004 to 14 February 2006. Mr R Ballou, Mr J Seiders, Mr M Kerschner and Mr J Stuart were Corporate Executives of CDI Corp and Directors of CDI AndersElite Limited from 12 November 2004 to 14 February 2006 (with the exception of Mr M Kerschner who was appointed Director of CDI AndersElite Limited on 14 October 2005 and Executive of CDI Corp on 11 November 2005 and Mr J Stuart who resigned on 31 May 2005).

2.77 The OFT considers that CDI Corp, which owned 100% of the shares in CDI AndersElite Limited and had a director and corporate executives in common, exercised decisive influence over CDI AndersElite Limited in the Relevant Period of the infringement. CDI Corp made no representations to the contrary in its response to the Statement of Objections issued on 21 October 2008.

2.78 In light of the above, the OFT considers that CDI Corp and CDI AndersElite Limited form part of the same undertaking. The OFT finds

⁵⁹ CDI Corp's 10K Annual Report for the years ended 31 December 2004, 2005 and 2006 respectively, File Reference: Public Documents 38, 39 & 40 respectively.

⁶⁰ <http://www.secinfo.com/d141Nx.z1sHg.htm>, File Reference: Public Document 43.

⁶¹ <http://www.secinfo.com/d14D5a.z21G1.c.htm>, File Reference: Public Document 44.

⁶² http://www.cdicorp.com/Investor_Relations/Executives.aspx, File Reference: Public Document 45 (as at 2/9/2008)

⁶³ http://www.cdicorp.com/Investor_Relations/Executives.aspx, File Reference: Public Document 45 (as at 2/9/2008).

these entities jointly and severally liable for the penalty imposed in respect of CDI AndersElite Limited's participation in the infringement that is the subject of this Decision.

2.79 CDI Corp was made aware of the OFT's proposed approach, and has applied for (and been granted) leniency for the infringement.

2.80 This Decision is therefore addressed to CDI Corp and CDI AndersElite Limited for their participation in the infringement (collectively referred to throughout this Decision as 'CDI AndersElite').

Eden Brown Limited

Summary

2.81 The OFT finds the following entity liable for the infringement that is the subject of this Decision and the penalty imposed in respect of its participation in the Margin Protection Initiative:

a) Eden Brown Limited

Reasoning

2.82 Eden Brown Limited was directly involved in the infringement the subject of this Decision.⁶⁴

2.83 Eden Brown Limited is a private limited company registered in England and Wales under company number 03643845.⁶⁵ Its registered address is at 222 Bishopsgate, London, EC2M 4QD. It describes itself as a provider of employment and recruitment agency services, human resources and training solutions in the UK.⁶⁶

2.84 All Eden Brown Limited's shares were owned at the time of the infringement by individual shareholders.

⁶⁴ See paragraphs 4.37 to 4.43 which detail the Admissions of the Parties.

⁶⁵ Company number 03643845:Eden Brown's Annual Return 363a (ef) for the period ending 29 September 2007, File Reference: Public Document 46.

⁶⁶ Eden Brown's Reports and Financial Statements for the year ended 31 March 2007, File Reference: Public Document 47.

- 2.85 Eden Brown Limited was acquired in its entirety, by Hamilton Bradshaw Human Capital Limited ('HB Human Capital') on 9 June 2007. HB Human Capital had no direct or indirect involvement in the infringement.
- 2.86 In light of the above, the OFT considers that HB Human Capital did not exercise any decisive influence over Eden Brown Limited at the time of the infringement.
- 2.87 The OFT finds Eden Brown Limited liable for the penalty imposed in respect of its participation in the infringement that is the subject of this Decision.
- 2.88 This Decision is therefore addressed to Eden Brown Limited for its participation in the infringement (referred to throughout this Decision as 'Eden Brown').

Fusion People Limited

Summary

- 2.89 The OFT finds the following entity liable for the infringement that is the subject of this Decision and the penalty imposed in respect of the Margin Protection Initiative:
- a) Fusion People Limited

Reasoning

- 2.90 Fusion People Limited was directly involved in the infringement the subject of this Decision.⁶⁷
- 2.91 Fusion People Limited is a private limited company registered in England and Wales under company number 04873626.⁶⁸ Its registered address is at Fusion House, 18 East Links, Tollgate, Eastleigh, Hampshire, SO53 3TG. Fusion People Limited describes itself as a provider of both a

⁶⁷ See paragraphs 4.37 to 4.43 which detail the Admissions of the Parties.

⁶⁸ Fusion People's Annual Return 363s for the period ended 21 August 2007, File Reference: Public Document 48.

recruitment agency and recruitment business which offers technical, managerial and supervisory staff to the built and natural environment.⁶⁹

2.92 At the time of the infringement and at the date of this Decision, Fusion People Limited was jointly controlled by its directors as stated in their Directors Report.⁷⁰

2.93 In light of the above, this Decision is addressed to Fusion People Limited. The OFT finds this entity liable for the penalty imposed in respect of Fusion People's participation in the infringement that is the subject of this Decision.

Hays Specialist Recruitment Limited

Summary

2.94 The OFT finds the following entities jointly and severally liable for the infringement that is the subject of this Decision and the penalty imposed in respect of their participation in the Margin Protection Initiative:

- a) Hays Specialist Recruitment Limited
- b) Hays Specialist Recruitment (Holdings) Limited
- c) Hays plc

Reasoning

2.95 Hays Specialist Recruitment Limited was directly involved in the infringement the subject of this Decision.⁷¹

2.96 Hays Specialist Recruitment Limited is a private limited company registered in England and Wales under company number 00975677.⁷² Hays Specialist Recruitment Limited's registered address is 250 Euston

⁶⁹ Fusion People's Financial Statements for the year ended 31 December 2007, File Reference: Public Document 49.

⁷⁰ Fusion People's Financial Statements for the years ended 31 December 2005 and 31 December 2006 respectively, File Reference: 50 & 51 respectively.

⁷¹ See paragraphs 4.37 to 4.43 which detail the Admissions of the Parties.

⁷² Company number 00975677: Hays Specialist Recruitment Limited's Report and Financial Statement for the year ended 29 June 2007, File Reference: Public Document 52.

Road, London, NW1 2AF. It describes its principal activity as the '*operation of specialist employment agencies and staff bureau*'.⁷³

- 2.97 Hays Specialist Recruitment Limited is a wholly owned subsidiary of Hays Specialist Recruitment (Holdings) Limited (except for one share which is held by Hays Nominees Limited).⁷⁴
- 2.98 Hays Specialist Recruitment (Holdings) Limited is registered in England and Wales under company number 00934047.⁷⁵ Its registered business address is 250 Euston Road, London, NW1 2AF.
- 2.99 Hays plc owned at the time of the infringement and continues to hold all shares of Hays Specialist Recruitment (Holdings) Limited.⁷⁶
- 2.100 Hays plc is a public limited company registered in England and Wales under company number 02150950.⁷⁷ Hays' registered address is at 250 Euston Road, London, NW1 2AF.
- 2.101 Hays plc describes itself as the largest publicly-listed recruitment group in the UK and a world leading Specialist Recruitment and HR services company.⁷⁸
- 2.102 The Directors of Hays Specialist Recruitment Limited from 21 October 2004 to 1 December 2005 were as follows:⁷⁹

- Mr D R Waxman

⁷³ Hays Specialist Recruitment Limited Report and Financial Statement for the year ended 29 June 2007, File Reference: Public Document 52.

⁷⁴ Hays Specialist Recruitment Limited Annual Returns 363a (ef) for the periods ending 27 September 2005 and 27 September 2006, File Reference: Public Documents 53 & 54 respectively.

⁷⁵ Company number 00934047: Hays Specialist Recruitment (Holdings) Limited's Annual Return 363a (ef) for period ending 27 September 2007, File Reference: Public Document 55.

⁷⁶ Hays Specialist Recruitment (Holdings) Limited Annual Returns 363a (ef) for the periods ending 27 September 2005, 27 September 2006 and 27 September 2007, File Reference: Public Documents 55b, 55c and 55 respectively.

⁷⁷ Company number 02150950: Hays plc's Annual Report and Accounts for the year ended 30 June 2007, File Reference: Public Document 56.

⁷⁸ Hays plc's Annual Report and Accounts for the year ended 30 June 2007, File Reference: Public Document 56.

⁷⁹ Hays Specialist Recruitment Limited Reports and Financial Statements for the years ended 24 June 2005 and 30 June 2006 respectively, File Reference: Public Documents 57 & 58.

- Mr J W Martin
- Mr R B Smith
- Mr N R Cox - appointed 20 June 2005
- Mr H G Bridgwater - appointed 20 June 2005
- Mr R D Hetherington - appointed 20 June 2005

2.103 The Directors of Hays Specialist Recruitment (Holdings) Limited from 21 October 2004 to 1 December 2005 were as follows⁸⁰:

- Mr D R Waxman
- Mr J W Martin
- Mr M C Brunning
- Mr H G Bridgwater - appointed 20 June 2005
- Mr L R McMaster - 12 November 2004 to 1 March 2005
- Mr R B Smith - 12 November 2004 to 20 June 2005
- Mr R A Lawson - 12 November 2004 to 20 June 2005
- Mr R D Hetherington - 12 November 2004 to 20 June 2005
- Mr S Hoefkens - 12 November 2004 to 20 June 2005

2.104 The Directors of Hays plc from 21 October 2004 to 1 December 2005 were as follows:⁸¹

- Mr D R Waxman
- Mr J W Martin

⁸⁰ Hays Specialists Recruitment (Holdings) Limited Reports and Financial Statements for the years ended 24 June 2005 and 30 June 2006 respectively, File Reference: Public Documents 58a & 58b

⁸¹ Hays plc's Annual Reports and Accounts for the years ended 30 June 2005 and 30 June 2006 respectively, File Refs: Public Documents 59 & 60 respectively.

- Mr B Wallace
- Mr B Lawson
- Ms L Knox
- Mr W Eccleshare - appointed 24 November 2004
- Mr P Stoneham - appointed 24 November 2004

2.105 Mr D Waxman and Mr J Martin were on the Board of Directors of Hays Specialist Recruitment Limited and Hays Specialist Recruitment (Holdings) Limited from 21 October 2004 to 1 December 2005. Mr R Smith also served as a Director of Hays Specialist Recruitment Limited from 21 October 2004 to 1 December 2005 and as a Director of Hays Specialist Recruitment (Holdings) Limited up to 20 June 2005. Mr H Bridgwater was appointed Director of Hays Specialist Recruitment Limited and Hays Specialist Recruitment (Holdings) Limited on 20 June 2005.

2.106 The OFT considers that Hays Specialist Recruitment (Holdings), which owned 99% of the ordinary shares in Hays Specialist Recruitment Limited and had Directors in common, exercised decisive influence over Hays Specialist Recruitment Limited in the Relevant Period of the infringement.

2.107 Mr D Waxman and Mr J Martin have been on the Board of Directors of Hays Specialist Recruitment (Holdings) Limited and Hays plc from 21 October 2004 to 1 December 2005. Mr B Lawson served as Director of Hays plc from 21 October 2004 to 1 December 2005 and as a Director of Hays Specialist Recruitment (Holdings) Limited up to 20 June 2005.

2.108 The OFT considers that Hays plc, which owned all the shares in Hays Specialist Recruitment (Holdings) and had Directors in common, exercised decisive influence over Hays Specialist Recruitment (Holdings) in the Relevant Period of the infringement. In its response to the Statement of Objections issued on 21 October 2008, Hays plc made no representations to the contrary.

2.109 In light of the above, the OFT considers that Hays plc, Hays Specialist Recruitment Limited and Hays Specialist Recruitment (Holdings) form part of the same undertaking. The OFT finds these entities jointly and

severally liable for the penalty imposed in respect of Hays Specialist Recruitment Limited's participation in the infringement that is the subject of this Decision.

2.110 This Decision is therefore addressed to Hays Specialist Recruitment Limited, Hays Specialist Recruitment (Holdings) and Hays plc for their participation in the infringement (collectively referred to throughout this Decision as 'Hays').

Henry Recruitment Limited

Summary

2.111 The OFT finds the following entity liable for the infringement that is the subject of this Decision and the penalty imposed in respect of its participation in the Margin Protection Initiative:

a) Henry Recruitment Limited

Reasoning

2.112 Henry Recruitment Limited was directly involved in the infringement the subject of this Decision.⁸²

2.113 Henry Recruitment Limited is a private limited company registered in England and Wales under company number 03094438.⁸³ Henry Recruitment Limited's registered address is at 20 The Causeway, Bishop's Stortford, Hertfordshire, CM23 2EJ.

2.114 Henry Recruitment Limited describes itself as providing staffing solutions to the UK's major contractors, consultancies and private practices in the construction, building and civil engineering industries.⁸⁴

2.115 At the time of the infringement and at the date of this Decision, Henry Recruitment Limited's shares were held by two individuals: Mr Nicholas McCaffrey and Ms Frances Manuel.⁸⁵

⁸² See paragraphs 4.37 to 4.43 which detail the Admissions of the Parties.

⁸³ Company number 03094438: Henry Recruitment Limited's Annual Return 363a (ef) dated 23 August 2007, File Reference: Public Document 61.

⁸⁴ Henry Recruitment Website: <http://www.henryrecruitment.co.uk>, File Reference: Public Document 62.

2.116 In light of the above, this Decision is addressed to Henry Recruitment Limited (referred to throughout this Decision as 'Henry Recruitment'). The OFT finds this entity liable for the penalty imposed in respect of Henry Recruitment's participation in the infringement that is the subject of this Decision.

C Industry structure and the conditions of competition at or around the time of the Margin Protection Initiative

Introduction

2.117 This section of this Decision describes the structure and conditions of competition within the Construction Industry at or around the time of the Margin Protection Initiative and also the services that are supplied by Recruitment Agencies to the Construction Industry.

2.118 In particular, it provides background to the Construction Companies that are of particular relevance to the Margin Protection Initiative. It also provides background to Recruitment Agencies that supply Candidates to the Construction Industry, the role of Neutral Vendors in the Construction Industry, and the conditions of competition affecting Recruitment Agencies.

The Construction Industry in the UK

2.119 In 2004, construction activity accounted for 6.2 per cent of the total UK Gross Value Added Product.⁸⁶ For 2005 the value of construction output in Great Britain was £107 billion and by 2006 the value of this had risen to £114 billion, which represented a rise of 13 per cent on 2001.⁸⁷

2.120 The Construction Industry includes the construction of residential premises, commercial premises, public building and civil engineering projects:

⁸⁵ Henry Recruitment's Annual Return 363s dated 23 August 2005; Henry Recruitment's Annual Return 363s dated 23 August 2006; Henry Recruitment's Annual Return 363a (ef) dated 23 August 2007, File Refs: Public Documents: 63, 64 & 61 respectively.

⁸⁶ See National Statistics, UK National Accounts, Table 8.3, 'The Blue Book', 2006, File Reference: Public Document 65.

⁸⁷ See table 2.1 and 2.2 (pages 35 & 36) ONS, Construction statistics annual report 2008, August 2008, File Reference: Public Document 66.

- Residential premises includes private house building (e.g. owner-occupiers, private-rented and tied accommodation) and public house building (e.g. local authority, registered social landlord or Ministry of Defence premises, covering single person accommodation, family homes, special needs and care homes).
- Commercial premises includes private building (e.g. industrial or retail buildings such as factories, offices, retail outlets, leisure facilities) and public building (e.g. schools and hospitals);
- Civil engineering includes a number of key public services or utilities as follows:⁸⁸
 - Transport and communications infrastructure projects such as roads, railways, bridges, tunnels, harbours, inland waterways, airports, and land-based facilities for telecommunications networks
 - Infrastructure and plant required for production and distribution of energy such as power stations including nuclear, overhead and underground power lines, dams for hydroelectric power generation, wind and wave power installations, oil and gas pipelines, gas mains, and other on-shore oil and gas facilities.
 - Public health infrastructure such as dams and reservoirs for the storage of water, water purification facilities, water distribution networks, sewage treatment plants, and the sewerage.

The design, build and post-build phases of a construction project

2.121 Projects in the Construction Industry can be characterised as consisting of successive phases. The design phase of building and civil engineering construction projects involves the initial conception, feasibility assessment, planning and design. The build phase consists of on-site work related to erecting buildings or completing construction of the project. The post-build phase consists of the fitting out of newly completed structures to meet clients' needs.

⁸⁸ The Civil Engineering Contractors Association, www.ceca.co.uk/.

2.122 The OFT considers that the Construction Industry includes undertakings involved in any phase of the building of residential and commercial premises and civil engineering projects.

Labour demand and conditions in the Construction Industry

2.123 Companies active in the Construction Industry require Candidates with a range of craft and trade skills (e.g. bricklayers or electricians) and professional qualifications (e.g. surveyors). The labour demand of the Construction Industry is complex, reflecting the nature of their work that results in projects of different duration, location, type of building or engineering undertaken and, consequently, the mix of skills and specialisation required. In some cases, the same core skills may be applicable to different stages of construction (albeit fulfilling different roles) and based either on or off the building site.⁸⁹

2.124 A description of the skills or professional roles that are most commonly required by the Construction Industry is provided at Annex A. The qualifications held by Candidates include national vocational qualifications (NVOs), diplomas, certificates and degrees offered at further education level and professional qualifications.⁹⁰

2.125 On the basis of evidence gathered by the OFT during its investigation, it appears that over the last decade the Construction Industry has experienced serious skill shortages, and this was particularly pronounced at or around the time of the Margin Protection Initiative.⁹¹ It appears that a number of initiatives have been put in place to address this.⁹²

⁸⁹ See paragraph 21 of meeting note with WS Atkins plc, 30 January 2007. File Reference: Atkins Third Party Correspondence-222

⁹⁰ Email from Parc to OFT of 9 January 2007 to an information request of 12 December 2006. File Reference: Parc Third Party Correspondence-168

⁹¹ The Chartered Institute of Building (CIOB) reported more than three-quarters of respondents to its annual construction skills survey experienced problems recruiting staff in 2004 and 2005 (CIOB 2005 and 2006), File Reference: Public Document 68. A Financial Times article noted that planned building of secondary schools, increased spending on transport and the 2012 Olympics is likely to increase the strain on available construction skills over the next five years (FT.Com, *UK construction sector faces skills shortage*, 4 March 2007), File Reference: Public Document 69.

⁹² See 'Market Report 2006, Building Contracting' Key Note, 9th edition, June 2006 pages 61 and 73. The report noted that the CITB-Construction Skills (the Sector Skills Council for the

2.126 For contractors, skill shortages can have serious consequences. At or around the time of the Margin Protection Initiative, it appears to the OFT that wages and vacancies had increased.⁹³ It has been put to the OFT that skill shortages can also delay project completion or result in costly mistakes, which in the long run may harm a contractor's reputation.⁹⁴ Shortages in skilled labour put Recruitment Agencies in a strong position, which contributed to an increase in fees.⁹⁵

Customers of Construction Companies

2.127 Customers that use services provided by Construction Companies include private developers of residential housing (including private and social housing), office space and commercial or industrial property; public bodies (local authorities and central government) and services including schools, hospitals; and infrastructure (airports, highways and rail), utilities and energy.⁹⁶

construction industry) had announced proposals for a national skills academy for construction and that the Chartered Institute of Building and CITB-Construction Skills operate a graduate recruitment program, File Reference: Public Document 70.

⁹³ Surveys undertaken by the Office of National Statistics (ONS) found that vacancies, especially in trade and professional skills, were becoming increasingly difficult to fill and earnings in the construction industry had increased at a higher rate than average between 1993 and 2006. From 1993 to 2003, the gross annual pay (median) in the construction industry had the highest earnings growth (57 per cent) among other main industries in the UK (average of 43 per cent). This development has continued in recent years. The increase from 2001 to 2006 was 20.7 per cent, which means that the rise of annual pay in the construction sector was slightly higher than the pay increase for all types of employee at 18.6 per cent (ONS, Annual Survey of Hours and Earnings (ASHE), 2001-2006 and ONS 'The Demand for Labour in the UK', Labour Market Trends, August 2004), File Reference: Public Document 71. An increased number of vacancies have been reported with main shortfalls in construction and engineering. Also, there has been substantial (although not the largest) salary increases in the construction industry (Association of Graduate Recruiters (AGR) 'Graduate Recruitment Winter Survey 2007'), File Reference: Public Document 72.

⁹⁴ See meeting notes with Vinci plc of 12 July 2006 (paragraph 12) and 28 February 2007 (paragraph 18). File Reference: Vinci Third Party Correspondence—52 and 273a

⁹⁵ See meeting notes with Vinci plc of 28 February 2007 (paragraphs 20 and 21), File Reference: Vinci Third Party Correspondence - 273a; and the email from Hays to Parc of 21 September 2004, File Reference: Hays Leniency - 15

⁹⁶ See Key Note Market Review 2006 – Construction Industry, Tenth Edition, June 2006, File Reference: Public Document 73.

Recruitment Agency services supplied to the Construction Industry

- 2.128 Construction Companies may use Recruitment Agencies to identify Candidates. Recruitment Agencies combine two functions. First, the identification and sourcing of potential Candidates. This can be termed the 'search function'. Second, the selection and matching of the most suitable Candidates with the appropriate skills to specific vacancies. This can be termed the 'selection function'.⁹⁷ Collectively, these functions can be termed 'recruitment services'. Positions filled by Recruitment Agencies may be permanent (which can include short or fixed term employment contracts) or temporary.
- 2.129 It is possible that Construction Companies may also recruit staff themselves through advertisements, personal introductions (such as 'recruit a friend' schemes) or speculative applications.⁹⁸
- 2.130 A Construction Company may appoint an Managed Service Provider ('MSP') (in the form of a Master Vendor or Neutral Vendor) to manage its recruitment activities including its recruitment through Recruitment Agencies. The role of MSPs is set out in more detail in paragraphs 2.150 to 2.163 below.

Legislation

- 2.131 The recruitment industry is governed by the Employment Agencies Act (EAA) 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Regulations). This legislation establishes minimum standards that both Candidates and clients are entitled to expect from Recruitment Agencies.
- 2.132 The law distinguishes between 'employment agencies', which supply workers engaged and paid directly by the client, and 'employment businesses', which enter into contracts with workers and supply their

⁹⁷ See annex A questions 5 and 6 of an information request of 16 October 2006 to Parties. File Reference: AndersElite Leniency - 26 & 27; Eden Brown Leniency-30; Fusion Leniency-88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833

⁹⁸ See meeting note with Taylor Woodrow plc of 18 July 2006 (paragraph 12) and Vinci plc analysis of 'offers sent January 2006 to December 2006' provided to the OFT on 28 February 2007. File Reference: TW Third Party Correspondence-46: File Reference:Vinci Third Party Correspondence-248

services to clients on a temporary basis.⁹⁹ In practice, both activities may be undertaken by the same organisation.

- 2.133 Employment agencies are prohibited from paying fees to people they introduce to a client.¹⁰⁰ Employment businesses are obliged to pay workers for work done even if the client does not pay the employment businesses' invoices.¹⁰¹ Both agencies and businesses are prohibited from charging fees to Candidates.¹⁰²

Industry code of practice

- 2.134 The Recruitment and Employment Confederation (REC)¹⁰³ has a Code of Professional Practice and Code of Ethics that applies to individual members.¹⁰⁴ According to the REC, the Code of Professional Practice is binding on all corporate members of the REC and sets general principles for the conduct of business to enhance the operation, image and reputation of the recruitment industry.¹⁰⁵

Candidates' relationship with Recruitment Agencies

- 2.135 Permanent Candidates do not enter into a contractual relationship with a Recruitment Agency. Where a Candidate is placed in a temporary position, the agency will usually pay the wage directly to the temporary Candidate.¹⁰⁶ Candidates may not be required by a Recruitment Agency

⁹⁹ S13 (2) and (3) of the EAA 1973.

¹⁰⁰ Regulation 8 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, except if of a particular profession (Schedule 3 of the Regulations) (mainly entertainment sector) or if the hiring company and the employment agency are connected with one another.

¹⁰¹ Regulation 12 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003.

¹⁰² S6(1) of the EAA 1973. Exceptions are for certain occupations listed in Schedule 3 of the regulations (entertainment and modelling sector), in which case the employment agency can charge a fee to candidates (Regulation 26).

¹⁰³ The trade body representing the UK recruitment industry.

¹⁰⁴ See <http://www.rec.uk.com/aboutrec>, File Reference: Public Documents 80 & 81.

¹⁰⁵ Where a member operates in a sector or sectors covered by the REC's specialist division codes of practice, the requirements of the relevant code or codes are also binding.

¹⁰⁶ Payment may be made either directly to the Candidate or by way of payment to a limited company owned by the Candidate. In its written representations on the Statement of Objections, Randstad estimated 90% of Candidates were paid in the latter manner. In this

to pay a fee for recruitment services. Candidates may register with as many agencies they wish.¹⁰⁷ In this way Recruitment Agencies may build a database of Candidates; who may be put forward to Construction Companies where the needs of the Construction Company and skills of the Candidate match a vacancy.

Construction Companies' relationship with Recruitment Agencies

- 2.136 Construction Companies enter into a contractual relationship with Recruitment Agencies, paying a fee usually contingent upon the successful appointment of a Candidate.
- 2.137 For permanent positions, the fee is usually a percentage commission based on a full year's salary of the Candidate.¹⁰⁸ The salary can be the basic gross pay (i.e. before deductions for tax) or include the value of perks such as car allowances.
- 2.138 For temporary positions,¹⁰⁹ the charge to the Construction Company client will include two elements: the fee retained by the agency and the payroll costs of the Candidate. Fees are usually a percentage commission based on the full year's basic wage. Pay roll costs cover the Candidates wage, contribution to paid holiday and national insurance.¹¹⁰ Fees for providing temporary workers are typically higher than for permanent positions given that placements are shorter and the

respect, the agency is acting as an Employment Business. The Recruitment Agency may enter into a 'contract for services' with the candidate or directly recruit the candidate themselves, in order to then manage the wages between the client and the candidate. See responses to question 4 of information request of 16 October 2006 to Parties. File Reference: AndersElite Leniency-26, 27; Eden Brown Leniency-30; Fusion Leniency-88; Hays Leniency - 429; Henry Leniency-3c; Select Leniency-1833

¹⁰⁷ This may result in the same candidate being put forward for the same job by different agencies.

¹⁰⁸ See sample Preferred Supplier Agreement, Permanent, provided at a meeting with Vinci plc 28 February 2007. File Reference: Vinci Third Party Correspondence-247.

¹⁰⁹ See responses to question 4 from Select and CDI AndersElite, information request of 16 October 2006 to Parties. File Reference: Select Leniency-1833; AndersElite Leniency-26, 27

¹¹⁰ In the case of PAYE

Recruitment Agency incurs additional costs such as operating the payroll.¹¹¹

Preferred Supplier Lists and Preferred Supplier Agreements

- 2.139 Construction Companies often use a preferred supplier list (PSL) consisting of a list of Recruitment Agencies that will be approached initially and on a routine basis when a vacancy arises and/or enter into preferred supplier agreements (PSA) with Recruitment Agencies.
- 2.140 The PSL may be split between first tier and second tier suppliers. First tier suppliers are usually offered vacancies first and benefit from a period of exclusivity (typically 48 hours).¹¹² Fee rates for first tier suppliers can be higher, to encourage prompt filling of vacancies with high quality Candidates, or lower to reflect the benefit of exclusivity.¹¹³ Second tier suppliers will have vacancies referred to them once the exclusive period has lapsed. Alternatively, Construction Companies may approach Recruitment Agencies on an ad-hoc basis (that is without any prior agreement) as vacancies arise, paying a fee rate agreed at the time.
- 2.141 Recruitment Agencies are a principal source of workers for the Construction Industry and the use of agencies has increased over the last decade.¹¹⁴ The reasons for this are set out below.¹¹⁵
- a) The shortage of skills has meant that employers in the Construction Industry have needed to use all means available to identify and attract Candidates.

¹¹¹ See the definitions section of 'MSP Contracts, negotiations and considerations' supplied by CDI AndersElite, 21 September 2006. File Reference: AndersElite Leniency-166 and Annex E of Competition in markets with commission rates, OFT889a, January 2007.

¹¹² See document 'MSP Contracts, negotiations and considerations' supplied by CDI AndersElite, 21 September 2006. File Reference: AndersElite Leniency-166

¹¹³ See document 'MSP Contracts, negotiations and considerations' supplied by CDI AndersElite, 21 September 2006. File Reference: AndersElite Leniency-166

¹¹⁴ See meeting note with Vinci plc of 12 July 2006, paragraph 7. File Reference: Vinci Third Party Correspondence-52

¹¹⁵ See notes of meeting with Vinci plc of 12 July 2006 (paragraph 7 – 8) and 28 February 2007 (paragraph 9 – 11) and meeting note with WS Atkins of 30 January 2007 (paragraph 6). File Reference: Vinci Third Party Correspondence-52 and 273a, and Atkins Third Party Correspondence-239 respectively.

- b) Candidates have a strong preference for using Recruitment Agencies as it is easier than applying directly to job vacancies.
- c) There is a particular need for Recruitment Agencies in the construction sector given the project based nature of construction work for temporary or short term workers. For temporary placements, it is much cheaper for the employer to use Recruitment Agencies. The cost of direct recruitment would be prohibitive.
- d) Recruitment Agencies may offer specialist recruitment skills that may not be available to Construction Companies or are costly for Construction Companies to maintain. In some cases, Construction Companies have lost the necessary recruitment skills to enable direct recruitment.

2.142 In addition to search and selection functions, Recruitment Agencies may offer Construction Companies other services, including: salary and package surveys; training for recruiting managers or skills training for Candidates; head-hunting or executive search; and a range of outsourcing services including management of all human resource functions on behalf of a Construction Company.¹¹⁶

2.143 The services to be provided by the Recruitment Agency will usually be set out in a contract with the Construction Company.¹¹⁷ Contracts may have a fixed duration (e.g. 12 months) or remain in force indefinitely subject to cancellation periods. Contracts generally specify:

- a) The principal service to be offered: the introduction of Candidates to the Construction Company that match a specific 'assignment'.

¹¹⁶ In particular see responses to question 6 from Select and CDI AndersElite, information request of 16 October 2006 to Parties. File Reference: Select Leniency-1833 and AndersElite Leniency-26, 27.

¹¹⁷ The characteristics of contracts set out above are based on sample Preferred Supplier Agreement (i.e. contracts) for Permanent; and Tradesperson and Contract Staff provided by Vinci plc (provided at a meeting with Vinci plc 28 February 2007) and WS Atkins Ltd (provided at a meeting of 30 January 2007). File Reference: Vinci Third Party Correspondence- 247 (for permanent) and 246 (for tradesperson and contract); File Reference: Atkins Third Party Correspondence-241

- b) The process to be followed by the Construction Company to notify the Recruitment Agency of a vacancy, and the process for the Recruitment Agency to introduce a Candidate.
- c) The terms of fee payments (including Fee Rates) and the basis of any rebate of fees if a Candidate's appointment ends soon after employment begins.
- d) Quantitative performance targets, for example, the maximum time allowed to fill vacancies or the minimum number of Candidates that should be offered for a particular position.
- e) Reporting arrangements and provision of management information to the Construction Company from the Recruitment Agency.
- f) Commitment by the Recruitment Agency not to encourage or offer a newly placed Candidate alternative work within an initial period of time. Similarly, the Construction Company is prohibited from approaching a known Candidate directly, without paying the agency's fees.
- g) Confidentiality of business secrets or other information about the Construction Company's business that comes into possession of the Recruitment Agency.

The role of recruitment consultants

2.144 Recruitment consultants are individuals that work for Recruitment Agencies and undertake the day to day operation and management of its business: searching for and selecting Candidates for Construction Companies. In respect of Construction Companies, the consultant's role also involves attracting business from Construction Company clients through sales and marketing, building relationships and getting to know the Construction Company clients' business. For Candidates, consultants attract and identify suitable Candidates through advertisements and interview – putting forward those most suitable for vacancies. Recruitment consultants can be involved in negotiating pay and salary

rates and finalising employment arrangements between Construction Company and Candidate.¹¹⁸

Competition between Recruitment Agencies

- 2.145 As set out above, Recruitment Agencies may be engaged through a contract (perhaps as a preferred supplier) or approached on an ad-hoc basis by a Construction Company. Fee Rates are only payable upon successful provision of a Candidate and contracts recognise that the Construction Company's recruitment needs will differ on a case by case basis as determined by the specific 'assignment'.¹¹⁹ Both Construction Companies and Candidates may use a number of competing Recruitment Agencies at the same time (see paragraphs 2.135 to 2.138 above).
- 2.146 Recruitment Agencies will not necessarily supply or attempt to supply Candidates for every vacancy notified to them. Instead agencies are likely to offer those Candidates meeting the Construction Company's specific requirements given the Candidates available at that time (if any) to the Recruitment Agency.¹²⁰ A key indicator of the performance of a Recruitment Agency will be its success rate in filling vacancies over a period of time.¹²¹ In this way, Recruitment Agencies compete to obtain or maintain their preferred status, even though some agencies may specialise in certain professions or do not offer Candidates for every vacancy.
- 2.147 The fee rates between Recruitment Agencies and Construction Companies will be negotiated periodically and will apply to all positions

¹¹⁸ <http://www.rec.uk.com/about-recruitment/careerrecruitment>, File Reference: Public Document 82.

¹¹⁹ In particular, the types of contracts used by parties relevant to this investigation are not established on a skill or profession by profession basis e.g. a Recruitment Agency contract with a contractor to supply permanent electrical engineers alone. See for example contracts of Vinci plc, File Reference: Vinci Third Party Correspondence- 247 (for permanent) and 246 (for tradesperson and contract).

¹²⁰ See responses to annex A question 9 of an information request of 16 October 2006 to Parties. File Reference: AndersElite Leniency-26 and 166; Eden Brown Leniency-30; Fusion Leniency-88; Hays Leniency - 429; Henry Leniency-3c; Select Leniency-1833 and meeting note with Vinci, 12 July 2006. File Reference: Vinci Third Party Correspondence-52.

¹²¹ See paragraph 11 and 13 of a meeting note with Vinci, 12 July 2006, File Reference: Vinci Third Party Correspondence - 52; paragraph 11 of a meeting note with Atkins, 30 January 2007, File Reference: Atkins Third Party Correspondence—222; and paragraph 32 of a meeting note with Taylor Woodrow, 18 July 2006, File Reference: TW Third Party Correspondence-46.

filled over the duration of that agreement (there may be certain exceptions where a position is particularly difficult to fill).

2.148 Even where a Construction Company does not have a PSA with a Recruitment Agency, a Construction Company's selection of a particular agency will typically be driven by past experience of using that agency. This experience will depend upon the reputation of a Recruitment Agency for quickly responding to the Construction Company's requests, matching suitable Candidates to positions, and its ability to attract the most suitable or highest quality Candidates.¹²² Candidates will prefer Recruitment Agencies with a reputation for providing access to attractive work opportunities.¹²³

2.149 As a result, competition between Recruitment Agencies on price and quality of service takes place over a period of time – through filling a number of vacancies – rather than on a vacancy-by-vacancy basis.

Managed Service Providers (Neutral Vendors & Master Vendors)

2.150 The role of an MSP is distinct from that of a Recruitment Agency.¹²⁴ This distinction has been described as:

*'The MSP function is 'consolidation': an interface between the client and different agencies. An agency functions as an interface between the client and candidates.'*¹²⁵

2.151 MSP services are being used increasingly across many industries as employers face greater constraints to identifying and attracting quality staff.¹²⁶ Larger sized or diversified employers are more likely to use MSP services. It would appear that employers are using MSPs because they

¹²² See paragraph 13 of a meeting note with Vinci, 12 July 2006. File Reference: Vinci Third Party Correspondence-52, paragraph 14–19 of a meeting note with Taylor Woodrow, 18 July 2006 File Reference: TW Third Party Correspondence-46.

¹²³ See paragraph 6 of a meeting note with Atkins, 30 January 2007, File Reference: Atkins Third Party Correspondence - 239.

¹²⁴ Some overlap may occur where an MSP acts as a Master Vendor – where the MV also provides candidates – but this is likely to be a separate part of agencies' business (see Hays response to annex A, question 13 of an information request of 16 October 2006), File Reference: Hays Leniency - 429

¹²⁵ See Hays response to annex A, question 13 of an information request of 16 October 2006, File Reference: Hays Leniency - 429

¹²⁶ Debunking the Myths, The Future of Managed Services in Recruitment, REC, File Reference: Public Document 83.

consider that it will help them to manage costs from recruitment more efficiently. MSP services include a range of different outsourcing options, managing some or all aspects of the recruitment process and day to day administration of employees.

- 2.152 A Construction Company may appoint a MSP to manage its recruitment needs. Principally, an MSP will manage a Construction Company's relationships with Recruitment Agencies.¹²⁷
- 2.153 The MSP's function is to take-over all aspects of the commercial relationship that a Construction Company would otherwise have with Recruitment Agencies.¹²⁸ This will typically include decisions on which agencies will be on its PSL. When an MSP enters into such an arrangement with a Recruitment Agency it will typically sign a PSA with that agency. The MSP will then be responsible for negotiating terms of supply, managing the recruitment process and invoicing of the Construction Company.¹²⁹
- 2.154 Typically the MSP will negotiate different Fee Rates with Construction Companies, usually as a percentage rate for each position filled. As with Recruitment Agencies, the Fee Rate may vary between permanent and temporary positions and with the salary of the position filled. The MSP will then negotiate with the Recruitment Agencies the fee rates that they will receive for supplying Candidates. The gap between these rates will be the margin earned by the MSP.
- 2.155 There may be cases where a Construction Company is keen for a particular Recruitment Agency to be on its PSL, and the agency demands a fee rate that would give the MSP insufficient or no margin. In these circumstances the MSP may negotiate with the Construction Company a higher fee rate for positions filled by the agency in question.

¹²⁷ See responses to annex A question 9 of an information request of 16 October 2006 to Parties, File Reference: AndersElite Leniency - 26 & 166; Eden Brown Leniency - 30; Fusion Leniency - 88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833.

¹²⁸ See paragraph 20 of a meeting note with Vinci, 12 July 2006, File Reference: Vinci Third Party Correspondence - 52.

¹²⁹ See responses to annex A question 10 and 11 of an information request of 16 October 2006 to Parties, File Reference: AndersElite Leniency - 26 & 166; Eden Brown Leniency - 30; Fusion Leniency - 88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833.

2.156 It has been put to the OFT that the benefits to Construction Companies from appointing an MSP include reduced recruitment costs due to lower fee rates, reduced staff turnover and improved speed and quality of recruitment.¹³⁰ It has also been suggested that if a Construction Company does not appoint an MSP:

*'... [clients] have to manage all recruitment themselves and try to engage, manage and police the use of recruitment agencies.'*¹³¹

2.157 An MSP will arrange for the Construction Company that it has contracted with to receive a single invoice usually on a monthly basis covering the recruitment fees of all the Recruitment Agencies it deals with. Contracting with an MSP may also lead to the standardisation of the Construction Companies' contract terms with all the Recruitment Agencies it uses.¹³²

2.158 It would appear that MSPs are able to offer this differentiated service in part because MSPs will generally be better informed than Construction Companies which puts them in a stronger position in negotiating with Recruitment Agencies. They will also be in a position to share systems and other fixed costs across Construction Companies. The benefits also arise from centralising the management of vacancies filled through multiple Recruitment Agencies.

Neutral Vendors and Master Vendors

2.159 MSPs may be distinguished between Neutral Vendors and Master Vendors.¹³³ Neutral Vendors and Master Vendors both act in an MSP

¹³⁰ See response from Fusion People to annex A question 10 of an information request of 16 October 2006 to Parties, File Reference: Fusion Leniency - 88

¹³¹ See Parc response to question 3A of an information request of 12 December 2006. File Reference: Parc Third Party Correspondence-168

¹³² For example, Vinci plc has indicated that it wanted standard terms to remove wide variation of the basis on which recruitment agencies charged their fees (for example basing fees on the basic salary rather than the whole remuneration package) and help monitor performance of candidates and recruitment agencies, see meeting note of 12 July 2006, (paragraphs 11–13), File Reference: Vinci Third Party Correspondence-52.

¹³³ See response to annex A question 9 of an information request of 16 October 2006 to Parties, File Reference: AndersElite Leniency - 26 & 166; Eden Brown Leniency - 30; Fusion Leniency - 88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833; and the definitions

capacity as both source Candidates from other Recruitment Agencies in order to meet the personnel needs of Construction Companies. However, a Master Vendor also operates as a Recruitment Agency in its own right and so will supply its own Candidates in addition to third party Candidates.

2.160 When a Neutral Vendor wins a contract to supply candidates to a Construction Company it will sign a Neutral Vendor Agreement with that Construction Company. When a Master Vendor wins a contract to supply candidates to a Construction Company it will sign a Master Vendor Agreement with that company. In each case, the Neutral Vendor or Master Vendor can then source candidates from the Recruitment Agencies with whom they have entered into Preferred Supplier Agreements. An MSP will in practice sign different PSAs with specific Recruitment Agencies for the supply of candidates to Construction Companies.

2.161 It has been suggested to the OFT that Neutral Vendors may offer certain advantages to a Construction Company as compared to Master Vendors. A Neutral Vendor may offer a Construction Company access to a wider pool of Candidates as they source Candidates from all Recruitment Agencies on an equal basis. In contrast, a Master Vendor may have an incentive to offer its own Candidates first which may create delays in filling vacancies.¹³⁴ Neutral Vendors may also have greater incentive to negotiate lower fee rates with agencies compared to Master Vendors.¹³⁵ The OFT has been informed that Master Vendor arrangements result in regular contact between competing Recruitment Agencies and, in particular, that in their capacity as Master Vendors, Recruitment Agencies may be negotiating terms of supply with Recruitment Agencies that have themselves been appointed Master Vendors for other Construction Companies.¹³⁶

section of 'MSP Contracts, negotiations and considerations' supplied by CDI AndersElite, 21 September 2006, File Reference: AndersElite Leniency – 166.

¹³⁴ See note of meeting with Taylor Woodrow of 18 July 2006 (paragraphs 30 and 46), File Reference: TW Third Party Correspondence— 46.

¹³⁵ See meeting note with Vinci of 12 July 2006, pages 4, 5 (paragraphs 18-24), File Reference: Vinci Third Party Correspondence—52

¹³⁶ See email from CDI AndersElite to OFT dated 21 September 2006, File Reference: AndersElite Leniency - 166

Parc's Neutral Vendor services

2.162 The OFT's infringement Decision concerns the response of the Parties to the activities of Parc. Parc is an MSP and operates as a Neutral Vendor.

2.163 According to Parc, its role as a neutral vendor at the time of the infringement was to:

*'source, screen and manage CV's and candidates for permanent, contract and temporary positions on behalf of [the client]. This entails managing the distribution of vacancies to agencies and then co-ordinating the response including arranging interviews and negotiating contractor and temporary rates.'*¹³⁷

D The OFT's investigation

2.164 This investigation arose from an application for leniency submitted to the OFT on 20 December 2005 by Select Appointments (Holdings) Limited (now Randstad UK Holding Limited). The information provided by Select Appointments (Holdings) Limited gave the OFT reasonable grounds for suspecting that the Chapter I prohibition had been infringed. On this basis,¹³⁸ on 31 May 2006, the OFT commenced a formal investigation into whether there had been an infringement of section 2(1) of the Act.¹³⁹

2.165 Between 13 and 15 June 2006, under Section 27 of the Act,¹⁴⁰ OFT officials made unannounced site visits to the premises of each of the Parties to this investigation. Copies of documents were taken from all sites visited.

¹³⁷ See 'Resource Management – New Hiring and Payment Process Guide'. File Reference: Henry s27 11 p2

¹³⁸ Section 25 of the Act empowers the OFT to conduct an investigation where there are reasonable grounds for suspecting that the Chapter 1 prohibition has been infringed.

¹³⁹ Note that the Act was amended by statutory instrument The Competition Act 1998 and Other Enactments (Amendment) Regulations SI 2004/1261, the relevant provisions entering into force on 1 May 2004.

¹⁴⁰ Section 27 of the Act empowers the OFT to, among other things, to enter premises without a warrant, with or without notice, and require the production of documents.

- 2.166 In June 2006, formal information requests under Section 26 of the Act were sent to AWA, CDI AndersElite, Eden Brown and Hays. During the course of its investigation the OFT has also requested information informally from each of the Parties.
- 2.167 Leniency applications were received from Hays and Eden Brown on 13 June 2006, Henry Recruitment on 16 June 2006, Fusion People on 21 June 2006 and CDI AndersElite on 7 July 2006.
- 2.168 Between July 2006 to December 2006, the OFT carried out a number of voluntary interviews of certain individuals who were employed by CDI AndersElite, BBT, Eden Brown, Fusion People, Hays, Henry Recruitment and HMG during the Relevant Period.
- 2.169 Between November 2006 and March 2007, the OFT also obtained witness statements from individuals employed by certain Parties to this investigation during the Relevant Period.
- 2.170 The OFT has also obtained information from other relevant parties to this investigation, in particular Parc, Vinci and Taylor Woodrow. Between July 2006 and February 2007 the OFT held meetings with Parc, Vinci and Taylor Woodrow.
- 2.171 On 21 October 2008, the OFT issued a Statement of Objections, giving the Parties notice under section 31(1)(a) of the Act and rules 4 and 5 of the OFT's procedural rules ('the OFT's Rules')¹⁴¹ of its proposed infringement decision. The Statement of Objections was issued to the following Parties:

'CDI AndersElite'

CDI AndersElite Limited

CDI Corp

'AWA'

A Warwick Associates Limited

AWA Holdings Ltd¹⁴²

¹⁴¹ The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004/2751)

¹⁴² The Statement of Objections was issued prior to AWA Holdings Ltd's dissolution. See further paragraphs 2.17 to 2.26 above.

'BBT'

Beresford Blake Thomas Limited

Randstad UK Holding Limited

Randstad Holding NV

'Eden Brown'

Eden Brown Limited

'Fusion People'

Fusion People Limited

'Hays'

Hays Specialist Recruitment Limited

Hays Specialist Recruitment (Holdings) Limited

Hays plc

'Henry Recruitment'

Henry Recruitment Ltd

'HMG'

Hill McGlynn & Associates Limited

Randstad UK Holding Limited

Randstad Holding NV

2.172 In fulfilment of the OFT's duty to give the Parties a reasonable opportunity to inspect the documents in the OFT's file, the Parties were sent on 21 October 2008 a DVD-ROM containing electronic copies of all the documents on the OFT's case file, excluding 'internal documents' and documents to the extent that they contained 'confidential information', as these terms are defined in the OFT's Rules.¹⁴³ The DVD-ROM also contained two indexes, one of the entire file and the other of 'key documents' relied upon in the Statement of Objections.

2.173 As required by the OFT's Rules,¹⁴⁴ the Parties were also notified of the period within which they might make written representations on the matters referred to in the Statement of Objections and of the possibility of making oral representations on such matters. The Parties provided

¹⁴³ Rule 1(1) of the OFT's Rules

¹⁴⁴ Rules 5(2)(c) and (4) of the OFT's Rules.

written representations in response to the Statement of Objections on the following dates: CDI AndersElite – 16 January 2009; AWA – 21 February 2009; BBT/HMG – 16 January 2009; Eden Brown – 16 January 2009; Fusion People – 8 January 2009; Hays – 23 January 2009 and Henry Recruitment – 14 January 2009.

- 2.174 CDI AndersElite, Eden Brown, Fusion People and Henry Recruitment made oral representations on 18 February 2009, 17 February 2009, 5 February 2009 and 4 February 2009 respectively. AWA, BBT/HMG and Hays did not take the opportunity to make oral representations.

3 LEGAL ASSESSMENT

A Legal background

3.1 This part sets out the legal framework against which the OFT has considered the evidence presented in this Decision.

Introduction - the Chapter I prohibition

3.2 Section 2(1) of the Act prohibits agreements between undertakings, decisions by associations of undertakings or 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.¹⁴⁵ Such agreements, decisions or concerted practices are prohibited unless exempted or excluded in accordance with the provisions of Part I of the Act ('the Chapter I prohibition').

3.3 Section 2(2) (a) of the Act provides that the Chapter I prohibition applies, in particular, to agreements, decisions or concerted practices which '*...directly or indirectly fix purchase or selling prices or any other trading conditions*'.

3.4 In order to find an infringement of the Chapter I prohibition, the OFT must establish that the Parties entered into an agreement or engaged in a concerted practice that may affect trade within the UK and which had as its object or effect the appreciable prevention, restriction or distortion of competition.¹⁴⁶

Application of section 60 of the Act – consistency with European Community law

3.5 Section 60(1) of the Act sets out the principle that, so far as it is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK are dealt with in a manner which is consistent with the treatment

¹⁴⁵ Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or concerted practice is, or is intended to be, implemented in the United Kingdom. The 'United Kingdom' means, in relation to an agreement, decision or concerted practice, which operates or is intended to operate only in part of the UK, that part: section 2(7) of the Act.

¹⁴⁶ As to the requirement for appreciability, see OFT guideline *Agreements and concerted practices* (OFT401, Edition 12/04), at paragraphs 2.15 to 2.21.

of corresponding questions arising in European Community law in relation to competition within the Community. In particular, under section 60(2) of the Act, the OFT must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the EC Treaty and the European Court and any relevant decision of the European Court.¹⁴⁷ Under section 60(3) of the Act, the OFT must, in addition, have regard to any relevant decision or statement of the European Commission.

- 3.6 The provision in European Community competition law closely corresponding to the Chapter I prohibition is Article 81 of the EC Treaty, on which the Chapter I prohibition is modelled.

Application of Article 81 of the EC Treaty - effect on interstate trade

- 3.7 Following the entry into force of Council Regulation (EC) No 1/2003¹⁴⁸ on 1 May 2004, the OFT is required when applying national competition law to agreements and/or concerted practices between undertakings which may affect trade between Member States also to apply Article 81 of the EC Treaty ('Article 81').¹⁴⁹
- 3.8 The effect on trade criterion is a jurisdictional European Community law criterion, which defines the scope of European Community competition law. The principles for assessing this criterion, and the requirement for appreciability, are set out in the European Commission's guidelines on the effect on trade concept contained in Articles 81 and 82 of the EC Treaty.¹⁵⁰
- 3.9 In order for an agreement or concerted practice to affect trade between Member States it is necessary for it to, amongst other things, affect 'trade'. 'Trade' can encompass where the agreement or concerted practice affects the competitive structure of the market.¹⁵¹ An agreement or concerted practice may affect trade between Member

¹⁴⁷ The 'European Court' means the Court of Justice of the European Communities (the 'ECJ') and includes the Court of First Instance (the 'CFI'): section 59(1).

¹⁴⁸ OJ 2003 L1/1.

¹⁴⁹ Article 3, Regulation 1/2003.

¹⁵⁰ Commission Notice 2004/C101/07, OJ C101/81, see paragraphs 44 to 57 for the requirement for appreciability.

¹⁵¹ Commission Notice 2004/C101/07, OJ C101/81, at paragraph 20.

States where it affects the competitive structure inside the Community by eliminating or threatening to eliminate a competitor operating within the Community.¹⁵²

- 3.10 Horizontal cartels covering a whole Member State are normally capable of affecting trade between Member States.¹⁵³ However, the European Commission considers that:

*'the capacity of such agreements to partition the internal market follows from the fact that undertakings participating in cartels in only one Member State, normally need to take action to exclude competitors from other Member States'.*¹⁵⁴

- 3.11 This must be considered in relation to whether the market concerned is susceptible to imports,¹⁵⁵ that is, whether the product covered by the agreement or concerted practice is tradable¹⁵⁶ and the existence or otherwise of any natural barriers to trade in the market.¹⁵⁷

Relevant case law in relation to undertakings

- 3.12 The Chapter I prohibition applies to agreements or concerted practices between 'undertakings'. In order to demonstrate that there has been an infringement it is necessary to establish that the Parties are 'undertakings'. The OFT therefore sets out below the relevant case law on 'undertakings'.
- 3.13 The word 'undertaking' is not defined in the Act or the EC Treaty. It has been given a broad interpretation by the European Court of Justice ('the ECJ') in which it has been held to cover '*...every entity engaged in an*

¹⁵² Joined Cases T-24/93 etc *Compagnie maritime belge v Commission* [1996] ECR II-1201, at paragraph 203 and Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, at paragraph 23. See also Commission Notice 2004/C101/07, OJ C101/81, at paragraph 20.

¹⁵³ Commission Notice 2004/C101/07, OJ C101/81, at paragraph 78.

¹⁵⁴ Commission Notice 2004/C101/07, OJ C101/81, at paragraph 79.

¹⁵⁵ See Case C246/86 *Belasco v Commission* [1989] ECR I-2117, at paragraph 34 and Joined Cases T-202/98 etc *Tate & Lyle v Commission* [2001] ECR II-2035, at paragraph 79.

¹⁵⁶ Commission Notice 2004/C101/07, OJ C101/81, at paragraph 79.

¹⁵⁷ Commission Notice 2004/C101/07, OJ C101/81, at paragraph 80; See also paragraph 51 of Joined cases C215/96 and 216/96 *Bagnasco v Banco Popolare di Novara* [1999] ECR I -135.

economic activity, regardless of the legal status of the entity and the way in which it is financed...'.¹⁵⁸

- 3.14 Accordingly, the key consideration in establishing whether an entity is an undertaking is whether it is engaged in an 'economic activity'. The ECJ has defined 'economic activity' broadly as any activity '*...of an industrial or commercial nature by offering goods and services on the market...*'¹⁵⁹
- 3.15 Accordingly, the term 'undertaking' includes any natural or legal person that is capable of carrying on commercial or economic activities. This has resulted in a variety of legal forms of organisations being captured by this definition, including companies,¹⁶⁰ partnerships,¹⁶¹ individuals operating as sole traders,¹⁶² trade associations¹⁶³ and (in some circumstances) public entities that offer goods or services on a given market.¹⁶⁴ The fact that an organisation does not make a profit¹⁶⁵ or lacks profit motive¹⁶⁶ or does not have an economic purpose does not disqualify it as an undertaking provided that it is carrying out some form of commercial or economic activity.

Relevant case law in relation to agreements and concerted practices

Agreement and/or concerted practice

- 3.16 The Chapter I prohibition applies to 'agreements' or 'concerted practices'.¹⁶⁷
- 3.17 The ECJ has confirmed that it is not necessary, for the purposes of finding an infringement of Article 81(1) of the EC Treaty, to characterise the infringement exclusively as an agreement or as a concerted

¹⁵⁸ Case C-41/90 *Hofner and Elser v Macrotron* [1991] ECR I-1979, at paragraph 21.

¹⁵⁹ Case C-118/85 *Commission v Italy* [1987] ECR 2599, at paragraph 7.

¹⁶⁰ In all their corporate forms, including a limited partnership (Case 258/78 *Nungesser v Commission* [1982] ECR 2015) or a trust company, see *Fides*, OJ 1979 L57/33.

¹⁶¹ For example, Commission decision *Breeders' rights: Roses*, OJ 1985 L369/9.

¹⁶² For example, Case 35/83 *BAT Cigaretten – Fabriken GmbH v Commission* [1985] ECR 363 and Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045.

¹⁶³ For example, Case 71/74 *FRUBO v Commission* [1975] ECR 563.

¹⁶⁴ Case C-41/90 *Hofner and Elser v Macrotron* [1991] ECR I-1979 at paragraph 23.

¹⁶⁵ Cases 209/78 etc *Van Landewyck v Commission* [1980] ECR 3125; Commission decision *P & I Clubs*, OJ 1985 L376/2; and Commission decision *EBU/Eurovision System*, OJ 1993 L179/23.

¹⁶⁶ Case 7/82 *GVL v Commission* [1983] ECR 483.

¹⁶⁷ Section 2(1) of the Act.

practice.¹⁶⁸ The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two. They are intended:

*'...to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves.'*¹⁶⁹

3.18 The ECJ further expressed this in *Anic* as follows:

*'The list in Article [81(1)] of the Treaty is intended to apply to all collusion between undertakings, whatever form it takes...The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion.'*¹⁷⁰

3.19 This is particularly, but not exclusively, so in the case of complex infringements of long duration.¹⁷¹ Indeed the same principle will apply even where the infringement is of short duration.¹⁷²

3.20 As the Competition Appeal Tribunal ('CAT') has confirmed in its judgments in both *JJB Sports plc v Office of Fair Trading* ('Replica Kit')¹⁷³ and *Argos Limited and Littlewoods Limited v Office of Fair Trading* ('Argos/Littlewoods'):¹⁷⁴

¹⁶⁸ Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 264; Case T-1/89 *Rhône Poulenc v Commission* [1991] ECR II-867, at paragraph 127; and Cases T-305/94 etc *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II 931, at paragraph 697.

¹⁶⁹ Case C-49/92 P *Commission v Anic Participazioni SpA* [1999] ECR I-4125, at paragraph 131.

¹⁷⁰ Case C-49/92 P *Commission v Anic Participazioni SpA* [1999] ECR I-4125, at paragraph 108. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 153.

¹⁷¹ See Commission decision *Citric Acid* OJ 2002 L239/18.

¹⁷² See, for example, OFT decision CA98/04/2006 *Agreement to fix prices and share the market for aluminium double glazing spacer bars*, 28 June 2006, paragraphs 199 to 204; and OFT decision CA98/03/2006 *Price fixing and market sharing in stock check pads*, 31 March 2006, at paragraph 55.

¹⁷³ See *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 644, referring to case T-305/94 *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931 ('PVC II'), at paragraphs 969 to 698 and Case C-49/92 P *Commission v Anic Participazioni SpA* [1999] ECR I-4125, at paragraphs 131 to 133; confirmed by the Court of Appeal in *Argos Limited and Littlewoods Limited v Office of Fair Trading*, [2006] EWCA Civ 1318, at paragraph 21.

¹⁷⁴ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at paragraph 665.

'It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other.'

3.21 It is not, therefore, necessary for the OFT to come to a conclusion as to whether the conduct of the Parties should be specifically characterised as an agreement or as a concerted practice in order to demonstrate an infringement of the Chapter I prohibition.

Agreements

3.22 The Chapter I prohibition applies to agreements. The OFT sets out below the relevant case law on agreements.

3.23 There is no requirement for an agreement within the meaning of the Chapter I prohibition to be legally binding or formal, nor to contain any enforcement mechanisms.¹⁷⁵ It may be constituted simply by way of an 'understanding', even where there is nothing to prevent either party going back on, or disregarding, the understanding. An agreement does not have to be in writing¹⁷⁶ and may be express or implied from conduct of the parties,¹⁷⁷ including conduct that appears to be unilateral.¹⁷⁸ The prohibition is intended to catch a wide range of agreements, including oral agreements and 'gentlemen's agreements' as, by their nature, anti-competitive agreements are rarely in written form.¹⁷⁹

¹⁷⁵ See, for example: *JJB Sports plc v Office of Fair Trading* [2004] CAT 17; *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24; Commission decision *Soda-ash - Solvay, CFK*, OJ 1991 L152/16, at paragraph 11; and Commission decision *PVC*, OJ 1994 L239/14, at paragraph 30.

¹⁷⁶ Case C-41/69 *ACF Chemiefarma NV v Commission* [1970] ECR 661, at paragraphs 106 to 114; and Commission decision *Citric Acid* OJ 2002 L239/18, at paragraph 137.

¹⁷⁷ Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711 at paragraph 256 to 258; Commission decision, *National Panasonic*, OJ 1982 L354/28 at paragraphs 43 to 47; and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at paragraph 658 and 766. See also Case T-168/01 *GlaxoSmithKline Services v Commission*, [2006] ECR II-2969, at paragraph 83.

¹⁷⁸ Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraphs 31 to 39; Case T-208/01 *Volkswagen AG v Commission* [2003] ECR-II 5141, at paragraphs 34 to 36, confirmed in Case C-74/04 P *Commission v Volkswagen AG* [2006] ECR I-6585, at paragraph 37.

¹⁷⁹ See the OFT guideline *Agreements and concerted practices* (OFT 401, edition 12/04), at paragraph 2.7. See also the judgment of the ECJ regarding gentlemen's agreements in Case C-41/69 *ACF Chemiefarma NV v European Commission* [1970] ECR 661 (in particular, at paragraphs 106 to 114). The European Commission also followed this in Commission decision *Citric Acid* 2002 OJ L239/18, at paragraph 137.

3.24 As held by the European Court of First Instance ('the CFI'), for an agreement to exist:

*'...it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way...'*¹⁸⁰

3.25 An agreement within the meaning of the Chapter I prohibition exists in circumstances where there is a concurrence of wills, in that at least two undertakings adhere to a common plan that limits, or is likely to limit, their individual commercial freedom by determining the lines of their mutual action, or abstention from action, in the market.¹⁸¹ This is irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed.¹⁸² The form in which the concurrence of wills is manifested is unimportant so long as it constitutes a faithful expression of the parties' intentions.¹⁸³

3.26 Equally, the fact that a party does not respect the agreement at all times¹⁸⁴ or comes to recognise that it can 'cheat' on the agreement at certain times¹⁸⁵ does not preclude the finding that an agreement existed.

3.27 An agreement or concerted practice between undertakings may be made on the undertaking's behalf by employees acting in the ordinary course

¹⁸⁰ Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256 and; Case T-41/96 *Bayer v European Commission* [2000] ECR II-3383, at paragraph 69. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 156.

¹⁸¹ See Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383 at paragraphs 67 to 69 (upheld in joined Cases C-2/01 P and Case C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23); *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraphs 21 to 27; *JJB Sports plc v Office of Fair Trading* [2004] CAT 17 at paragraphs 155 to 157 and 637; *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 at paragraphs 150 to 153 and 658; Commission decision *Soda-Ash –Solvay, CFK* OJ 1991 L152/16, at paragraph 11; and Commission decision *Polypropylene* OJ 1986 L230/1, at paragraph 81.

¹⁸² Joined cases T-305/94 etc *Limburgse Vinyl Maatchappij NV and others v Commission* [1999] ECR II-931, at paragraph 715.

¹⁸³ Case T-41/96 *Bayer AG v Commission* [2002] ECR II-3383, at paragraph 69, cited with approval in Case C-2/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG* [2004] ECR I-23, at paragraph 97.

¹⁸⁴ See, for example, Commission decision *Zinc phosphate* OJ 2003 L153/1, at paragraph 216 and Commission decision *PO/Interbrew and Alken-Maes* OJ 2003 L200/1, at paragraph 227.

¹⁸⁵ Case C-246/86 *Belasco v Commission* [1989] ECR 2117, at paragraphs 10 to 16.

of their employment despite the ignorance of more senior management.¹⁸⁶

3.28 There may be '*...inchoate understandings and conditional or partial agreement*' during the bargaining process sufficient to amount to an agreement in the sense of Article 81(1) (and, by virtue of section 60 of the Act, the Chapter I prohibition).¹⁸⁷ Finally, an agreement may consist not only of an isolated act, but also of a series of acts or a course of conduct.¹⁸⁸

Concerted practices

3.29 The Chapter I prohibition also applies to concerted practices. The OFT sets out below, with reference to the relevant case law, the elements necessary to establish a concerted practice:

- the definition of a concerted practice (paragraphs 3.30 to 3.32 below);
- the principle of concertation (paragraphs 3.33 to 3.39 below);
- the requirement of reciprocal contacts between undertakings (paragraphs 3.34 to 3.39 below);
- the requirement that there is conduct on the market subsequent to the concertation (paragraphs 3.40 to 3.42 below); and
- the presumption that those undertakings that are parties to the concertation take the information into account when determining their subsequent conduct on the market (paragraphs 3.43 to 3.44 below).

¹⁸⁶ Cases 100/80 etc *Musique Diffusion Francaise v Commission* [1983] ECR 1825, at paragraph 97. This citation relates to fining, but, by implication the same must apply to culpability otherwise the fining point would never have come up. Support for this view can be found at Bellamy, C, and Child, G, *European Community Law of Competition*, Edited by Roth, P, (2001) Sweet & Maxwell, London, paragraph 2-028.

¹⁸⁷ See Commission decision *Pre-insulated Pipe Cartel* OJ 1999 L24/1, substantially upheld on appeal, Cases T-9/99 etc *HFB Holding v Commission* [2002] ECR II-1487.

¹⁸⁸ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 81.

3.30 A concerted practice does not require an actual agreement (whether express or implied) to have been reached. Rather, as the ECJ explained in *Dyestuffs*:

*'Article [81] draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that Article a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.'*¹⁸⁹

3.31 The ECJ provided further explanation of the term in its judgment in *Anic*:

*'The list in Article [81(1)] of the Treaty is intended to apply to all collusion between undertakings, whatever form it takes...The only essential thing is the distinction between independent conduct, which is allowed and collusion, which is not, regardless of any distinction between types of collusion.'*¹⁹⁰

3.32 The prohibition on concerted practices prohibits any direct or indirect contact between undertakings, where the object or effect is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which the undertaking has itself decided to adopt or contemplates adopting on the market.¹⁹¹

Concertation

¹⁸⁹ Case 48/69 *ICI Ltd v Commission* [1972] ECR 1969, at paragraph 64. This has been followed in: Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 26; Cases C-89/85 etc *Ahlström Osakeyhtiö v Commission* [1993] ECR I-1307, at paragraph 63; Case C-49/92 P *Commission v Anic Participazioni SpA* [1999] ECR I-4125, at paragraph 115; and Case C-199/92 P *Hüls v Commission* [1999] ECR I-4125, at paragraph 158. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 151; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(iii).

¹⁹⁰ Case C-49/92 P *Commission v Anic Participazioni SpA* [1999] ECR I-4125, at paragraph 108. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 24, at paragraph 153.

¹⁹¹ Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 174. See also Case T-7/89 *Hercules Chemicals NV SA v Commission* [1991] ECR II-1711, at paragraph 258; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(v).

3.33 The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market including the choice of the persons and undertakings to which it makes offers or sells or provides services.¹⁹² In particular, as the ECJ held in *Suiker Unie*:

*'Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.'*¹⁹³

Reciprocal contacts

3.34 A concerted practice may, in particular, occur where there are reciprocal contacts between undertakings which have the object or effect of removing or reducing uncertainty as to their future conduct on the market,¹⁹⁴ including by way of the disclosure to a competitor of the course of conduct which an undertaking has itself decided to adopt or contemplates adopting on the market.¹⁹⁵

3.35 In *Cimenteries* the CFI held that reciprocal contacts are established:

¹⁹² Joined Cases 40-48/73 *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 173; Case C-199/92 P etc *Hüls AG v Commission* [1999] ECR I-4287, at paragraph 159; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(v).

¹⁹³ Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 174. This was followed in Case C-49/92 P *Commission v Anic Participazioni SpA* [1999] ECR I-4125, at paragraph 117 and Case C-199/92 P etc *Hüls AG v. Commission* [1999] ECR I-4287, at paragraph 160. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(v).

¹⁹⁴ Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 175.

¹⁹⁵ Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 174 and Case C-49/92 P *Commission v Anic Participazioni SpA* [1999] ECR I-4125, at paragraph 117.

*'Where one competitor discloses its future intentions or conduct on the market to another when the latter requests it, or at the very least, accepts it...'*¹⁹⁶

and that:

*'...it is sufficient that, by its statement of intention, that competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part.'*¹⁹⁷

3.36 Therefore, in order to demonstrate a concerted practice, it is not necessary to show that an undertaking has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have expressly requested information on their future conduct on the market. It is sufficient that, by its statement of intention, an undertaking should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on its part. The CAT applied this principle in *Replica Kit* and concluded that:

*'Applying the principles of Suiker Unie and Cimenteries...the facts as we find them to be disclose direct contact between competitors, taking place in a private home, at which retail prices were discussed. In the course of that contact both JJB and Sports Soccer respectively disclosed the course of conduct which they had decided to adopt or contemplated adopting in the market, namely to price at £39.99. By stating their respective pricing intentions, both JJB and Sports Soccer in our view substantially reduced uncertainty as to their future conduct in the market.'*¹⁹⁸

3.37 Moreover, concertation may occur as a result of the unilateral disclosure of future intentions or conduct by one undertaking to another when the

¹⁹⁶ Cases T-25/95 etc *Cimenteries CBR v Commission* [2000] ECR-II 491, at paragraph 1849. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(vii).

¹⁹⁷ Cases T-25/95 etc *Cimenteries CBR v Commission* [2000] ECR-II 491, at paragraph 1852. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(viii) and *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 872.

¹⁹⁸ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 872.

latter requests it or, at the very least, accepts it or does not express any reservations or objections.¹⁹⁹ In *Tate and Lyle* the CFI held that:

*'Moreover, the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice.'*²⁰⁰

3.38 Similarly, the mere receipt of information concerning a competitor's intentions may be sufficient to give rise to concertation. Thus, in *Tate and Lyle* the CFI stated, in response to Napier Brown's argument that it was attending the meeting in its capacity as a customer and not as a competitor, that:

'66....even if its competitors had been informed [that Napier Brown was participating in those meetings in a spirit that was different from theirs], the mere fact that it received at those meetings information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate that it had an anti-competitive intention.

*'67. By participating at one of those meetings, each participant knew that during the following meetings its most important competitor...would reveal its future price intentions. Independently of any other reason for participating in those meetings, there was always one at least which was to eliminate in advance the uncertainty concerning the future conduct of competitors'.*²⁰¹

3.39 The ECJ has recently confirmed that a concerted practice may occur when there is only a single meeting between competitors in the circumstances where:

'...the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct

¹⁹⁹ Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II 2035, and Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491 at paragraph 1849, referred to by the CAT in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 at paragraph 154 and *Apex Asphalt Paving and Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(vii).

²⁰⁰ Joined Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035, at paragraph 54.

²⁰¹ Joined Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035, at paragraphs 66 and 67.

*with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.*²⁰²

Subsequent conduct on the market

3.40 In addition to the requirement of concertation between undertakings, the concept of a concerted practice implies subsequent conduct on the market pursuant to that concertation and a relationship of cause and effect between the two. Thus, in *Anic*, the ECJ held that:

*'As is clear from the very terms of Article [81(1)] of the Treaty, a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.'*²⁰³

3.41 The concept of a concerted practice does not, however, necessarily imply that the concertation should produce the concrete effect of preventing, restricting or distorting competition. Thus, the ECJ held in *Anic* that:

*'Although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition.'*²⁰⁴

3.42 In particular, it will not be necessary to prove such a concrete anti-competitive effect where the concerted practice has an anti-competitive object. As the ECJ held in *Anic*:

²⁰² Case C-8/08 *T-Mobile Netherlands BV and ors v NMa* Judgement of 4 June 2009 at paragraph 60.

²⁰³ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 118. This was followed in Cases C-199/92 P etc *Hüls AG v Commission* [1999] ECR I-4287, at paragraph 162. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(ix).

²⁰⁴ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 124. See also *Apex Asphalt Paving and Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(xi).

*'It follows from the actual text of Article [81(1)] that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited regardless of their effect, when they have an anti-competitive object.'*²⁰⁵

Presumption of reliance

3.43 Furthermore, where an undertaking participating in a concerted practice remains active on the market, there is a presumption that it will take account of the information exchanged with its competitors for the purposes of determining its conduct on that market. In *Anic*, the ECJ held:

*'...subject to proof to the contrary, which it is for the economic operators concerned to adduce, there is a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on the market, particularly when they concert together on a regular basis over a long period, as was the case here.'*²⁰⁶

3.44 The European Court and the CAT have re-stated this principle in a number of subsequent judgments.²⁰⁷ In its judgment in *Replica Kit* the CAT, relying on EC jurisprudence, stated that:

'Even where participation in a meeting is limited to the mere receipt of information about the future conduct of a competitor, the law presumes that the recipient of the information cannot fail to take

²⁰⁵ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 123. See also *Apex Asphalt Paving and Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(xii).

²⁰⁶ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 121, Cases C-199/92 P etc *Hüls AG v Commission* [1999] ECR I-4287, at paragraph 162; Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, at paragraphs 1865 and 1910; and Case T-9/99 *HFB Holding v Commission* [2002] ECR II-487, at paragraph 216. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(x).

²⁰⁷ Cases C-199/92 P etc *Hüls AG v Commission* [1999] ECR I-4287, at paragraph 162; Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491, at paragraph 1910; and Case T-9/99 *HFB Holding v Commission* [2002] ECR II-487, at paragraph 216. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206(x)

*that information into account when determining its own future policy on the market.*²⁰⁸

Participation in an agreement or concerted practice and public distancing

- 3.45 In order for an undertaking which was involved in an agreement or concerted practice (for example, by attending meetings with a manifestly anti-competitive purpose or by receiving information by participating in meetings) not to be found liable of an infringement, it is necessary for the undertaking to have publicly distanced itself from what was agreed or discussed or to have reported it to the relevant competition authority.²⁰⁹
- 3.46 In *Aalborg Portland*, the ECJ stated that an undertaking will be taken to have participated in an agreement or concerted practice unless that undertaking puts forward evidence to establish that it had publicly distanced itself from what was discussed:

'81. According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see Case C-199/92 P Hüls v Commission [1999] ECR I-4287, paragraph 155 and Case C-49/92 P Commission v Anic [1999] ECR I-4125, paragraph 96).

82. The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.

²⁰⁸ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 873.

²⁰⁹ See, for example, Cases C-204/00 P etc *Aalborg Portland A/S v Commission* [2004] ECR I-123, at paragraph 81 and the references cited there.

83. The principles established in the case-law cited at paragraph 81 of this judgment also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must 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 (Commission v Anic, paragraph 87).

84. In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its contents or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.

85. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting (see Case C-291/98 P Sarrió v Commission [2000] ECR I-9991, paragraph 50).²¹⁰

3.47 Where an undertaking '*...knew or ought to have known...*' when it participated in the agreements and/or concerted practices that it was taking part in a single agreement then its participation constitutes the expression of its accession to that agreement.²¹¹

²¹⁰ Cases C-204/00 P etc *Aalborg Portland A/S v Commission* [2004] ECR I-123, at paragraph 81 onwards. See also *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraphs 1042 to 1043.

²¹¹ Joined Cases T-25/95 etc *Cimenteries CBR SA v Commission* ECR II-491, at paragraphs 4027, 4060, 4109 and 4112.

3.48 The CFI has held that '*...the notion of public distancing as a means of excluding liability must be interpreted narrowly*'.²¹² In considering how a party could publicly distance itself from the agreement or concerted practice the CFI noted that:

'If the applicant had in fact wanted to disassociate itself from the collusive discussions, it could easily have written to its competitors and to the secretary of the VFIG after the meeting of 14 October 1994 to say that it did not in any way want to be considered to be a member of the cartel or to participate in meetings of a professional association which served as a cover for unlawful concerted actions'.²¹³

3.49 The CAT in *Replica Kit* also considered the concept of public distancing and the requirement that a party publicly distance itself or report the matter to the relevant competition authority. The CAT considered that, in order to meet the requirement of publicly distancing itself from the agreement or concerted practice a party should, at the very least, '*genuinely and explicitly*' state to the other parties involved that:

'...they are entirely free to disregard any previous arrangements there may be restricting competition, and that [the opposing party] wishes to play no part, tacitly or otherwise, in any such arrangements'.²¹⁴

3.50 The CAT also noted that '*[r]eporting what transpired to the OFT puts the matter beyond doubt*'.²¹⁵ When applying this to the facts of the case, the CAT held that there was no evidence that JJB had explicitly distanced itself from the arrangements, that JJB did not clarify the matter to the other participants and did not put anything in writing.²¹⁶

3.51 In light of this, the OFT considers that in order to distance itself publicly from an agreement or concerted practice, an undertaking must explicitly communicate to at least other participants to the agreement or

²¹² Case T-303/02 *Westfalen Gassen Nederland BV v Commission* [2006] ECR II-4567, at paragraph 103.

²¹³ Case T-303/02 *Westfalen Gassen Nederland BV v Commission* [2006] ECR II-4567, at paragraph 103.

²¹⁴ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 1046.

²¹⁵ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 1046.

²¹⁶ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraphs 1047 to 1049.

concerted practice that it does not want to participate in the agreement or concerted practice or that its participation in any meeting with its competitors is in a spirit that is different from theirs.

Single infringement where acts are in pursuit of common objectives

3.52 In order to establish the existence of a single overall infringement it is necessary to demonstrate that:

- the agreements or concerted practices that made up the single overall infringement were all in pursuit of the same common objectives;
- each party to the single overall infringement intended to contribute by its own conduct to the common objectives of the single overall infringement; and
- each party was aware of or could reasonably have foreseen actual conduct planned or put into effect by other parties in pursuit of the common objectives.

3.53 The OFT sets out below the relevant case law.

Common objective

3.54 Where a group of undertakings pursues a common objective or objectives, it is not necessary to divide the agreements or concerted practices involved by treating them as consisting of a number of separate infringements where there is sufficient consensus to adhere to a plan limiting the commercial freedom of the parties.²¹⁷ Further, it would be artificial and contrary to the commercial reality of the situation to seek to split up such continuous conduct where it is characterised by a single purpose or objective, by treating it as consisting of a number of separate infringements.

3.55 The characterisation of a complex cartel as a single overall infringement is not 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

²¹⁷ Case T-1/89 *Rhône Poulenc v Commission* [1991] ECR II-867, at paragraph 126.

themselves constitute infringements.²¹⁸ The existence of a single overall infringement has been confirmed in many EC²¹⁹ and OFT decisions.²²⁰

- 3.56 Agreements and/or concerted practices may also constitute a single overall infringement notwithstanding that they vary in intensity and effectiveness, or even if the arrangement in question is suspended during a short period.²²¹

Participation in a single overall infringement

- 3.57 It is also necessary to demonstrate that each undertaking: (i) intended to contribute through its own conduct to the common objectives of the single overall infringement, and (ii) that it was aware or could reasonably have foreseen actual conduct planned or put into effect by other undertakings in pursuit of the common objectives.

- 3.58 A finding of a single overall infringement does not require a finding that all the parties have given their express or implied consent to each and every aspect of the single overall infringement,²²² the parties may show varying degrees of commitment to the common objectives and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement which is manifestly anti-competitive does not relieve that party of responsibility for it.²²³ Equally, the fact that a party may come to recognise that in practice it can 'cheat' on the agreement or concerted practice at certain times does not preclude a finding that there was a continuing single overall infringement.²²⁴ None of those factors will prevent an arrangement from constituting an agreement (or a

²¹⁸ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 81. See also Commission decision *Organic Peroxides* OJ 2005 L110/44, at paragraphs 307 to 308.

²¹⁹ See, for example, Commission decision *Pre-insulated Pipe Cartel* OJ 1999 L24/1, at paragraph 119; Commission decision *British Sugar plc* OJ 1999 L76/1; Commission decision *PVC* OJ 1994 L239/14; and Commission decision *Roofing Felt* OJ 1986 L232/15.

²²⁰ See, for example, OFT decision CA98/04/2006 *Agreement to fix prices and share the market for aluminium double glazing spacer bars*, 28 June 2006; and OFT decision CA98/03/2006 *Price fixing and market sharing in stock check pads*, 31 March 2006.

²²¹ Case T-23/99 *LR af 1998 A/S v Commission* [2002] ECR II-1705, at paragraphs 106 to 109.

²²² Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 80; and Case T-28/99 *Sigma Technologie di Rivestimento v Commission* [2002] ECR II-1845, at paragraph 40.

²²³ Cases T-305/94 etc *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, at paragraph 773; and Case T-141/89 *Tréfileurope v Commission* [1995] ECR II-791, at paragraphs 60 and 85.

²²⁴ Case C-246/86 *Belasco v Commission* [1989] ECR 2117, at paragraphs 10 to 16.

concerted practice) and the fact that a party does not abide fully by an anti-competitive agreement or concerted practice does not relieve that party of responsibility for it, in particular, if the party knew, or must have known, that the collusion in which it participated was part of an overall plan intended to distort competition.²²⁵

3.59 The ECJ has stated that an undertaking that has taken part in an agreement and/or concerted practice through conduct of its own:

*'...which was intended to bring about the infringement as a whole [will] also [be] responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement.'*²²⁶

3.60 As the ECJ explained in *Anic*, in order to demonstrate that an undertaking has participated in a single overall infringement it is necessary to demonstrate 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.'*²²⁷

3.61 The fact that an undertaking did not participate in all aspects of the single overall infringement or played only a minor role in those aspects that it did participate in is not material to demonstrating an infringement on the part of that undertaking.²²⁸

3.62 In *Pre-insulated pipes*, relating to a collective refusal to both purchase and supply in the context of overall cartel activity, the fact that not all parties directly participated or took action to implement the collective

²²⁵ Cases T-305/94 etc *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931 at paragraph 773; case T-141/89 *Tréfileurope Sales SARL v Commission* [1995] ECR II-791 at paragraphs 60 and 85; *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at paragraph 687; and Commission decision *Pre-Insulated Pipe Cartel* OJ 1999 L24/1 at paragraph 134.

²²⁶ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 83.

²²⁷ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 87.

²²⁸ Cases C-204/00 P etc *Aalborg Portland A/S v Commission* [2004] ECR I-123, at paragraph 86.

boycott did not prevent the Commission from establishing that all parties were responsible for infringement. All of the parties had subscribed to the overall infringement and were fully aware of the scheme:

*'[t]he fact that (for purely practical reasons) the main part in implementing the agreed boycott fell to ABB and Løgstør does not absolve of responsibility the others who were in the plan. Whatever was done by Løgstør and ABB was within the contemplation of the scheme devised on 24 March 1995. Their acts were in furtherance of a scheme to which all subscribed and of which all were fully aware.'*²²⁹

- 3.63 The fact that an undertaking did not take any direct action in pursuit of the common objectives of the single infringement did not prevent the Commission in *Pre-insulated pipes* from demonstrating that that undertaking was a party to the single infringement:

*'[t]he Commission accepts that there is no evidence of Tarco's having itself taken direct action to harm Powerpipe... This does not alter the fact that... it was privy to the plan to boycott Powerpipe and to attempt to ensure that it failed to complete the Leipzig-Lippendorf project.'*²³⁰

- 3.64 Further, the Commission found in *Pre-insulated pipes* that non-compliance with one aspect of the single overall infringement (in this instance, the collective boycott) did not absolve an undertaking from being a party to the single overall infringement.²³¹

Prevention, restriction or distortion of competition

- 3.65 As noted above, the Chapter I prohibition prohibits, among other things, agreements between undertakings or concerted practices which:

'...have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.'

²²⁹ Commission decision *Pre-insulated Pipe Cartel* OJ 1999 L24/1, at paragraph 119.

²³⁰ Commission decision *Pre-insulated Pipe Cartel* OJ 1999 L24/1, at paragraph 122. See also paragraph 144.

²³¹ Commission decision *Pre-insulated Pipe Cartel* OJ 1999 L24/1, at paragraph 182.

No need to prove anti-competitive effect where anti-competitive object is established

3.66 In light of the express wording of the Chapter I prohibition, the OFT is not, as a matter of law, obliged to establish that an agreement or concerted practice has an anti-competitive **effect** where it is found to have as its **object** the prevention, restriction or distortion of competition.²³² The CAT held in *Argos* moreover:

'It is trite law that once it is shown that such agreements or practices had the object of preventing restricting, or distorting competition, there is no need for the OFT to show what the actual effect was: see Cases 56 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 342 and many subsequent cases';

and:

*'the issue is whether ... there was in place an agreement or concerted practice between Hasbro and Argos directed at maintaining Argos' selling prices at or near RRP's [i]f an agreement or concerted practice is established on the facts, the question of what the pricing position might have been in the absence of that agreement or concerted practice is irrelevant to the issue of liability.'*²³³

3.67 Fusion People in its representations in response to the Statement of Objections stated that the above approach must now be seen in light of the CFI's judgement in *GlaxoSmithKline*²³⁴ 'in which the Court held that a finding by object did not obviate the need to consider whether the agreement in question prevented, restricted or distorted competition.'²³⁵

²³² The ECJ has acknowledged this principle on many occasions in relation to the interpretation of Article 81(1). In Cases 56/64 etc *Consten & Grundig v Commission* [1966] ECR 299, at paragraph 342, the ECJ stated that '*...there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition*'.

²³³ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at paragraphs 357 and 708.

²³⁴ Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006] ECR II-2969.

²³⁵ Fusion People written representations of 8 January 2009 at paragraph 6.

- 3.68 In response to this argument, the OFT notes that the ECJ has recently made clear that, in order to find an ‘object’ infringement, an agreement or concerted practice need only be *capable* in an individual case, having regard to the legal and economic context, of preventing, restricting or distorting competition.²³⁶ The OFT is therefore not required to conduct a competitive analysis to demonstrate an *actual* prevention, restriction or distortion of competition in any particular case.²³⁷ Moreover, an impact on consumer prices is not a pre-requisite to the finding of an ‘object’ infringement,²³⁸ as the competition rules are ‘*designed to protect not only the immediate interests of individual customers or consumers but also to protect the structure of the market and thus competition as such.*’²³⁹
- 3.69 The OFT also notes the opinion of Advocate General Kokott in *T-Mobile Netherlands*²⁴⁰:

‘Ultimately...the prohibition on ‘infringements of competition by object’ resulting from Article 81(1) EC is comparable to the risk offences...known in criminal law: in most legal systems, a person who drives a vehicle... when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant.’

²³⁶ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraph 31. See also the Opinion of AG Kokott in the same case, 19 February 2009, at paragraph 48.

²³⁷ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraph 43.

²³⁸ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraphs 36-39. See also the Opinion of AG Kokott, 19 February 2009, at paragraphs 56-58, and the Opinion of AG Trstenjak in Case C-501/06 *GlaxoSmithKline Services v Commission*, 30 June 2009, at paragraphs 102-118.

²³⁹ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraph 38.

²⁴⁰ Opinion of AG Kokott, 19 February 2009, at paragraph 56-58

3.70 The OFT recognises that, in order to demonstrate an object infringement, it should consider the purpose of the agreement at issue, in the economic context in which it is to be applied²⁴¹, but this should not extend to an examination of the effects of the agreement. Indeed, the ECJ has recently reiterated that:

*'the distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'*²⁴² (emphasis added)

Non-Implementation

3.71 The fact that a party does not act on or subsequently implement an agreement or concerted practice does not preclude a finding that an agreement existed. The fact that a clause intended to restrict competition has not been implemented by the parties is not sufficient to remove it from Article 81(1) (and, by virtue of section 60 of the Act, the Chapter I prohibition).²⁴³ As the CAT held in *Apex*:

*'We are satisfied that there was a concerted practice in place between Apex and Briggs to provide non-competitive prices such that Briggs would not win the FHH contract. The fact that in relation to the FHH contract Briggs did not put in a tender at all is not material to the question whether a concerted practice was in place. Likewise the reason for Briggs not putting in a tender is immaterial.'*²⁴⁴

²⁴¹ Case C-209/07 *Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats*, judgment of 20 November 2008, at paragraphs 15-16.

²⁴² Case C-209/07 *Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats*, judgment of 20 November 2008, at paragraph 17.

²⁴³ Cases C-129/85 etc *A Ahlström Osakeyhtiö v Commission* [1993] ECR I-1307, at paragraph 175. See also Case 86/92 *Hassleblad v Commission* [1984] ECR 883 and Case C-277/87 *Sandoz v Commission* [1990] ECR I-45.

²⁴⁴ *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraphs 235 to 236.

- 3.72 The fact that potentially legitimate objectives or aims are pursued in tandem with objectives or aims that infringe the Chapter I prohibition cannot justify or override the infringing objectives or aims.²⁴⁵
- 3.73 In light of the OFT's conclusion (at paragraphs 4.396 to 4.406 below) that the agreements and/or concerted practices described in this Decision had as their object the prevention, restriction or distortion of competition, the OFT sets out below salient details of the law on anti-competitive object.

The law on anti-competitive object

- 3.74 Agreements or concerted practices that prevent, restrict or distort competition by object are those that, by their very nature, have the potential to do so. This principle has been confirmed by the ECJ in a number of cases.²⁴⁶
- 3.75 The 'object' of an agreement and/or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it, but rather is determined by an objective analysis of its aims.²⁴⁷ Nonetheless, although proof of subjective intention is not a necessary factor, there is nothing to prevent the OFT from taking that intention into account in demonstrating an infringement that has as its object the prevention, restriction or distortion of competition.²⁴⁸
- 3.76 The objective analysis of whether the agreement and/or concerted practice has the potential of preventing, restricting or distorting

²⁴⁵ That point was explored in Cases 56/64 etc *Consten and Grundig v Commission* [1966] ECR 299 and Cases 96-102 etc *NZ IAZ International Belgium v Commission* [1983] ECR 3389, at paragraphs 22-25 and confirmed in Case C-551/03 *General Motors BV v Commission* [2006] ECR I-3173, at paragraph 64: '*...contrary to what General Motors argues, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives*'. See also Case C-209/07 *Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats*, judgment of 20 November 2008, at paragraph 21.

²⁴⁶ See, for example, Case 123/83 *BNIC v Clair* [1985] ECR 391, at paragraph 22 and Commission Notice *Guidelines on the application of Article 81(3) of the Treaty* OJ 2004 C101/97, at paragraph 21.

²⁴⁷ Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141, at paragraph 136. See also Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, at paragraph 109 and Case T-14/89 *Montedipe SpA v Commission* [1992] ECR II-1155, at paragraph 265.

²⁴⁸ *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at paragraph 270, citing Case C-551/03 P *General Motors BV v Commission* [2006] ECR I-3173, at paragraphs 77 and 78.

competition contrary to the Chapter I prohibition by its very nature²⁴⁹ must take account of the actual framework and, therefore, the legal and economic context in which the arrangement (to which the restriction is imputed) is deployed.²⁵⁰ In *CRAM*, the ECJ held that:

'In order to determine whether an agreement has as its object the restriction of competition, it is not necessary... to verify that the parties had a common intent at the time when the agreement was concluded. It is rather a question of examining the aims pursued by the agreement as such, in the light of the economic context in which the agreement is to be applied'.²⁵¹

3.77 The European Commission's Guidelines on the application of Article 81(3) EC state:

'The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. 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. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition.'²⁵²

²⁴⁹ See, for example, Case 19/77 *Miller v Commission* [1978] ECR 131, at paragraph 7.

²⁵⁰ See also, for example, Joined Cases 96/82 etc *NV IAZ International Belgium v Commission* [1983] ECR 3369, at paragraphs 22 to 25; Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* [1984] ECR 1679 at paragraphs 25 and 26; and Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, at paragraph 110.

²⁵¹ Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* [1984] ECR 1679, at paragraph 26.

²⁵² Commission Notice *Guidelines on the Application of Article 81(3) of the Treaty* OJ 2004 C101/97, at paragraph 22. See also *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, at paragraph 268.

- 3.78 Therefore, in considering whether an agreement and/or concerted practice has as its object the prevention, restriction or distortion of competition, the OFT will consider the aims of the agreement and/or concerted practice in the economic context in which it operates. In cases where the agreement or concerted practice contains 'obvious restrictions of competition' it will be treated as having an anti-competitive object and no account need be taken of the actual conditions in which the agreement or concerted practice functions, or the actual structure of the market.²⁵³
- 3.79 Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition.²⁵⁴ This will be the case even if the agreement or concerted practice also had other objectives.²⁵⁵

Price fixing

- 3.80 Section 2(2)(a) of the Act applies, in particular, to agreements and concerted practices that '*...directly or indirectly fix purchase or selling prices...'*
- 3.81 It follows that agreements or concerted practices that fix prices almost invariably infringe the Chapter I prohibition (providing that such agreements or concerted practices are not exempted or excluded).²⁵⁶
- 3.82 The OFT considers that any provision in an agreement and/or concerted practice which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, fixes the prices at which goods or services are sold will amount to an object infringement of the

²⁵³ Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141, at paragraph 136. See also Case T-148/89 *Tréfilunion SA v Commission* [1995] ECR II-1063, at paragraph 109 and Case T-14/89 *Montedipe SpA v Commission* [1992] ECR II-1155, at paragraph 265.

²⁵⁴ Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141, at paragraph 136. See also Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, at paragraph 109 and Case T-14/89 *Montedipe SpA v Commission* [1992] ECR II-1155, at paragraph 265.

²⁵⁵ Case 96/82 *IAZ v Commission* [1983] ECR 3369, at paragraphs 22 to 25.

²⁵⁶ See, for example, OFT guideline *Agreements and concerted practices* (December 2004), at paragraph 3.4.

Chapter I prohibition since such price-fixing, by its very nature, restricts competition.²⁵⁷

3.83 Agreements and concerted practices do not need to fix prices explicitly in order to be caught under the Chapter I prohibition. Examples where prices were indirectly fixed include:²⁵⁸ an agreement not to offer discounts,²⁵⁹ an agreement to fix the maximum level of discounts offered,²⁶⁰ an agreement on interest rates and other credit terms,²⁶¹ and an agreement involving prior consultation between competitors on price lists including a commitment not to quote before such consultations.²⁶²

3.84 As the Commission explained in relation to *British Sugar*:²⁶³

*'While the Commission did not have sufficient evidence that prices to be charged to individual buyers of industrial or retail sugar were jointly fixed, the systematic participation ... in regular meetings ... led to an atmosphere of **mutual certainty** as to the participants' intentions concerning their future pricing behaviour. **Each of them could rely, if not on the precise price levels of the other participants, then at least on their intentional pursuit of the collaborative strategy of higher pricing**'²⁶⁴ (OFT emphasis)*

²⁵⁷ See also the section in this Decision on Appreciability at paragraphs 3.108 to 3.110 below.

²⁵⁸ See also OFT guideline *Agreements and concerted practices* (December 2004), at paragraphs 3.5 to 3.7.

²⁵⁹ See, for example, Case 246/86 *Belasco v Commission* [1989] ECR 2181 and Commission decision *Far East Trade Tariff Charges and Surcharges Agreement* OJ 2000 L268/1.

²⁶⁰ See, for example, Commission decision *Citric Acid* OJ 2002 L239/18; Commission decision *Vimpoltu* OJ 1983 L200/44; and Commission decision *Italian flat glass*, OJ 1981 L326/32.

²⁶¹ See, for example, Commission decision *Austrian Banks (Lombard Agreement)* OJ 2004 L56/1; Commission decision *Fine Art Auction Houses*, 22 December 2004, [2006] 4 CMLR 90; and Commission decision *Vimpoltu*, OJ 1983 L200/44.

²⁶² See, for example, Commission decision *Cast iron and steel rolls* OJ 1983 L317/1; Commission decision *Building and construction industry in the Netherlands* OJ 1992 L92/1 (upheld on appeal in Case T-29/92 *SPO v Commission* [1995] ECR II-289); Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission* [1984] ECR 1679 and Commission decision *Astra* OJ 1993 L20/23.

²⁶³ Commission decision *British Sugar plc* OJ 1999 L76/1.

²⁶⁴ Page 138 of 1998 E Comm Competition Report

- 3.85 The fact that prices are 'recommended' rather than directly fixed is not sufficient to demonstrate that an agreement or concerted practice to fix prices has not been reached.²⁶⁵
- 3.86 An agreement or concerted practice may constitute a price-fixing agreement or concerted practice where it restricts price competition even if it does not entirely eliminate price competition.²⁶⁶

Disclosure and/or exchange of price information

- 3.87 The disclosure and/or exchange of price information can also amount to an agreement or concerted practice that has the object of preventing, restricting or distorting competition. Such disclosure and/or exchange of price information can have the object of preventing, restricting or distorting competition either on its own or as part of a single overall infringement.

Disclosure and/or exchange of price information as part of a single overall infringement

- 3.88 The disclosure and/or exchange of price information may in particular infringe the Chapter I prohibition where its purpose is to reinforce a single overall agreement or concerted practice. For example, the CFI in *Cimenteries* held that the purpose of exchanging price information was to reinforce the general agreement and that, as the general agreement had the object of restricting competition, the exchange of price information also had the object of restricting competition.²⁶⁷
- 3.89 The disclosure and/or exchange of future pricing intentions can also amount to an infringement of the Chapter I prohibition. In *Replica Kit* the CAT held that:

²⁶⁵ Commission decision *Anheuser-Busch Incorporated – Scottish & Newcastle*, OJ 2000 L49/37: 'That the guidelines are called 'recommended' guidelines is in itself not sufficient to demonstrate that the guidelines are not an agreement'. See also Commission decision *Papiers peints de Belgique*, OJ 1974 L237/3, at paragraph II.C.3: 'Their object is also, by fixing resale prices, to abolish price competition between wallpaper dealers...the mere fixing of a price, even if only as a guide, affects competition in that it gives all market participants sufficiently certain foreknowledge of their rivals' pricing policies'.

²⁶⁶ See, for example, OFT guideline *Agreements and concerted practices* (December 2004), at paragraph 3.6.

²⁶⁷ Joined Case T-25/95 etc *Cimenteries CBR SA v Commission* ECR II-491, paragraphs 4027, 4060, 4109 and 4112.

'...even if the evidence had established only that JJB had unilaterally revealed its future pricing intentions to Allsports and Sports Soccer a concerted practice falling within the Chapter I prohibition would thereby have been established. The 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'.²⁶⁸

3.90 In *Rhone Poulenc*, the CFI held that the direct exchange of information between competitors about, among other matters, the prices they wished to see charged on the market and the prices they intended to charge amounted to a concerted practice²⁶⁹ and that it had been established that the meetings at which the exchanges took place had an anti-competitive object.²⁷⁰

3.91 In *Tate & Lyle*, the CFI held that such a conclusion applied also where the participation of one or more undertakings in meetings with an anti-competitive purpose was limited to the mere receipt of information about the future behaviour, in relation to pricing, of their market competitors. In particular, the CFI held that:

'66. ...even if its competitors had been informed [that Napier Brown was participating in those meetings in a spirit that was different from theirs], the mere fact that it received at those meetings information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate that it had an anti-competitive intention.

'67. By participating at one of those meetings, each participant knew that during the following meetings its most important competitor ... would reveal its future price intentions.

²⁶⁸ See, for example, *JJB Sports plc v OFT* [2004] CAT 17, at paragraph 644, referring to case T-305/94 *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, at paragraphs 969 to 998 and Case C-49/92 P *Commission v Anic Participazioni SpA* [1999] ECR I-4125, at paragraphs 131-133; confirmed by the Court of Appeal in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraph 21.

²⁶⁹ Case T-1/89 *Rhône Poulenc v Commission* [1991] ECR II-867, at paragraphs 122 and 123.

²⁷⁰ Case T-1/89 *Rhône Poulenc v Commission* [1991] ECR II-867, at paragraph 157.

*Independently of any other reason for participating in those meetings, there was always one at least which was to eliminate in advance the uncertainty concerning the future conduct of competitors.*²⁷¹

- 3.92 The threat to effective competition is especially obvious where an arrangement involves the regular and systematic exchange of specific information as to future pricing intentions between competitors. The exchange of such information reduces uncertainties inherent in the competitive process and facilitates the coordination of the parties' conduct on the market.²⁷² Furthermore, and as the CAT confirmed in *Replica Kit*, the law presumes that a recipient of information about the future conduct of a competitor cannot fail to take that information into account when determining its own future policy on the market'.²⁷³
- 3.93 In light of the above, the OFT considers that the disclosure and/or exchange of price information will restrict competition by object where it reinforces a single overall agreement.

Collective refusals

- 3.94 Collective refusals generally take two forms: collective refusals to supply, and collective refusals to purchase. As the infringement in this Decision relate, in part, to a collective refusal to supply, the OFT sets out below the relevant law on collective refusal to supply.
- 3.95 Collective refusals to supply can have the object of preventing, restricting or distorting competition either on their own or as part of a single overall infringement.

Collective refusal to supply as a standalone object restriction of competition

²⁷¹ Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II 2035, at paragraphs 66 and 67.

²⁷² See OFT Competition law guideline *Trade associations, professions and self-regulating bodies* (OFT 408, Edition 12/04), at paragraph 3.10.

²⁷³ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 644, referring to Case T-305/94 *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II-931, at paragraphs 969 to 998 and Case C-49/92 P *Commission v Anic Participazioni SpA* [1999] ECR I-4125, at paragraphs 131 to 133; confirmed by the Court of Appeal in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraph 21, at paragraph 873, citing Cases T-202/98 etc *Tate and Lyle* [2001] ECR II-2035, at paragraphs 56 to 58 and Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, at paragraphs 122 to 123.

3.96 The CAT has held that a collective refusal to supply can, in itself, have as its object the prevention, restriction or distortion of competition.²⁷⁴

Collective refusal to supply as part of a single overall infringement

3.97 The OFT considers that a collective refusal to supply will have as its object the prevention, restriction or distortion of competition when it is pursued as part of overall cartel activity.

3.98 The Commission has followed the principle that a collective refusal to supply will have as its object the prevention, restriction or distortion of competition when it is pursued as part of overall cartel activity in *Pre-insulated pipes*, concerning, amongst other things, both a collective refusal to purchase and a collective refusal to supply. The Commission stated that '*[t]he principal aspects of the complex of agreements and arrangements which can be characterised as restrictions of competition...*'²⁷⁵ included:

- '*agreeing a collective boycott of the contractors and suppliers involved in the [Powerpipe] project,*
- '*approaching Powerpipe's suppliers in order to persuade them to withhold or delay supplies essential for the proper and timely performance of its contracts...*'²⁷⁶

3.99 In respect of these principal aspects of the agreement (including those listed above), the Commission stated:

'[i]t is not necessary, given their manifest anti-competitive object, to examine in relation to each one of the above restrictions of competition the extent to which it contributed in achieving the aim being pursued

For the avoidance of doubt, it is, however, necessary to state that:

²⁷⁴ See *The Institute of Independent Insurance Brokers v The Director General of Fair Trading* [2001] CAT 4, in particular, paragraphs 179 to 218.

²⁷⁵ Commission decision *Pre-insulated Pipe Cartel* OJ 1999 L24/1, at paragraph 147.

²⁷⁶ Commission decision *Pre-insulated Pipe Cartel* OJ 1999 L24/1, at paragraph 147.

*(a) the above-listed restrictions of competition are not separate infringements of Article [81] but aspects of the single continuing infringement...*²⁷⁷

3.100 The principle that a collective refusal to supply can have as its object the prevention, restriction or distortion of competition when part of overall cartel activity is also supported by the Commission's guideline on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements although the guideline relates to collective refusals to purchase rather than collective refusals to supply:

*'Purchasing agreements only come under Article 81(1) by their nature if the cooperation does not truly concern joint buying, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation.'*²⁷⁸

3.101 Also, in *Belgian wallpaper*, relating to an agreement to fix retail prices and an associated collective refusal to supply where a dealer sold below the resale price set by the parties, in fixing the amount of the fine the Commission stated that:

*'[t]he collective boycott is traditionally considered one of the most serious infringements of the rules of competition, since it is aimed at eliminating a troublesome competitor.'*²⁷⁹

3.102 Although this specifically went to determine that the infringement was committed intentionally, the OFT considers that this also demonstrates that a collective refusal to supply in the context of cartel activity/a single continuous infringement has the object of preventing, restricting or distorting competition.

3.103 The OFT considers that, where a collective refusal to supply forms one of a series of efforts or schemes in pursuit of a single economic aim or purpose,²⁸⁰ it will have the object of preventing, restricting or distorting competition where the single overall agreement and/or concerted practice has the object of preventing, restricting or distorting

²⁷⁷ Commission decision *Pre-insulated Pipe Cartel* OJ 1999 L24/1, at paragraph 148.

²⁷⁸ Commission Notice 2001/C 3/20, OJ 2001 C3/2, at paragraph 124.

²⁷⁹ Commission decision *Papiers peints de Belgique* OJ 1974 L237/3, at paragraph IV.3.

²⁸⁰ See paragraphs 3.52 to 3.64 above.

competition. Where such an effort or scheme is in pursuit of a single economic aim or purpose, it would be artificial to split up such conduct.²⁸¹

Effect on trade within the UK

3.104 By virtue of Section 2(1)(a) of the Act, the Chapter I prohibition applies only to agreements or concerted practices which:

'...may affect trade within the United Kingdom'.

3.105 For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.²⁸²

3.106 It should be noted that, to infringe the Chapter I prohibition, an agreement and/or concerted practice does not actually have to affect trade as long as it is capable of affecting trade.²⁸³ The test is not read as importing a requirement that the effect on trade should be appreciable.²⁸⁴ Moreover, effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of Community competition law and national competition law.

3.107 By their very nature, agreements and/or concerted practices to fix prices restrict competition are likely to affect trade. A collective refusal to supply, which is aimed at eliminating a competitor from the market, is clearly capable of affecting trade.

Appreciability

3.108 An agreement and/or concerted practice will infringe the Chapter I prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition in the UK.

²⁸¹ See paragraph 3.54 above.

²⁸² Section 2(7) of the Act.

²⁸³ Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035, at paragraph 78 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, at paragraph 235.

²⁸⁴ *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at paragraphs 459 and 460.

- 3.109 The OFT takes the view that an agreement or concerted practice will generally have no appreciable effect on competition if the aggregate market share of the parties to the agreement or concerted practice does not exceed 10 per cent of the relevant market affected by the agreement or concerted practice where the arrangement is made between competing parties (that is, undertakings which are actual or potential competitors on any of the markets concerned).²⁸⁵
- 3.110 However, the OFT will generally regard any agreement or concerted practice which directly or indirectly fixes prices as being capable of having an appreciable effect even where the parties' combined market share falls below the ten per cent threshold.²⁸⁶ In particular, the European Commission's Notice on agreements of minor importance is not applicable to an agreement between competitors which directly or indirectly has as its object the fixing of prices.²⁸⁷

Burden and standard of proof

Burden of proof

- 3.111 The burden of proving an infringement of the Chapter I prohibition lies upon the OFT. The CAT held in *Napp* that:

'95. ...As regards the burden of proof, the Director²⁸⁸ accepts that it is incumbent upon him to establish the infringement, and that the persuasive burden of proof remains on him throughout.

100. In our view it follows from Article 6(2) [of the European Convention on Human Rights] that the burden of proof rests throughout on the Director to prove the infringements alleged.²⁸⁹

²⁸⁵ The OFT has regard to the EC thresholds on appreciability in determining whether there is an appreciable effect on competition. See European Commission Notice on Agreements of Minor Importance (OJ 2001 C368/13) and OFT guideline *Agreements and concerted practices* (OFT401, Edition 12/04), at paragraphs 2.16-2.19.

²⁸⁶ See OFT guideline *Agreements and Concerted Practices* (OFT401), Edition 12/04, at paragraph 2.17.

²⁸⁷ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) OJ 2001 C C368/13.

²⁸⁸ References to the 'Director' are to the Director General of Fair Trading. As from 1 April 2003, section 2(1) of the Enterprise Act 2002 transferred the functions of the Director General of Fair Trading to the OFT.

3.112 However, this burden does not preclude the OFT from relying, where appropriate, on inferences or evidential presumptions. In *Napp* the CAT went on to say:

*'110. That approach does not in our view preclude the Director, in discharging the burden of proof, from relying in certain circumstances, on inferences or presumption that would, in the absence of any countervailing indications, normally follow from a given set of facts, for example ...that an undertaking's presence at a meeting with manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged.'*²⁹⁰

3.113 The CAT also considered the use of inference to prove an infringement of the Chapter I prohibition in *Makers* and held that it was open for the OFT to draw that inference.²⁹¹ When considering whether it was open for the OFT to draw that inference, the CAT considered whether the evidence before it provided a plausible explanation for the events other than the conclusion that the OFT drew.²⁹²

3.114 Where a party seeks to rebut such an inference or presumption, it remains incumbent on the OFT to prove the infringement.²⁹³

Standard of proof

3.115 As regards the standard of proof, the CAT held in *Napp* that:

'109. ...formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what

²⁸⁹ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, [2002] CAT 1, at paragraphs 95 and 100. The CAT confirmed this approach in *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 164. See also paragraphs 928 and 931.

²⁹⁰ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, [2002] CAT 1, at paragraph 110. See also *Claymore Dairies Ltd and Express Dairies plc v Office of Fair Trading* [2003] CAT 18. Observations of the Tribunal upon staying the appeal, at paragraph 10.

²⁹¹ *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, at paragraphs 48 and 93.

²⁹² *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, at paragraphs 50, 52 and 80.

²⁹³ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, [2002] CAT 1, at paragraph 111.

*is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.*²⁹⁴

3.116 The CAT further held in *Replica Kit* that:

*'...the applicable standard of proof in a case such as the present is the civil standard of proof – i.e. the infringement must be established on the preponderance of probabilities. The Tribunal must be satisfied that it is more probable than not.*²⁹⁵

3.117 This statement has been further clarified by the CAT in its ruling in the *Replica Kit* appeals, where the CAT stated that:

*'...the Tribunal must be satisfied that the quality of evidence and weight of the evidence is sufficiently strong to overcome the presumption that the party in question is not engaged in unlawful conduct.*²⁹⁶

And that:

*'It also follows that the reference by the Tribunal to 'strong and compelling' evidence at [109] of Napp should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled.*²⁹⁷

3.118 Most recently, the CAT summarised the burden and standard of proof in *Makers*:

²⁹⁴ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, [2002] CAT 1, at paragraph 109. The issue of the of the application of the civil standard of proof has also recently been considered by the House of Lords in *Re D (Northern Ireland)* [2008] 1 WLR 1499 at paragraph 28

²⁹⁵ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 196.

²⁹⁶ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 200.

²⁹⁷ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 204. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at paragraphs 164 and 165.

*'Both of the parties agreed that the burden of proof lies on the OFT and that the standard of proof is the civil standard, the balance of probabilities, taking into account the gravity of what is alleged: see JJB and Allsports v OFT [2004] CAT 17 paragraphs 195, 197. The standard is not akin to the criminal standard but the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which Makers is entitled: JJB and Allsports paragraphs 200 – 204 and Burgess v OFT [2005] CAT 25, paragraphs 115 and 116.'*²⁹⁸

Nature of evidence

- 3.119 What evidence is sufficiently strong to overcome the presumption of innocence to which the parties are entitled is a question of fact and will be determined in the particular circumstances of the case.²⁹⁹
- 3.120 The CAT has acknowledged that, by their nature, cases involving a possible infringement of the Chapter I prohibition will often concern cartels that are in some way hidden or secret and that the nature of the evidence may therefore be fragmentary or circumstantial.³⁰⁰
- 3.121 The CAT has expanded on this in its *Replica Kit* and *Argos and Littlewoods* judgments:

*'206. As regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in Claymore Dairies that cartels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see Claymore Dairies at [3] to [10]...'*³⁰¹ *As the Court of Justice said in Cases 204/00P etc. Aalborg Portland v European*

²⁹⁸ *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, at paragraph 46.

²⁹⁹ *Claymore Dairies Limited and Arla Foods UK plc v Office of Fair Trading* [2003] CAT 18, observations of the Tribunal upon staying the appeal, at paragraph 14.

³⁰⁰ *Claymore Dairies Ltd and Express Dairies plc v Office of Fair Trading* [2003] CAT 18, observations of the Tribunal upon staying the appeal, at paragraph 3.

³⁰¹ See also the following cases cited here by the CAT: the opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867; and Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491.

*Commission, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57.*³⁰²

'55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction...

57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules'.³⁰³

and:

*'Even if, for example, particular documents or particular pricing patterns may appear inconclusive standing alone, nonetheless in our judgment the overall picture convincingly establishes the OFT's case.'*³⁰⁴

3.122 The CAT reiterated its position in *Argos/Littlewoods*. The CAT noted that evidence of arrangements:

³⁰² Joined Cases C-204/00 P etc *Aalborg Portland v Commission* [2004] ECR I-123.

³⁰³ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 206. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 312.

³⁰⁴ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 311.

*'In cases such as the present the documentary evidence is likely to be sparse, incomplete and perhaps elliptically expressed.'*³⁰⁵

3.123 In *Claymore Dairies*, the CAT held that:

*'...indirect evidence and circumstantial evidence generally, may well have a powerful role to play in the factual matrix of a case.'*³⁰⁶

3.124 In addition, the CFI has recently confirmed that the evidence demonstrating an infringement:

*'may consist of direct evidence, taking the form, for example, of a written document [...], or, failing that, indirect evidence, for example in the form of conduct [...].'*³⁰⁷

Type and weight attached to evidence

3.125 There is no hierarchy of evidence.³⁰⁸ That said, the CAT has explained that it will generally give differing weight to differing types of evidence.

3.126 The CAT's general approach to evidence is to look at the evidence in the round.³⁰⁹ In *Argos and Littlewoods*, the CAT explained that

*'We think that it is essential to look at evidence as a whole. Even if for example, particular documents or particular pricing patterns may appear inconclusive standing alone nonetheless in our judgment the overall picture convincingly establishes the OFT's case'*³¹⁰

3.127 The CAT has also indicated the weight that it has attached to different types of evidence in making its judgments.

Contemporaneous and documentary evidence

³⁰⁵ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 312.

³⁰⁶ *Claymore Dairies v Office of Fair Trading* [2003] CAT 18. Observations of the Tribunal in staying the appeal, dated 2 September 2003, at paragraph 9.

³⁰⁷ Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, at paragraph 83.

³⁰⁸ *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at paragraphs 126 to 134.

³⁰⁹ *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at paragraph 128.

³¹⁰ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 311.

3.128 The CAT's normal approach to documentary evidence is to:

*'...give the document in question what appears to be its natural meaning, and accord it such weight as appears appropriate, given the time when, and circumstances in which, it was prepared, the identity of the author, and any particular factors likely to undermine its credibility.'*³¹¹

3.129 In *Replica Kit*, the CAT examined and attached significance to a number of contemporaneous documents:

*'As regards the contemporaneous documents, it seems to us that a document prepared at the time, which the author never anticipated would see the light of day, is likely to be more credible than explanations given later. We have therefore given weight to contemporary documents, unless there is good reason not to do so.'*³¹²

3.130 Where a party looks to rebut inferences that the OFT draws from documentary evidence, the explanations by the parties need to be *'sufficiently convincing'*. As the CAT held in *Argos/Littlewoods*:

*'In general, we did not find the explanations put forward by Argos or Littlewoods sufficiently convincing to rebut the inferences which the OFT have sought to draw from the documents in question.'*³¹³

Witness evidence

3.131 The CAT has also made it clear that the OFT is not limited to relying only on documentary or written evidence to establish an infringement of the Chapter I prohibition.³¹⁴ In particular, the OFT can rely on witness evidence provided that the witness is credible and that a cautious approach is taken particularly where a witness's recollection is some time after the events in question.

³¹¹ *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, at paragraph 132.

³¹² *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 287. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at paragraph 312.

³¹³ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 314.

³¹⁴ *Claymore Dairies v Office of Fair Trading* [2003] CAT 18, observations of the Tribunal in staying the appeal, dated 2 September 2003, at paragraph 8.

3.132 In *Claymore*, the CAT considered that the oral evidence of a witness, if believed, may in itself constitute sufficient evidence to demonstrate an infringement depending on the circumstances of the case.³¹⁵ The CAT also considered that nothing precluded the OFT from accepting the oral evidence of a witness at face value if it believes it is right to do so.³¹⁶

3.133 In *Replica Kit*, the CAT considered the difficulties associated with witness evidence and noted that:

*'...all the witnesses in this case are open to the contention that their evidence is coloured, at least sub-consciously, by various factors.'*³¹⁷

3.134 In relation to the position of individuals giving evidence, the CAT stated that:

*'At all stages in these proceedings, the Umbro witnesses have found themselves in the invidious position of having to prepare witness statements tending to incriminate extremely valuable customers such as JJB and Allsports...'*³¹⁸

3.135 In light of these factors, the CAT considered that:

*'In all these circumstances, 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.'*³¹⁹

Economic and market context evidence

3.136 In both *Replica Kit* and *Argos/Littlewoods* the CAT considered evidence of the economic and market context in its analysis. It stated:

³¹⁵ *Claymore Dairies v Office of Fair Trading* [2003] CAT 18, observations of the Tribunal in staying the appeal, dated 2 September 2003, at paragraph 8.

³¹⁶ *Claymore Dairies v Office of Fair Trading* [2003] CAT 18, observations of the Tribunal in staying the appeal, dated 2 September 2003, at paragraph 8.

³¹⁷ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 288.

³¹⁸ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraphs 289 to 290.

³¹⁹ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 294.

*'We regard background evidence as to the economic and market context, both before and after the alleged agreements, as relevant to our assessment as to whether the alleged agreements or concerted practices are likely to have occurred.'*³²⁰

3.137 However, the CAT expressed caution about how much weight could be placed upon this type of circumstantial evidence, indicating that it would need to be corroborated by further evidence:

*'On the other hand, the fact that an undertaking has been involved in earlier infringing agreements does not of itself necessarily establish its involvement in subsequent infringing agreements. Much care should be exercised, in our judgment, before drawing inferences from past conduct, having regard, in particular to the presumption of innocence.'*³²¹

3.138 In *Argos/Littlewoods* the CAT contrasted the absence of price competition during the period of the infringement to the strong price competition that existed previously:

*'Thirdly, the policy of "market pricing" as explained to us does not in our view account for the pricing patterns seen in this case. Market pricing did not necessarily or imply going to RRP's. Moreover, a market pricing policy which, we are told, involved selective price cutting and entry point pricing does not in our judgment satisfactorily explain the virtual absence of price competition over a two-year period on the high profile products with which this case is concerned especially when, historically speaking, competitive pricing on toys had always been seen as an important element of the success of the catalogue overall.'*³²²

3.139 Although the strength of particular types of evidence will vary on a case by case basis the OFT has taken the observations of the CAT and the EC Courts into account when considering the evidence presented in this Decision.

³²⁰ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 286.

³²¹ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 914.

³²² *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 709.

4 EVIDENCE RELIED ON BY THE OFT IN RELATION TO THE INDIVIDUAL INFRINGEMENT

A Introduction – the Margin Protection Initiative

4.1 This Part of this Decision analyses the evidence and states the inferences and conclusions that the OFT draws from that evidence. The OFT finds that during the Relevant Period³²³ each of the Parties infringed the Chapter I prohibition by participating in agreement(s) and/or a concerted practice, which together are referred to as the 'Margin Protection Initiative'. The OFT finds that the Margin Protection Initiative was a single overall infringement in pursuit of a common objective, namely the protection of the margins that could be obtained in respect of Fee Rates for the supply of Candidates to Neutral Vendors and certain Construction Companies in the UK. The OFT finds that the Margin Protection Initiative is made up of the following elements:

- An agreement between the Parties to withdraw and/or refrain from entering into contracts in which Parc was acting as a Neutral Vendor for the supply of Candidates to Construction Companies in the UK, which had as its object the prevention, restriction or distortion of competition in the market for the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the UK. This agreement is referred to as 'The Collective Refusal to Supply Parc'.
- An agreement and/or concerted practice between the Parties to fix target Fee Rates for the supply of Candidates to Neutral Vendors and certain Construction Companies in the UK, which had as its object the prevention, restriction or distortion of competition in the market for the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the UK. This agreement and/or concerted practice is referred to as 'The Target Fee Rates Initiative'.

³²³ It should be noted that the exact duration of the involvement of each party in the infringement can differ from one party to the other.

4.2 This Section is structured as follows:

- First, it provides background to the Margin Protection Initiative (paragraphs 4.3 – 4.36);
- Second, it summarises the admissions made by the Leniency Parties regarding the Margin Protection Initiative (paragraphs 4.37 - 4.43); and
- Third, it analyses the evidence and states the inferences and conclusions that the OFT draws from that evidence regarding the Margin Protection Initiative (paragraphs 4.44 - 4.414).

B Background to the Margin Protection Initiative

4.3 Section 2 of this Decision described the role of Recruitment Agencies in supplying Candidates to the Construction Industry. It also outlined the emergence of the MSP business model in this sector, in particular Parc's provision of Neutral Vendor services.

4.4 The purpose of this section is to provide background to the Margin Protection Initiative. It does so under the following headings:

- The Neutral Vendor Agreements signed by Parc with Taylor Woodrow and Vinci;
- The formation of the CRF;
- The operation of the CRF;
- Contact between the Parties outside of the CRF; and
- The consequences of the Margin Protection Initiative.

The Neutral Vendor Agreements signed by Parc with Taylor Woodrow and Vinci

Taylor Woodrow

4.5 In September 2003, Parc first began to act as an MSP to the Construction Industry by signing a Neutral Vendor contract to supply Candidates to the Construction Company Taylor Woodrow. Parc has

stated that this was the first Neutral Vendor arrangement of its kind in the Construction Industry.³²⁴

- 4.6 Following the signature of the Neutral Vendor Agreement with Taylor Woodrow, between September and December 2003 Parc contacted CDI AndersElite, Eden Brown, Fusion People, Henry Recruitment, HMG and Hays and offered them Fee Rates of 10% for the supply of Candidates to Taylor Woodrow. Fusion People accepted this offer in December 2003. All other Parties rejected the offer. However, they subsequently accepted revised offers from Parc at higher Fee Rates.³²⁵ Between September 2003 and April 2004, HMG, Hays, Fusion People, Eden Brown, CDI AndersElite³²⁶ and Henry Recruitment entered into PSAs with Parc to supply Candidates to Taylor Woodrow.³²⁷

Vinci

- 4.7 In August 2004 Parc signed a Neutral Vendor Agreement to supply Candidates to the Construction Company Vinci.
- 4.8 Following the signature of the Neutral Vendor Agreement with Vinci, between September and October 2004 Parc contacted AWA, CDI AndersElite, BBT,³²⁸ Eden Brown, Fusion People, Henry Recruitment, HMG and Hays and offered them Fee Rates of 10% for the supply of

³²⁴ Email of 31 July 2006 from Darren Day of Parc to OFT attaching pre-meeting notes with time line, File Reference: Parc Third Party Correspondence - 45.

³²⁵ HMG at 12% in September 2003; Eden Brown at 11.5% in October 2003; CDI AndersElite at 13.5%/15% in March 2004; Hays at 12.5%/13.5%/15% in March 2004; and Henry Recruitment at 15% in April 2004. Fusion People accepted Parc's initial offer at 10% in December 2003. See spreadsheet submitted by Parc on 7 March 2007 detailing the margins between Parc and agencies and Parc and the client, for both Vinci and Taylor Woodrow; File Reference: Parc Third Party Correspondence - 232 and 243

³²⁶ CDI AndersElite's agreement to supply Taylor Woodrow via Parc was to be reviewed in August 2004 – Internal CDI AndersElite Email of 18 February 2004; File Reference: AndersElite leniency - 160. However, an internal CDI AndersElite email of 22 October 2004 stated that it was 'business as usual with Parc and Taylor Woodrow'; File Reference: AndersElite Leniency - 176d.

³²⁷ Email of 31 July 2006 from Darren Day of Parc to OFT attaching pre-meeting notes with time line, File Reference: Parc Third Party Correspondence - 45.

³²⁸ Although the Spreadsheet provided by Parc appears to indicate that BBT were not contacted to supply Vinci, BBT emails appear to confirm that such an offer was made (See Select; File Reference: Leniency - 1636).

permanent Candidates to Vinci. AWA and Henry Recruitment accepted this offer in October 2004.³²⁹ All other Parties declined Parc's offer.³³⁰

The formation of the CRF

HMG's instigation of the CRF

4.9 HMG has stated to the OFT that one of its main concerns regarding the emergence of Parc's Neutral Vendor model was the pressure it placed on HMG's margins. HMG has stated that it:

*'had some problems with Parc. Those problems would've been service levels, would've been efficiency levels, would've been the price on which we operate'*³³¹

(emphasis added)

4.10 In addition, HMG has stated that *'The fees offered [by Parc] were [.....] [C]'*³³² and that: *'as a recruitment provider, we were not allowed to contact the hiring manager within Taylor Woodrow'*.³³³ This is because Parc was responsible for all contacts with Taylor Woodrow.

4.11 According to HMG, *'The issue started to go out and gather a head of steam'* when Parc started *'making noises'* that it had signed an agreement with Vinci.³³⁴ Vinci had a number of significant Construction Company subsidiaries including Norwest Holst Construction and Rosser & Russell.

³²⁹ See spreadsheet submitted by Parc on 7 March 2007 detailing the margins between Parc and agencies and Parc and the client, for both Vinci and Taylor Woodrow; File Reference: Parc Third Party Correspondence - 232 and 243.

³³⁰ See spreadsheet submitted by Parc on 7 March 2007 detailing the margins between Parc and agencies and Parc and the client, for both Vinci and Taylor Woodrow; File Reference: Parc Third Party Correspondence - 232 and 243.

³³¹ Transcript of OFT interview with Steven Ware (HMG) dated 14 November 2006, page 3. File Reference: Select Leniency - 1859

³³² Transcript of OFT interview with Mark Bull (HMG) dated 13 November 2006, page 4. File Reference: Select Leniency - 1859

³³³ Transcript of OFT interview with Mark Bull (HMG) dated 13 November 2006, page 4. File Reference: Select Leniency - 1859

³³⁴ Transcript of OFT interview with Mark Bull (HMG) dated 13 November 2006, page 5. File Reference: Select Leniency - 1859

- 4.12 Steven Ware of HMG became aware that the agreement between Parc and Vinci was very similar to the agreement with Taylor Woodrow. There was to be no contact between Recruitment Agencies and the line managers at Vinci and the fee structure was very similar.³³⁵
- 4.13 In August 2004, internal HMG communications raised alarm with respect to the new contract which Parc had secured with Vinci. For example, the internal communications include the following: *'parc taking over!!! now its norwest holst'* and *'Norwest Holst Appoint PARC Resource Management'*.³³⁶
- 4.14 Internal HMG meeting minutes from September 2004 reveal that HMG decided it would contact certain other Recruitment Agencies (Hays, BBT, CDI AndersElite, Henry Recruitment and Eden Brown) in order to discuss the emergence of Parc and their response to it, specifically to:
- 'discuss the Parc Neutral vendor product with a view to not entering an agreement under predetermined permanent and f/i rates'*³³⁷
- 4.15 Minutes and action points from a meeting of the HMG Board of Directors of 15 September 2004 make clear how HMG would respond to the emergence of Parc as a Neutral Vendor to the Construction Industry, namely that it would *'Instigate cartel meeting to counter neutral vendor (PARC) Margin erosion'*.³³⁸

³³⁵ Transcript of OFT interview with Mark Bull (HMG) dated 13 November 2006, page 5. File Reference: Select Leniency - 1859

³³⁶ Internal HMG email of 20 August 2004 from Jasmit Kalra to Steven Ware, Mark Bull, Mike Bower and Karen Harris', File Reference: Select Leniency - 1588; internal HMG email of 20 August 2004 from Glen Dawson to Mike Bower, Karen Sims, Jasmit Kalra and Steven Ware, copied to branch managers and to Antonio Camisotti and Pippa Holland, 'Norwest Holst Appoint PARC Resource Management', File Reference: Select Leniency - 59

³³⁷ Internal HMG document: Action points of Weekly UK Ops PSA Review Meeting of 10 September 2004, item 2.8: File Reference: Select Leniency - 1091.

³³⁸ HMG Board of Directors Minutes and Actions from Meeting of 15 September 2004, point 3 vi: Trading forecast September and October given by Steven Ware: Q3/Q4 Objectives, point 4. File Reference: Select Leniency - 1981.

- 4.16 An internal HMG presentation provides a further insight into the view in relation to Parc within the company during this time:³³⁹

*'Operation Wipeout. Target Company: Vinci Group. Reason: Parc in place. Removing the threat to our livelihoods; "Cutting the cancer out of the industry". Objective: To enlighten Vinci Group to the danger of appointing a managing agent into their business.'*³⁴⁰

- 4.17 The 'danger' mentioned above refers to the fact that HMG proposed to tell Vinci that it would not supply Candidates to Vinci if Vinci insisted on using an MSP, specifically Parc.³⁴¹
- 4.18 HMG implemented the strategy that it had formulated during this period by establishing the CRF. The CRF was the name given to the group of Recruitment Agencies that met formally on five occasions between 12 November 2004 and 22 May 2006.

The selection of CRF members by HMG

- 4.19 According to the information in the OFT's possession, Steven Ware of HMG decided which Recruitment Agencies to invite to CRF1 on the basis that he believed they were generally large Recruitment Agencies whom he thought were likely to be involved in Master Vendor and Neutral Vendor arrangements.³⁴²
- 4.20 Steven Ware stated that he thought he should involve the key players in the sector, but claims that in some cases, he did not know the individuals whom he contacted very well, or even at all. He says that he may have chosen whom to contact on the basis of the details in '*Construction News*'.³⁴³

³³⁹ Internal HMG email (with attached presentation) of 18 October 2004 from Claire Burton, and forwarded to further colleagues in an internal email of 18 October 2004 from Alison Playle; File Reference: Select Leniency - 1699.

³⁴⁰ File Reference: Select Leniency - 1108, 1698 and 1699

³⁴¹ File Reference: Select Leniency - 1108, 1698 and 1699.

³⁴² Transcript of OFT interview with Steven Ware (HMG) dated 14 November 2006, page 9. File Reference: Select Leniency - 1859

³⁴³ Transcript of OFT interview with Steven Ware (HMG) dated 14 November 2006, page 9. File Reference: Select Leniency - 1859

- 4.21 The Recruitment Agencies selected by HMG to participate in the CRF were AWA, CDI AndersElite, Eden Brown, Fusion People, Hays, Henry Recruitment and BBT.

Circulation of the CRF1 agenda by HMG

- 4.22 On 1 October 2004, Steven Ware's personal assistant, Angelique Morgan, emailed each of the CRF Members enclosing the agenda for the first CRF meeting which was to take place on 12 November 2004.³⁴⁴
- 4.23 Within HMG the CRF was also referred to as the 'G8' and the first agenda sent to CRF Members was entitled '*G8 Summit – Neutral Vendor*.'³⁴⁵ Mark Bull of HMG was to chair this meeting.
- 4.24 Steven Ware has told the OFT that he or his personal assistant called each of the CRF Members before the meeting and told them that the key reason for the meeting was to discuss MSPs and, in particular, Parc. He has stated to the OFT that he received a very positive response.³⁴⁶
- 4.25 The email which accompanied the agenda circulated in advance of CRF1 was entitled 'Neutral vendor – friend or foe' and stated:

*'Further to our telephone conversations with reference to the above I write to confirm an informal meeting on Friday 12th November 2004.... Please find agenda and location map for your reference'*³⁴⁷

- 4.26 Items two and three from this agenda make clear that the objectives for CRF1 included forming '*a united front*' in light of the emergence of the Neutral Vendor and Master Vendor business model, discussion of the

³⁴⁴ Email of 1 October 2004 from Angelique of HMG on behalf of Steven Ware of HMG, to: Claire McKernan of Hays; Anne Edwards of Fusion People; Zerin Drury of Eden Brown; Kathryn Marks of Henry Recruitment; AWA; Thomas Young of CDI AndersElite; Mike Kenrick of BBT. File Reference: Select Leniency - 155/156.

³⁴⁵ Email of 1 October 2004 from Steven Ware of HMG (attaching '*G8 Summit – Neutral Vendor – Agenda*'), to: Claire McKernan of Hays; Anne Edwards of Fusion People; Zerin Drury of Eden Brown; Kathryn Marks of Henry Recruitment; AWA; Thomas Young of CDI AndersElite; Mike Kenrick of BBT. File Reference: Fusion s27 - 8

³⁴⁶ Transcript of OFT interview with Steven Ware (HMG) dated 14 November 2006 page 4. File Reference: Select Leniency - 1859

³⁴⁷ Email of 1 October 2004 from Angelique Morgan of HMG on behalf of Steven Ware of HMG, to: Claire McKernan of Hays; Anne Edwards of Fusion People; Zerin Drury of Eden Brown; Kathryn Marks of Henry Recruitment; AWA; Thomas Young of CDI AndersElite; Mike Kenrick of BBT. File Reference: Select Leniency–156; Henry s27–14, 15; Fusion s27 – 8, 9,10,11; AndersElite Leniency – 176f

'rise (and fall) of Parc (Taylor Woodrow/Vinci Agreements)' and 'agreement of fee and margin percentages'.

'SETTING THE SCENE

- *neutral Vendor/Master Vendor- Friend or Foe?*
- *Perception of how the industry is changing*
- *Problems/ difficulties encountered*
- ***The rise (and fall) of Parc (Taylor Woodrow/Vinci Agreements)***

WHAT SHOULD OUR STANCE BE REGARDING- NV/MV

- *Benefits of a united front, common goals and actions*
- ***Proposed benchmarks to entry- Fee and margin percentages***
- *Alternative solutions*
- *Benchmarking a way forward/period of reflection'*
(emphasis added)

The operation of the CRF

- 4.27 The CRF met formally at the Institute of Directors on 12 November 2004 ('CRF1'), 24 February 2005 ('CRF2'), 19 May 2005 ('CRF3'), 27 September 2005 ('CRF4') and 22 May 2006 ('CRF5') in order to discuss the emergence of Parc and formulate a strategy to counter the emergence of Parc.³⁴⁸
- 4.28 CRF Meetings were well organised, with agendas being circulated to the Parties in advance. Minutes were also taken, which were circulated to the Parties after each meeting.
- 4.29 CRF Meetings were also well attended. Representatives from each of the CRF Members attended each of the first four CRF Meetings (except for AWA who did not attend CRF2). Representatives of BBT, HMG and Henry Recruitment did not attend CRF5.

³⁴⁸ CRF Minutes also show that the CRF evolved as a forum in the course of its existence where aspects relevant to the construction recruitment industry other than the Margin Protection Initiative were discussed (for example, changes in legislation). Whilst CRF1 appears to have been focused entirely on Parc and the Neutral Vendor/MSP model, CRF2, CRF3, CRF4 and CRF5 included discussions on legislation, the sharing of risk-bad debt information and legal support feedback, amongst others. See Minutes of CRF1, CRF2, CRF3, CRF4 and CRF5; File Reference: Select Leniency – 1604 (CRF1), Select Leniency – 1668 (CRF2), Select Leniency – 1685 (CRF3), Select Leniency – 1624 (CRF4) and Eden Brown s27 – 97 (CRF5).

4.30 Tables C.2 – C.6 in Annex C set out details of when CRF Agendas and CRF Minutes were circulated to each of the Parties, and also which representatives of the Parties attended CRF Meetings.

Contact between the Parties outside of the CRF

4.31 The OFT's investigation has revealed that contact between the Parties was in no way limited to discussion at CRF Meetings. Evidence gathered by the OFT shows that the Parties entered into a range of multi-partite and bi-partite communications in relation to the Margin Protection Initiative. The Parties (with the exception of AWA) also participated in the CRF Conference Call.

The consequences of the Margin Protection Initiative

4.32 The question of whether the Margin Protection Initiative was successful or not is not relevant to the OFT's infringement finding. The clear object of the Margin Protection Initiative was to prevent, restrict or distort competition in the market for the supply, by Recruitment Agencies, of Candidates required by the Construction Industry. This is sufficient to infringe the Chapter I prohibition.

4.33 The fact that certain of the Parties might not have abided fully by the Margin Protection Initiative (specifically the Collective Refusal to Supply Parc) does not relieve that Party of responsibility for it, in particular if the Party knew, may have known or could reasonably have foreseen, that the activity in which it participated was part of an overall plan intended to distort competition.³⁴⁹ This is relevant in this case, for example, because following CRF1 HMG 'cheated' on the agreement that had been reached at CRF1 and signed a Preferred Supplier Agreement with Parc on 10 January 2005 for the supply of Candidates to Vinci. Other Parties responded negatively to HMG signing this agreement with Parc. HMG terminated this agreement on 14 March 2005.

4.34 Despite the Collective Refusal to Supply Parc, Taylor Woodrow remained firm in its position regarding the use of Parc and insisted that all recruitment be carried out via Parc rather than directly with the Parties.

³⁴⁹ See paragraphs 3.71 to 3.73 on non-implementation above.

- 4.35 Between March and April 2005 (during the period of the Margin Protection Initiative) certain of the Parties signed an agreement with Vinci (with a limited role for Parc) at higher Fee Rates than had previously been proposed by Parc to the Parties prior to the creation of the CRF. The agreements entered into between a Party and Vinci with a limited facilitating role for Parc are referred to as the Vinci (Parc Facilitator) Agreements.
- 4.36 The OFT notes however that the Margin Protection Initiative did not ultimately lead to Parc's withdrawal from the supply of Neutral Vendor services to the Construction Industry. The Parties appeared to conclude that the Collective Refusal to Supply Parc had not had the desired impact, and that the reason for this was due, at least in part, to Parc being able to source Candidates from smaller Recruitment Agencies.³⁵⁰

C The admissions of the Leniency Parties

- 4.37 All the Parties, except for AWA, have applied for leniency in this case. AWA is currently in liquidation.
- 4.38 As background, a summary of the admissions of the Leniency Parties in relation to each of the constituent elements of the Margin Protection Initiative is set out below.

Admissions of the Leniency Parties in relation to The Collective Refusal to Supply Parc

- 4.39 All of the Leniency Parties have admitted to participating in an agreement not to work with Parc in connection with its arrangements with Taylor Woodrow and Vinci.³⁵¹

³⁵⁰ See minutes of CRF3 and CRF 4; File Reference: Select Leniency – 1685 & 1624 respectively.

³⁵¹ CDI AndersElite's submission of 19 October 2007, File Reference: AndersElite Leniency - 209a; HMG and BBT co-ordinated conduct evidence grids, File Reference: Select Leniency 1943 and Letter of 19 October 2007 from Cobbetts on behalf of Select to the OFT; File Reference: Select-Leniency-2101; Letter of 19 October 2007 from Taylor Wessing on behalf of Eden Brown to the OFT; File Reference: Eden Brown-Leniency-84; Fusion People's leniency application of 17 September 2007, paragraph 18, File Reference: Fusion-Leniency-162; Letter of 19 October 2007 from Freshfields on behalf of Hays to the OFT, File

Admissions of the Leniency Parties in relation to the Target Fee Rates Initiative

- 4.40 CDI Corp, BBT, Eden Brown, Hays and HMG have admitted an agreement and/or concerted practice to set and apply a target minimum fee in relation to the supply of Candidates to Neutral Vendors and/or Construction Companies.³⁵²
- 4.41 Fusion People and Henry Recruitment have admitted participation in, at the very least, a concerted practice to directly or indirectly coordinate fees and other terms in breach of the Competition Act and they have signed their leniency agreements on this basis.³⁵³

Admissions of the Leniency Parties in relation to the scope of The Target Fee Rates Initiative

- 4.42 Hays' and Henry Recruitment's admissions in relation to the Target Fee Rate Initiative relate to Fee Rates for the supply of Candidates to Neutral Vendors.³⁵⁴
- 4.43 BBT's, HMG's, Eden Brown's, Fusion People's and CDI Corp's admissions in relation to the Target Fee Rates Initiative relate to the Fee Rates for the supply of Candidates from the Parties to both Neutral Vendors and Construction Companies direct.³⁵⁵

Reference: Hays-Leniency-710; Henry Recruitment Co-ordinated Conduct Evidence Table, File Reference: Henry Leniency – 40.

³⁵² CDI AndersElite's submission of 19 October 2007, File Reference: AndersElite Leniency - 209a; HMG and BBT fees evidence grids, File Reference: Select Leniency 1943 and Letter of 19 October 2007 from Cobbetts on behalf of Select to the OFT; File Reference: Select-Leniency-2101; Letter of 19 October 2007 from Taylor Wessing on behalf of Eden Brown to the OFT; File Reference: Eden Brown-Leniency-84; Letter of 19 October 2007 from Freshfields on behalf of Hays to the OFT, File Reference: Hays-Leniency-710.

³⁵³ Fusion People's leniency application of 17 September 2007, paragraph 18, File Reference: Fusion-Leniency-162, Letter from OFT to Fusion People dated 15 July 2008, File Reference: Fusion Leniency 187; Henry Recruitment Fees Evidence Table; File Reference: Henry Leniency – 39, Letter from OFT to Henry Recruitment dated 15 July 2008, File Reference: Henry Leniency 69.

³⁵⁴ Henry Recruitment Fees Evidence Table, File Reference: Henry Leniency – 39; Letter of 19 October 2007 from Freshfields on behalf of Hays to the OFT, File Reference: Hays-Leniency-710.

³⁵⁵ CDI AndersElite's submission of 19 October 2007, File Reference: AndersElite Leniency - 209a; HMG and BBT fees evidence grids, File Reference: Select Leniency 1943 and Letter of

D Agreement(s) and/or a concerted practice implemented by each of the parties in respect of the supply of Candidates to Construction Companies

The Collective Refusal to Supply Parc

- 4.44 In this section of this Decision the OFT presents, analyses and draws conclusions from the evidence in relation to the Collective Refusal to Supply Parc on which it is relying in reaching its conclusions.
- 4.45 The OFT finds that each of the Parties infringed the Chapter I prohibition by entering into an agreement to withdraw and/or refrain from entering into any contracts in which Parc was acting as a Neutral Vendor for the supply of Candidates to Construction Companies. This agreement had as its object the prevention, restriction or distortion of competition in the market for the supply, by Recruitment Agencies, of Candidates required by the Construction Industry.
- 4.46 This section is structured as follows:
- First, it provides a summary of The Collective Refusal to Supply Parc (paragraphs 4.47 to 4.50);
 - Second, it presents and analyses the evidence on which the OFT relies in respect of the Collective Refusal to Supply Parc by reference to the relevant law (paragraphs 4.51 to 4.165); and
 - Third, it sets out the OFT's conclusions in respect of each Party's involvement in the Collective Refusal to Supply Parc by reference to the evidence and the relevant law (paragraphs 4.166 to 4.174).

19 October 2007 from Cobbetts on behalf of Select to the OFT; File Reference: Select-Leniency-2101, and Letter of 17 October 2007 from Cobbetts on behalf of Select to the OFT, File Reference: Select-Leniency-2099; Letter of 19 October 2007 from Taylor Wessing on behalf of Eden Brown to the OFT; File Reference: Eden Brown-Leniency-84; Fusion People's leniency application of 17 September 2007, paragraph 18, File Reference: Fusion-Leniency-162.

Summary of the Collective Refusal to Supply Parc

- 4.47 In September 2004 HMG contacted various Recruitment Agencies with a view to setting up CRF1. At CRF1, attended by all of the Parties, discussions took place as to how the Parties could react to the threat posed by Parc to their margins. As a result of those discussions it was agreed that the Parties would terminate their existing agreements with Parc and decline to enter any new agreements with Parc.
- 4.48 Following CRF1, each of the Parties either terminated their contracts or declined to deal with Parc for the supply of Candidates to Taylor Woodrow and/or Vinci, subject to the following three exceptions:
- Following CRF1, HMG entered into an agreement with Parc for the supply of Candidates to Vinci on 10 January 2005. Under this agreement HMG secured higher Fee Rates than had been proposed by Parc prior to the creation of the CRF. Other Parties responded negatively to HMG entering into this agreement with Parc. HMG subsequently terminated this agreement on 14 March 2005.
 - AWA appears to have never had the opportunity to implement the agreement not to supply Candidates to Taylor Woodrow via Parc because it never signed a PSA with Parc to supply Candidates to Taylor Woodrow and nor was it approached by Parc for that purpose. Moreover it did not abide by the Collective Refusal to Supply Candidates to Vinci via Parc.
 - It appears that following CRF1 Hays did not fully stop supplying Candidates to Taylor Woodrow through Parc, continuing to supply a certain category of Candidates ('technical'³⁵⁶) to Taylor Woodrow via Parc.
- 4.49 As has been set out, the fact that a Party might not have abided fully by the Collective Refusal to Supply Parc does not relieve that Party of responsibility for it, in particular if the Party knew, may have known or

³⁵⁶ Broad classifications of candidates such as 'Labour', 'Technical' and 'Trade and Labour' cited here and elsewhere within this Decision are often those used by the Parties themselves and may differ between them. They do not therefore necessarily correspond exactly with the Standard Occupational Classification.

could reasonably have foreseen, that the activity in which it participated was part of an overall plan intended to distort competition.³⁵⁷

- 4.50 Subsequent to CRF2, Hays, Fusion People and HMG entered into (separate) agreements with Vinci whereby Parc acted as a facilitator in the supply of Candidates to Vinci. Under this Vinci (Parc Facilitator) Agreement, Parc acted in a more limited capacity than would have been the case had it been acting as a Neutral Vendor under a Preferred Supplier Agreement. In particular, Parc could not negotiate fees and manage the entire recruitment process. In respect of each of these agreements, the Fee Rates were higher than those which had been proposed by Parc to the Parties prior to the creation of the CRF.

Analysis of evidence in relation to The Collective Refusal to Supply Parc

Introduction

- 4.51 As indicated in paragraphs 3.22 to 3.28 of section 3 above, an agreement within the meaning of the Chapter I prohibition exists where at least two undertakings adhere to a common plan that limits, or is likely to limit, their individual commercial freedom by determining the lines of their mutual action, or abstention from action, in the market. The form in which they adhere to this plan and the fact that a party to the agreement does not implement it or cheats on it at certain times does not preclude the finding that an agreement existed.
- 4.52 A 'Collective Refusal to Supply' will have as its object the prevention, restriction or distortion of competition when it is pursued as part of overall cartel activity or a single continuous infringement where the agreement and/or concerted practice has the object of preventing, restricting or distorting competition. In this regard, the OFT has found that the Collective Refusal to Supply Parc was part of a wider strategy to safeguard the margins that the Parties could achieve in relation to the supply of Candidates to Neutral Vendors and Construction Companies which had as its object the prevention, restriction or distortion of competition.

Analysis relied on by the OFT in relation to the Collective Refusal to Supply Parc

³⁵⁷ See paragraphs 3.71 to 3.73 above.

4.53 Much of the evidence relevant to the Collective Refusal to Supply Parc refers to an explicit 'agreement' within CRF Meetings not to deal with Parc (and in one internal Eden Brown email to a 'pact' not to deal with Parc³⁵⁸) or the parties having 'agreed' not to deal with Parc. This evidence is derived from the following contemporaneous sources:

- CRF Agendas, CRF Minutes³⁵⁹ and manuscript notes taken at CRF Meetings;
- Documentary evidence relating to the Collective Refusal to Supply Parc in respect of the supply of Candidates to Taylor Woodrow;
- Documentary evidence relating to the Collective Refusal to Supply Parc in respect of the supply of Candidates to Vinci; and
- Additional internal and external correspondence between the Parties.

4.54 Given the contemporaneous nature of this documentary evidence, the OFT places particular emphasis and reliance on this material. Accordingly, in the absence of any compelling countervailing evidence, the OFT is following its literal meaning.³⁶⁰

CRF Agendas, CRF Minutes and manuscript notes taken at CRF Meetings

4.55 Paragraphs 4.56 to 4.69 below provide an overview of the evidence from CRF Agendas, CRF Minutes and manuscript notes taken at CRF Meetings in relation to the Collective Refusal to Supply Parc. More

³⁵⁸ Email (internal) of 26 January 2006 from Andrew Thorpe to Ian Wolter of Eden Brown; *File Reference: Eden Brown s27-54*.

³⁵⁹ A number of parties have made representations regarding the accuracy of the CRF minutes. The OFT considers the minutes to be an accurate representation of the discussions that took place during the CRF meetings. The reasoning for this is in Annex B. Also, after the first CRF1 it appears that a set of draft minutes and action points were created within HMG (entitled 'G8 SUMMIT MEETING') along with a note outlining key action points (also entitled 'G8 SUMMIT MEETING'). These notes were then finalised and circulated to CRF Members (entitled 'Construction Recruitment Forum'). All references to CRF1 Minutes in this Decision, unless otherwise specified, are to the Minutes entitled 'Construction Recruitment Forum' that were circulated to the CRF Members by HMG.

³⁶⁰ *'As regards the contemporaneous decision, it seems to us that a document prepared at the time, which the author never anticipated would see the light of day, is likely to be more credible than explanations given later. We have therefore given weight to contemporary documents, unless there is a good reason not to do so.'* JJB Sports v OFT, [2004] CAT 17, para 287.

detailed references to this evidence in the context of the supply to Taylor Woodrow and Vinci is set out when the Collective Refusal to Supply Parc in relation to Taylor Woodrow and Vinci is considered.

CRF1

- 4.56 At CRF1 the Parties agreed not to supply Parc and agreed that they would write to Taylor Woodrow and Vinci confirming this.
- 4.57 In respect of CDI AndersElite, Fusion People, Henry Recruitment, HMG, AWA and Eden Brown, the CRF1 Minutes set out details of the timeframe within which each of these Parties would withdraw from their PSA with Parc to supply Candidates to Taylor Woodrow and Vinci. The CRF 1 Minutes also state that Hays would look to opt out, but that it [...] [C] and also that BBT had not entered into an agreement with Parc and had no intention of doing so.³⁶¹
- 4.58 Handwritten notes of Karen Harris of HMG taken at CRF1 also support a view that the CRF Members agreed not to supply Candidates to Parc. For example:

'Parc – no exclusivity

Agreed not to deal with them on any new agreements.

(12.5-17 on PSA/MV direct)

What do we do on agreements already in place, i.e. TW?

No vacancy's to be filled via Parc for TW as of Mon – all agreed – stop

Vinci – all agreed not to enter the agreement at all.

*Do we serve notice on Parc? – formally serve notice ~~by end Nov~~ over next three month period + cc to TW.'*³⁶²

³⁶¹ See paragraph 4.73 below.

³⁶² Transcript of Karen Harris' handwritten notes of CRF1; File Reference: Select Leniency 1831.

- 4.59 Handwritten notes of Chay Smalls of Henry Recruitment taken at the CRF1 clearly indicate a desire to withdraw from the supply of Candidates to Parc:

*'Give notice on Parc! – over months = 3'*³⁶³

CRF2

- 4.60 Item two of the agenda circulated in advance of CRF2 is headed '*PARC UPDATE*' and included a sub-heading '*Vinci-Taylor Woodrow*'.³⁶⁴
- 4.61 CRF2 Minutes record that during this meeting each of the CRF Members updated those present on actions agreed at CRF1 in relation to the Collective Refusal to Supply Parc and in particular the supply of Candidates to Taylor Woodrow and Vinci and on the status of their dealings with Taylor Woodrow, Vinci and Parc. If a CRF Member had already withdrawn from the agreement to supply Candidates to Taylor Woodrow via Parc or confirmed to Vinci that they would not supply Candidates to Vinci via Parc, this was confirmed to those present.³⁶⁵
- 4.62 During CRF2, CRF Members sounded a warning that Parc was trying to establish itself with three other Construction Companies (Gleasons, Mowlems and Amec), and agreed that the CRF Members would not supply Candidates to Parc in relation to these Construction Companies. In this respect the CRF2 Minutes record the CRF Members agreeing as follows:

'All agreed that when speaking to Gleasons, Mowlems and Amec we back up the fact that Parc are not the way forward for them and that we do not wait (sic) to work via Parc'.³⁶⁶

CRF3

- 4.63 CRF3 Minutes record that during this meeting CRF Members gave a further update on the status of the Collective Refusal to Supply Parc and also the position with regard to Taylor Woodrow and Vinci.

³⁶³ Page 3; File Reference Henry s27-20.

³⁶⁴ Agenda for CRF2; File Reference: Select Leniency – 1607.

³⁶⁵ Minutes of CRF2, Item 2; File Reference: Select Leniency – 1668.

³⁶⁶ Minutes of CRF2, Item 2.2; File Reference: Select Leniency – 1668.

4.64 Again, as with CR2, CRF3 Minutes record the CRF Members also agreed not to supply Candidates to Parc in relation to Construction Companies other than Taylor Woodrow and Vinci. Item 3.2 of the CRF Minutes confirm that Parc were '*actively targeting*' the Construction Company Multiplex in addition to the Construction Companies previously identified at CRF2. Under this item CRF Members are recorded as concluding as follows:

'All agreed NOT to enter into any further agreements via Parc without consultation and openness in the forum group'.³⁶⁷

4.65 However, by the time of CRF3, it appears to the OFT that CRF Members had come to a realisation that they were unable to have an impact on Parc's ability to act as a Neutral Vendor to the Construction Industry in the way that had been envisaged at the time of CRF1.

4.66 CRF3 Minutes record, under the heading '*Do We actually want to resolve the issues we have with Parc on Vinci and Taylor Woodrow*', as follows: '*It is evident that as a group we don't actually have as much ability to control things as we first thought*'.³⁶⁸

CRF4

4.67 During CRF4 the CRF discussed the reasons for Parc's ability to withstand the Collective Refusal to Supply Parc. CRF 4 Minutes record, under the heading '*NEUTRAL VENDOR/VINCI PARC*', sub-heading '*Conclusions*' as follows:

'Parc will work with or without us and in reality don't need the business of the group to survive. There are too many second tier suppliers working at lower fees'.³⁶⁹

4.68 Despite this apparent realisation, during CRF 4 the CRF Members agreed to maintain their position in relation to The Collective Refusal to Supply Parc, with the CRF4 Minutes recording as follows (item1): '*All agreed to maintain our stance and not support Parc*'.

³⁶⁷ Minutes of CRF3, Item 3.2; File Reference: Select Leniency – 1685.

³⁶⁸ Minutes of CRF3, item 3.3; File Reference: Select Leniency – 1685.

³⁶⁹ Minutes of CRF4, item 1; File Reference: Select Leniency - 1624.

4.69 Handwritten notes taken at CRF4 by Karen Harris (of HMG) support the view that although CRF Members seemed to recognise at this time that their strategy to refuse to supply candidates to Parc had not had the desired impact, CRF Members still agreed to remain steadfast in not dealing with Parc:

- *'Parc/Vinci working without us don't need to do their business – summary with or without us. Price to the lowest level. Vinci are happy with Parc Services.*
- *Too many second tier suppliers type company.*
- *Only way to counteract parc getting the business would be to price lower.*
- [...] [C]
- *We should **Not** support them.*
- *All agreed maintain stance with Parc'*³⁷⁰

Evidence relating to the Collective Refusal to Supply Parc in respect of the supply of Candidates to Taylor Woodrow

4.70 At the time of CRF1, CDI AndersElite, Fusion People, Eden Brown, Hays, HMG and Henry Recruitment had all entered into PSAs with Parc for the supply of Candidates to Taylor Woodrow.

4.71 Paragraphs 4.72 to 4.98 below provide a detailed account of the Parties' refusal to supply Candidates to Parc in respect of Taylor Woodrow.

4.72 The CRF1 Minutes record that:

'All agreed the outcome and actions as follows:

...

*All agencies to serve notice by writing to both Parc and the key Directors at Taylor Woodrow and Vinci Group explaining their reasons for opting out of the supply of both Permanent and Freelance recruitment services to the client via Parc'*³⁷¹

³⁷⁰ Page 1 of Transcribed notes; File Reference: Select Leniency - 2045.

³⁷¹ Minutes of CRF1, item 1.2; File Reference: Select Leniency – 1604.

4.73 The CRF1 Minutes also reveal that a timetable for the withdrawal by each CRF Member from their Preferred Supplier Agreements with Parc was established as follows:

- '- Group Discussion took place on Parc, Taylor Woodrow and Vinci Group.*
- All agreed that the current fees and make up of the agreement is not acceptable.*
- No direct contact by agencies to Line Managers at Taylor Woodrow, Norwest Holst and Vinci is restricting our business.*
- All agreed the outcome and actions as follows:*
 - 1. Anders Elite – stated that they will opt out of the Parc agreement and are already at the end of the 6 month period.*
 - 2. Fusion People – have a meeting arranged for end of November at which time they will terminate their agreement.*
 - 3. Henry Recruitment – stated that they will opt out by end of November 2004*
 - 4. Hill McGlynn – stated that they will opt out by end of December 2004*
 - 5. AWA – stated that they will opt out by end December 2004*
 - 6. Eden Brown – stated that they will opt out by end December 2004*
 - 7. Hayes (sic) – stated that as they are [.....] [C] [.....] [C], Simon Cheshire confirmed that they will look into opting out and the ability to keep the Labour Hire business contract*

*8. BBT – stated that they had not signed up to the agreements and had no intention of doing so.*³⁷²

4.74 After CRF1, the following Parties either terminated their agreements with Parc for the supply of Candidates to Taylor Woodrow or (for those Parties that had not entered into such an agreement) declined Parc's corresponding offer to that effect:

- BBT - 18 November 2004: Mike Kenrick of BBT wrote to Darren Day of Parc stating that BBT were not prepared to sign up to the Taylor Woodrow deal implying it was due to low Fee Rates.³⁷³
- CDI AndersElite - 19 November 2004: John Petersen of CDI AndersElite wrote to Marian Noone of Parc stating that CDI AndersElite had no intention to continue as a second-tier supplier to Parc for Taylor Woodrow.³⁷⁴
- Henry Recruitment - 22 November 2004: Nick McCaffrey of Henry Recruitment wrote to Andrew Niker of Parc serving notice of termination of the agreements with Parc for the supply of Candidates to Taylor Woodrow and Vinci.³⁷⁵
- Eden Brown - 17 December 2004: Tony Pearce of Eden Brown wrote to Darren Day of Parc stating the Parc/Taylor Woodrow agreement did not fit in with Eden Brown's commercial interests and serving notice of termination.³⁷⁶
- Fusion People - 14 January 2005: Paul Metcalfe of Fusion People wrote to Andrew Niker and Darren Day of Parc instructing them to

³⁷² Minutes of CRF1, Item 1.1 and 1.2; File Reference: Select Leniency – 1604.

³⁷³ Email of 18 November 2004 from Mike Kenrick of BBT to Darren Day of Parc; File Reference: Select Leniency - 1652

³⁷⁴ Letter of 19 November 2004 from John Petersen of CDI AndersElite to Marian Noone of Parc; File Reference: AndersElite Leniency-77. See also Letter of 23 November 2004 from John Petersen of CDI AndersElite to Andrew Wyllie of Taylor Woodrow informing them of CDI AndersElite's decision not to work through Parc; File Reference: AndersElite Leniency-80.

³⁷⁵ Letter of 22 November 2004 from Nick McCaffrey of Henry Recruitment to Andrew Niker of Parc; File Reference: Henry Leniency-7.

³⁷⁶ Letter of 17 December 2004 from Tony Pearce of Eden Brown to Darren Day of Parc; File Reference: Eden Brown s27-12.

remove Fusion People from the second-tier supplier list to Parc's client, Taylor Woodrow.³⁷⁷

- Hays - 31 January 2005: Duncan Collins of Hays wrote to Brian Warrington of Taylor Woodrow informing him that Hays would not supply Candidates to Taylor Woodrow with Labour through Parc in the North West Region.³⁷⁸
- HMG - 24 February 2005: Karen Sims of HMG wrote to Darren Day of Parc confirming that HMG would not supply Candidates to Taylor Woodrow via Parc under the current trading terms.³⁷⁹

4.75 The CRF2 Minutes record updates being given on the status of each Party's withdrawal from its Preferred Supplier Agreement with Parc for the supply of Candidates to Taylor Woodrow, as follows:

- CDI AndersElite

'Vinci/TW – Anders have told both that they are not prepared to deal with them under the Parc Agreement'³⁸⁰

- Fusion People

'Letters were then issued in January to TW and Parc to confirm their exit of the agreement'³⁸¹

- Henry Recruitment

'Wrote to TW and Parc to confirm their exit of the PSA agreement'³⁸²

³⁷⁷ Letter of 14 January 2005 from Paul Metcalfe of Fusion People to Andrew Niker and Darren Day of Parc. See also letter of the same date sent to Taylor Woodrow informing them of Fusion People's decision in relation to the Parc arrangement; File Reference: Fusion s27-33.

³⁷⁸ Letter of 31 January 2005 from Duncan Collins of Hays to B. Warrington of Taylor Woodrow Developments; File Reference: Hays Leniency - 23. This letter was a response to Taylor Woodrow's letter of 27 January informing Hays that Taylor Woodrow North West had entered into an agreement with Parc for the supply and management of all of their agency labour requirements, with effect from 1 February 2005; File Reference: Hays Leniency - 22.

³⁷⁹ File Reference: Select Leniency - 2008.

³⁸⁰ Minutes of CRF2, item 2.1; File Reference: Select Leniency – 1668.

³⁸¹ Minutes of CRF2, item 2.1; File Reference: Select Leniency – 1668.

- Eden Brown

'confirmed their exit of the TW/Parc agreement'³⁸³

- Hays

'As previously discussed did not exit the TW agreement due to their current [...] [C] and their Labour Hire Business. Hays are dealing with Labour directly to TW and Technical still via the Parc Agreement'

and

'Simon Cheshire confirmed that if the Labour Hire business was put through Parc as well Hays would exit the agreement on both the Labour and Technical business'³⁸⁴

- BBT

'TW – did not ever join the agreement'³⁸⁵

- Hill McGlynn

'TW - Exited the agreement'³⁸⁶

4.76 The CRF3 Minutes³⁸⁷ reveal further updates being provided, and confirmation that HMG, Fusion People, BBT, Henry Recruitment, CDI AndersElite, AWA and Eden Brown were not supplying Candidates to Parc in respect of Taylor Woodrow.

4.77 The Collective Refusal to Supply Parc in respect of Taylor Woodrow appears to have remained in place from CRF3 on 19 May 2005 until

³⁸² Minutes of CRF2, item 2.1; File Reference: Select Leniency – 1668.

³⁸³ Minutes of CRF2, item 2.1; File Reference: Select Leniency – 1668.

³⁸⁴ Minutes of CRF2, item 2.1; File Reference: Select Leniency – 1668.

³⁸⁵ Minutes of CRF2, item 2.1; File Reference: Select Leniency – 1668.

³⁸⁶ Minutes of CRF2, item 2.1; File Reference: Select Leniency – 1668.

³⁸⁷ Minutes of CRF3, Item 3.1; File Reference: Select Leniency – 1685.

January 2006, when Hays and HMG entered into agreements with Parc to supply Candidates to Taylor Woodrow.³⁸⁸

- 4.78 Accordingly, until this time none of the CRF Members' who had either terminated their agreements with Parc, or declined Parc's offer to supply Candidates to Taylor Woodrow, had resumed dealing with Parc to supply Candidates to Taylor Woodrow.³⁸⁹

The position of AWA and Hays in relation to the supply of Candidates to Taylor Woodrow

- 4.79 It does not appear that AWA was approached by Parc or Taylor Woodrow to supply Candidates to Taylor Woodrow, and therefore may not have had an opportunity to implement the Collective Refusal to Supply Parc in relation to Taylor Woodrow. Hays only partially abided by the Collective Refusal to Supply Parc.
- 4.80 The relevant evidence in relation to AWA and Hays does not affect the OFT's infringement finding in relation to AWA and Hays, for the reasons that are set out below.

AWA

- 4.81 AWA appears to have never entered into an agreement to supply Taylor Woodrow via Parc or have been approached by Parc for that purpose from September 2003 and throughout the period of the infringement.³⁹⁰ The OFT notes that AWA may have never been approached by Parc or Taylor Woodrow to supply Taylor Woodrow and may not have had the opportunity to implement the Collective Refusal to Supply Parc in respect of Taylor Woodrow.

³⁸⁸ HMG Timeline document; File Reference: Select Leniency 1776; Parc Timeline Document; File Reference: Parc Third party Correspondence - 45.

³⁸⁹ However, see paragraphs 4.84 to 4.88 for further information regarding the position of Hays.

³⁹⁰ The OFT has not found evidence of an agreement between AWA and Parc or BBT and Parc for the supply of candidates to Taylor Woodrow. In this regard, see timeline submitted on 31 July 2006 by Darren Day of Parc to the OFT, which does not include AWA or BBT in the list of agencies who were approached by Parc or entered into an agreement with Parc for the provision of candidates to Taylor Woodrow, File Reference: Parc Third Party Correspondence - 45; See also agreed notes of a meeting held on 27 February 2007 between Taylor Woodrow and the OFT, response to question 11; File Reference: TW Third Party Correspondence - 272. The OFT has found an email from BBT to Parc of 18 November 2004 which suggests that Parc approached BBT to discuss supply of candidates to Taylor Woodrow; File Reference: Select Leniency - 1652.

- 4.82 This does not preclude the finding that AWA participated in an agreement consisting of the Collective Refusal to Supply Parc. The fact that an undertaking does not respect an agreement at all times or does not implement it is not material to the finding that an agreement existed.
- 4.83 As has been set out, liability for an infringement of the Chapter I prohibition may be excluded when there is evidence that the undertaking in question objected or publicly distanced itself from the unlawful discussions or agreements that took place in meetings with its competitors. The OFT has not found any evidence that AWA's representatives raised any objections or distanced themselves publicly from what was discussed and agreed at CRF meetings.

Hays

Technical staff

- 4.84 At the time of CRF1, Hays had an agreement with Parc to supply 'technical' staff to Taylor Woodrow's Development and Construction divisions. It appears that following CRF1 Hays continued to supply 'technical' staff to Taylor Woodrow through Parc.
- 4.85 CRF2 Minutes (see paragraph 4.75 above) and CRF3 Minutes indicate that Hays continued to supply 'technical' staff to Taylor Woodrow through Parc.

Labour staff

- 4.86 At the time of CRF1, Parc did not have an agreement to supply 'labour staff' to Taylor Woodrow and so Hays supplied these staff directly. On 27 January 2005, Hays were notified that with effect from 1 February 2005, Parc was appointed to manage the supply of 'Trade and Labour' to Taylor Woodrow Development in the North West region.³⁹¹ In a letter dated 31 January 2005, Hays informed Taylor Woodrow that it refused to supply Labour Candidates to Taylor Woodrow through Parc in the

³⁹¹ Letter from Tony Mellor (Taylor Woodrow Developments Limited) to Hays dated 27 January 2005; File Reference: Hays Leniency 22.

North West Region.³⁹² CRF2 Minutes confirm that *'Hays are dealing with Labour directly to TW and Technical still via the Parc agreement'*.

- 4.87 Further, CRF3 Minutes confirm that Hays maintained this stance in the face of opposition from Taylor Woodrow:

' [Hays] Currently remain in an agreement with TW as this is linked to the Labour Hire Business. TW have tried to move the agreement to work via Parc but Hays have told them that they would walk away from the agreement if this happened'.

- 4.88 In November 2005, Parc was appointed by Taylor Woodrow Development to manage all agency requirements for all regions. Hays wrote to Parc in November 2005 expressing a willingness to supply labour Candidates via Parc to Taylor Woodrow Development. Agreement to this effect was reached in January 2006.

The position of Taylor Woodrow throughout the Collective Refusal to Supply Parc

- 4.89 Throughout 2005, and even after all the Parties (except for AWA³⁹³) terminated their existing contracts with Parc for supply of candidates to Taylor Woodrow or declined an offer from Parc to that effect,³⁹⁴ Justine Brown (Head of Resourcing and Contracts at Taylor Woodrow) remained firm in her position regarding Parc and insisted that all recruitment be carried out through Parc rather than directly with the Recruitment Agencies in question.³⁹⁵ This approach is evidenced by the following extract from a letter of 13 December 2004 from Justine Brown to John Petersen of CDI AndersElite:

'As you are aware, Parc's role at Taylor Woodrow includes the management of all our vacancies and the processing of all related invoices, and this remains the only mechanism that Taylor

³⁹² Letter from Duncan Collins (Hays) to B Warrington (Taylor Woodrow Developments Limited) dated 31 January 2005; File Reference: Hays Leniency 23.

³⁹³ See paragraph 4.81.

³⁹⁴ See paragraph 4.74 above.

³⁹⁵ See for example: Letters of 13 December 2004 and 22 February 2005 from Justine Brown of Taylor Woodrow to John Petersen of CDI AndersElite, File Reference: AndersElite-Leniency-85 and AndersElite-s26-77. Also Letter of 9 February 2005 from Justine Brown to Nick McCaffrey of Henry Recruitment; File Reference: Henry s27-45a.

*Woodrow recognise for the sourcing of staff and for payment. In light of this and for the benefit of our other suppliers, we kindly request that you inform your consultants not to contact or supply any further details to Taylor Woodrow. We shall not be liable to meet the Charges to any such activity, unless they are under the terms agreed with Parc in line with the contract originally signed.*³⁹⁶

4.90 Further evidence of the Parties trying unsuccessfully to deal directly with Taylor Woodrow can be found in Justine Brown's letters of 9 February 2005 and 22 February 2005 to Nick McCaffrey of Henry Recruitment³⁹⁷ and John Petersen of CDI AndersElite³⁹⁸ respectively.

4.91 In her letter to Nick McCaffrey, Justine Brown stated:

'During the last few months you served a letter which stated that your company were terminating your agreement with Parc Resource Management who have been appointed to manage all recruitment for Taylor Woodrow. At this time it was explained that this is the only mechanism that Taylor Woodrow recognise for providing staff and for making payments to.

*It has now come to my attention that your business has continued to attempt supply against your previous letter and the wishes of Taylor Woodrow Human Resources. As inferred, Henry recruitment are not recognised as a Supplier of recruitment services to Taylor Woodrow and hence we will return any future invoices as you have no mechanism to deal directly'*³⁹⁹

4.92 In her letter to John Petersen, Justine Brown stated:

'In December you served a letter, which stated that your company were terminating your agreement with Parc Resource Management who have been appointed to manage all recruitment for Taylor Woodrow. At this time it was explained that this is the only

³⁹⁶ Letter of 13 December 2004 from Justine Brown of Taylor Woodrow to John Petersen of CDI AndersElite; File Reference: AndersElite Leniency-85.

³⁹⁷ File Reference: Henry s27-45a.

³⁹⁸ File Reference: AndersElite s26-77.

³⁹⁹ Letter of 9 February 2005 from Justine Brown of Taylor Woodrow to Nick McCaffrey of Henry Recruitment; File Reference: Henry s27-45a.

mechanism that Taylor Woodrow recognise for providing staff and for making payments to suppliers.

We meet [sic] in early January to discuss the issues and concerns of both parties and agreed that you would provide a proposal for new rates to be charged going forward. You can therefore imagine my surprise when on Friday rather than receiving a one-page document detailing your proposed new charge rates I received a supply proposal, service options and new terms and conditions.

As you are aware, Parc's role at Taylor Woodrow includes not only the management of all our vacancies and the processing of all related invoices, but negotiating with suppliers on our behalf in respect of contract negotiations. I have therefore passed a copy of the supply proposal, service options and new terms and conditions to Darren Day at Parc so that he can contact you to discuss the renegotiation of your contract. Taylor Woodrow will not be involved in these discussions and we are happy to leave Anders Elite and Parc to come to an agreement on the terms of the contract going forward.⁴⁰⁰

Conclusion in relation to the Collective Refusal to Supply Parc in relation to Taylor Woodrow

- 4.93 At CRF1 all of the Parties agreed not to deal with Parc in any capacity in relation to the supply of Candidates to Taylor Woodrow.
- 4.94 Those Parties that had already entered into Preferred Supplier Agreements with Parc to supply Candidates to Taylor Woodrow withdrew from these agreements following CRF1.
- 4.95 Those Parties who had not already entered into Preferred Supplier Agreements with Parc to supply Candidates to Taylor Woodrow did not subsequently do so, in accordance with the agreement reached at CRF1.
- 4.96 The Parties updated each other on the respective positions on the Collective Refusal to Supply Parc in relation to Taylor Woodrow at CRF Meetings.

⁴⁰⁰ Letter of 22 February 2005 from Justine Brown of Taylor Woodrow to John Petersen of CDI AndersElite; File Reference: AndersElite s26-77.

- 4.97 During this time, Taylor Woodrow refused to source Candidates direct from the Parties, despite the attempts of certain of the Parties to enter into PSAs with Taylor Woodrow direct.
- 4.98 With the exception of AWA and of Hays with respect to 'Technical' staff, each of the Parties subsequently acted on this agreement by collectively refusing to supply Candidates via Parc to Taylor Woodrow, until at least January 2006.

Evidence relating to the Collective Refusal to Supply Parc in respect of the supply of Candidates to Vinci

- 4.99 The only Parties who had entered into Preferred Supplier Agreements with Parc for the supply of Candidates to Vinci by the time of CRF1 were Henry Recruitment and AWA. CRF1 Minutes record that all CRF Members agreed during this meeting that they would not supply Candidates to Parc in relation to Vinci:

'All agreed the outcome and actions as follows:

...

All agencies to serve notice by writing to both Parc and the key Directors of Taylor Woodrow and Vinci Group explaining their reasons for opting out of the supply of both Permanent and Freelance recruitment services to the client via Parc⁴⁰¹

- 4.100 Following CRF1 on 12 November 2004 and after all but one of the Parties had declined Parc's initial offer or terminated their existing contract with Parc,⁴⁰² HMG 'cheated' on the agreement reached at CRF1 to not supply candidates to Parc and on 10 January 2005 signed a PSA with Parc to supply Candidates to Vinci. This agreement contained higher Fee Rates than those originally offered by Parc prior to the formation of the CRF.⁴⁰³

⁴⁰¹ Minutes of CRF Meeting of 12 November 2004, item 1.2; File Reference: Select Leniency 1604.

⁴⁰² Save for AWA, see paragraphs 4.118 to 4.119 below.

⁴⁰³ In September 2004 Parc contacted various CRF Members and offered them to enter into a contract with Parc for the supply of permanent candidates to Vinci at 10%. The contract HMG entered into in January 2005 had rates of 13.5% for candidates with salaries up to

4.101 Also, between CRF2 and CRF3, Hays, Fusion People and HMG signed a PSA direct with Vinci, which involved Parc in a limited capacity (the Vinci (Parc Facilitator) Agreement). In entering into this agreement, these Parties also achieved higher fee rates than had previously been offered to them by Parc prior to the formation of the CRF.

4.102 This part of this Decision considers the Collective Refusal to Supply Parc as it relates to Vinci under the following headings:

- The position of Henry Recruitment, CDI AndersElite and BBT;
- HMG 'cheats' on the agreement reached at CRF1, and the position of AWA;
- Hays pioneers the Vinci (Parc Facilitator) Agreement;
- Hays, HMG and Fusion People sign Vinci (Parc Facilitator) Agreements; and
- HMG, Hays and Eden Brown contract directly with Parc for the supply of Candidates to Vinci.

The position of Henry Recruitment, CDI AndersElite and BBT.

4.103 On 22 November 2004, Nick McCaffrey of Henry Recruitment wrote to Andrew Niker of Parc serving notice of termination of the agreements with Parc for the supply of Candidates to Vinci. He also wrote to Vinci (and HMG⁴⁰⁴) to confirm this.⁴⁰⁵ Henry Recruitment subsequently declined an offer of a direct Preferred Supplier Agreement with Vinci on 28 April 2005⁴⁰⁶ and continued not to deal with Parc either directly or indirectly for the rest of the period covered by the OFT's investigation.

4.104 The stance of CDI AndersElite and BBT remained unchanged throughout the period covered by the OFT's investigation. Neither of these Parties

£45,000 and 16% for candidates with salaries above £45,000. See spreadsheet prepared by Parc setting out Margins; File Reference: Parc Third Party Correspondence-243.

⁴⁰⁴ Email from Kathryn Marks (on behalf of Nick McCaffrey) of Henry Recruitment to Steven Ware of HMG dated 15 November 2004); File Reference: Select Leniency-167.

⁴⁰⁵ Letters of 22 November from Nick McCaffrey of Henry Recruitment to Andrew Niker of Parc and Colin Jellicoe of Vinci; File Reference: Henry-Leniency-7 and Henry Leniency-9.

⁴⁰⁶ Letter of 28 April from Nick McCaffrey of Henry Recruitment to Colin Jellicoe of Vinci; File Reference: Henry Leniency-36.

signed Preferred Supplier Agreements either with Parc or Vinci for the supply of Candidates to Vinci.

HMG 'cheats' on the agreement reached at CRF1, and the position of AWA.

HMG

- 4.105 Between December 2004 and January 2005, despite the agreement recorded in the CRF1 Minutes, Steven Ware of HMG re-entered discussions with Vinci and Parc.⁴⁰⁷
- 4.106 The OFT notes that communications took place directly between Vinci and HMG.⁴⁰⁸
- 4.107 In the CRF Conference Call of 7 January 2005, Steven Ware of HMG and Simon Cheshire of Hays relayed to the other Parties involved in the call the details of the increased Fee Rates which Colin Jellicoe of Vinci had said would be available to the first tier Recruitment Agencies who now signed the agreement with Parc for the supply of Candidates to Vinci.
- 4.108 The participants in the CRF Conference call were:⁴⁰⁹ John Petersen of CDI AndersElite; Mike Kenrick of BBT; Tony Pearce of Eden Brown; Paul

⁴⁰⁷ See for example: Email of 20 December 2004 from Lisa Deacon of HMG to Sonya Quarlena of Vinci providing an agenda for a meeting with Parc and Vinci to be held on 22 December; File Reference: Select-leniency-1995. Also relevant is the Email (internal) of 4 January 2005 from Karen Sims to Steven Ware and Glen Dawson attaching list of action points including signature of the Vinci/Parc contract and setting out the actions to be taken in order to implement the Vinci and Parc PSA rollout; File Reference: Select Leniency-1997.

⁴⁰⁸ HMG and Vinci met on 13 December to discuss, amongst others, the '*appointment of HMG as a Master Vendor or PSA provider to Vinci plc on a national basis. Operating independently to Parc*' and '*fee structure / terms of business*'. See Agenda for meeting of 13 December 2004 sent by Steven Ware of HMG to Sonya Quarlena of Vinci and letter of 14 December from Steven Ware and Mark Bull of HMG to Colin Jellicoe of Vinci setting out the terms agreed with Vinci for the supply of candidates via Parc at the 13 December 2004 meeting; File Reference: Vinci Third Party Correspondence-74.

⁴⁰⁹ Internal CDI AndersElite email from Susan Humphreys on behalf of John Petersen, to Thomas Young, John Seaman, Dave Francis, Bridget Ingram and Helen Johnson, of 11 January 2005, reporting on CRF telephone conference of 7 January 2005. File Reference: AndersElite s27-61.

Metcalfe and Paul Scott of Fusion People; Simon Cheshire of Hays; Chay Smalls of Henry Recruitment⁴¹⁰ and Steven Ware of HMG.

4.109 On 10 January 2005, HMG entered a Preferred Supplier Agreement with Parc for the supply of Candidates to Vinci. The Fee Rates in this agreement between Parc and HMG were 13.5% for candidates with a salary of up to £45,000 and 16% for candidates with a salary in excess of £45,001 and 18% of gross margin for temporary Candidates. Previously the Fee Rates offered by Parc had been 10% of annual basic salary for all grades of permanent Candidates.⁴¹¹

4.110 Moreover, the OFT notes that the Fee Rates in the agreement between Parc and HMG were above the Fee Rates recorded as the agreed target minimum Fee Rates in the CRF1 Minutes.⁴¹²

4.111 HMG's action was documented in the CRF2 Minutes as follows:

*'S Ware advised that Vinci pushed for deal and HMG made the decision to go for an inside view on how Parc operate, understand their financial model and work to bring about their downfall from within. HMG achieved pushing the price up to **Perm – 13.5% up to £45,000 / 16% on £45,000 + and Freelance 18% GM Technical / 15% GM Trades on Freelance Margin**. Terms were revised before agreement to them in a model that will be deliverable to the Forum Group'.*

4.112 HMG's decision to contract with Parc provoked consternation among the other CRF Members. CRF2 Minutes record that:

⁴¹⁰ The OFT notes that the internal CDI AndersElite email reporting on the 7 January 2005 call states that Nick McCaffrey of Henry Recruitment participated in the call. However, in his interview with the OFT Nick McCaffrey confirmed that it was Chay Smalls who participated in this call on behalf of Henry Recruitment. See page 19 of approved Transcript interview with Nick McCaffrey (Henry Recruitment) dated 25 September 2006; File Reference: Henry Leniency - 49a.

⁴¹¹ See paragraphs 4.6 and 4.8 above. See also, Clause 4 of draft PSA for permanent staff sent by Andrew Niker of Parc to Glen Dawson of HMG in an email of 21 September 2004. Schedule 2 (Charges) of the draft PSA for contract staff established that the agency and Parc would agree the charges prior to the commencement of the contractor's services (contractor being defined as the '*business entity, temporary worker, person or contingent labour provided by the Supplier to fulfil Assignments*'); File Reference: Select Leniency-1096.

⁴¹² Minutes of the CRF Meeting of 12 November 2004, entitled 'Construction Recruitment Forum', item 2.01: '*All parties agreed not to operate below 12.5% permanent fee rate on all future PSA/ Master Vendor agreements*'.

'The Group commented on how they weren't happy with HMG not keeping our word and working with Vinci via Parc. It appeared that Parc were close to falling over until HMG took on the Vinci agreement, this threw them a life line'.

4.113 CRF2 Minutes reveal that Steven Ware of HMG agreed to circulate to the other CRF Members the PSA entered into by HMG with Parc on 10 January 2005 and that HMG would indicate to Vinci that other CRF Members should be offered the same tier supplier Fee Rates for the supply of Candidates to Vinci via Parc:

'10. S Ware confirmed that he is happy to speak up to Vinci on Parc issues and make a play for tier suppliers to be involved on the same T&C's already agreed with HMG.

*11. S Ware to issue a copy of the Vinci agreement to all attendees.'*⁴¹³

4.114 At the end of February 2005 or the beginning of March 2005, it appears that Steven Ware of HMG contacted Colin Jellicoe of Vinci again. Henry Recruitment has told the OFT that, at about this time,

*'I received a call late in the afternoon, I am unable to recall the day or date from S.Ware HMG. I believe he had been at a meeting with C. Jellicoe. It appears that he had taken it upon himself to nominate suppliers to the Vinci Group, Henry Recruitment being one, Fusion people being the other. As I recall, he was excited and animated about how he had 'delivered' '*⁴¹⁴

4.115 On 8 March 2005 Steven Ware of HMG sent an email to Colin Jellicoe of Vinci copying Paul Metcalfe of Fusion People and Kathryn Marks of Henry Recruitment setting out dates for meetings between those Recruitment Agencies and Vinci and confirmed that he had:

'forwarded both parties [Fusion People and Henry] a copy of the Vinci plc permanent PSA service contract and advised them that the freelance agreement is currently being formulated. With

⁴¹³ Minutes of CRF meeting of 24 February 2005, item 2.1; File Reference: Select Leniency – 1668.

⁴¹⁴ Henry Recruitment timeline submitted to OFT on 4 July 2006; File Reference: Henry Leniency - 3a.

reference to the PSA process they have been informed that the agreement will be facilitated by PARC'.⁴¹⁵

4.116 Fusion People had also approached Vinci directly at the end of February 2005. This is revealed in an email of 25 February 2005 from Paul Metcalfe of Fusion People to Colin Jellicoe of Vinci:

'... I had made a mental note to contact you at the end of February..., in the hope that my offer of Fusion People assisting you with your recruitment issues directly, rather than via Parc, may be something you would consider.'⁴¹⁶

4.117 HMG withdrew from its agreement to supply Candidates to Vinci via Parc on 14 March 2005.⁴¹⁷ This was confirmed in the minutes circulated following CRF3 on 19 May 05. Under the Heading '*NEUTRAL VENDORS*', sub-heading '*Taylor Woodrow/Vinci*', in relation to HMG the note records '*Vinci – withdrawn from the Parc agreement. Dealing direct and being invoiced direct with Vinci*'.

AWA

4.118 It appears from the evidence that following CRF1 and throughout the period of the infringement AWA did not terminate its agreement to supply Candidates to Vinci via Parc⁴¹⁸ (contrary to what had been stated

⁴¹⁵ Email of 8 March 2005 from Angelique Morgan (on behalf of Steven Ware) of HMG to Colin Jellicoe of Vinci and copied to Karen Sims of HMG, Paul Metcalfe of Fusion People and Kathryn Marks of Henry Recruitment; File Reference: Select Leniency-2017a.

⁴¹⁶ Email of 25 February 2005 from Angelique Morgan on behalf of Paul Metcalfe of Fusion People to Colin Jellicoe of Vinci; File Reference: Fusion s27-41. See also Email of 1 March 2005 from Paul Metcalfe of Fusion People to Colin Jellicoe of Vinci where in response to Vinci's wish to continue working with Parc Paul Metcalfe states '*I will continue to keep in touch but I still feel that our consultants do not have the confidence in parc and would therefore not service the account through them suitably. However, I am sure they would be able to do so if they were dealing directly, Time can change things though, so I will continue to review the situation*'; File Reference: Vinci Third Party Correspondence-88.

⁴¹⁷ Letter from Karen Sims of HMG to Darren Day of Parc dated 14 March 2005; File Reference: Parc Third Party Correspondence-105.

⁴¹⁸ The OFT has found evidence of two invoices in 2005 issued by AWA to Parc. One invoice is dated 24 January 2005 at a rate of 10% and the other one is dated 12 July 2005 with no indication as to the rate. In addition, on 30 March 2007 Parc supplied the OFT with a spreadsheet outlining fee rates and contracts with different agencies for both supply of candidates to Taylor Woodrow and Vinci. In this document, AWA appear to have had the initial contract entered in October 2004 at 10% in place until the contract between Parc and Vinci was terminated in June 2006; File Reference: Parc Third Party Correspondence-243.

in CRF1, as recorded in the minutes)⁴¹⁹ . However, it gave the following update at CRF3, as recorded in the CRF3 Minutes:

'Vinci – have just completed previous business with Vinci, but are not dealing with any new business from them. AWA are still getting calls from Vinci Line Managers but are stating that they are unable to supply as will not enter an agreement via Parc'.⁴²⁰

4.119 The OFT has found that AWA placed a candidate⁴²¹ with Crispin and Borst (a subsidiary of Vinci) in January 2005 and the invoice was to be issued to Parc at a rate of 10%.⁴²² This and an invoice issued to Parc later that year, in July 2005, demonstrate that AWA continued dealing with Parc in 2005.⁴²³

Hays pioneers the Vinci (Parc Facilitator) Agreement

4.120 Between December 2004 and January 2005 Simon Cheshire of Hays communicated directly with Vinci, proposing an increase in the Fee Rates which had been offered by Parc in September 2004, under an arrangement which would subsequently become the Vinci (Parc Facilitator) Agreement.

4.121 In December 2004, Hays wrote to Vinci, proposing a direct agreement with Vinci as follows:

'We propose that we contract directly with yourselves, where terms and rates, sla's, service reviews etc... are handled directly. We accept vacancies from your central team and we co-ordinate vacancies centrally and we then invoice/bill through the third party (Parc in this instance).

⁴¹⁹ See paragraph 4.73 above.

⁴²⁰ Minutes of CRF3, item 3.1; File Reference: Select Leniency – 1685.

⁴²¹ AWA has told the OFT that AWA does not supply temporary staff as a matter of course and they operate within the permanent recruitment sector; File Reference: AWA General Correspondence-3.

⁴²² See placement confirmation form concerning AWA; File Reference: AWA s27-7.

⁴²³ See invoice of 12 July 2005 issued to Parc; File Reference: AWA s27-14. It should be noted that this second invoice does not provide details on the percentage rate or the company in which the candidate in question had been placed.

*On rates for permanent staff I have proposed a slight increase in your figures but removed any charges for benefits in kind (this makes pricing very simple). And on the penalty clause asked for a 'settling in period' so that we can get up to speed.*⁴²⁴

- 4.122 CRF2 Minutes reflect that Simon Cheshire of Hays was in the process of negotiating an agreement which was to become the Vinci (Parc Facilitator) Agreement at this time:

*'W.c. 14.02.05, Simon had a conversation with Colin Jellico [sic] with regards Hays going direct to Vinci and not via Parc. Hays agreed to supply them but under the conditions that payment to Hays is directly from Vinci. The vacancy distribution and processing is still via Parc, An agreement with Vinci not Parc is on HR table being legally checked and Hays are likely to sign'*⁴²⁵

- 4.123 CRF2 Minutes also record that Hays refused to enter into an agreement with Parc to supply Candidates to Parc in relation to Vinci, as follows:

'Vinci – initially said no to servicing them via Parc, they were then asked to reconsider and again refused to enter the agreement.'

Hays, HMG and Fusion People sign Vinci (Parc Facilitator) Agreements

- 4.124 Hays' discussions with Vinci formed the basis of what would eventually be the Vinci (Parc Facilitator) Agreement. Under the Vinci (Parc Facilitator) agreement Parc was utilised in a more limited capacity than that envisaged in the PSA proposed by Parc to the Parties between August 2004 and November 2004. Parc was not a signatory to this agreement. Previously, the agreement which had been offered to the Parties was an agreement with Parc rather than Vinci.
- 4.125 Under the Vinci (Parc Facilitator) Agreement, Hays would be invoicing Vinci directly (as compared to Hays' previous PSA with Parc, where Hays would have invoiced Parc for payment). As such Hays could

⁴²⁴ Email of 17 December 2004 from Simon Cheshire of Hays to Colin Jellicoe of Vinci; File Reference: Hays leniency-19.

⁴²⁵ Minutes of CRF2, item 2.1; File Reference: Select Leniency – 1668.

contact Vinci for issues surrounding payment. Furthermore Hays staff were entitled to contact Vinci line managers for clarification of specific issues that would assist Hays in sourcing candidates for the Assignment.⁴²⁶ The OFT notes in practice however that despite the wording of the agreement, invoicing was done via Parc.⁴²⁷

4.126 On 10 March 2005, Simon Cheshire of Hays circulated a copy of a draft Vinci (Parc Facilitator) Agreement between Hays and Vinci to Paul Metcalfe of Fusion People⁴²⁸. Simon Cheshire of Hays has told the OFT that:

*'Under the new agreement vacancy distribution and processing was still via Parc, and invoices were submitted to Vinci via Parc. The principle difference between this arrangement and a direct agreement between Hays C&P and Parc for the supply of staff to Vinci was that [...] [C]'*⁴²⁹

4.127 Hays and Vinci subsequently entered into the Vinci (Parc Facilitator) Agreement on 14 March 2005. The OFT notes that under the terms of the Vinci (Parc Facilitator) Agreement of 14 March 2005 between Vinci and Hays for permanent Candidates, the Fee Rates were 13.5% of basic salary for Candidates with an annual salary of up to £45,000 (inclusive) and 16% of basic salary for Candidates with an annual salary in excess of £45,001⁴³⁰.

4.128 In other words, the Fee Rates in this agreement were the same as those which HMG had obtained in its agreement with Parc of 10 January 2005

⁴²⁶ Agreement between Hays and Vinci, File Reference: Vinci Third Party Correspondence- 91.

⁴²⁷ According to Vinci '[...] [C]';

Email of 24 August 2006 from Madeleine Abas (legal representative to Vinci) to the OFT; File Reference: Vinci Third Party Correspondence-54.

⁴²⁸ Email of 10 March from Simon Cheshire of Hays to Paul Metcalfe of Fusion People; File Reference: Hays Leniency-466

⁴²⁹ Witness Statement of 26 January 2007 of Simon Cheshire of Hays Specialist Recruitment (Holdings) Limited, paragraph 5. File Reference: Hays Leniency-516

⁴³⁰ Preferred Supplier Contract – Permanent signed by Simon Cheshire on behalf of Hays (14 March 2005) and Colin Jellicoe on behalf of Vinci (17 March 2005); File Reference: Vinci Third party correspondence-91.

and which Steven Ware had relayed to the other CRF Members during the CRF Conference Call and subsequently at CRF2. By contrast, the fees in the agreement offered by Parc to Hays for the supply of permanent Candidates to Vinci in September 2004 were 10%.⁴³¹

4.129 The following exchanges then occurred between the Parties:

- On 14 March 2005, HMG informed Vinci that it was terminating the agreement it had signed with Parc on 10 January 2005.⁴³²
- On 15 March 2005, Simon Cheshire of Hays sent a copy of the Vinci (Parc Facilitator) Agreement between Hays and Vinci to Nick McCaffrey of Henry Recruitment.⁴³³
- On 23 March 2005, Paul Metcalfe of Fusion People forwarded to Simon Cheshire of Hays comments he had received from Colin Jellicoe of Vinci regarding his negotiations for a Vinci (Parc Facilitator) Agreement.⁴³⁴ In that email Paul Metcalfe provided his views on Colin Jellicoe's comments and invited Simon Cheshire to *'feel free to add any comments'* before Paul Metcalfe sent a response by e-mail to Colin Jellicoe.⁴³⁵
- On 6 April 2005 Fusion People sent a copy of the final supply agreement containing the final fees agreed upon between Fusion

⁴³¹ Email of 21 September 2004 from Simon Cheshire of Hays to Darren Day of Parc; File Reference: Hays Leniency-15.

⁴³² Letter of 14 March from Karen Sims of HMG to Darren Day of Parc; File Reference: Parc Third party correspondence-105

⁴³³ Email of 15 March from Simon Cheshire of Hays to Nick McCaffrey of Henry Recruitment; File Reference: Henry Leniency-21.

⁴³⁴ Email of 23 March 2005 from Paul Metcalfe of Fusion People to Simon Cheshire of Hays; File Reference: Fusion leniency-12a.

⁴³⁵ Simon Cheshire replied to Paul Metcalfe's email on 24 March 2005. However, Paul Metcalfe had already sent his response to Colin Jellicoe on 23 March 2005; File Reference: Fusion leniency-11.

People and Vinci to the following Parties: BBT,⁴³⁶ Hays,⁴³⁷ Eden Brown,⁴³⁸ HMG,⁴³⁹ and Henry Recruitment.⁴⁴⁰

- 4.130 On 6 April 2005, Fusion People entered into a Vinci (Parc Facilitator) Agreement with Vinci. As in the case of the Vinci (Parc Facilitator) Agreement which Hays had signed with Vinci on 14 March 2005, Parc was not a signatory to this agreement. Previously, the agreement which had been offered to Fusion People was an agreement with Parc rather than Vinci.
- 4.131 The OFT also notes that under the terms of the Vinci (Parc Facilitator) Agreement of 6 April between Vinci and Fusion People for permanent Candidates, the Fee Rates were 13.5% of basic salary for candidates with an annual salary of up to £45,000 (inclusive) and 16% of basic salary for candidates with an annual salary in excess of £45,001.⁴⁴¹
- 4.132 These were the same Fee Rates which HMG and Hays had obtained in their Preferred Supplier Agreements with Parc and Vinci respectively, and which Simon Cheshire of Hays had relayed to certain of the other Parties. By contrast, the Fee Rates in the agreement offered by Parc to Fusion People for the supply of Candidates to Vinci in September 2004 were 10% for all Candidates.⁴⁴²

⁴³⁶ E-mail of 6 April 2005 from Paul Metcalfe (Fusion People) to Mike Kenrick (BBT); File Reference: Fusion Leniency - 26.

⁴³⁷ E-mail of 6 April 2005 from Paul Metcalfe (Fusion People) to Simon Cheshire (Hays); File Reference: Fusion Leniency - 25.

⁴³⁸ E-mail of 6 April 2005 from Paul Metcalfe (Fusion People) to Zerine Drury (Eden Brown). Zerine Drury was PA to Tony Pearce (Sales Director, Eden Brown) at the time; File Reference: Fusion Leniency - 24.

⁴³⁹ E-mail of 6 April 2005 from Paul Metcalfe (Fusion People) to Steven Ware (HMG); File Reference: Fusion Leniency-23a.

⁴⁴⁰ E-mail of 6 April 2005 from Paul Metcalfe (Fusion People) to Kathryn Marks (Henry Recruitment). Kathryn Marks was PA to Nick McCaffrey (Henry Recruitment) at the time; File Reference: Fusion Leniency-23.

⁴⁴¹ Preferred Supplier Contract – Permanent signed by Paul Metcalfe on behalf of Fusion People (6 April 2005) and Colin Jellicoe on behalf of Vinci (8 April 2005); File Reference: Vinci Third party Correspondence - 106.

⁴⁴² See spreadsheet submitted by Parc on 7 March 2007 detailing the margins between Parc and agencies and Parc and Vinci, including the dates on which the various offers were made by Parc and subsequently accepted by the various agencies; File Reference: Parc Third Party Correspondence - 232 and 243. See also email of 4 January 2005 from Clare McCabe of Parc to Lee McEvoy of Fusion People, which attaches the draft contract for permanent staff including rates of 10%; File Reference: Fusion s27 - 27

- 4.133 Fusion People's agreement with Vinci was terminated in August 2005 by Parc and Vinci '*as a result of a lower than expected activity from Fusion on this account*'.⁴⁴³ Thereafter, Fusion People did not deal with Parc either directly or indirectly throughout the period covered by the OFT's investigation.
- 4.134 On 12 April 2005, HMG entered a Vinci (Parc Facilitator) Agreement with Vinci for the supply of Candidates to Vinci. Parc was not a signatory to this agreement. Once again, the OFT notes that the Fee Rates were 13.5% of basic salary for candidates with an annual salary of up to £45,000 (inclusive) and 16% of basic salary for Candidates with an annual salary in excess of £45,001⁴⁴⁴ whereas the Fee Rates which had originally been offered by Parc in September 2004 were 10% for all permanent Candidates.⁴⁴⁵
- 4.135 Therefore, by the time of CRF3 on 19 May 2005, HMG, Hays and Fusion People had signed Vinci (Parc Facilitator) Agreements directly with Vinci. All invoicing was still carried out through Parc⁴⁴⁶ and details

⁴⁴³ Email of 19 August 2005 from Andrew Niker of Parc to Paul Metcalfe of Fusion People; File Reference: Fusion Leniency - 40 Preferred Supplier Contract – Permanent signed by Steven Ware on behalf of HMG (12 April 2005) and Colin Jellicoe on behalf of Vinci (14 April 2005); File Reference: Vinci Third party Correspondence - 111. HMG and Hays had recently obtained in their agreements with Parc in order words there were the same fees

⁴⁴⁵ Email of 21 September 2004 from Andrew Niker of Parc to Glen Dawson of HMG; File Reference: Select Leniency -1096

⁴⁴⁶ According to Vinci '*[...] [C]*';

Email of 24 August 2006 from Madeleine Abas (legal representative to Vinci) to the OFT; File Reference: Vinci Third Party Correspondence - 54. This has been confirmed by Simon Cheshire who has told the OFT that '*invoices were submitted to Vinci via Parc. ... [...] [C]*'; Simon Cheshire's Witness Statement of 26 January 2007, paragraph 5. The OFT notes however that there seems to be some confusion in the emails and updates given by the Parties in the CRF meetings on whether payment was made direct by Vinci. Clause 6 of the Preferred Supplier Contracts signed by Hays, Fusion People and HMG direct with Vinci set out the payment terms applicable between those agencies and the Client (i.e. Vinci) and clause 14.1 allowed direct contact with Vinci for '*issues in respect of payment*', File Reference: Vinci Third Party Correspondence - 91 (Hays), Vinci Third Party Correspondence - 145 (Fusion People) and Vinci Third Party Correspondence - 111 (HMG); see also updates provided by each of Hays, Fusion People and HMG recorded in item 3.1 of the Minutes of the CRF Meeting of 19 May 2005 and which set out that those agencies were '*invoiced direct with Vinci*' and '*invoiced by Vinci direct*'; similarly, the Email of 7 April 2005 from Paul Metcalfe of Fusion People to Mike Kenrick of BBT in relation to the Preferred Supplier

of vacancies were communicated to HMG, Hays and Fusion People through Parc, although access to Vinci's line managers was available to HMG, Hays and Fusion People solely for clarifying details of vacancies.⁴⁴⁷

4.136 However, the Fee Rates for the supply of Candidates provided by HMG, Hays and Fusion People had not been negotiated solely between Parc and these Parties. Instead Vinci had also been brought into the negotiations. HMG, Hays and Fusion People had all communicated with Colin Jellicoe of Vinci in an attempt to increase their Fee Rates from the original 10% offered by Parc in September-October 2004.⁴⁴⁸

4.137 For example, an email of 26 November 2004 from Darren Day of Parc to Colin Jellicoe of Vinci reveals that Vinci had agreed rates with Hays:

'then because of how you have technically agreed rates at 13 with them, it may be best that we script a mail from yourself explaining that you have paid them etc but any further invoices received will be processed via Parc at the agreed 13%'.⁴⁴⁹ (emphasis added)

4.138 Parc stated the Vinci (Parc Facilitator) Agreements entered into by HMG, Hays and Fusion People was part of the Parties' strategy to target Parc. In addition, Parc stated that the Vinci (Parc Facilitator) Agreements were borne out of a concern within Vinci that, given the CRF Members' stance not to supply Candidates via Parc, they would not be able to recruit

Contract between Fusion People and Vinci states: *'we will be invoicing Vinci and are being paid by Vinci'*; File Reference: Select Leniency – 2027.

⁴⁴⁷ See Clause 14.2 of the Vinci (Parc Facilitator) Agreements signed by Hays, HMG and Fusion People direct with Vinci. Clause 4.2 of the same contracts also established a reduction of 50% of the fees to be paid to the agencies if those agencies placed candidates direct with Vinci 'without utilising the services of the Facilitator', i.e. Parc. Preferred Supplier Contracts for permanent staff signed by Hays, Fusion People and HMG with Vinci; File Reference: Vinci Third Party Correspondence - 91 (Hays), Vinci Third Party Correspondence - 145 (Fusion People) and Vinci Third Party Correspondence - 111 (HMG).

⁴⁴⁸ See Agenda for meeting of 13 December 2004 sent by Steven Ware of HMG to Sonya Quarlena of Vinci and letter of 14 December from Steven Ware and Mark Bull of HMG to Colin Jellicoe of Vinci setting out the terms agreed with Vinci for the supply of candidates via Parc at the meeting of 13 December 2004; File Reference: Vinci Third Party Correspondence - 74; Email of 17 December 2004 from Simon Cheshire of Hays to Colin Jellicoe of Vinci, File Reference: Hays Leniency - 19; Email of 25 February 2005 from Anne Edwards on behalf of Paul Metcalfe of Fusion People to Colin Jellicoe of Vinci; File Reference: Fusion s27-41.

⁴⁴⁹ Email of 26 November 2004 from Darren Day of Parc to Colin Jellicoe of Vinci; File Reference: Parc Third Party Correspondence - 73.

suitable Candidates unless they signed direct agreements with the Parties. Parc has told the OFT in this regard that:

*'The fact that the major agencies refused to sign / then refusing to have a direct contract with Parc led to HR and Managers worrying that they would not be able to find staff and this would affect the Vinci business. The fact that they offered to work with Vinci but not with Parc was we believe an attempt to remove the Managed Service that Vinci had decided to implement to control agencies and introduce efficiencies to the business. Higher rates were agreed by Vinci to gain their support to supply permanent staff.'*⁴⁵⁰

(emphasis added)

- 4.139 Vinci has told the OFT that *'given that Hays and HMG were the two biggest suppliers of staff to Vinci Vinci decided to accommodate their concerns by agreeing that whilst they would supply candidates through the Parc model, Vinci would pay them directly'*⁴⁵¹.
- 4.140 However, Vinci has also put to the OFT that *'Colin [Jellicoe] wishes to say immediately that he disagrees with any suggestion that he was put under pressure by anyone. He wanted the big agencies on board as he needed them to ensure vacancies were filled'*.⁴⁵²
- 4.141 In addition, when asked about the rates agreed with Hays, HMG and Fusion People in the early months of the Parc contract, when Vinci was remunerating them directly, Colin Jellicoe has told the OFT *'that the fee rates contained in these agreements were 13.5% and 15% and were fee rates that were 'dictated' by Vinci' and 'that the fact that these three agreements contained the same fee terms, was not evidence of collusion between the agencies. It was based upon what Vinci had been prepared to pay'*.⁴⁵³

⁴⁵⁰ Letter of 13 August 2006 from Darren Day of Parc to the OFT: File Reference: Parc Third Party Correspondence - 281.

⁴⁵¹ Note of meeting held on 12 July 2006 between OFT and Vinci plc, paragraph 33; File Reference: Vinci Third Party Correspondence - 52.

⁴⁵² Email of 24 August 2006 from Madeleine Abas on behalf of Vinci to the OFT; File Reference: Vinci Third Party Correspondence - 54.

⁴⁵³ Note of meeting held on 12 July 2006 between OFT and Vinci plc, page 7; File Reference: Vinci Third Party Correspondence - 52.

4.142 However, it appears to the OFT that Vinci was under some pressure to recruit suitable Candidates during this time. For example, an email of 17 January 2005 from Vinci to Parc, attaching correspondence from Hays and Fusion People confirming their unwillingness to deal with Parc, demonstrates that Vinci was under some pressure to recruit candidates and that it was unhappy with the reaction of the Parties to the emergence of Parc. In this email Colin Jellicoe of Vinci stated that:

'[...] [C]'

.⁴⁵⁴

4.143 Therefore, despite Colin Jellicoe's statement that '*he was not put under pressure by anyone*', the OFT notes that the Collective Refusal to Supply Parc (particularly in relation to Taylor Woodrow) was having an adverse impact on his ability to recruit Candidates.

4.144 Therefore the OFT is of the view that the refusal by the Parties (including Hays and HMG, who were at this time according to Vinci '*the two biggest suppliers of staff to Vinci*') to deal with Parc at 10% may have influenced Vinci's decision to offer/agree with those Recruitment Agencies the Vinci (Parc Facilitator) Agreements.

HMG, Hays and Eden Brown contract directly with Parc

4.145 Direct agreements with Parc for the supply of Candidates to Vinci were entered into by HMG and Hays in January 2006⁴⁵⁵ and by Eden Brown in

⁴⁵⁴ Email of 17 January 2005 from Colin Jellicoe of Vinci to Darren Day of Parc; File Reference: Vinci Third Party Correspondence - 82.

⁴⁵⁵ Letter of 13 August 2007 from Darren Day to the OFT, response to question 4 which sets out that Hays and HMG entered into contracts with Parc for the supply of candidates to Vinci in January 2006; File Reference: Parc Third Party Correspondence -281. See also Email of 2 February 2006 from Darren Day of Parc to Duncan Collins of Hays, attaching the contracts; File Reference: Hays Leniency - 322; and Email (internal) from Duncan Collins to Tim Cook, Andrew Bredin, Adrian Basu, Jim Mitchell, Darren Montagu, Pam Lindsay-Dunn, James Leon, Phil Jackson, Adele Greensall, Richard Lescott, Duncan Bullimore, Robert Fry, Iain Dennis, Trevor Mills, Greg Lettington, David Trotman (all of Hays) attaching 'the newly re-signed contracts' with Parc for supply to Taylor Woodrow and Vinci; File Reference: Hays Leniency - 322

April 2006.⁴⁵⁶ These agreements remained in force until the OFT's investigation commenced in June 2006.

4.146 The OFT notes that in relation to permanent Candidates under the terms of these agreements HMG, Hays and Eden Brown were paid 13.5% of basic salary for candidates with an annual salary of up to £45,000 (inclusive) and 16% of basic salary for candidates with an annual salary in excess of £45,001⁴⁵⁷ and not 10% as originally offered by Parc in September 2004.

Conclusion in relation to the Collective Refusal to Supply Parc in respect of Vinci

4.147 At CRF1 all of the Parties agreed not to deal with Parc in any capacity at all in relation to the supply of Candidates to Vinci.

4.148 Following CRF1 HMG entered into an agreement with Parc to supply Candidates to Vinci via Parc, at higher rates than had previously been proposed by Parc. Within a matter of weeks HMG withdrew from this agreement.

4.149 Despite the agreement reached at CRF1, AWA did not terminate its PSA with Parc for the supply of permanent candidates to Vinci at 10%.

4.150 Subsequently, Vinci was brought into the negotiations with HMG, Hays and Fusion People who also obtained an increase in Fee Rates above the 10% originally offered by Parc in September 2004. They did so by signing Vinci (Parc Facilitator) Agreements with Vinci. Fee Rates in these agreements were above the Fee Rates recorded as the agreed minimum Fee Rates in the CRF1 Minutes.⁴⁵⁸

⁴⁵⁶ Letter of 13 August 2007 from Darren Day to the OFT, response to question 4 which sets out that Eden Brown entered into a contract with Parc for the supply of candidates to Vinci in April 2006; File Reference: Parc Third Party Correspondence – 281.

⁴⁵⁷ Letter of 13 August 2007 from Darren Day to the OFT, response to question 4 which sets out fees for the contracts entered into by Hays and HMG with Parc in January 2006; File reference: Parc Third Party Correspondence – 281. See also Email of 5 January 2006 from Duncan Collins of Hays to Andy Szkopiak, Steven Orr, Bill Chitty, David Trotman and Darren Day of Parc attaching draft contracts with Parc for the supply of permanent and freelance candidates to Vinci and Taylor Woodrow; File Reference: Hays Leniency - 314.

⁴⁵⁸ Minutes of CRF1, item 2.01: '*All parties agreed not to operate below 12.5% permanent fee rate on all future PSA/ Master Vendor agreements*'; File Reference: Select Leniency – 1604.

- 4.151 Under the Vinci (Parc Facilitator) Agreement, Parc was no longer able independently to negotiate and reduce the Fee Rates payable to the Parties. As a result, Parc was prevented from effectively carrying out one of the key functions of a Neutral Vendor. Parc remained responsible for invoicing and processing details of vacancies and Candidates.
- 4.152 Therefore the OFT considers that HMG, Hays and Fusion People participated in the agreement consisting of The Collective Refusal to Supply Parc in respect of the supply of Candidates to Vinci, notwithstanding the fact that they entered into the Vinci (Parc Facilitator) Agreements, in which Parc played at least some role.
- 4.153 CDI AndersElite, BBT, and Henry Recruitment initially either refused to deal with Parc or terminated their existing agreements with Parc between September and November 2004, and did not engage with them in any capacity throughout the period under investigation. Eden Brown initially did the same but signed a Preferred Supplier Agreement with Parc to supply Candidates to Vinci in January 2006.
- 4.154 When HMG, Hays and Eden Brown⁴⁵⁹ ultimately signed Preferred Supplier Agreements with Parc in January and April 2006 the Fee Rates remained at the same higher level as those which HMG and Hays had obtained in the previous year with Vinci⁴⁶⁰. Therefore, these agreements should also be considered against the backdrop of the collective pressure which the CRF Members had placed on Parc and Vinci to negotiate higher Fee Rates with Parc.

Additional internal and external correspondence between the Parties

- 4.155 Internal email evidence gathered by the OFT during its investigation provides further evidence that the Parties considered they had agreed during CRF Meetings not to supply Candidates to Parc.

⁴⁵⁹ Eden Brown entered into a contract with Parc for the supply of candidates to Vinci in April 2006 at the same higher rates secured by HMG, Hays and Fusion People in early 2005. See letter of 13 August 2007 from Parc to the OFT, response to Question 4; File Reference: Parc Third Party Correspondence - 281.

⁴⁶⁰ See fees in the draft preferred supplier contract between Parc and Hays for the provision of permanent candidates to Vinci attached to an email of 5 January 2006 from Duncan Collins of Hays to Andy Szkopiak, Steven Orr, Bill Chitty, David Trotman of Hays and Darren Day of Parc; File Reference: Hays Leniency - 314.

Internal Eden Brown correspondence following HMG's agreement with Parc in January 2005

- 4.156 As has been set out, on 10 January 2005 HMG 'cheated' on the agreement reached at CRF1 not to supply Candidates to Parc and entered into a PSA with Parc in relation to Vinci. Internal email correspondence within Eden Brown and CDI AndersElite during this time clearly reveals that these Parties thought HMG had reneged on the agreement reached at CRF1 not to work with Parc.
- 4.157 HMG discussed the Preferred Supplier Agreement it had signed with Parc with the other CRF Members at CRF2. The Minutes of CRF2 record that other CRF Members were unhappy that HMG had signed this agreement,⁴⁶¹ and an internal email sent within Eden Brown later that same day clearly indicates that Eden Brown felt HMG had acted contrary to the agreed position at CRF1:

*'Attended the 'G8 summit' this morning, interesting 3.5 hour meeting, specially with Steven Ware taking loads of flak from everyone for **Hill McGlynn doing a sneaky deal with Parc/TW behind our backs!!'***⁴⁶²

(emphasis added)

- 4.158 An agenda for CRF2, annotated by Tony Pearce, was attached to this email. It stated:

*'Round table confirmation that all had acted as agreed at last meeting, and withdrawn from Parc/TW and future Parc/Vinci contracts. Much heated debate and accusation during Hill McGlynn's report, as **they have reneged on what we agreed and***

⁴⁶¹ Mike Kenrick of BBT has told the OFT that he expressed his 'displeasure' on Steven Ware going and seeing Vinci in contravention of what had been agreed, '*that no-one would approach any Parc agreements*'. Transcript of OFT Interview with Mike Kenrick (BBT) dated 13 November 2006, page 36. File Reference: Select Leniency - 1859

⁴⁶² From Tony Pearce to Dave Gibbons, Ian Wolter, Michael Sterling, Nick Sheik and Adam Herron reporting on CRF2; File Reference: Eden Brown s27 - 19. The OFT notes that this email refers to HMG having done a 'sneaky deal' with Parc/Taylor Woodrow but other evidence clearly shows that the deal referred to in Tony Pearce's email was the contract entered by HMG with Parc for the supply of candidates to Vinci. See Annotated agenda of CRF2 attached to this email.

*done their own deal with Parc/Vinci in between meetings. Trust built at last meeting has been destroyed'*⁴⁶³

(emphasis added)

Internal CDI AndersElite correspondence following CRF2 and the receipt of a proposal to supply Candidates to Parc

- 4.159 An internal CDI AndersElite email from Thomas Young to John Petersen of 1 March 2005, sent after CDI AndersElite had seemingly received a proposal from Parc to enter into a PSA, refers to the agreement reached during CRF2 not to deal with Parc:⁴⁶⁴

*'Darren [of Parc] would like to speak regarding the proposal but I have put him off till next week. Reasons being, firstly, you mentioned the other day you wanted to draft a response to Justine Brown's [of Taylor Woodrow] letter we received last week and secondly, given the status of that and **agreements made at our last Recruitment Forum**, thought best to wait for your direction and outcome of those meetings'*⁴⁶⁵

(emphasis added)

Internal HMG correspondence confirming HMG's exit from the PSA with Parc in relation to Taylor Woodrow

- 4.160 An internal HMG email from Steven Ware to Steve Atkin of 10 May 2005 in response to an enquiry as to the status of the HMG Parc/Taylor Woodrow dealings reinforces the conclusion that HMG had taken steps to exit its Preferred Supplier Agreement with Parc in light of the agreement reached during CRF Meetings not to deal with Parc

'Steve,

- *Written confirmation sent to PARC re exit of PSA agreement.*

⁴⁶³ Annotated agenda of CRF2 sent by Tony Pearce to Dave Gibbons, Ian Wolter, Michael Sterling, Nick Sheik and Adam Herron on 24 February 2005; File Reference: Eden Brown s27 - 19.

⁴⁶⁴ Item 2.3 of CRF2 Minutes state *'all agreed not to work with Parc'*; File Reference: Select Leniency - 1668.

⁴⁶⁵ Email of 1 March 2005 from Thomas Young to John Petersen regarding contract with Taylor Woodrow; File Reference: AndersElite Leniency - 120a.

- *Prime stated reason given, percentage Fee's. In reality G8 summit members to exit all PARC agreements.*
- *All invoices paid via PARC i.e. Taylor Woodrow will not facilitate agreement direct.*
- *In summary we will not get paid for any recruitment undertaken.*
- *Hope the above clarifies current status.'*⁴⁶⁶

4.161 An Internal HMG email exchange of 20 May 2005 between Mike Bower and Vicky Hart confirms that in HMG's view there was an agreement or common understanding that CRF members would withdraw from the Parc/Taylor Woodrow arrangement:

*'Who is included on the list of agencies that were meant to be withdrawing from recruiting for TW? Was RGB included on the ones that were meant to have withdrawn?'*⁴⁶⁷

'I dont [sic] think they are big enough to be included but remember it's a secret as TW aren't supposed to know or PARC as the idea is that we force PARC out and we get to deal with TW again direct like we used to.

*RGB haven't been mentioned but I'll get a list, its (sic) the likes of Anders, Montrose, Henry etc etc BBT bla bla'*⁴⁶⁸

Email correspondence from CDI AndersElite to Hays

4.162 It appears to the OFT that in an email of 6 July 2005 from John Petersen of CDI AndersElite to Simon Cheshire of Hays, CDI AndersElite explicitly recognised that the CRF had agreed not to supply Candidates to Parc. In this email CDI AndersElite seemingly accepted that Hays would still be supplying Trades and Labour Candidates to Parc, but expressed concern that Hays were also supplying technical and

⁴⁶⁶ Internal HMG email of 10 May 2005 from Angelique Morgan on behalf to Steven Ware to Steve Atkin. File reference: Select Leniency – 623a

⁴⁶⁷ Internal HMG Email from Vicky Hart to Mike Bower of 20 May 2005; File Reference: Select Leniency - 1594

⁴⁶⁸ Internal HMG email of 20 May 2005 from Mike Bower to Vicky Hart. File Reference: Select Leniency - 1594.

professional Candidates to Parc, contrary to what had been agreed at the CRF:

'Simon,

*I promised to send you details of any activities by your RC's which appeared to go against **our Construction Forum agreement not to work through Parc** – I recognise that on the Trades & Labour side, you are obliged to continue with Parc. However, the attached suggests that your people continue to deal through Parc for technical and professional placements. I would welcome your comments⁴⁶⁹*

(emphasis added)

Internal email correspondence within Eden Brown

- 4.163 On 24 January 2006 Eden Brown met Vinci to discuss terms for supply of candidates under a possible Vinci (Parc Facilitator) Agreement.
- 4.164 Following that meeting, on 26 January 2006 Andrew Thorpe (of Eden Brown) sent an email to Ian Wolter (also of Eden Brown) entitled '*Construction forum v parc*' stating the following:

*'I have a slight predicament. The construction forum have a pact that we will not support parc.'*⁴⁷⁰

Internal email correspondence within CDI AndersElite

- 4.165 An internal CDI AndersElite email of 3 February 2006 from John Petersen to Euan Boyd and Dave Francis recognises the 'united front' agreed during CRF Meetings not to supply Candidates to Parc, and also that this agreement applied to all Construction Companies (in this case Skanska):

⁴⁶⁹ Email of 6 July 2005 from Susan Humphreys on behalf of John Petersen of CDI AndersElite to Simon Cheshire of Hays; File Reference: AndersElite Leniency - 122 and Hays Leniency - 120. This email arose in the context of CDI AndersElite finding out at the end of May 2005 that Hays had been supplying a candidate to TW through Parc, File Reference: AndersElite Leniency - 103.

⁴⁷⁰ Email (internal) of 26 January 2006 from Andrew Thorpe to Ian Wolter of Eden Brown; File Reference: Eden Brown s27 - 54.

*'I agree with Paul. I would like to speak to the most senior contact we have at Skanska to make it clear that we along with the other key players in the field will not deal through Parc. Please give me the names titles and contact details and I will speak to them direct. On a separate note I would ask JS to note the Parc approach to this client and to raise the matter at the next Construction forum. John.'*⁴⁷¹

(emphasis added)

Conclusion in respect of each party's involvement in the Collective Refusal to Supply Parc

- 4.166 Based on the evidence cited in paragraphs 4.56 to 4.165 above, the OFT finds that each of the Parties participated in an agreement that had as its object the prevention, restriction or distortion of competition in the form of the Collective Refusal to Supply Parc and therefore infringed the Chapter I prohibition.
- 4.167 The OFT considers that the understanding reached between the CRF Members at the CRF1 meeting on 12 November 2004 and confirmed throughout the Relevant Period regarding the Collective Refusal to Supply Parc was such as to constitute an agreement for the purposes of the Chapter I prohibition of the Act.
- 4.168 The evidence further demonstrates that the Parties had a common plan to limit their individual commercial freedom by determining the lines of their mutual action in the market, and that there was a 'concurrence of wills'⁴⁷² regarding the Collective Refusal to Supply Parc.
- 4.169 CRF Minutes indicate that the Collective Refusal to Supply Parc was to be applied to Parc in respect of the supply of Candidates to any Construction Company. Although in practice it appears that it applied in the main to PSAs with Parc to supply Candidates to Taylor Woodrow and Vinci, evidence gathered by the OFT during the investigation

⁴⁷¹ Email of 3 February 2006 from John Petersen to Euan Boyd and Dave Francis; File Reference: AndersElite s26 – 137.

⁴⁷² See paragraphs 3.22 to 3.28 of Section 3.

indicates that it was also applied to at least one other Construction Company.⁴⁷³

- 4.170 That the Parties had a common plan not to deal with Parc is evidenced by, for example, the timetable they agreed for withdrawing from the Parc PSAs with Taylor Woodrow and/or Vinci (as recorded in the CRF1 Minutes, see paragraph 4.73) and their reaction when HMG revealed during CRF2 that it had entered into a contract with Parc for the supply of candidates to Vinci in January 2005 in contravention of what had been agreed at CRF1 (see paragraphs 4.112 and 4.158).
- 4.171 Although certain Parties (HMG in relation to Vinci, AWA in relation to Vinci and Hays in relation to Taylor Woodrow)⁴⁷⁴ appear not to have fully abided by the Collective Refusal to Supply Parc this is irrelevant for a finding that an agreement existed and that they participated in such an agreement. In this regard, the relevant test is whether the Parties publicly distanced themselves from the discussions regarding the Collective Refusal to Supply that took place at CRF meetings (see paragraphs 3.26, 3.45 to 3.51 and paragraphs 4.172 to 4.173).
- 4.172 There is no evidence in the OFT's possession to indicate that any of the parties objected to the discussions regarding the Collective Refusal to Supply Parc during or after CRF meetings. By not publicly distancing themselves from the discussions on the Collective Refusal to Supply Parc, the parties were effectively encouraging the continuation of the infringement.⁴⁷⁵
- 4.173 In this respect, it is established case law that '*that complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable*'.⁴⁷⁶ In light of the evidence gathered, the OFT is of the view that none of the Parties publicly distanced themselves from the discussions at CRF meetings to the requisite legal standard in order to exclude their liability for an

⁴⁷³ Email of 3 February 2006 from John Petersen to Euan Boyd and Dave Francis; File Reference: AndersElite s26-137.

⁴⁷⁴ See paragraphs 4.79 to 4.88 and 4.118 to 4.119.

⁴⁷⁵ Case T-303/02 *Westfalen Gassen Nederland BV v Commission* [2006] ECR II-4567, at paragraph 124. See paragraphs 3.45 to 3.51 in Section 3.

⁴⁷⁶ Case T-303/02 *Westfalen Gassen Nederland BV v Commission* [2006] ECR II-4567, at paragraph 124. See paragraphs 3.45 to 3.51 in Section 3.

infringement of the Chapter I prohibition consisting of the Collective Refusal to Supply Parc.

4.174 Based upon the evidence cited in paragraphs 4.51 to 4.165 above, the OFT finds that each of the Parties engaged in The Collective Refusal to Supply Parc, which had as its object the prevention, restriction or distortion of competition and therefore infringed the Chapter I prohibition.

The Target Fee Rates Initiative

4.175 In this section of this Decision the OFT presents, analyses and draws conclusions from the evidence in relation to the Target Fee Rates Initiative on which it is relying to reach its infringement finding.

4.176 The OFT finds that each of the Parties infringed the Chapter I prohibition by participating in an agreement and/or concerted practice to fix target Fee Rates for the supply of Candidates to Neutral Vendors and certain Construction Companies, which had as its object the prevention, restriction or distortion of competition in the market for the supply, by Recruitment Agencies, of Candidates required by the Construction Industry.

4.177 This section is structured as follows:

- First, it provides a summary of the Target Fee Rates Initiative (see paragraphs 4.178 to 4.179);
- Second, it presents and analyses the evidence on which the OFT relies in respect of the Target Fee Rates Initiative by reference to the relevant law (see paragraphs 4.180 to 4.323); and
- Third, it sets out the OFT's conclusions in respect of each Party's involvement in the Target Rate Fee Rates Initiative by reference to the evidence and the relevant law (see paragraphs 4.324 to 4.331).

Summary of the Target Fee Rates Initiative

4.178 During CRF1 (attended by all of the Parties) the Parties identified target Fee Rates for the Supply of Permanent Candidates under PSAs and

Master Vendor Agreements. During CRF2 (attended by all of the Parties with the exception of AWA), the Parties identified target Fee Rates for the supply of Temporary Candidates. During CRF3, attended by all of the Parties, Eden Brown relayed to the Parties details of the Fee Rates charged to Rosser and Russell, a subsidiary of Vinci.

4.179 The OFT has also identified the following additional behaviour, arising out of the initial contact made or agreement reached at CRF Meetings, where Parties were able to either increase Fee Rates for the supply of Candidates to Neutral Vendors and Construction Companies or reduce uncertainty in the market in relation to the Fee Rates charged for the supply of Candidates to Neutral Vendors and Construction Companies:

- HMG was able to increase the Fee Rates payable by Parc in the agreement that it signed with Parc to supply Candidates to Vinci immediately following CRF1, as compared to the Fee Rates proposed by Parc to seven of the eight Parties prior to the establishment of the CRF. Details of the Fee Rates under this agreement were shared by HMG with other CRF Members.
- The Vinci (Parc Facilitator) Agreements entered into by Hays, Fusion People and HMG contained Fee Rates that were above the minimum Fee Rates agreed at CRF1 and also higher than the Fee Rates proposed by Parc prior to the creation of the CRF. Details of the Fee Rates under certain of these Vinci (Parc Facilitator) Agreements were shared with all of the Parties, with the exception of AWA and CDI AndersElite.
- BBT, Eden Brown, Hays, AndersElite and Fusion People each engaged in co-ordinated price-fixing conduct (including information sharing) regarding Fee Rates for the Supply of Candidates to the Construction Company Atkins.

Analysis of evidence in relation to the Target Fee Rates Initiative

Introduction

4.180 The OFT finds that each of the Parties infringed the Chapter I prohibition by participating in an agreement and/or concerted practice in relation to the Target Fee Rates Initiative.

- 4.181 As set out in section 3, it is not necessary for the OFT to come to a conclusion as to whether the conduct of the Parties should be specifically characterised as an agreement or as a concerted practice in order to demonstrate an infringement of the Chapter I prohibition.
- 4.182 An agreement within the meaning of the Chapter I prohibition exists where at least two undertakings adhere to a common plan that limits, or is likely to limit, their individual commercial freedom by determining the lines of their mutual action, or abstention from action, in the market.
- 4.183 The form in which the concurrence of wills is manifested is unimportant so long as it constitutes a faithful expression of the parties' intentions. In addition, the fact that a party to the agreement does not implement it or cheats on it at certain times does not preclude the finding that an agreement existed.
- 4.184 A concerted practice is a form of co-ordination between undertakings which, without having reached an agreement, knowingly substitute practical cooperation for the risks of competition.⁴⁷⁷
- 4.185 It is clear from the case law that practical co-operation in the form of reciprocal contacts, including participation in meetings, which have the object or effect of removing or reducing uncertainty as to the future intentions on the market of competitors is a sufficient basis for a finding that a concerted practice has taken place.⁴⁷⁸ This can also be expressed in terms of an absence of purely unilateral conduct.⁴⁷⁹ There is no additional requirement that such behaviour comprises implementation.⁴⁸⁰
- 4.186 If the Parties to those reciprocal contacts remain active on the market subsequent to the concertation then there is a presumption that they have taken into account the information they have received from their competitors as part of those reciprocal contacts when determining their subsequent conduct in the market. It follows that where two or more undertakings engage in reciprocal contacts which have the object or effect of removing uncertainty in the market and they remain active in

⁴⁷⁷ See paragraph 3.30.

⁴⁷⁸ See paragraphs 3.34 to 3.39.

⁴⁷⁹ *Apex Asphalt & Paving Co Limited v OFT* [2005] CAT 4, paragraph 206 and Case T-41/96 *Bayer AG v European Commission* [2000] ECR II-3383, paragraph 66.

⁴⁸⁰ See paragraphs 3.43 to 3.44.

the market subsequent to those contacts then they are presumed to have relied on the information exchanged and therefore to have engaged in a concerted practice in contravention of the Chapter I prohibition.

4.187 An agreement or concerted practice between undertakings which, directly or indirectly, fixes prices at which goods or services are sold will amount to an object infringement of the Chapter I prohibition since price-fixing, by its very nature, restricts competition to an appreciable extent.⁴⁸¹

Evidence relied on by the OFT in relation to the Target Fee Rates Initiative

4.188 The OFT considers that this evidence clearly demonstrates an agreement and/or concerted practice between the Parties in relation to the Target Fee Rates Initiative. This evidence is derived from the following sources:

- CRF Agendas, CRF Minutes⁴⁸² and manuscript notes taken at CRF Meetings;
- Bilateral and/or multilateral contacts between the Parties:
 - Documentary evidence relating to bilateral and/or multilateral contacts between the Parties in relation to Fee Rates for the supply of Candidates to Vinci; and
 - Documentary evidence relating to bilateral and/or multilateral contacts between the Parties in relation to Fee Rates for the supply of Candidates to Atkins.

CRF Agendas, CRF Minutes and manuscript notes taken at CRF Meetings

CRF 1

4.189 The CRF itself was established with the stated intention of providing a forum for discussion of the emergence of Neutral Vendors and Master Vendors providing services to the Construction Industry and also forming a strategy with regard to the Fee Rates that the Parties wanted to secure in supplying Candidates to Neutral Vendors and Master Vendors. An

⁴⁸¹ See paragraphs 3.80 to 3.86.

⁴⁸² See Annex B in relation to the accuracy of the minutes.

objective of HMG in setting up the CRF was to come to some agreement on Fee Rates.⁴⁸³

4.190 This can be seen by the first substantive item of the agenda circulated to the Parties in advance of CRF1, which states as follows:

'SETTING THE SCENE

- *neutral Vendor/Master Vendor- Friend or Foe?*
- *Perception of how the industry is changing*
- *Problems/ difficulties encountered*
- *The rise (and fall) of Parc (Taylor Woodrow/Vinci Agreements)'*

and

'WHAT SHOULD OUR STANCE BE REGARDING – NV/MV

- *Proposed benchmarks to entry – Fee and margin percentages'*

4.191 The CRF1 Minutes explicitly set out that during this meeting CRF Members agreed to introduce target Fee Rates in relation to Candidates supplied under PSA and Master Vendor Agreements. CRF1 Minutes record under the Heading 'Other Master Vendor/Neutral Vendor' as follows:

'All parties agreed not to operate below 12.5% permanent fee rate on all future PSA/Master Vendor agreements';

'Discussion took place on a minimum Freelance Gross Margin level of 17%. To be reviewed and agreed at the next meeting for both Construction and Specialist Sector Business'; and

*'In the eventuality of any one or more of the groups represented at the meeting, being appointed to an MV / NV agreements, all parties to communicate to **ensure that fees and terms are discussed and agreed prior to the bid submission**'. (emphasis added)*

⁴⁸³ Transcript of OFT interview with Steven Ware (HMG) dated at p5. File Reference: Select Leniency – 1859.

4.192 Under the Heading 'ANY OTHER BUSINESS', the CRF1 Minutes record '*Email Contacts – Email addresses for all attendees to be made available to enable a flow of information and maximise communication*'.

4.193 Karen Harris of HMG took the minutes of CRF Meetings. Her handwritten meeting notes of CRF1 record that CRF Members were seemingly aware that their conduct could be seen to constitute cartel activity, and that CRF Members did not want details of this conduct to become known outside of the CRF:

*'Not to let it get out that **we are a cartel**'*⁴⁸⁴ (emphasis added)

4.194 Karen Harris' handwritten notes of CRF1 also indicate that CRF Members discussed on what terms they would be willing to supply Candidates:

'What % are we comfortable with as min entry level?

- min fee entry level.

*- Level of exclusivity **issue** should be considered*

Perm 12.5% - Tony (E Brown) for being 1 of 4 12.5 – 15% Hayes [sic] for being 1 of 3-4 (12.5 – 17 on PSA/ MV direct)

*Parc – no exclusivity **Agreed** not to deal with them on any new agreements. (12.5% - 17 on PSA/MV direct)'*⁴⁸⁵ (emphasis added)

4.195 These notes also indicate CRF Members discussed on what terms they would be willing to act as MSPs themselves; in this scenario they would be acting as Master Vendors as they would be supplying Candidates from their own Recruitment Agency business in addition to Candidates supplied to the client from other Recruitment Agencies. Although the OFT does not include this conduct within the scope of the Target Fee Rates Initiative, the handwritten notes reproduced below indicate that if

⁴⁸⁴ Contemporaneous notes taken by Karen Harris of HMG at first CRF meeting, on 12 November 2004, page 2; (typed transcript provided to OFT by Select on 8 November 2006); File Reference: Select Leniency - 1831.

⁴⁸⁵ Contemporaneous notes taken by Karen Harris of HMG at first CRF meeting, on 12 November 2004, page 3; (typed transcript provided to OFT by Select on 8 November 2006); File Reference: Select Leniency - 1831.

this situation arose CRF Members would aim to limit the number of Recruitment Agencies who were supplying under this arrangement and that they would communicate with each other to ensure that fee rates were set at an acceptable level:

'If an Agency are Master vendor 2-3 Tier Suppliers should be on equal fee basis – is this right?

Shouldn't push fees down to push out other suppliers.

If Agency wins MV with 2-3 suppliers fees should be: (as PSA supplier + MV) 1 of 4 max

-instead of agreement min fees set up a line of communication for discussions when a contract arises.

-Look at T&C's that protect each other would mean it would be easier to work with each other so there is no threat' ⁴⁸⁶

(emphasis added)

4.196 Handwritten notes from John Peterson of CDI AndersElite also reveal that information about Fee Rates was disclosed between the Parties, including the Fee Rates which other CRF Members had in place regarding the supply of candidates to the construction industry. His handwritten notes on the Agenda of CRF1 record as follows⁴⁸⁷

'Simon – Hays – 12%

m 12.5% Perm'

CRF2

4.197 Item four of the agenda circulated in advance of CRF 2 is headed *'MVS/PSA/NV FREELANCE AGREEMENTS GROSS MARGIN ENTRY PERCENTAGE'*.

⁴⁸⁶ Contemporaneous notes taken by Karen Harris of HMG at first CRF meeting, on 12 November 2004 page 4; (typed transcript provided to OFT by Select on 8 November 2006); File Reference: Select Leniency - 1831.

⁴⁸⁷ Transcript of John Petersen's notes on CRF1 Agenda. File Reference: AndersElite Leniency - 28a.

4.198 CRF2 Minutes record, under the heading '*MVS/NEUTRAL VENDOR – MIN MARGIN ENTRY LEVELS*' that minimum fees, target margins and minimum margins were discussed during this meeting.⁴⁸⁸

4.199 CRF2 minutes record that HMG informed CRF Members of the Fee Rates in place under its recent arrangement with Parc for the supply of Candidates to Vinci and advised that a 'model' providing further information on this arrangement would be provided to CRF Members:

*'Vinci: 1. Are supplying ... HMG achieved pushing the price up to Perm- 13.5% up to £45,000/ 16% on £45,001 + and Freelance 18% GM Technical/ 15% GM Trades on Freelance Margin. Terms were revised before agreement to them in a model that will be deliverable to the Forum Group.'*⁴⁸⁹

4.200 During CRF2 the CRF Members further discussed the need to co-ordinate action in relation to Fee Rates in order to ensure that Fee Rates were at a suitable level. CRF2 Minutes record under the heading 'Neutral Vendors/MV' as follows:

*'If any of the Forum Group becomes a Neutral Vendor/Supplier need to ensure all members for the Forum Group are happy with the agreement terms and fees'*⁴⁹⁰

4.201 During CRF2 it also appears that the Parties present at that meeting, in addition to affirming their agreement not to work with Parc, agreed that they could work with Neutral Vendors other than Parc if Fee Rates were at levels acceptable to the CRF:

'All agreed not to sign any further Parc agreements, but can work with other Neutral Vendor companies if fees are agreeable to all other members of the Group'

4.202 During CRF2 the CRF Members affirmed the target Fee Rate of 12.5% agreed at CRF1 in relation to the supply of Permanent Candidates, and

⁴⁸⁸ Item 5 of CRF2 minutes; File Reference: Select Leniency – 1668.

⁴⁸⁹ Minutes of CRF2, item 2.1, update given by HMG with regard to Parc / Vinci; File Reference: Select Leniency - 1668.

⁴⁹⁰ Item 2.3 CRF2 Minutes; File Reference: Select Leniency - 1668.

reviewed the target Fee Rates to be pursued in relation to the supply of Temporary Candidates, concluding that a target fee rate of 20% should be put in place for Temporary Candidates. Under the heading '*MVS/NEUTRAL VENDOR – MIN MARGIN ENTRY LEVELS*', CRF 2 Minutes record as follows (reproduced here in their entirety):

'5.1 Permanent

- *Agreed at the previous meeting to have a minimum fee of 12.5% on Permanent Business with Neutral Vendors.*

Freelance

- *Agreed that it was unrealistic to put in place a set of minimum freelance GM entry level, due to different sectors working at different fee levels.*
- *Agreed we should aim for a 20% margin as a starting point on all sectors.*

General

- *All agreed that if a neutral vendor situation arose, all members for the Forum Group should be contacted to agree a suitable fee rate.*
- *If a level of 12-13% is required buy [sic] the Neutral Vendor it was agreed by all that we should walk away and not do business at this rate.*
- *If business circumstances slacked up, the lowest the Forum Group would operate is 14%'*

4.203 An agenda for CRF2 annotated by John Petersen reads:⁴⁹¹

'Internal review

Meeting with TW Vinci & Parc

Agreed 14 ½ perm & 18.5...

⁴⁹¹ Agenda for CRF2 annotated by hand by John Petersen and Transcript of the annotations; File Reference: AndersElite Leniency -134 and AndersElite Leniency-135.

12.5% for Perm...

Core business 20% Gross Margin return ...

Hays should be looking for 20% Gross Margin return ...'

4.204 An agenda for CRF2 annotated by Tony Pearce reads:

'MVS/PSA/NV FREELANCE AGREEMENTS

GROSS MARGIN ENTRY PERCENTAGE

- *Contractors*
- *Public Sector*
- *Client Organisations*

Failure to reach agreement on this point at last meeting. SW asked TP to present thought on minimum entry %'s for public sector agreements. TP outlined EB's approach in negotiating sector by sector on LCSG contracts. ... No agreement reached once again! Standard margin for core business in group is c20%, comment that demand is still high and supply still low, so no need to go into early teens %'s'.⁴⁹²

CRF3

4.205 Item 3 of the agenda circulated in advance of CRF3 is headed '*NEUTRAL VENDOR'S*', and included the sub-heading '*Parc entry into new clients*'. Item 3.2 of CRF3 minutes sets out details of the fee rates at which other Recruitment Agencies, not involved in the CRF, were doing business with Parc.

4.206 CRF3 Minutes record that Eden Brown disclosed the Fee Rates for permanent candidates it had in place (by verbal agreement) direct with the Construction Company Rosser and Russell (a subsidiary of Vinci).

⁴⁹² Internal Email from Tony Pearce of Eden Brown to Dave Gibbons, Ian Wolter, Michael Sterling, Nick Sohail and Adam Heron attaching annotated agenda for CRF2. File Reference: Eden Brown s27-19

*'Eden Brown: Vinci – only dealing with Russell [sic] and Russell side of the business directly via their Line Managers only. They have a verbal agreement with Colin Jellicoe that invoices will be paid. Fees are currently Perm 13 ½ % up to £45k and 16% over £45k.'*⁴⁹³

4.207 These Fee Rates obtained by Eden Brown were the same that HMG, Fusion People and Hays had agreed in their Vinci (Parc Facilitator) Agreements and therefore above the minimum Target Fee Rate of 12.5% agreed and recorded at CRF1.

4.208 John Petersen of CDI AndersElite's handwritten notes on the CRF3 Agenda read:

'Resourcers – 20 basic

*+ cpa'*⁴⁹⁴

John Petersen's Handwritten notes on the CRF2 Minutes read:

'on trades and labour

£1m @ 20%'

'Vinci Montrose Fusion

Parc were 10% fees – 14%

*12% GM – 18%'*⁴⁹⁵

CRF4

4.209 Item 1 of the agenda circulated in advance of CRF4 is headed '*Neutral Vendor Review*'. CRF4 Minutes record, under the heading '*NEUTRAL VENDOR/VINCI PARC*', details of Fee Rate structures that were in place.

⁴⁹³ Minutes of CRF3, item 3.0 '*NEUTRAL VENDORS: 3.1 Taylor Woodrow/ Vinci*', update given by Eden Brown; File Reference: Select Leniency – 1685.

⁴⁹⁴ Transcript of John Petersen's handwritten notes on agenda to CRF3. File Reference: AndersElite Leniency-32.

⁴⁹⁵ Transcript of John Petersen's handwritten notes on CRF2 minutes. File Reference: AndersElite Leniency-31.

4.210 CRF4 Minutes also record that HMG gave a presentation on Parc's activities with other Recruitment Agencies, which included details of the rates that Parc had in place with HMG and Hays at that time:

'1.0 NEUTRAL VENDOR/ VINCI PARC

1.0 Discussed presentation from Steven Ware, key facts are as follows:

- *Currently two First Tier Suppliers appointed nationally;*
 - *Hayes Montrose*

 - *Hill McGlynn*

- *In addition to the First Tier suppliers, two regional suppliers appointed across each region*
- *Vacancies issued to Second Tier Suppliers after;*
 - *14 days Permanent*

 - *48 hrs Freelance*

- *Parc currently utilising in excess of 40nr Second Tier suppliers*

Fee Structure

Permanent

- ***£0 - £45,000 – 13.5%***
- ***£45,001+ - 16%***

Freelance

- ***'Open Book' Margin – 18%⁴⁹⁶***

(emphasis added)

CRF5

⁴⁹⁶ Minutes of CRF4, item 1; File Reference: Select Leniency – 1624.

4.211 CRF5 Minutes record, under the heading '*Why the Construction Forum Exists*', as follows: '*Master Vendor Contracts – This is an issue – threat to margins*'.⁴⁹⁷

Bilateral and/or Multilateral contacts between the Parties

Introduction

4.212 The prohibition on concertation prohibits any direct or indirect contact between undertakings, where the object or effect is to influence the conduct on the market of a competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.⁴⁹⁸ The disclosure of any information which removes or reduces uncertainty as to future conduct is therefore of particular significance.

4.213 HMG took the lead role in organising CRF meetings and these meetings were preceded and followed by bilateral contacts between HMG and each of the CRF Members. This series of bilateral contacts is shown in tables C.2 – C.6 of Annex C which records which individuals received the agenda and minutes and when these were received.

Documentary evidence relating to bilateral and multilateral contacts in relation to Fee Rates for the supply of Candidates to Vinci.

4.214 The OFT notes that the first documentary evidence of an exchange of such information between any of the Parties pre-dates the first CRF meeting of 12 November 2004.

4.215 In an email of 21 October 2004 from Simon Cheshire of Hays to Steven Ware of HMG, Simon Cheshire forwarded a copy of an email of 21 September 2004 which he had sent to Darren Day and Marian Noone of Parc. In the email to Parc, Simon Cheshire reported that the Board of Hays had considered the contract offered by Parc for the supply of staff to Vinci but:

⁴⁹⁷ Minutes of CRF5, item 5; File Reference: Eden Brown s27 – 97.

⁴⁹⁸ Cases 40/73 etc. *Suiker Unie and Others v Commission* [1975] ECR 1663, at paragraph 174, see also Case T -7/89 *Hercules Chemicals NV SA v Commission* [1991] ECR II-1711 at paragraph 258. See also *Apex Asphalt and Paving Co. Limited v Office of Fair Trading* [2005] CAT 4 at paragraph 206 (v).

*'are not in a position to support Parc on permanent recruitment at the rates at which you propose. Ten per cent is too far from current market rates to be acceptable.'*⁴⁹⁹

- 4.216 The first key development in relation to the Vinci deal following CRF1 took place when HMG met with Parc and Vinci in December 2004 to discuss the supply of candidates to Vinci. On 10 January 2005 HMG signed an agreement to supply candidates to Vinci via Parc, at higher rates than had previously been proposed by Parc to CRF Members in August 2004.⁵⁰⁰
- 4.217 Details of this agreement were shared with other Parties during the CRF Conference Call.
- 4.218 Internal CDI AndersElite email correspondence provides an insight into what was discussed during the CRF Conference Call. It provides compelling evidence that during this call the Parties identified target Fee Rates that they would contract at in relation to the supply of Candidates to Vinci. These Fee Rates were the same as those that had been agreed by HMG in its Preferred Supplier Agreement with Parc to supply Candidates to Vinci following CRF1. The Fee Rates were higher than those that had been proposed by Parc prior to the establishment of the CRF and higher than the minimum Fee Rates agreed at CRF1.

'I participated in a conference call last Friday, called at the suggestion of Steve Ware of Hill McGlynn with other 'members' of the construction forum. Also attending were Tony Pearce of Eden Brown, Mike Kenrick of BBT, Simon Cheshire of Hays Montrose, Nick McCaffrey of Henrys and Messrs Metcalfe and Scott of Fusion. Steve Ware reported that following a letter to Vinci, saying that he would not be working for Vinci through Parc, Colin Jellicoe, the Group HR Director, asked to see him which he did. The Vinci HR Manager, Sonia ???? also attended. Colin Jellicoe said that Vinci had 23 suppliers via Parc. Steve repeated that he was not prepared to continue to work for them under the current terms and

⁴⁹⁹ Email of 21 October 2004 from Simon Cheshire of Hays to Steven Ware of HMG, forwarding email of 21 September 2004 from Simon Cheshire of Hays to Darren Day and Marian Noone of Parc: File Reference: Hays Leniency-518.

⁵⁰⁰ Thereby 'cheating' on the Collective Refusal to Supply Parc.

conditions. After discussion, he outlined his conditions for commencing work again for Vinci:

- *No more than 3 first tier suppliers*
- *Guaranteed lead times – 5 days for perm, 48 hours for freelance – these lead terms would be exclusive to the three first tier suppliers*
- *Access to line managers for vacancy clarification*
- ***Entry fees – currently via Parc of 10% for Perm, 12% for Contract – to be changed to 'minimum margin on client charges of 13.5% up to £45,000 for a perm placement, 16% over, 18% for Contract'***
- *Quarterly review meetings direct with Vinci*
- *All current temps transferred at current margins*
- *Vinci to run workshops to allow RC's to talk face to face with hiring managers*
- *All contentious contract clauses to be removed*

On 22nd December 2004, Vinci set up a meeting with Hill McGlynn – Steve Ware – attended by Parc at Parc's offices, where all these conditions were agreed. Steve Ware believes that the Parc arrangement with Vinci [...] [C]'.

Simon Cheshire of Hays reported that he had also seen Jellicoe, who proposed similar terms. However, Cheshire said he wanted to sign the agreement with Vinci, not Parc, but Vinci could not agree to this. Therefore, Hays will not be working with Vinci. Tony Pearce of Eden Brown has written to Parc saying they are not prepared to work with Vinci on the Parc terms. It was generally agreed, however, that it would probably be better to work within the agreement of 13.5% etc for the next few months.

Paul Scott said that they had met with Colin Jellicoe.

We have to decide now whether we wish to throw our hat into the ring at 13.5%, rather than the previous Parc 10%.⁵⁰¹

(emphasis added).

4.219 Handwritten notes made by John Petersen on an email of 4 January 2005 relating to the CRF Conference Call state:

'2. Simon Cheshire of Hays – also saw Colin Jellicoe of Vinci who proposed similar – wanted to sign agreement with Vinci not Parc – but they wont agree.

4. Entry fees

Minimum margins on client charges

13.5% up to 45K 16% over

18% free contract

V Perm 10% Contract 12%⁵⁰²

4.220 From this email it also appears that Hays had sought to contract direct with Vinci but that, at this stage, it did not appear that this was going to happen.

4.221 It appears that between January 2005 and April 2005, Fusion People, Hays, HMG and Henry Recruitment held negotiations directly with Vinci in relation to possible Vinci (Parc Facilitator) Agreements. Fusion People, HMG and Hays subsequently entered into Vinci (Parc Facilitator agreements) agreements in the first half of 2005. These agreements were at the same higher Fee Rates as originally agreed by HMG with Parc in January 2005 for the supply of Candidates to Vinci via Parc.

⁵⁰¹ Internal CDI AndersElite email from Susan Humphreys on behalf of John Petersen, to Thomas Young, John Seaman, Dave Francis, Bridget Ingram and Helen Johnson, of 11 January 2005, reporting on telephone conference of 7 January 2005. File Reference: AndersElite s27-61.

⁵⁰² Transcript of Handwritten notes made by John Petersen on an email from Karen Harris of HMG to Tony Pearce of Eden Brown, Adrian Warwick of AWA, John Petersen of CDI AndersElite, Mick Kenrick of BBT, Nick McCaffrey of Henry Recruitment, Paul Metcalfe of Fusion People, Paul Scott of Fusion People, Simon Cheshire of Hays, Thomas Young of CDI AndersElite, Steven Ware of HMG and Mark Bull of HMG regarding teleconference on 7 January 2005; File Reference: AndersElite Leniency-29 and AndersElite Leniency-157.

4.222 The specific instances when the OFT is aware that information on Fee Rates was disclosed between the Parties in relation to the supply of Candidates to Vinci (both by HMG under its PSA with Parc and by certain of the Parties direct to Vinci under the Vinci (Parc Facilitator) Agreement) are as follows:

- On 7 January 2005 the CRF Conference Call took place, when HMG and Hays relayed details of the terms and Fee Rates which they had agreed with Parc for the supply of Candidates to Vinci at the end of 2004.⁵⁰³ Specifically, during the CRF Conference Call, Steven Ware of HMG disclosed that HMG had an agreement with Parc to supply Vinci and the Fee Rates at which it would be supplying. Simon Cheshire of Hays disclosed that Vinci had proposed the same terms to Hays,⁵⁰⁴
- At CRF2 on 24 February 2005 HMG again outlined to the CRF details of the Fee Rates it had achieved with Parc for the supply of Candidates to Vinci;⁵⁰⁵
- On 8 March 2005, Steven Ware of HMG sent Fusion People and Henry Recruitment a copy of the Vinci (Parc Facilitator) Agreement between Vinci and HMG, which contained information on Fee Rates;⁵⁰⁶
- On 10 March 2005, Simon Cheshire of Hays sent Fusion People a copy of the proposed Vinci (Parc Facilitator) Agreement between Hays and Vinci (which was signed on 14 March 2005), which contained information about proposed Fee Rates;⁵⁰⁷

⁵⁰³ Email (internal) of 11 January 2005 from Susan Humphreys on behalf of John Peterson to Thomas Young, File Reference: AndersElite s27-61.

⁵⁰⁴ Email from Susan Humphreys (on behalf of John Petersen) to Thomas Young and others dated 11 January 2005; File Reference: AndersElite s27-61.

⁵⁰⁵ Minutes of CRF2, item 2.1.3; File Reference: Select Leniency – 1668.

⁵⁰⁶ Email dated 8 March 2005, to Colin Jellicoe, copied to Paul Metcalfe (Fusion People) and Kathryn Marks (Henry Recruitment). File Reference: Henry s27-60.

⁵⁰⁷ Email dated 10 March 2005 from Simon Cheshire to Paul Metcalfe; File Reference: Hays Leniency - 466.

- On 15 March 2005, Simon Cheshire of Hays sent Henry Recruitment a copy of its Vinci (Parc Facilitator) agreement with Vinci, which contained information about Fee Rates;⁵⁰⁸
- On 6 April 2005 Fusion People sent the final version of the Vinci (Parc Facilitator) Agreement agreed with Vinci to all CRF members with the exception of AWA and CDI AndersElite. This included information on the level of Fee Rates;⁵⁰⁹
- On 7 April there was an exchange between Fusion People and BBT in relation to the Vinci (Parc Facilitator) Agreement. BBT replied to Fusion People's email of 6 April 2005 by asking '*Are you billing Vinci or Parc? Is it the same deal as Hill McGlynn? Have Hays also signed up to the deal? What contract rate have you got?*'. In response to this Fusion People confirmed '*This is direct with Vinci – Parc is actually the facilitator. The rates are: 13.5% up to £45,000, 16% over £45,000*'; and
- At CRF3 on 19 May 2005 Eden Brown relayed details of the fees charged to Rosser and Russell, a subsidiary of Vinci. Those rates were the same that HMG, Hays and Fusion People had agreed for the Vinci (Parc Facilitator) Agreement and therefore above the 12.5% recorded as agreed at CRF1.

Apparent changes in Fee Rates in relation to the supply of Candidates to Vinci

4.223 As the Margin Protection Initiative is an infringement by object, the OFT does not need to determine whether or not it had an effect. However, the OFT notes that Fee Rates between certain of the Parties and Vinci in relation to the supply of Candidates to Vinci would appear to have increased over the period:

- Prior to the formation of the CRF, Parc proposed Fee Rates to all the Parties (with the exception of BBT and CDI AndersElite) of 10%. AWA and Henry Recruitment agreed these rates;

⁵⁰⁸ Email from Claire McKernan (on behalf of Simon Cheshire) to Henry Recruitment dated 15 March 2005; File Reference: Henry s27- 65.

⁵⁰⁹ Emails dated 6 April 2005, from Paul Metcalfe to Mike Kenrick, Simon Cheshire, Zerin Drury, Steven Ware and Kathryn Marks; File Refs: Fusion Leniency 26, 25, 24, 23a and 23.

- In January 2005 HMG agreed to supply Vinci via Parc at Fee Rates ranging from 13.5% to 18%, which were higher than the Fee Rates proposed by Parc prior to the formation of the CRF;
- Between March and May 2005 Hays, HMG and Fusion People signed Vinci (Parc facilitator) agreements with Vinci at these same Fee Rates, also ranging from 13.5% to 18%.

4.224 It appears to the OFT that disclosure of information on Fee Rates for the supply of Candidates to Vinci may have influenced the conduct of certain of the Parties, in particular it may have led to certain Parties signing Vinci (Parc Facilitator) Agreements with Parc at similar Fee Rates, which were higher than those proposed to them by Parc prior to the establishment of the CRF.

4.225 The disclosure of any information which removes or reduces uncertainty as to future conduct is of particular significance in showing the existence of a concerted practice. As set out in paragraphs 3.43 to 3.44, there is a presumption that information disclosed within the context of a concerted practice will be taken into account if undertakings continue to be active on the market following such disclosure. This is of particular importance when such disclosure relates to future pricing intentions.

4.226 As has been set out, certain of the Parties disclosed information on the Fee Rates that they had obtained for the supply of Candidates to Vinci to other Parties. The OFT has set out above that Fee Rates payable to the Parties would appear to have increased in the period from when Parc first proposed Fee Rates prior to the establishment of the CRF to when Hays, HMG and Fusion People signed the Vinci (Parc Facilitator) Agreements.

4.227 The OFT considers it likely that this co-ordinated conduct and pricing information disclosure between the Parties contributed to the certainty that Fee Rates higher than those originally proposed by Parc could be achieved in relation to the supply of Candidates to Vinci. This view is supported by an analysis of fees over the period in question, as set out in paragraphs 4.223 to 4.224 above. This includes a comparison of the Fee Rates agreed by certain of the Parties with Vinci and the Fee Rates

agreed between Parc and other Recruitment Agencies for the supply of candidates to Vinci

4.228 At the very least, the OFT considers that this disclosure enabled the each of Parties to be confident that they were not getting a 'worse deal' than the other Parties for the supply of Candidates to Vinci. This view is supported by analysis of the Parties' responses to questions put by the OFT during its investigation, as set out in paragraphs 4.229 to 4.237 below.

Specific representations from certain of the Parties in relation to the consequences of reciprocal contacts regarding the supply of Candidates to Vinci

4.229 Certain of the Parties have confirmed in response to questions put by the OFT that the exchange of information regarding fees and the contracts with Vinci and Parc removed uncertainty in the market. This is because it allowed them to confirm that they were being offered the same rates as other Parties. In particular, CDI AndersElite, Hays and Fusion People have confirmed that the exchange of information on fees removed uncertainty in the market.

4.230 For example, CDI AndersElite told the OFT that:

'because each CRF member then knew the rates at which Vinci were prepared to deal for this type of arrangement. In consequence:

- *It enabled each CRF member to know that in tendering at that rate they would not be missing out on a commercial opportunity to deal at a higher rate.*
- *It meant that CRF members knew that if they wished to be added to the PSL, they need not offer a rate lower than that apparently achieved by Hill McGlynn in its negotiations.*
- *It meant that [sic] knew that it would be commercially worthwhile making the effort to deal direct with Vinci.*
- *It potentially affected Vinci/Parc's negotiating power.'*⁵¹⁰

⁵¹⁰ CDI AndersElite Fees Evidence Grid of 14 February 2007, page 54, response to question 14; File Reference: AndersElite Leniency-185.

4.231 During the course of its investigation the OFT asked certain of the Parties to comment on this statement from CDI AndersElite, and Hays responded as follows:

'Hays accepts that the information described in the OFT's letter dated 1 June 2007 [quoting CDI AndersElite's paragraphs above] could have encouraged a CRF member not to accept an offer at a lower rate and/or hold out for a higher rate.

Hays therefore broadly agrees with the analysis provided by CDI-AndersElite [cited above].'⁵¹¹

4.232 Tony Pearce of Eden Brown has indicated that when Fusion People agreed with Vinci a fee which was in excess of the 10 per cent agreed with Parc/Taylor Woodrow:

'[I]t is possible that the higher fee achieved [by Fusion People] may have been partly as a result of the agreement not to go below 12.5% at CRF1 or may have been partly as a result of Hill McGlynn's disclosure at CRF2 that they had achieved a rate of 13.5% for permanent employees with Parc/Vinci'.⁵¹²

4.233 Fusion People has acknowledged that it exchanged information in order to ensure that it was not receiving lower rates:

'Fusion did this in the aim of finding out whether it was receiving lower fees than other CRF members, as had been the case in relation to the Parc agreement involving Taylor Woodrow'.⁵¹³

4.234 Fusion People also accepted that *'the members of the CRF increased the transparency of the relevant market for the supply of recruitment services and that this would have facilitated collusion. Fusion accepts*

⁵¹¹ Hays Letter of 21 June 2007, paragraph 11; File Reference: Hays Leniency-677a.

⁵¹² Tony Pearce's Witness Statement of 16 May 2008, para 8; File Reference: Eden Brown Leniency-97.

⁵¹³ Fusion People's Leniency application of 17 September 2007, paragraph 24; File Reference: Fusion Leniency 162.

that the effect of the increased market transparency may have been to remove pressure to reduce prices and agree less advantageous terms'.⁵¹⁴

4.235 HMG's knowledge that the other Parties had refused to supply candidates to Vinci through Parc may have assisted HMG to achieve a higher rate in its negotiations. This seems to be confirmed by BBT who has told the OFT that:

'BBT accepts that CRF1 reduced some uncertainty as to the position of other agencies... the reduction of uncertainty may have assisted other CRF members in deciding how to proceed.'⁵¹⁵

4.236 The fact that only one Party discloses⁵¹⁶ its future intentions is not sufficient to exclude the possibility of a concerted practice. The mere receipt of information concerning competitors may be sufficient to give rise to concertation unless the recipient of the information puts forward evidence to establish that it has indicated its opposition to the disclosure of information by competitors. The OFT has not received any evidence from the Parties which suggests that they indicated their opposition to the disclosure of the information they received either at the CRF meetings or in other communications between the Parties.

4.237 Vinci has told the OFT that it was under no pressure to source Candidates direct from Recruitment Agencies during this time. However, the OFT notes that Vinci's focus was on getting candidates and that Vinci appears to have been frustrated during this time because of the perception that the Collective Refusal to Supply Parc (specifically in relation to the Taylor Woodrow account) was inhibiting Vinci's ability to recruit Candidates (see paragraphs 4.139 to 4.144).

Specific reciprocal contacts in relation to the supply of Candidates to Atkins Group and Atkins Water Division

4.238 In this section the OFT sets out its evidence and reasoning why contacts between certain of the Parties (namely CDI AndersElite and BBT, BBT

⁵¹⁴ Fusion People's Leniency application of 17 September 2007, paragraph 19; File Reference: Fusion Leniency 162.

⁵¹⁵ BBT fees evidence grid of 14 February 2007, page 15, response to question 14. File Reference: Select Leniency-1943

⁵¹⁶ Joined Cases T-202/98 etc *Tate & Lyle and others v Commission* [2001] ECR II-2035, paragraph 54.

and Fusion People and Eden Brown and Hays) in relation to Atkins form part of the overall Target Fee Rates Initiative. This evidence, along with the OFT reasons for proposing to include it within the scope of the Target Fee Rates Initiative, was previously set out in the Statement of Objections.

4.239 CDI AndersElite, BBT and Eden Brown did not make any submissions in response to the OFT's proposed finding in the Statement of Objections that their contacts with the other specified Parties in relation to Atkins forms part of the Target Fee Rates Initiative.

4.240 Fusion People made representations that its contact with BBT in relation to Atkins should not form part of the Target Fee Rates Initiative. Hays also made representations in response to the Statement of Objections that the OFT has not demonstrated to the requisite standard that its contact with Eden Brown regarding Atkins forms part of the Target Fee Rates Initiative. These representations are considered below.

4.241 The OFT notes that in its written response to the Statement of Objections, Hays submits that the alleged infringement in relation to Atkins is '*the sole basis on which the OFT intends to extend the scope of the Target Fee Rates Initiative for Hays to Construction Companies*'.⁵¹⁷ However, the evidence set out in paragraphs 4.206 and 4.221 - 4.222 above, which was included in the Statement of Objections, clearly indicates that the reciprocal contacts between the Parties concerning Atkins was not the sole basis on which the OFT extended the scope of the Target Fee Rate Initiative. The OFT therefore rejects Hays' submission in this regard.

4.242 After considering responses to the Statement of Objections, the OFT remains of the view that contact between CDI AndersElite and BBT, BBT and Fusion People and Eden Brown and Hays regarding fee rates to be charged for the supply of Candidates to Atkins forms part of the Target Fee Rates Initiative. This section is structured as follows:

- First it provides an analysis of contact between CDI AndersElite and BBT in relation to Atkins. (Paragraphs 4.243 to 4.255 below)

⁵¹⁷ Hays written response to the Statement of Objections at paragraph 1.7(b).

- Second, it provides an analysis of contact between Fusion People and BBT in relation to Atkins including:
 - an analysis of the evidence; (paragraphs 4.256 to 4.262 below)
 - a consideration of Fusion People's submissions in response to the Statement of Objections regarding this contact and the OFT's response to Fusion People's submissions (paragraphs 4.263 to 4.266); and
 - the OFT's conclusion in relation to Fusion People and BBT's contacts in relation to Atkins (paragraphs 4.267 to 4.270 below).
- Third, it provides an analysis of contact between Eden Brown and Hays in relation to Atkins including:
 - an analysis of the evidence; (paragraphs 4.271 to 4.285 below)
 - a consideration of Hays' submissions in response to the Statement of Objections regarding this contact and the OFT's response to Hays' submissions (paragraphs 4.286 to 4.305 below); and
 - the OFT's conclusion in relation to Hays and Eden Brown's contact in relation to Atkins (paragraphs 4.306 to 4.314).

CDI AndersElite and BBT's contacts regarding Atkins

4.243 In June 2005, CDI AndersElite was in negotiations with Atkins Water concerning the supply of Candidates to the Atkins Water division. At a meeting on 14 June 2005, Atkins Water informed CDI AndersElite it wanted their Preferred Suppliers List to operate at a margin of 8%.⁵¹⁸ This offer was rejected by CDI AndersElite but CDI AndersElite stated that it would consider supplying if Atkins were to increase the fee rates that it was prepared to pay.⁵¹⁹

⁵¹⁸ Minutes from meeting between CDI AndersElite and Atkins Water of 14 June 2005. File Reference: AndersElite Leniency – 37.

⁵¹⁹ Letter of 16 June 2005 from CDI AndersElite to Atkins. File Reference: AndersElite Leniency-105.

4.244 On 28 June 2005, CDI AndersElite confirmed to Atkins that a 12% rate was acceptable,⁵²⁰ but ultimately Atkins Water rejected this proposal.⁵²¹

4.245 In June 2005, BBT was also involved in negotiations to supply Atkins Water. During the course of negotiations, BBT became aware (from Atkins) that other preferred suppliers agreed to supply Atkins Water at 12% mark up, a figure which BBT considered too low.⁵²²

4.246 An internal CDI AndersElite email of 23 June 2005, (from John Petersen to John Seasman) stated:

*'I have spoken to my contact at BBT, who has said to Jenny Afflick that there is no way he would drop the rate to 8% or 10% - they are going in at 15% but could drop to a bit lower - say 13%. I have said emphatically that we have not agreed 8%.'*⁵²³

4.247 CDI AndersElite has confirmed that the contact at BBT was Mike Kenrick. The following entry also appears on 23 June of John Petersen's 2005 diary:

*'Mike Kenrick of BBT...Atkins. Database building on contract workers'.*⁵²⁴

4.248 Mike Kenrick has stated that during the course of this conversation he was asked if BBT were supplying at a certain Fee Rate.⁵²⁵

4.249 On 23 June 2005, BBT emailed Atkins with Fee Rates of 13% for contract Candidates. For permanent Candidates it offered 12% (up to £19,000), 13% (for £20,000 - £34,999) and 14% (for £35,000) upwards.⁵²⁶ Atkins responded offering rates of 13% on contract

⁵²⁰ Email dated 28 June 2005 from John Seasman to Jenny Affleck; File Reference: AndersElite Leniency - 42.

⁵²¹ Email from Ryan McDonald to John Seasman dated 20 July 2005; File Reference: AndersElite Leniency - 43.

⁵²² See Cobbetts's response on behalf of Select to Question 4 of an OFT's information request; File Reference: Select Leniency - 1943

⁵²³ Internal CDI AndersElite email of 23 June 2005; File Reference: AndersElite Leniency - 148.

⁵²⁴ John Petersen's diary, 23 June 2005; File Reference: AndersElite Leniency - 147.

⁵²⁵ Transcript of OFT interview of 13 November 2006 with Mike Kenrick (BBT) at page 39. File Reference; Select Leniency - 1859

⁵²⁶ Email of 23 June 2005 from BBT to Atkins; File Reference: Select Leniency - 2039a.

Candidates and 12% for all permanent in line with other preferred suppliers.⁵²⁷ BBT then rejected this offer.⁵²⁸

4.250 On 30 June 2005, Mike Kenrick of BBT attempted to send an email to John Petersen of CDI AndersElite. In this correspondence, he referred to 'a conversation last week' and asked if Mr Petersen would confirm if CDI AndersElite were a preferred supplier to Atkins Water and that he had been told that all suppliers had gone to 12%, which he would not go to.⁵²⁹ As this email appeared to be misaddressed, it is not known if Mr Petersen received this email.

Conclusion on contacts between CDI AndersElite and BBT

4.251 The OFT considers that the evidence shows that in a telephone conversation Mr Petersen and Mr Kenrick discussed Fee Rates to be charged to Atkins Water and that both parties stated that they would not reduce Fee Rates to a level of 8-10%.

4.252 This conversation had the effect of reducing uncertainty in the market place and thus facilitated co-ordination of their prices when negotiating their agreements with Atkins.

4.253 Prior to the issue of the Statement of Objections, CDI AndersElite admitted in its leniency application to exchanging information regarding fees for the supply direct to clients. Randstad's leniency agreement covered conduct relating to obtaining information on rates from Fusion People and CDI AndersElite.

4.254 Neither CDI AndersElite nor Randstad provided any representations in response to the Statement of Objections regarding the OFT's provisional finding that the Target Fee Rate Initiative extended to CDI AndersElite and BBT's contacts regarding Atkins.

4.255 Accordingly, the OFT considers that the contacts between CDI AndersElite and BBT concerning Atkins form part of the overall infringement.

⁵²⁷ Email of 28 June 2005 from Atkins to BBT; File Reference: Select Leniency - 2039a

⁵²⁸ Subsequent to this, in an email exchange of 28 June 2005, CDI AndersElite confirmed to Atkins that a 12% rate on water was acceptable. File Reference: AndersElite Leniency-42.

⁵²⁹ Email of 30 June 2005 from BBT to John Petersen. File Reference: Select Leniency - 2039.

Fusion People and BBT's contact regarding Atkins

- 4.256 During its negotiations with Atkins Water, BBT decided to contact other agencies regarding fees to '*to establish if Atkins was being truthful in its claims about other consultancies*' in relation to Fee Rates.⁵³⁰
- 4.257 On 29 June 2005, Ryan McDonald of Atkins Water emailed Mike Kenrick of BBT accepting BBT's offer as set out in paragraph 4.249, but suggesting a clause to renegotiate the rates should BBT wish to reduce its fees to be in line with other recruitment companies.⁵³¹
- 4.258 In an internal BBT email of 1 July 2005, BBT set out its understanding that Fusion People had agreed to 12% for Atkins permanent business and stated that it was negotiating for 15% for freelance.⁵³²
- 4.259 BBT has told the OFT that the information received from Fusion People relating to fees agreed with Atkins could have removed uncertainty surrounding Fee Rates in place.⁵³³
- 4.260 However, regarding the internal BBT email described at paragraph 4.258 above Fusion People has stated that '*no weight can reasonably be attached to that email*'.⁵³⁴ Fusion People has stated that the information attributed to the Fusion People contact is inaccurate as Fusion People had agreed with Atkins on different rates from those specified in the email.⁵³⁵
- 4.261 Fusion People has told the OFT that it believed a contract signed with Atkins in October 2004 with rates of 15% for permanent staff was in place and has provided evidence to show that in 2005, the rates at

⁵³⁰ BBT Evidence Table on Fees at p15 attached to email of 14 February 2007 from Cobbetts on behalf of Select in response to an OFT's request for information. File Reference: Select Leniency - 1943 at page 70.

⁵³¹ Email from Ryan McDonald to Mike Kenrick dated 29 June 2005; File Reference: Select Leniency - 2039a.

⁵³² Internal BBT Email of 1 July 2005; File Reference: Select - Leniency-2039a.

⁵³³ See BBT Evidence Table on Fees at p15 attached to email of 14 February 2007 from Cobbetts on behalf of Select in response to OFT information request. File Reference: Select Leniency - 1943 at page 70.

⁵³⁴ Fusion People's Leniency Application at paragraph 16 ; File Reference: Fusion Leniency - 162.

⁵³⁵ Fusion People Leniency Application at paragraph 17 ; File Reference: Fusion Leniency - 162.

which it supplied Atkins varied from those contained in the BBT internal email.⁵³⁶

4.262 However, the OFT has been provided with a signed contract for permanent recruitment between Fusion People and Atkins Ltd dated 14 January 2005, signed by Fusion People on 22 July 2005 and Atkins on 29 July 2005. The rate specified in this contract was 12% across all salaries.⁵³⁷ While the OFT notes that subsequent supply by Fusion People to Atkins was at a higher rate, this contract, signed shortly after the BBT internal email was sent, is consistent with the Fee Rates described in the BBT internal email.

Fusion People's submission in response to the Statement of Objections and the OFT's response

4.263 In its written response to the Statement of Objections, Fusion People reiterated its view that no weight could reasonably be placed on the email referred to above. Fusion People stated:

'The allegation here that Fusion People engaged in co-ordinated price fixing conduct in relation to Atkins comes solely from an alleged exchange of emails between Mat Woodall of BBT and Ivan Williams of Fusion People from which no inference of such conduct can be drawn , and certainly not to the standard of proof required by the OFT...Mr Woodall was a junior BBT employee...Mr Williams used to work for BBT and after his departure remained a personal friend of Mr Woodall...Mr Williams has left Fusion [...] [C].'⁵³⁸

4.264 As Fusion People has not provided any further evidence regarding its contact with BBT regarding Atkins, this response effectively repeats the submissions made by Fusion People in relation to this evidence prior to the issue of the Statement of Objections.

⁵³⁶ See documents provided by Fusion People at a meeting with the OFT held on 6 March 2008. File Reference: Fusion Leniency - 178.

⁵³⁷ Letter from WS Atkins plc in response to an OFT's information request of 24 October 2007 annexing contracts between various CRF members and Atkins – see attachment C3; File Reference: Atkins Third Party Correspondence - 290.

⁵³⁸ Fusion People's written representations on the Statement of Objections at paragraph 31.

4.265 However, in response to Fusion People's submissions the OFT notes the following:

- although the OFT does not have specific evidence of the original contact between Fusion People and BBT, but only an internal BBT email describing the content of the contact between Fusion People and BBT, the content of the internal BBT email is supported by the contract signed by Fusion People on 22 July 2005 referred to in paragraph 4.262 above;
- although Fusion People refer to the submission by Randstad that the author of the internal BBT email, Mr Woodall, was a junior employee, the OFT notes that Mr Woodall's email was sent to Mike Kenrick of BBT, who was Operations Director of BBT and reported directly to the CEO, Peter Reynolds. Therefore, the information obtained by Mr Woodall was passed directly to a senior manager of BBT; and
- Mr Woodall's email was sent in response to him being forwarded an email chain containing email negotiations between BBT (Mike Kenrick) and Atkins regarding fee rates for the supply to Atkins.

4.266 In these circumstances, the OFT is satisfied that Mr Woodall's email shows the following:

- there was contact between an employee of BBT and an employee of Fusion People;
- during the course of this discussion, the Fusion People employee disclosed information regarding the fee rates Fusion People had agreed with Atkins, thereby disclosing its course of conduct upon the market; and
- this information was disclosed to Mr Kenrick who was, at the relevant time, engaged in negotiations with Atkins regarding fee rates to supply Atkins.

Conclusion on contacts between Fusion People and BBT

4.267 The OFT considers that there was contact between Fusion People and BBT concerning the rates that Fusion People had agreed with Atkins.

This had the effect of removing uncertainty in the market and had the potential to facilitate co-ordination in the market.

- 4.268 The evidence shows that Fusion People and BBT were prepared to discuss fee rates agreed not only with Neutral or Master Vendors but also those agreed directly to Construction Companies, in this case Atkins. This contact only arose after the original contact between Fusion People and BBT was made at CRF meetings and after the commencement of the Target Fee Rate Initiative.
- 4.269 The OFT therefore considers that this contact between Fusion People and BBT regarding fee rates agreed with Atkins does not constitute a stand alone agreement and/or concerted practice, but rather forms part of the overall continuing agreement and/or concerted practice known as the Target Fee Rate Initiative. Thus, the OFT does not consider it necessary that this contact form an agreement and/or concerted practice in itself, but rather is a constituent part of the overall agreement and/or concerted practice.
- 4.270 Taking the evidence in the round, the OFT is satisfied that this arose in the context of the overall Target Fee Rate Initiative and the OFT is therefore satisfied that the scope of the Target Fee Rate Initiative was not limited to the supply to Neutral and Master Vendors, but extended to the supply of Candidates directly to Construction Companies. Therefore this contact forms part of the overall infringement.

Hays and Eden Brown's contacts concerning Fee Rates to Atkins

- 4.271 In June 2004, Eden Brown and Hays both entered into agreements with Atkins to supply Temporary and Permanent Candidates.⁵³⁹
- 4.272 At the time of these agreements, Atkins was already one of Eden Brown's largest clients.⁵⁴⁰ Atkins had attempted to renegotiate the rates that Eden Brown was to charge in the June 2004 contracts, however Eden Brown had resisted any change to these rates, which remained at

⁵³⁹ Letter from WS Atkins plc to OFT dated 6 November 2007; File Reference: Atkins Third Party Correspondence - 290.

⁵⁴⁰ Transcript of OFT interview with Tony Pearce (Eden Brown) dated 27 September 2006, at page 30. File Reference: Eden Brown Leniency – 50c (See also Eden Brown Leniency – 73 – Email from Taylor Wessing to the OFT approving the transcript).

their prevailing levels.⁵⁴¹ As a result Atkins informed Eden Brown that when the contracts were to be renegotiated the following year it hoped Eden Brown would be more cooperative.⁵⁴²

4.273 When these contracts were due to be renewed in June 2005, Eden Brown was aware that both Hays and CDI AndersElite were large suppliers to Atkins.⁵⁴³ Prior to Eden Brown commencing negotiations with Atkins about the renewal of these contracts, Tony Pearce of Eden Brown and Simon Cheshire of Hays had a telephone conversation regarding their respective Atkins contracts.

Eden Brown's evidence in relation to contact with Hays regarding Atkins

4.274 During an interview with the OFT in September 2006, Tony Pearce was asked by the OFT whether he had discussed with either Hays or CDI AndersElite the Atkins contract. Mr Pearce stated that he had one telephone conversation with Simon Cheshire of Hays regarding Atkins. This discussion was regarding the '*...forthcoming and pending negotiations or renegotiations but there was no discussion or disclosure of our individual fees*'.⁵⁴⁴ Mr Pearce stated that the conversation was conducted '*...in the spirit of the first construction forum meeting when there was a mutual agreement not to go below a certain [fee] level...[and] not to fix fees uniformly across all three companies.*'⁵⁴⁵

4.275 Mr Pearce's recollection of the conversation is that although neither he nor Mr Cheshire disclosed individual fee levels, they did agree to communicate on Fee Rates in relation to Atkins and '*...agreed to take a stance on not lowering our existing level*'⁵⁴⁶ in relation to the upcoming renegotiation of Eden Brown's and Hays' respective contracts with Atkins.

⁵⁴¹ Internal Eden Brown email from Tony Pearce to Dave Gibbons, Andrew Thorpe and Simon Jennings dated 15 April 2005. File Reference: Eden Brown s27 - 34.

⁵⁴² Internal Eden Brown email from Tony Pearce to Dave Gibbons, Andrew Thorpe and Simon Jennings dated 15 April 2005. File Reference: Eden Brown s27 - 34.

⁵⁴³ Transcript of OFT interview with Tony Pearce (Eden Brown) dated 27 September 2006, at page 30. File Reference: Eden Brown Leniency – 50c.

⁵⁴⁴ Transcript of OFT interview with Tony Pearce (Eden Brown) dated 27 September 2006, at p31. File Reference: Eden Brown Leniency – 50c

⁵⁴⁵ Transcript of OFT interview with Tony Pearce (Eden Brown) dated 27 September 2006, at p31. File Reference: Eden Brown Leniency – 50c

⁵⁴⁶ Transcript of OFT interview with Tony Pearce (Eden Brown) dated 27 September 2006, at p32. File Reference: Eden Brown Leniency – 50c

4.276 During the course of his interview with the OFT, Mr Pearce confirmed his belief that he and Mr Cheshire had reached a mutual understanding to resist pressure to reduce fees.⁵⁴⁷ He also stated:

'I wouldn't say that we agreed to coordinate, but we certainly agreed to communicate [on fees]

We didn't agree to discuss our fees going forward. We agreed to take a stance on not lowering our existing level [and that] we are not going to budge from the position that we are in now...

We agreed that it was our intention not to reduce [fees to Atkins].⁵⁴⁸

4.277 The OFT subsequently asked that Mr Pearce provide a witness statement, including details of the telephone conversation with Mr Cheshire. In his statement dated 16 May 2008, Mr Pearce stated:

'I had a phone conversation with Simon Cheshire of Hays Montrose where we discussed the fact that we would shortly be renewing contracts with Atkins in June 2005. I believe this conversation took place on 28 January 2005 as I recall the conversation took place while I was in Eden Brown's Bristol office and my Outlook calendar confirms that was the only day I was there during the relevant period. We did not disclose our specific fee margins but agreed that we should try to avoid dropping our fee levels below those already in place.'⁵⁴⁹

4.278 The OFT notes that although Tony Pearce's recollection during his interview with the OFT was that the telephone call with Simon Cheshire took place in March 2005, Eden Brown later confirmed that Tony Pearce's recollection was also that he was in Bristol when the conversation took place. The only day on which Tony Pearce was in

⁵⁴⁷ Transcript of interview of Tony Pearce dated 27 September 2006 at page 32; File Reference: Eden Brown Leniency 50c.

⁵⁴⁸ Transcript of interview of Tony Pearce dated 27 September 2006 at page 32; File Reference: Eden Brown Leniency 50c.

⁵⁴⁹ Witness statement of Tony Pearce dated 16 May 2008, at paragraphs 9-10. File Reference: Eden Brown Leniency - 97.

Bristol in 2005 was on 28 January 2005. Tony Pearce has confirmed to the OFT that the conversation occurred on this date.⁵⁵⁰

4.279 Tony Pearce left Eden Brown in April 2005. In a handover note to his colleagues Dave Gibbons, Andrew Thorpe and Simon Jennings, he stated:

*'Warning – we were given new contracts last summer, and there was some renegotiation of rates. We stood firm on our margins/fees but made a few concessions on temp to perm and payroll only. It was commented that there may be further negotiations around March/April 2005 and that they hoped EB would be a little more co-operative, due to business levels. I recommend that we liaise with Hays (Simon Cheshire) and Anders (John Petersen) and take a stance on maintaining fees/margins.'*⁵⁵¹

4.280 Mr Pearce stated that he recommended liaising with CDI AndersElite and Hays because:

*'I think it was for standing up for the principles for each of our companies and in the spirit of the arrangement that had been agreed at the construction forum meetings that this was a minimum baseline.'*⁵⁵²

4.281 Eden Brown's contract with Atkins was subsequently renewed on 30 July 2005 with the same Fee Rates as in its previous Agreement.⁵⁵³

4.282 Eden Brown has admitted that it *'discussed and agreed with other agencies in the construction recruitment sector fees to be charged to construction companies other than Taylor Woodrow plc and Vinci plc; in*

⁵⁵⁰ Email from Robert Vidal, Taylor Wessing (on behalf of Eden Brown) to OFT dated 26 June 2007; File Reference: Eden Brown Leniency 53D. Witness statement of Tony Pearce dated 16 May 2008, at paragraphs 9-10; File Reference: Eden Brown Leniency – 97.

⁵⁵¹ Internal Eden Brown email from Tony Pearce to Dave Gibbons, Andrew Thorpe and Simon Jennings dated 15 April 2005. File Reference: Eden Brown s27 – 34.

⁵⁵² Transcript of OFT interview with Tony Pearce (Eden Brown) dated 27 September 2006 at p30. File Reference: Eden Brown Leniency – 50c.

⁵⁵³ Letter from WS Atkins plc to OFT dated 6 November 2007; File Reference: Atkins Third Party Correspondence - 290.

particular, Eden Brown discussed with Hays an attempt to maintain fee margins when the contract with Atkins was to be renewed'.⁵⁵⁴

Hays' evidence in relation to contact with Eden Brown regarding Atkins

- 4.283 During an interview with the OFT in November 2006, Simon Cheshire stated that he had no recollection of any contact with Tony Pearce regarding Atkins.⁵⁵⁵
- 4.284 However, Hays subsequently provided telephone records from Simon Cheshire's mobile telephone number which shows that on 28 January 2005, Simon Cheshire telephoned [.....] [C] at 11:08:39 for 40 seconds and [.....] [C] at 11:09:30 for 668 seconds.⁵⁵⁶ Hays has confirmed that its understanding is that [.....] [C] was Tony Pearce's direct line telephone number and that [.....] [C] is Eden Brown's Bristol Office switchboard number.⁵⁵⁷ In its written representations in response to the Statement of Objections, Hays confirmed that it believed Mr Cheshire tried to contact Mr Pearce's direct line.⁵⁵⁸
- 4.285 In a meeting with Atkins in January 2007, the OFT was informed that in June 2005, Hays negotiated an extension to its Preferred Supplier Agreement with Atkins with an increase in Fee Rates.⁵⁵⁹ Hays submitted in response to the Statement of Objections that it did not increase its Fee Rates with Atkins. In its submission, Hays stated:

'The schedules provided for an increase in the temporary worker rate and no increase in the permanent worker rate. These schedules were not amended during the terms of these agreements.'⁵⁶⁰

⁵⁵⁴ Letter of 19 October 2007 from Taylor Wessing to the OFT, at paragraph 2(b); File Reference: Eden Brown Leniency - 84.

⁵⁵⁵ Transcript of OFT interview with Simon Cheshire (Hays) dated 22 November 2006 at p 86; File Reference: Hays Leniency – 645 a.

⁵⁵⁶ Letter from Freshfields to OFT dated 25 September 2007; File Reference: Hays Leniency - 702.

⁵⁵⁷ Letter from Freshfields to OFT dated 1 October 2007; File Reference: Hays Leniency - 707.

⁵⁵⁸ Hays written submission on the Statement of Objections at paragraph 2.18.

⁵⁵⁹ Meeting note with Atkins of 30 January 2007; File Reference: Atkins Third Party Correspondence – 222.

⁵⁶⁰ Hays' written response to the Statement of Objections at paragraph 2.27.

The OFT therefore notes that Hays' fee rates with Atkins, at the very least, were not reduced as a result of the negotiations.

Hays' submissions in response to the Statement of Objections and the OFT's response

- 4.286 In advance of the issue of the Statement of Objections Hays stated to the OFT that '*Hays notes that its extensive internal inquiries with respect to Atkins have not uncovered anything to suggest that its dealings with Atkins were influenced by any of the matters under investigation by the OFT. Accordingly, no admissions have been made in this respect.*'⁵⁶¹
- 4.287 In the Statement of Objections, as set out above, the OFT set out the interview and witness testimony evidence that had been obtained from Tony Pearce of Eden Brown in relation to his contact with Simon Cheshire regarding Atkins.
- 4.288 In advance of providing representations in response to the Statement of Objections, Hays requested a copy of the tape that related to the relevant section of the interview between Tony Pearce and the OFT that took place on 27 September 2006⁵⁶². After giving Eden Brown the opportunity to provide any representations on the OFT's proposal to provide this tape to Hays (which Eden Brown chose not to do)⁵⁶³, the OFT provided Hays with a copy of this tape.⁵⁶⁴
- 4.289 Hays subsequently provided a number of written representations on the OFT's provisional finding contained in the Statement of Objections, including the conversation with Mr Pearce. Hays stated that the OFT has not '"produced sufficiently precise and consistent evidence to support the firm conviction"⁵⁶⁵ *that Hays participated in the Target Fee Rate Initiative in respect of any Construction Companies*'.⁵⁶⁶

⁵⁶¹ Letter from Freshfields to OFT dated 19 October 2007; File Reference: Hays Leniency - 710

⁵⁶² Email from Freshfields to OFT dated 12 January 2009.

⁵⁶³ Letter from OFT to Hamilton Bradshaw Ltd dated 13 January 2009.

⁵⁶⁴ Letter from OFT to Freshfields enclosing copy of tape, dated 21 January 2009.

⁵⁶⁵ Joined cases T-67/00 *JFE Engineering Corp v Commission* [2004] ECR II-2501, at para 179.

⁵⁶⁶ Hays written submission on the Statement of Objections at paragraph 2.9.

- 4.290 Hays submits that the evidence relied upon by the OFT in relation to Atkins, do not provide a sufficient basis for the OFT's findings in this regard.
- 4.291 Hays submits that Tony Pearce's evidence is neither consistent nor persuasive and that at most, following '*persistent questioning by the OFT*' agreed to communicate in respect of any future renegotiation which ultimately never occurred. Hays submit that the reference in Mr Pearce's witness statement to the agreement to '*try to avoid dropping [their] fee levels below those already in place*' can only be a reference to an understanding that they would discuss the position at a future time.⁵⁶⁷
- 4.292 While the OFT notes that Mr Pearce was uncertain as to the date of the conversation that he had with Mr Cheshire of Hays, no such uncertainty arises in relation to his evidence concerning the nature of the conversation between himself and Mr Cheshire. Mr Pearce's evidence in both his witness statement and interview as to the nature of the conversation is clear and consistent in that he and Mr Cheshire reached an agreement to take a stance to resist reducing fee levels in the upcoming renegotiation of Eden Brown's and Hays' respective contracts with Atkins.
- 4.293 The OFT does not agree with Hays' representation that the reference in Mr Pearce's witness statement to '*try to avoid dropping [their] fee levels below those already in place*' can only be a reference to an understanding that they would discuss the position at a future time. In his witness statement Mr Pearce made repeated reference to the fact that he and Mr Cheshire agreed during the telephone conversation to take a stance on not reducing fee levels. The fact that they also agreed to discuss the matter further does not undermine the conclusion that an agreement not to reduce fee levels was reached.
- 4.294 Hays submits that Mr Pearce's evidence does not demonstrate that Hays and Eden Brown entered into an agreement or understanding in respect of Atkins which violated the Chapter I prohibition.

⁵⁶⁷ Hays written submission on the Statement of Objections at paragraph 2.22(e).

- 4.295 However, the OFT considers that Mr Pearce's evidence is clear in that he believed that he and Mr Cheshire reached a mutual understanding.⁵⁶⁸ Mr Pearce's evidence is clear that he and Mr Cheshire '*agreed*' to take a stance in not reducing fees. They also agreed that they would communicate further.
- 4.296 Hays submit that the existence of an agreement of the nature proposed by the OFT is inherently unlikely as '*it would not have been possible for Mr Cheshire to have engaged in any discussion regarding Hays' position with respect to Atkins as Mr Cheshire was not responsible for the Atkins account*'.⁵⁶⁹ The Atkins account was handled by Duncan Collins, National Accounts Director at the relevant time. Mr Collins confirmed in his interview with the OFT that he had no knowledge of the CRF.⁵⁷⁰
- 4.297 However, the OFT notes that at the relevant time, Mr Cheshire was Mr Collins' line manager.⁵⁷¹ In his interview of 22 November 2006, Mr Cheshire was asked whether he was '*ever involved in the negotiations with Atkins*' to which he replied: '*I don't think so...I didn't go and see Atkins but my opinion would have been sought*'.⁵⁷² Evidence provided by Hays also shows that Simon Cheshire's view was sought on the Atkins negotiations and that the approval of the Hays Construction & Property Board, which Mr Cheshire sat on, was sought in relation to the Atkins negotiation.⁵⁷³ For example, in an email concerning Atkins from Duncan Collins to a number of Hays staff including Mr Cheshire dated 4 January 2005, Mr Collins stated:

'Are you happy to continue at existing perm rates? I think they are way too low and would advocate that we attempt to get nearer [sic] to [...]C% minimum, with either increments across salary

⁵⁶⁸ Transcript of Interview with Tony Pearce at page 32; File Reference Eden Brown Leniency 50c.

⁵⁶⁹ Hays' written representations on the Statement of Objections.

⁵⁷⁰ Hays' written representations on the Statement of Objections, paragraph 2.23.

⁵⁷¹ Transcript of interview of Duncan Collins of 1 August 2006 at page 21; File Reference Hays Leniency 657.

⁵⁷² Transcript of interview with Simon Cheshire dated 22 November 2006 at page 83. File Reference: Hays Leniency 645 a.

⁵⁷³ See attachments (including emails and minutes of Hays Construction and Property Board meeting dated 25 January 2005) to witness statement of Duncan Collins, dated 17 May 2007; File Reference Hays Leniency 663.

bandings, or at the very least [...] [C] % flat rate. We have already pitched higher than existing but the response unsurprisingly [sic] was negative.

*The current temps fees are 18% margin. They want to reduce this even further, I want to aim for [...] [C] %.*⁵⁷⁴

4.298 Simon Cheshire responded to this email on 5 January 2005. In his response he stated:

'I agree, a quid pro quo trade looks like the best bet. If we can tie them in more, and work closer through the RMUs on campaigns etc we might get some better results.

*This could then justify maintaining the current rates.*⁵⁷⁵

4.299 Atkins was also discussed at a Hays Construction & Property Board meeting on 25 January 2005, a meeting attended by Mr Cheshire. The minutes record the following:

'4.1 Atkins Perm – stick where we are

*Temps – No reduction in margin*⁵⁷⁶

4.300 In light of this evidence, while the OFT accepts that Mr Cheshire may not have been involved directly in the negotiations with Atkins, the OFT does not accept the representation that Hays has now made in response to the Statement of Objections that Mr Cheshire could not have engaged in any discussion regarding Hays' position with respect to Atkins. While the OFT notes that the specific references referred to above occurred prior to the conversation between Mr Cheshire and Mr Pearce, (by only 3 days in the case of the Hays Construction & Property meeting), the OFT

⁵⁷⁴ Email of 4 January 2005 from Duncan Collins to Robert Smith, Simon Cheshire, Tim Cook, Andrew Bredin, Steven Orr and Andy Szopiak attached to witness statement of Duncan Collins, dated 17 May 2007; File Reference Hays Leniency 663.

⁵⁷⁵ Email of Simon Cheshire to Tim Cook, Duncan Collins, Robert Smith, Andrew Bredin, Steven Orr and Andy Szopiak dated 5 January 2005 attached to witness statement of Duncan Collins, dated 17 May 2007; File Reference Hays Leniency 663.

⁵⁷⁶ Minutes of Hays Construction and Property Board meeting dated 25 January 2005 - attachment to witness statement of Duncan Collins, dated 17 May 2007; File Reference Hays Leniency 663.

does not consider this undermines its conclusion regarding Mr Cheshire's involvement in discussions relating to Atkins.

4.301 Hays submits that the handover note prepared by Mr Pearce does not support the contention by the OFT that there was an agreement reached between Hays and Eden Brown as it would be reasonable to expect that if such an agreement had existed, Mr Pearce would have made reference to it in his handover note. Hays also submits that it would be illogical for Mr Pearce to have advised his predecessors to liaise with Hays and CDI AndersElite without distinction if an agreement had been reached with Hays but not CDI AndersElite.⁵⁷⁷

4.302 The OFT considers that the inferences Hays is attempting to draw from the lack of any reference in Mr Pearce's handover note to an agreement with Hays are not sufficiently strong to overcome Mr Pearce's clear evidence that Mr Pearce and Mr Cheshire came to an consensus to take a stance on not reducing fees.

4.303 Hays submits that as a matter of legal assessment, Mr Pearce's evidence does not demonstrate that Hays and Eden Brown entered into an agreement or understanding in respect of Atkins which violated the Chapter I prohibition. Hays submit that:

- Mr Pearce's evidence is clear that at no point did he and Mr Cheshire discuss the actual Fee Rates that Eden Brown and Hays were receiving from Atkins;
- Mr Pearce merely indicated his intention to try to resist Fee Rate reductions in any future Atkins contract renegotiations and that Mr Cheshire agreed to communicate about this in the future;
- This was not an agreement to reach a more detailed and finalised agreement. There was no exchange of confidential information that would or could have reduced pricing uncertainty; and
- While the evidence may show an aspiration on the part of Mr Pearce to try to communicate with Mr Cheshire about a possible

⁵⁷⁷ Hays' written representations on the Statement of Objections paragraphs 2.24-2.25.

future renegotiation of the Atkins account, it shows nothing more than this.⁵⁷⁸

4.304 The OFT does not accept Hays' submissions in this regard. The OFT notes that:

- While Mr Pearce stated that he and Mr Cheshire agreed to communicate about future contract renegotiations, his evidence both in his interview and subsequent witness statement was that also he and Mr Cheshire agreed to take a stance to '*...avoid dropping our fee levels below those already in place.*'⁵⁷⁹
- In these circumstances, the OFT considers that both parties expressed a joint intention to resist dropping fee rates from the level currently in place thereby disclosing their proposed course of conduct on the market. This placed each of the parties in a position of knowledge when conducting its negotiations that one of its competitors would not be reducing its own fee rates. This removed or reduced downward pressure upon fee rates.

4.305 Further the OFT notes the case law of *Suiker Unie* referred to at paragraph 3.33 above which stated that the requirement of independence '*strictly preclude[s] any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.*'⁵⁸⁰

OFT's conclusion in relation to Eden Brown/Hays reciprocal contacts regarding Atkins

4.306 Despite being questioned on this subject by the OFT, Mr Cheshire was unable to remember having any conversation with Mr Pearce in relation to Atkins. In these circumstances, the OFT considers that it is reasonable to accept Mr Pearce's interview and witness testimony

⁵⁷⁸ Hays' written representations on the Statement of Objections paragraphs 2.28-2.30.

⁵⁷⁹ Tony Pearce witness statement of 16 May 2008; File Reference: Eden Brown Leniency 97.

⁵⁸⁰ Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 174.

evidence as to the nature of the telephone conversation with Mr Cheshire.

- 4.307 The OFT therefore concludes that Mr Cheshire and Mr Pearce had a telephone call on 28 January 2005 regarding Atkins. During the course of this telephone call Mr Cheshire and Mr Pearce came to an agreement that they would take a stance in the up coming negotiations not to reduce their fees from the existing level.
- 4.308 Although Mr Pearce could not remember the exact detail of what Mr Cheshire said during the conversation, he believed that there was a mutual understanding between himself and Mr Cheshire to resist pressure to reduce fees. In light of Mr Pearce's evidence, the OFT considers it a reasonable inference to make that during the course of the conversation Mr Cheshire gave Mr Pearce reason to believe that an understanding had been reached between them regarding the stance to take on reducing fees.
- 4.309 The OFT accepts that it has no evidence of any further communication took place between Mr Cheshire and Mr Pearce in this regard. The OFT also accepts that it has no evidence that Mr Cheshire or Mr Pearce mentioned their individual fee rates during the course of the conversation. However, as described in paragraph 3.83 above, conduct does not need to directly fix prices to amount to price fixing conduct.
- 4.310 During the course of their telephone conversation, Simon Cheshire and Tony Pearce agreed not to negotiate fees lower than their existing fee rates. This removed uncertainty in the minds of the parties as to what action the other would be taking in relation to fees.
- 4.311 The OFT considers that this evidence shows that Hays and Eden Brown were prepared to discuss Fee Rate levels for supply not only to Neutral or Master Vendors but also those for supply directly to Construction Companies, in this case Atkins. This contact only arose after the original contact between Hays and Eden Brown was made at CRF meetings and after the commencement of the Target Fee Rate Initiative.
- 4.312 Given the nature of the contact between Hays and Eden Brown regarding Atkins, the OFT considers that the objective of this contact between Hays and Eden Brown was to protect margins, thus having the same object as the Margin Protection Initiative.

4.313 The OFT therefore considers that this contact between Hays and Eden Brown does not constitute a stand alone agreement and/or concerted practice, but rather forms part of the overall continuing agreement and/or concerted practice known as the Target Fee Rate Initiative. Thus, the OFT does not consider it necessary that this contact form an agreement and/or concerted practice in itself, but rather that it is a constituent part of the overall agreement and/or concerted practice.

4.314 Taking the evidence in the round, the OFT is satisfied that this contact arose in the context of the overall Target Fee Rate Initiative and thus the scope of the Target Fee Rate Initiative was not limited to the supply to Neutral and Master Vendors, but extended to the supply of Candidates directly to Construction Companies. Therefore this contact forms part of the overall infringement.

Scope of The Target Fee Rates Initiative and the references in CRF Minutes to 'PSA'

4.315 The OFT notes that CRF Minutes refer on more than one occasion to Fee Rates under a 'PSA', i.e. a Preferred Supplier Agreement, and so can be interpreted in such a way as to indicate that the Parties sought to set Target Fee Rates in relation to supply of Candidates to Construction Companies direct.

4.316 However, CRF Minutes appear somewhat ambiguous as to whether the agreements on fees reached at those meetings related only to the supply to intermediary companies or the supply direct to construction companies. For example, CRF1 minutes refer to an agreement on fees in relation to PSAs and intermediaries, whereas CRF2 minutes refer to an agreement for intermediaries only. There is also a reference to Fee Rates for '*Non PSA / MV / NV Permanent Fees / Terms of Business*' in the CRF3 Minutes. Given this possible ambiguity, the OFT is not relying on this evidence in establishing that the Target Fee Rate Initiative included Fee Rates for the supply of Candidates direct to Construction Companies. However, for completeness the OFT sets out its analysis on the CRF Minutes in this regard below.

4.317 As has been set out, a PSA is a form of agreement used by Construction Companies and is not restricted to intermediaries such as Master or Neutral Vendors. PSAs can sometimes be referred to as PSL (Preferred

Supplier List), where an agency is 'short-listed' for supply to a Construction Company.

4.318 The CRF1 Minutes record, under the heading '*OTHER MASTER VENDOR/NEURTAL VENDOR*' that '*All parties agreed not to operate below 12.5% permanent fee rate on all future **PSA / Master Vendor agreements***' (emphasis added).

4.319 Similarly, the CRF2 Agenda refers to:

'MVs/PSA/NV Freelance Agreements Gross Margin Entry Percentage'

4.320 Under the heading '*MVS/Neutral vendor – MIN MARGIN ENTRY LEVELS*' of the minutes circulated following the CRF2 meeting of 24 February 2005 (item 5) it is recorded that:

'Agreed at the previous meeting to have a minimum fee of 12.5% on permanent business with Neutral Vendors ...

' All agreed that if a neutral vendor situation arose, all members for the Forum Group should be contacted to agree suitable fee rate. If a level of 12-13% is required buy (sic) the Neutral Vendor it was agreed that we should walk away and not do business at this rate. If business circumstances slacked up, the lowest the Forum Group would operate is 14%

'Freelance', 'Agreed that it was unrealistic to put in place a set minimum freelance GM entry level, due to different sectors working at different fee levels' and 'Agreed we should aim for a 20% margin as a starting point on all sectors'.

4.321 The OFT notes that this point has been acknowledged by Select Appointments (on behalf of HMG/BBT) in a letter to the OFT of 17 October 2007:

*'Our client remains of the view that the agreement and/or discussions on fees were intended to apply only to Master Vendors or Neutral Vendors (that is to say intermediaries). **However, given that the minutes of CRF1 in November 2004 also refer to PSAs, our client therefore accepts that it is possible that the agreement***

*was also intended to apply to fees charged directly to clients. Our client cannot say with any certainty exactly what was meant at the time of CRF1, particularly now that nearly three years have elapsed since that meeting. However, the recollection of those who attended CRF1 (Mark Bull, Mike Kenrick and Steven Ware) is that the agreement was intended only to apply to intermediaries.'*⁵⁸¹
(emphasis added)

- 4.322 The OFT notes that Eden Brown's⁵⁸², Randstad's⁵⁸³ and CDI AndersElite's⁵⁸⁴ leniency applications cover the discussion and agreement with other Recruitment Agencies of the Fee Rates charged to construction companies other than Taylor Woodrow plc and Vinci plc.
- 4.323 In summary, the OFT considers that even if the Target Fee Rates Initiative was initially focused on Parc because it was the obvious immediate threat to the Parties' margins, given the contact that had been established during CRF, it was reasonably foreseeable that the Parties might also communicate on what would be acceptable Fee Rates for the supply of candidates to Construction Companies direct, irrespective of the possible involvement of a Neutral Vendor or MSP. Indeed, this is what happened with a number of the Parties in the case of the Vinci (Parc Facilitator) Agreements and Atkins.

Conclusion in respect of each party's involvement in the Target Fee Rates Initiative

- 4.324 Based on the evidence cited in paragraphs 4.180 to 4.323 above, the OFT finds that each of the Parties participated in an agreement and/or concerted practice that had as its object the prevention, restriction or distortion of competition in the form of the Target Fee Rates Initiative and therefore infringed the Chapter I prohibition.
- 4.325 This evidence demonstrates that the Parties had a common plan to limit their individual commercial freedom by determining the lines of their

⁵⁸¹ Letter of 17 October 2007 from Cobbetts to the OFT; File Reference: Select Leniency - 2099.

⁵⁸² Letter of 19 October 2007 from Taylor Wessing to the OFT, paragraph 2(b); File Reference: Eden Brown Leniency - 84.

⁵⁸³ Letter of 31 January 2007 from Cobbetts to the OFT, section 1; File Reference: Select Leniency - 1856.

⁵⁸⁴ Submission of 19 October 2007; File Reference: AndersElite Leniency - 209a.

mutual action in the market, and that there was a 'concurrence of wills'⁵⁸⁵ regarding the Target Fee Rates Initiative, sufficient to show an agreement.

- 4.326 And, or in the alternative, this evidence demonstrates that all the Parties received information on other Parties' pricing intentions and continued to be active on the market subsequent to those disclosures, sufficient to show a concerted practice. The evidence shows that the Parties knowingly substituted practical co-operation for the risks of competition, and in particular that they engaged in reciprocal horizontal contacts which had as their object or effect the removal or reduction of uncertainty as to their future pricing conduct on the market. Accordingly, the Parties are presumed to have relied on the price information disclosed within CRF meetings or in further contacts outside of CRF meetings when determining their conduct on the market.⁵⁸⁶
- 4.327 There is no evidence in the OFT's possession to indicate that any of the Parties objected to, or publicly distanced themselves from, the discussions regarding the Target Fee Rates Initiative during or after CRF meetings or that they objected to the information they received on other Parties' pricing intentions. By not publicly distancing themselves from the discussions on the Target Fee Rates Initiative, the Parties were effectively encouraging the continuation of the infringement.⁵⁸⁷ It is established case law 'that complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable'.⁵⁸⁸
- 4.328 The OFT considers that the discussions between the Parties that took place in CRF meetings and subsequent exchanges of information regarding the Fee Rates to Vinci and Atkins removed uncertainty in the market and substituted practical co-operation between the Parties for the risks of competition. This has been further confirmed by most of the Parties (see paragraphs 4.229 to 4.235).

⁵⁸⁵ See paragraphs 3.22 to 3.28.

⁵⁸⁶ See paragraphs 3.43 to 3.44.

⁵⁸⁷ Case T-303/02 *Westfalen Gassen Nederland BV v Commission* [2006] ECR II-4567, at paragraph 124. See paragraphs 3.45 to 3.51.

⁵⁸⁸ Case T-303/02 *Westfalen Gassen Nederland BV v Commission* [2006] ECR II-4567, at paragraph 124. See paragraphs 3.45 to 3.51.

- 4.329 Agreements and concerted practices do not need to fix prices explicitly in order to be caught under the Chapter I prohibition. As indicated in paragraphs 3.80 to 3.86, participation in regular meetings creates an atmosphere of mutual certainty which leads the parties to rely on the price levels of their competitors or at least on their intentional pursuit of collaborative strategy of higher pricing.⁵⁸⁹ The OFT considers that the same can be said if those regular meetings are complemented by exchanges of emails where those pricing intentions are disclosed.
- 4.330 Although AWA does not appear to have fully abided by the Target Fee Rates Initiative⁵⁹⁰ this is irrelevant for a finding that an agreement and/or concerted practice existed and that it participated in such an agreement and/or concerted practice. In this regard, the relevant test is whether the Parties distanced themselves publicly from the discussions regarding the Target Fee Rates Initiative that took place at CRF meetings. (see paragraphs 3.26, 3.45 to 3.51).
- 4.331 In addition to this, however, the OFT notes that five of the Parties (Hays, Fusion People, HMG, CDI AndersElite and Eden Brown) had originally refused to deal with Parc at the Fee Rates initially offered by Parc between September and October 2004 for the supply of Candidates to Vinci (that is 10%) but that three of these five Parties (Hays, Fusion People and HMG) subsequently entered into, between January and April 2005, a Vinci (Parc Facilitator) Agreement at higher Fee Rates (which were also above the 12.5% target Fee Rate agreed at CRF1 for Permanent Candidates).

E THE OFT's CONCLUSIONS ON THE AGREEMENT(S) AND/OR CONCERTED PRACTICE

- 4.332 On the basis of the evidence set out and analysed at paragraphs 4.3 to 4.331 above, the OFT finds that the Collective Refusal to Supply Parc and the Target Fee Rates Initiative collectively formed a single overall agreement and/or concerted practice (collectively referred to in this Decision as the Margin Protection Initiative). The OFT has set out at paragraphs 3.52 to 3.64 above the case law on single overall

⁵⁸⁹ See paragraphs 3.80 to 3.86.

⁵⁹⁰ For example, AWA did not terminate its agreement with Parc to supply Vinci with permanent candidates at a rate of 10%. See paragraphs 4.79 to 4.88 and 4.118 to 4.119.

infringement. Where a common objective or objectives is pursued by the participants in a cartel, it is not necessary to divide a series of actions by the Parties (which may of themselves amount to a separate infringement(s)) where there is sufficient consensus to adhere to a plan limiting the commercial freedom of the Parties.

- 4.333 Both the Collective Refusal to Supply Parc and the Target Fee Rates Initiative⁵⁹¹ pursued the same common objective, namely to protect margins. Given this, it is not necessary for the OFT to treat these agreement(s) and/or concerted practice as separate infringements.⁵⁹² The OFT considers that it would also be artificial and contrary to the commercial reality of the Parties for the OFT to seek to split these agreements and/or concerted practice and treat them as separate infringements.⁵⁹³
- 4.334 This is particularly so given that both the Collective Refusal to Supply Parc and the Target Fee Rates Initiative were formed at the same time (that is, during CRF1) and in response to the same concerns (namely, the entry of Parc and the pressure placed on the Parties' margins).⁵⁹⁴ As explained at paragraphs 4.9 to 4.18 above, the CRF1 was originally set up by HMG as a result of concerns over the emergence of Parc's Neutral Vendor business model.
- 4.335 The OFT notes that the Target Fee Rates Initiative had a number of elements. While the original discussions at CRF meetings focussed predominantly upon rates to be charged to intermediaries, the culture created by the CRF resulted in some of the Parties making contact with one another outside the context of CRF meetings, for example the contacts between some of the Parties regarding the Vinci (Parc Facilitator) Agreement (see paragraph 4.222 above). Fusion People admitted it had circulated this information to ensure that it was not getting lower fees than other CRF members (see paragraph 4.233 above).

⁵⁹¹ It is implicit within fixing the target fee rate that margins would be protected (as a minimum rate would protect the Parties' margins).

⁵⁹² Case T-1/89 *Rhône Poulenc v Commission* [1991] ECR II-867, at paragraph 126.

⁵⁹³ See paragraph 3.54 above.

⁵⁹⁴ See paragraphs 4.9 to 4.18 above assessing the purpose of CRF1.

- 4.336 In relation to the contacts between certain Parties regarding the Construction Company Atkins, the OFT considers that the objective of this contact was to protect margins. Thus, these contacts shared the same objective as the other elements of the Margin Protection Initiative. Thus the OFT considers that this conduct formed part of the overall infringement. The fact that not all the Parties had contact with one another regarding Atkins does not prevent this conduct from forming part of the overall infringement.⁵⁹⁵ In these circumstances, although the OFT does not rule out that the Parties contacts concerning Atkins could amount to a stand alone infringement, it is not necessary to do so, but rather only that it forms part of the overall agreement and/or concerted practice.
- 4.337 Further, the OFT finds that each of the Parties participated in the Margin Protection Initiative and is therefore responsible, throughout the period of time of their participation, for conduct put into effect by other Parties in the context of the Margin Protection Initiative.⁵⁹⁶
- 4.338 The OFT considers that each of the Parties intended to contribute through their own conduct to the common objective of the Margin Protection Initiative.⁵⁹⁷ In respect of the Collective Refusal to Supply Parc, each Party agreed to this, agreed to implement this (that is, agreed to refrain from or withdraw from working with Parc), and acted on what had been agreed (that is, refrained from or withdrew from working with Parc).⁵⁹⁸ In respect of the Target Fee Rates Initiative, each Party agreed to this.⁵⁹⁹
- 4.339 The OFT also considers that each of the Parties was either aware of the actual conduct planned or put into effect by other Parties in pursuit of the same objective (namely, to protect margins, see paragraph 4.333 above) or could reasonably have foreseen it and was prepared to take the risk.⁶⁰⁰

⁵⁹⁵ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 80;

⁵⁹⁶ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 83.

⁵⁹⁷ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 87.

⁵⁹⁸ See, for example, paragraphs 4.73 to 4.74 above. See also paragraphs 4.81 to 4.83 for the position in relation to AWA.

⁵⁹⁹ See, for example, paragraph 4.191 above.

⁶⁰⁰ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 87.

- 4.340 Prior to CRF1, each Party received the agenda.⁶⁰¹ From the agenda, the Parties would have been aware of the purpose of CRF1 and what was planned to be discussed in advance of attending that meeting.
- 4.341 Each of the Parties would have been aware from their attendance at CRF1 of the actual conduct planned or put into effect by the other Parties.
- 4.342 The minutes of CRF1 were also received by all of the Parties and so each Party would further have been aware of the actual conduct planned or put into effect by the other Parties.
- 4.343 Such awareness was further reinforced from participation in the CRF Conference Call on 7 January 2005⁶⁰² and subsequent contacts between the Parties and attendance at further CRF meetings.⁶⁰³

F Duration

Introduction

- 4.344 Duration is important insofar as it is a relevant factor for determining the penalty that the OFT imposes following a finding of infringement⁶⁰⁴ and the OFT sets out below what it considers to be the duration of each Party's participation in the Margin Protection Initiative.
- 4.345 The OFT's finding on the duration of each party's involvement in the Margin Protection Initiative as set out below takes into account representations that were made on this issue in response to the Statement of Objections. Representations received are highlighted and the OFT's final view is then outlined. Where the OFT has amended its view on the duration of a party's involvement in the Margin Protection Initiative in the light of representations received, this is also identified. Where such a change has occurred, the relevant party's leniency agreement has been amended accordingly.

⁶⁰¹ See paragraph 4.22 above.

⁶⁰² See paragraphs 4.218 above.

⁶⁰³ See, for example, paragraph 4.222 above providing examples of Parties receiving updates on implementation of the Margin Protection Initiative and reaffirming what had been agreed.

⁶⁰⁴ Penalties Guidance

Summary of the OFT's approach

- 4.346 In cartel cases, the duration of an agreement and/or concerted practice is determined merely with reference to the existence of infringing agreements and/or concerted practices and it is not necessary to calculate a period of implementation.⁶⁰⁵
- 4.347 In determining the duration of each Party's participation in the Margin Protection Initiative, the OFT notes the CFI has stated that: *'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'*.⁶⁰⁶
- 4.348 By not publicly distancing itself from an anti-competitive agreement or concerted practice an undertaking gives the impression to its competitors that it is following/implementing those agreements/concerted practices and is hence encouraging the continuation of the infringement.⁶⁰⁷ It follows that insofar as an undertaking does not take steps in the market to change its conduct it would not be publicly distancing itself from the infringement.
- 4.349 The OFT considers, as discussed at paragraph 4.215 above, that the Margin Protection Initiative started at the latest on 21 October 2004, when Hays and HMG first exchanged information on Fee Rates and that participation by all of the Parties in the Margin Protection Initiative had started at the latest by 12 November 2004, which was the date of CRF1.
- 4.350 The OFT notes that the last known meeting where the Margin Protection Initiative was discussed was CRF4 on 27 September 2005, as confirmed by most of the parties.⁶⁰⁸ The first action recorded by the Parties in the

⁶⁰⁵ Case T-213/00 CMA CGM v Commission ('FETTCSA') [2003] ECR II-913, [2003] 5 CMLR 268, paragraph 280

⁶⁰⁶ Case T-43/92, Judgment of the Court of First Instance (Second Chamber) of 7 July 1994. *Dunlop Slazenger International Ltd v Commission of the European Communities*.

⁶⁰⁷ Cases C-204/00 P etc *Aalborg Portland A/S v Commission* [2004] ECR I-123, at paragraph 81 onwards.

⁶⁰⁸ All Leniency Parties have admitted duration of all or some of the constituent elements of the single overall infringement at least until 27 September 2005, date of CRF 4. See CDI AndersElite's submission of 19 October 2007, File Reference: AndersElite Leniency -209a;

CRF4 Minutes was '*All agreed to maintain our stance and not support Parc*'. The third action was '*Hays - Simon Cheshire advised that Colin Jellicoe is looking like pushing them towards working via Parc instead of direct with Vinci. If this is the case Hays will not agree to this - Simon will keep the group up to date on the situation*'.⁶⁰⁹

4.351 Given this evidence, the OFT considers that not only did CRF4 represent a continuation of the Margin Protection Initiative, but that the Margin Protection Initiative continued beyond CRF4.

4.352 In the light of this, the OFT has taken the following approach to identification of the end-point of each Party's involvement in the Margin Protection Initiative:

- The OFT has first identified any strong and compelling evidence which indicates the last point in time at which a Party explicitly implemented the Margin Protection Initiative following CRF 4, and where such evidence is found (as is the case for CDI AndersElite, Eden Brown, Fusion People and Hays), the date of this evidence is used as the end-point for that Party's involvement in the Margin Protection Initiative;
- If such evidence is not found, the OFT identifies any evidence which indicates the date at which a Party either publicly distanced itself from the Margin Protection Initiative or adopted autonomous conduct on the market following CRF4 (which applies in the case of BBT, Henry Recruitment and HMG), and the date of this evidence is used as the end-point for that Party's involvement in the Margin Protection Initiative; and
- In all other cases, the OFT has used the date of CRF4 as the end-point of that Party's involvement in the Margin Protection Initiative.

HMG and BBT co-ordinated conduct evidence grids, File Reference: Select Leniency 1943 and Letter of 19 October 2007 from Cobbetts to the OFT; File Reference: Select-Leniency-2101; Letter of 19 October 2007 from Taylor Wessing to the OFT; File Reference: Eden Brown-Leniency-84; Fusion People's leniency application of 17 September 2007, paragraph 18, File Reference: Fusion-Leniency-162; Letter of 19 October 2007 from Freshfields to the OFT, File Reference: Hays-Leniency-710; Henry Recruitment Co-ordinated Conduct Evidence Table, File Reference: Henry Leniency – 40.

⁶⁰⁹ Minutes of CRF4, File Reference: Select Leniency 1624.

- 4.353 The result of this approach is that the OFT considers that the Margin Protection Initiative ended as a whole on 26 January 2006.
- 4.354 There is some evidence to suggest that the Target Fee Rates Initiative may have continued beyond this date. However, the OFT does not consider that it has seen sufficiently strong and compelling evidence which would support a conclusion that the Margin Protection Initiative could be considered to have continued after 26 January 2006.

CDI AndersElite

- 4.355 Representatives of CDI AndersElite attended CRF1 on 12 November 2004 and CDI AndersElite continued its participation in CRF meetings throughout 2005. CDI AndersElite therefore participated in meetings at which anti-competitive agreement(s) and/or a concerted practice were concluded, without manifestly opposing them (no objections were recorded in the CRF Minutes).
- 4.356 In its written representations in response to the Statement of Objections, CDI AndersElite has submitted that its involvement in the infringement ended on 3 February 2006⁶¹⁰ (and not 14 February 2006 as set out in the Statement of Objections), as the OFT's test set out in the first bullet of paragraph 4.352 above is satisfied by the CDI AndersElite internal email of 3 February 2006, regarding supply of candidates to Skanska (discussed at paragraph 4.165).⁶¹¹
- 4.357 The OFT considers that this email confirms that on 3 February 2006 CDI AndersElite still considered the agreement not to deal with Parc in force and planned to act in accordance with it and that it does represent the latest evidence of CDI AndersElite explicitly implementing the Margin Protection Initiative following CRF4, in accordance with paragraph 4.352.
- 4.358 However, the concept of an agreement and/or a concerted practice requires more than one undertaking to participate in the agreement and/or concerted practice. Given all the other Parties' involvement in the infringement ended before 3 February 2006, CDI AndersElite's involvement in the infringement could not extend beyond 26 January

⁶¹⁰ CDI AndersElite's written representations in response to the Statement of Objections.

⁶¹¹ File Reference: AndersElite s26 - 137.

2006, the date on which Eden Brown's involvement in the infringement ended (see paragraphs 4.366 to 4.371 below). Beyond this date CDI AndersElite was the only party abiding by the Margin Protection Initiative

4.359 Therefore, the OFT considers that CDI AndersElite's involvement in the overall infringement continued uninterrupted between 12 November 2004 and 26 January 2006: a period of 1 year, 2 months and 14 days.

AWA

4.360 Representatives of AWA attended CRF1 on 12 November 2004 and AWA continued its participation in CRF meetings throughout 2005. AWA therefore participated in meetings at which anti-competitive agreement(s) and/or a concerted practice were concluded, without manifestly opposing them (no objections were recorded in the CRF Minutes).

4.361 The OFT does not have any evidence of AWA publicly distancing itself from the infringement following CRF4. In light of the circumstances that AWA never had a contract to supply Taylor Woodrow via Parc, and never appeared to withdraw from its agreement to supply Vinci, the OFT does not consider that it has sufficiently strong and compelling evidence on its file which would support a conclusion that AWA's participation in the Margin Protection Initiative could be considered to have continued after CRF4.

4.362 Therefore, the OFT considers that AWA's involvement in the overall infringement continued uninterrupted between 12 November 2004 and 27 September 2005: a period of 10 months and 15 days.

BBT

4.363 Representatives of BBT attended CRF1 on 12 November 2004 and BBT continued its participation in CRF meetings throughout 2005. BBT therefore participated in meetings at which anti-competitive agreement(s) and/or a concerted practice were concluded, without manifestly opposing them (no objections were recorded in the CRF Minutes).

4.364 After CRF4, BBT continued to be party to the Margin Protection Initiative at least until 14 November 2005, which was the date on which Select

Appointments first contacted the OFT in relation to applying for leniency on behalf of its subsidiaries HMG and BBT.⁶¹²

4.365 Therefore, the OFT considers that BBT's involvement in the overall infringement continued uninterrupted between 12 November 2004 and 14 November 2005: a period of 1 year and 2 days.

Eden Brown

4.366 Representatives of Eden Brown attended CRF1 on 12 November 2004 and Eden Brown continued its participation in CRF meetings throughout 2005. Eden Brown therefore participated in meetings at which anti-competitive agreement(s) and/or a concerted practice were concluded, without manifestly opposing them (no objections were recorded in the CRF Minutes).

4.367 In its written representations in response to the Statement of Objections, Eden Brown has submitted that it terminated its involvement in the infringement on 24 January 2006 (and not 14 February 2006 as set out in the Statement of Objections), as it was on this date that Eden Brown met Vinci to discuss terms for supply of candidates under a Vinci (Parc Facilitator) Agreement. Eden Brown submitted that this is not consistent with a continued Collective Refusal to Supply to have met Vinci to discuss supply via Parc.

4.368 However, the OFT does not consider that Eden Brown's participation in the Margin Protection Initiative ended on 24 January 2006. The OFT considers that an email sent on 26 January 2006 from Andrew Thorpe (of Eden Brown) to Ian Wolter (also of Eden Brown) represents the latest evidence that Eden Brown was explicitly implementing the Margin Protection Initiative, in accordance with paragraph 4.352. This email was entitled '*Construction forum v parc*' and stated as follows:

*'I have a slight predicament. The construction forum have a pact that we will not support parc.'*⁶¹³

⁶¹² Parties may be considered to have withdrawn from a cartel by reporting it to the relevant authority - Case T-303/02, *Westfalen Gassen Nederland BV v Commission of the European Communities*, [2006] ECR II-04567 at paragraph 139.

⁶¹³ File Reference: Eden Brown s27-54.

- 4.369 Although in the Statement of Objections the OFT set out its preliminary view that Eden Brown's involvement in the infringement extended until 14 February 2006, upon consideration of Eden Brown's representations upon the Statement of Objections, the OFT considers that the email referred to in paragraph 4.368 represents the last explicit evidence of Eden Brown implementing the Margin Protection Initiative.
- 4.370 Therefore, the OFT considers that Eden Brown's involvement in the infringement continued until 26 January 2006. The OFT notes that accepting either version of events (i.e. the termination of the infringement having occurred either on 24 January 2006 or on 26 January 2006) would result in the infringement having lasted for between one year and one and one quarter year.
- 4.371 Therefore, the OFT considers that Eden Brown's involvement in the overall infringement continued uninterrupted between 12 November 2004 and 26 January 2006: a period of 1 year, 2 months and 14 days.

Fusion People

- 4.372 Representatives of Fusion People attended CRF1 on 12 November 2004 and Fusion People continued its participation in CRF meetings throughout 2005. Fusion People therefore participated in meetings at which anti-competitive agreement(s) and/or a concerted practice were concluded, without manifestly opposing them (no objections were recorded in the CRF Minutes).
- 4.373 The OFT notes that although Fusion People originally submitted that it terminated its involvement in the infringement on 27 September 2005,⁶¹⁴ it has subsequently admitted that its involvement in the infringement lasted until 16 December 2005.⁶¹⁵
- 4.374 On 16 December 2005, Fusion People emailed Parc re-stating that Fusion People was not interested in dealing with them⁶¹⁶ and the OFT

⁶¹⁴ Fusion People's leniency application of 17 September 2007; File Reference: Fusion Leniency - 162.

⁶¹⁵ Letter from Trethowans to OFT dated 5 August 2008; File Reference: Fusion Leniency 188.

⁶¹⁶ Email of 16 December 2005 from Paul Metcalfe of Fusion People to Darren Day of Parc; File Reference: Parc Third Party Correspondence - 124.

considers that this represented a continuation of Fusion People's implementation of the Collective Refusal to Supply Parc.

4.375 Therefore, the OFT considers that Fusion People's involvement in the overall infringement continued uninterrupted between 12 November 2004 and 16 December 2005: a period of 1 year, 1 month and 4 days.

Hays

4.376 Simon Cheshire of Hays sent confidential information on Fee Rates to Steven Ware of HMG on 21 October 2004. Hays attended CRF1 on 12 November 2004 and continued its participation in CRF meetings throughout 2005 without raising any objections to or publicly distancing itself from the Refusal to Supply Parc and/or the Target Fee Rates Initiative.

4.377 Following CRF4, on 24 November 2005 Hays emailed Parc stating:

*'I am cordially reconfirming our current position here, that Hays have not agreed to the contract imposed upon us and until or unless any formal agreement is reached, we will continue to supply Taylor Woodrow Developments directly, under our Terms of Business. We will not be transferring any existing temp workers over to Parc.'*⁶¹⁷

4.378 On 1 December 2005, Hays met with Parc to discuss supply of both permanent and freelance/trades staff to Vinci and Taylor Woodrow via Parc.⁶¹⁸ In the Statement of Objections the OFT set out its view that Hays continued to implement the Collective Refusal to Supply Parc until 1 December 2005, as the OFT had found no evidence to show that Hays

⁶¹⁷ Email from Duncan Collins of Hays to Darren Day and Andrew Niker of Parc, dated 24 November 2005; File Reference: Hays Leniency 169. The OFT notes that on 25 November 2005, Duncan Collins emailed Darren Day of Parc referring to a meeting '*next week*' and expressing a hope to '*broker an agreement*'; File Reference: Hays Leniency 172.

⁶¹⁸ Email from Darren Day of Parc to Duncan Collins of Hays of 2 December 2005; File Reference: Hays Leniency 306.

publicly distanced itself from the infringement between CRF4 and this date.⁶¹⁹

4.379 However, the OFT considers that Hays email to Parc of 24 November 2005 represents the last explicit evidence of Hays' implementing the Margin Protection Initiative. In order to ensure consistency of approach with paragraph 4.352, the OFT considers that Hays' involvement in the Margin Protection Initiative ended on that date. The OFT notes that accepting either version of events (i.e. the termination of the infringement having occurred either on 24 November 2005 or on 1 December 2005) would result in the infringement having lasted for between one year and one and one quarter year.

4.380 Therefore, the OFT considers that Hays' involvement in the overall infringement continued uninterrupted between 21 October 2004 and 24 November 2005: a period of 1 year, 1 month and 3 days.

Henry Recruitment

4.381 Representatives of Henry Recruitment attended CRF1 on 12 November 2004 and Henry Recruitment continued its participation in CRF meetings throughout 2005 without raising any objections to or publicly distancing itself from the Refusal to Supply Parc and/or the Target Fee Rates Initiative.

4.382 In its written representations in response to the Statement of Objections, Henry Recruitment submitted that 7 April 2005 (and not 13 January 2006 as set out in the Statement of Objections) should be applied as the end date of its involvement in the infringement as that was the date that Henry Recruitment wrote in response to a meeting with Vinci, stating that Henry Recruitment would be prepared to work with Parc as a Facilitator in all respects.⁶²⁰

⁶¹⁹ The OFT notes however that in an email on 13 December 2005, Bill Chitty of Hays stated: *'Remember that TWC are not part of the Parc LH deal...so their business is still up for grabs. Myself, Dave Trotman and Duncan Collins are meeting them on the 12th Jan to present a new deal aimed at closing Parc out of the loop.'* File Reference: Hays Leniency 482.

⁶²⁰ Henry Recruitment Written Representations in response to the Statement of Objections at page 6.

- 4.383 The OFT accepts, in the light of evidence that Henry Recruitment has provided in response to the Statement of Objections, that Henry Recruitment's participation in the Margin Protection Initiative ended before 13 January 2006. However, the OFT does not accept Henry Recruitment's representation that it ended on 7 April 2005, given that representatives of Henry Recruitment attended CRF4, which, as described in paragraphs 4.350 - 4.351 above clearly represented a continuation of the Margin Protection Initiative.
- 4.384 After CRF4 Henry Recruitment implemented the Margin Protection Initiative until 20 October 2005, which was the date on which it sent an email to one of its clients⁶²¹ indicating a reduction in fees below the 12.5% recorded in the minutes of CRF 1 and CRF 2. The OFT has been provided with some evidence from Henry Recruitment showing that it offered one off placements below 12.5% on 7 and 18 October 2005.⁶²² However as these reductions were not ongoing but rather only for the next placement made, the OFT does not consider that these represent a termination of Henry Recruitment's involvement in the infringement.
- 4.385 The OFT notes that accepting either version of events (i.e. the termination of the infringement having occurred either on 7 October 2005 or 20 October 2005) or, for that matter, Henry Recruitment's representation in response to the Statement of Objections that the termination of the infringement ended on 7 April 2005, would result in the infringement having lasted for less than one year.
- 4.386 Therefore, the OFT considers that Henry Recruitment's involvement in the overall infringement continued uninterruptedly between 12 November 2004 and 20 October 2005: a period of 11 months and 8 days.

HMG

- 4.387 Steven Ware of HMG received confidential information on Fee Rates from Hays on 21 October 2004, attended CRF1 on 12 November 2004

⁶²¹ See email from Phil Leggatt of Henry Recruitment to Valerie Ralph of JDP Ltd of 20 October 2005 – Document C of Henry Recruitment's written representations on the Statement of Objections at page 8.

⁶²² See letters from David Rowe of Henry Recruitment to Elaine McCoy of Clancy Docwra Ltd dated 7 October 2005 and from Simon Jeffries of Henry Recruitment to Keith Wood of Unidata UK Ltd dated 18 October - Document C of Henry Recruitment's written representations on the Statement of Objections at pages 11 and 12 respectively.

and continued its participation in CRF meetings throughout 2005 without raising any objections to or publicly distancing itself from the Refusal to Supply Parc and/or the Target Fee Rates Initiative. After CRF4 HMG continued to implement the Margin Protection Initiative at least until 14 November 2005, which was the date on which Select first contacted the OFT in relation to applying for leniency on behalf of its subsidiaries HMG and BBT.

4.388 Therefore, the OFT considers that HMG's involvement in the overall infringement continued uninterrupted between 21 October 2004 and 14 November 2005: a period of 1 year and 24 days.

G Directions

4.389 Section 32(1) of the Act provides that if the OFT has made a decision that an agreement and/or concerted practice infringes the Chapter I prohibition, 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.

4.390 As the OFT has no evidence on its file to suggest that the infringement is continuing it does not issue directions in this case.

H Undertakings

4.391 Each of the Parties was, and is (with the exception of AWA which is in liquidation), engaged in offering goods or services on the Relevant Market.⁶²³ The OFT therefore considers that each of the Parties was, and is (again with the exception of AWA), engaged in an economic activity and constitutes an undertaking for the purposes of the Act.⁶²⁴

I Application of Article 81(1) of the EC Treaty – Effect on Interstate trade

4.392 The OFT has set out at paragraphs 3.7 to 3.11 above the relevant case law on effect on interstate trade.

⁶²³ See paragraph 3.14.

⁶²⁴ See paragraph 3.13.

- 4.393 The OFT finds that the Collective Refusal to Supply Parc and the Target Fee Rates Initiative set out in this Decision do not give rise to an effect on trade between Member States. The OFT is therefore not under a duty to apply Article 81 EC in respect of the Margin Protection Initiative set out in this Decision.
- 4.394 Specifically, the agreements and/or concerted practice described in this Decision focus on the supply of recruitment services by UK based firms to clients in the UK, supplying candidates to a range of geographic locations across the UK. The UK focus of the recruitment services in question indicate that the services supplied are not easily tradable across borders which tends to suggest that the agreements and/or concerted practice described in this Decision did not give rise to an effect on trade between Member States.
- 4.395 In addition, the OFT considers that there may be natural barriers to trade in the relevant market irrespective of the international nature of the businesses of the Parties, in particular, the need to comply with UK specific legislation to supply recruitment services, the preference by clients for agencies with knowledge about local recruitment conditions and the absence of any use by clients of non-UK based agencies.⁶²⁵

J Object or effect of preventing, restricting or distorting competition

- 4.396 The OFT finds that the Margin Protection Initiative had as its object the prevention, restriction or distortion of competition.
- 4.397 The aim of the Margin Protection Initiative described in this Decision was to protect margins⁶²⁶ and therefore maintain prices at higher levels than might otherwise have been the case. It is established in EC law that an agreement or concerted practice whose object is to fix prices is clearly restrictive of competition.⁶²⁷

⁶²⁵ See paragraphs 5.37 to 5.43 below.

⁶²⁶ See paragraphs 4.332 to 4.334.

⁶²⁷ See, for example, Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125. See also paragraphs 3.80 to 3.86. Agreements or concerted practices do not need to explicitly fix prices in order to be caught by the Chapter I prohibition (see paragraph 3.85).

4.398 The OFT therefore considers that the obvious consequence of the Margin Protection Initiative was to prevent, restrict or distort competition. This was therefore the object of the Margin Protection Initiative.⁶²⁸ The fact that the Margin Protection Initiative may have had other potentially legitimate objectives does not affect the finding that it was restrictive by object.⁶²⁹

4.399 The constituent elements of the Margin Protection Initiative (that is the Collective Refusal to Supply Parc and the Target Fee Rates Initiative) both pursued a common objective. Given this, the OFT considers that the Collective Refusal to Supply Parc and the Target Fee Rates Initiative both had as their object the prevention, restriction or distortion of competition:

The Collective Refusal to Supply Parc

4.400 The OFT considers that this constituent element was pursued as part of the Margin Protection Initiative⁶³⁰ and therefore had as its object the prevention, restriction or distortion of competition.

4.401 Where a collective refusal to supply is pursued as part of overall cartel activity that collective refusal to supply will have as its object the prevention, restriction or distortion of competition.⁶³¹

The Target Fee Rates Initiative

4.402 The OFT considers that this constituent element was also pursued as part of the Margin Protection Initiative⁶³² and therefore had as its object the prevention, restriction or distortion of competition.

4.403 The objective of the Target Fee Rates Initiative was to agree target fee rates, that is to fix prices (specifically, Fee Rates). Price fixing is clearly restrictive of competition.⁶³³

⁶²⁸ See paragraph 3.79.

⁶²⁹ See paragraph 3.79.

⁶³⁰ See paragraphs 4.332 to 4.334.

⁶³¹ See paragraphs 3.97 to 3.103.

⁶³² See paragraphs 4.332 to 4.334.

⁶³³ See paragraphs 3.80 to 3.86 above.

- 4.404 Even if the Fee Rates agreed were only a 'target', 'recommended' or 'guidelines', this is not sufficient to demonstrate that an agreement or concerted practice to fix prices has not been reached.⁶³⁴ It is also not necessary for a price fixing agreement or concerted practice to entirely eliminate price competition in order to be caught by the Chapter I prohibition.⁶³⁵
- 4.405 In addition, the purpose of the disclosure and/or exchange of price information in respect of the Target Fee Rates Initiative was to reinforce the Margin Protection Initiative.⁶³⁶ Given that the Margin Protection Initiative had as their object the prevention, restriction or distortion of competition and that the purpose of the disclosure and/or exchange of price information was to reinforce the Margin Protection Initiative the OFT considers that the disclosure and/or exchange of price information also had as its object the prevention, restriction or distortion of competition.⁶³⁷
- 4.406 Given that the Margin Protection Initiative and its constituent elements (that is the Collective Refusal to Supply Parc and the Target Fee Rates Initiative) had as their object the prevention, restriction or distortion of competition it is not necessary for the OFT to show that they also had as their effect the prevention, restriction or distortion of competition on the relevant market(s) described above.⁶³⁸

K Appreciability

- 4.407 The Margin Protection Initiative described in this Decision at paragraphs 4.5 to 4.331 above involved price-fixing agreements and/or a concerted practice. Such agreements and/or concerted practice are regarded as being capable of preventing, restricting or distorting competition to an appreciable extent even where the market shares fall below the relevant thresholds, provided that such agreements do not have only insignificant

⁶³⁴ See paragraphs 3.80 to 3.86. Agreements or concerted practices do not need to explicitly fix prices in order to be caught by the Chapter I prohibition (see also paragraph 3.85).

⁶³⁵ See paragraph 3.86.

⁶³⁶ See paragraphs 4.328 to 4.330 above.

⁶³⁷ See paragraph 3.88.

⁶³⁸ See paragraph 3.66.

effects.⁶³⁹ This is the position whether or not the Parties' combined market share in the relevant market falls below 10 per cent.⁶⁴⁰

4.408 The OFT considers that the Margin Protection Initiative prevented, restricted or distorted competition to an appreciable extent but has nevertheless also considered the combined market share of the parties. The OFT considers it likely that, at the very least, the Parties can be estimated to have held over 13.6 per cent market share (see paragraph 5.220 below).⁶⁴¹

4.409 The OFT therefore considers that the Margin Protection Initiative prevented, restricted or distorted competition to an appreciable extent, for the purposes of the Chapter I prohibition.⁶⁴²

L Effect on trade within the UK

4.410 The Margin Protection Initiative described in this Decision at paragraphs 4.5 to 4.331 above were implemented in the UK.⁶⁴³ Moreover, the objective of the Margin Protection Initiative was at the very least capable of affecting trade within the UK.⁶⁴⁴ The OFT therefore finds that trade within the UK was likely to have been affected by the Margin Protection Initiative.

⁶³⁹ The OFT Competition Law Guideline on *Agreements and Concerted Practices* (OFT 401, Edition 12/04), at paragraphs 2.16 and 2.17, and Case 5/69 *Völk v Vervaecke* [1969] ECR 295.

⁶⁴⁰ See paragraphs 3.108 to 3.109 above.

⁶⁴¹ The OFT also notes that Steven Ware of HMG (who selected the CRF Members) has stated to the OFT that in establishing the CRF he thought he should involve the 'main competitors' in the sector (see paragraph 4.20 above).

⁶⁴² The OFT does not consider that the Margin Protection Initiative produced only insignificant effects in the sense outlined in Case 5-69 *Volk v Vervaecke* [1979] ECR 295. The *de minimis* doctrine formulated in that case (the interpretation of which is now set out in the Commission Notice on Agreements of Minor Importance (*de minimis* notice) OJ C368, 22 December 2001, pages 13 to 15), states that '*an agreement will fall outside the prohibition where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question*' (the market shares in that case were 0.2 per cent and 0.5 per cent respectively).

⁶⁴³ See paragraphs 4.48 and 4.178 to 4.179 above.

⁶⁴⁴ See paragraphs 3.104 to 3.107 above.

M Exemption or exclusion

- 4.411 Following the entry into force on 1 May 2004 of EC Regulation 1/2003⁶⁴⁵ and consequent amendments to the Act,⁶⁴⁶ it is for the Parties to demonstrate whether the Margin Protection Initiative benefited from an exemption under section 9(1) of the Act.⁶⁴⁷ No Party has to date provided any information to suggest that the Margin Protection Initiative, in fact, may have benefited from such an exemption.
- 4.412 Further, the OFT considers that the Margin Protection Initiative would not have met the requirements of section 9 of the Act in order to benefit from an exemption. In particular, the OFT considers that price fixing does not contribute to improving production or distribution of goods.⁶⁴⁸ Also, there are no resulting benefits of which consumers receive a fair share.⁶⁴⁹
- 4.413 Moreover, the OFT considers that the Margin Protection Initiative do not fall within any of the exclusions within the Act.

N Conclusion on application of the Chapter I Prohibition

- 4.414 The OFT finds that on the basis of the strong and compelling evidence⁶⁵⁰ set out at paragraphs 4.5 to 4.331 above that the Parties infringed the Chapter I prohibition by participating in agreement(s) and/or a concerted practice that had as their object the prevention, restriction or distortion of competition in the market for the supply, by Recruitment Agencies, of Candidates required by the Construction Industry. The OFT considers

⁶⁴⁵ 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 EC Treaty, OJ 2003 L1/1.

⁶⁴⁶ See generally OFT guideline *Modernisation* (Edition 12/04).

⁶⁴⁷ See OFT guideline *Modernisation* (Edition 12/04), at paragraph 3.7.

⁶⁴⁸ Section 9(1)(a) of the Act.

⁶⁴⁹ Section 9(1)(a) of the Act.

⁶⁵⁰ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, [2002] CAT 1, at paragraph 109; *JJB Sports plc v Office of Fair Trading* [2004] CAT 17; and *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24. See paragraphs 3.115 to 3.124 above.

that the evidence set out in this Decision is sufficient to overcome the presumption of innocence to which the Parties are entitled.⁶⁵¹

⁶⁵¹ *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, at paragraph 204. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at paragraphs 164 and 165. See paragraphs 3.115 to 3.124 above.

5 THE OFT'S ACTION

A Decision

5.1 This Part sets out the OFT's enforcement action and reasons for it.

5.2 The OFT finds, on the basis of strong and compelling evidence sufficient to overcome the presumption of innocence to which the Parties are entitled which is set out in Section 4 above, that the Parties listed at paragraph 1.8 above have infringed the Chapter I prohibition.

5.3 The OFT finds that in respect of the following elements of a single overall infringement in pursuit of a common objective (the Margin Protection Initiative):

- The Collective Refusal to Supply Parc: Each of the Parties participated in an agreement to withdraw and/or refrain from entering into contracts in which Parc was acting as a Neutral Vendor for the supply of Candidates to Construction Companies in the UK, which had as its object the prevention, restriction or distortion of competition in the market for the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the UK.
- The Target Fee Rates Initiative: Each of the Parties participated in an agreement and/or concerted practice to fix target Fee Rates for the supply of Candidates to Neutral Vendors and certain Construction Companies in the UK, which had as its object the prevention, restriction or distortion of competition in the market for the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the UK.

B Financial penalties

General points

5.4 Section 36(1) of the Act provides that on making a decision that an agreement or a concerted practice has infringed the Chapter I Prohibition, the OFT may require an undertaking which is a party to the agreement or concerted practice to pay the OFT a penalty in respect of the infringement(s). No penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the 2000 Order.⁶⁵²

5.5 In imposing a financial penalty under Section 36(1) of the Act, the OFT has identified the legal or natural person or persons whom it considers responsible for the infringement by each undertaking. This Decision is addressed to:

- CDI AndersElite Limited and CDI Corp;
- A Warwick Associates Limited;
- Beresford Blake Thomas Limited, Hill McGlynn & Associates Limited, Randstad UK Holding Limited and Randstad Holding NV;
- Eden Brown Limited;
- Fusion People Limited;
- Hays Specialist Recruitment Limited, Hays Specialist Recruitment (Holdings) Limited and Hays plc; and
- Henry Recruitment Limited.

Where this Decision is addressed to a Party's ultimate parent company, the parent company is jointly and severally liable with its subsidiaries for payment of the penalty.

5.6 As explained in section 4 the OFT considers the infringement comprises agreement(s) and/or a concerted practice with one overall objective, and

⁶⁵² Section 36(8) of the Act

is therefore treating these agreements and/or concerted practice as a single overall infringement (the Margin Protection Initiative). The OFT has therefore imposed a single financial penalty on each Party in respect of their participation in the single overall infringement.

Intention/negligence

5.7 The OFT may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently.⁶⁵³ The CAT has stated that:⁶⁵⁴

'...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition.'

5.8 The OFT considers that serious infringements of the Chapter I prohibition, which have as their object the prevention, restriction or distortion of competition, such as price fixing, are, by their very nature, committed intentionally.⁶⁵⁵ Ignorance or a mistake of law is no bar to a finding of intentional infringement under the Act.

5.9 The OFT finds in this case that the Parties participated in agreement(s) and/or a concerted practice that had as their object the protection of the margins that could be obtained in respect of Fee Rates for the supply of Candidates to Neutral Vendors and certain Construction Companies in the UK.

⁶⁵³ Section 36(3) of the Act.

⁶⁵⁴ See *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 221 and *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director of Fair Trading* [2002] CAT 1, at paragraphs 452 to 458.

⁶⁵⁵ See OFT 407, *Enforcement* (December 2004) at paragraphs 5.9 to 5.11. In this regard the OFT also notes that price fixing falls within the OECD (Organisation for Economic Cooperation and Development) definition of 'hardcore cartels' – see Penalties Guidance, at paragraph 1.4, footnote 8.

- 5.10 The OFT considers that the nature of the restrictions themselves (i.e. the attempted fixing of prices and exclusion of a new entrant in the sector) meant that the Parties must have been aware, or could not have been unaware, that their conduct had the object or could have the effect of preventing, restricting or distorting competition or that the Parties ought to have known that their conduct could result in a restriction or distortion of competition. It is well established through EC law that such practices are unlawful and can lead to very substantial penalties.
- 5.11 For the reasons set out in paragraphs 5.286 to 5.300 below, and after consideration of the representations that have been made in response to the Statement of Objections, the OFT finds that each of the Parties intentionally committed the infringement. Even if the OFT had not concluded that the infringement had been committed intentionally, the evidence in this case, as set out below, would be sufficient to demonstrate that the infringement had been committed negligently.

Small agreements

- 5.12 Section 39(3) of the Act provides that a person is immune from the effect of section 36(1) if he is 'party to a 'small agreement'. 'Small agreement' is defined, pursuant to section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000⁶⁵⁶, as an agreement between undertakings, the combined applicable turnover of which for the business year ending in the calendar year preceding the one during which the infringement occurred, does not exceed £20 million.
- 5.13 However, by virtue of section 39(1)(b), a price fixing agreement does not qualify as a 'small agreement' for the purposes of the Act. The Margin Protection Initiative is a single overall infringement in the nature of a price fixing agreement and/or concerted practice within the meaning of section 39(1)(b).⁶⁵⁷ Accordingly, none of the Parties will benefit from immunity from penalties under section 39(3). In any case, the combined turnover of the Parties exceeds £20 million and therefore they do not benefit from the small agreement regulation.

⁶⁵⁶ SI 2000/262.

⁶⁵⁷ See paragraphs 4.396 to 4.406 above.

Previous OFT decisions

- 5.14 Certain of the Parties have argued in response to the Statement of Objections that there are alleged inconsistencies between the OFT's approach to the calculation of the penalties in this case and the approach it has adopted in previous cases, particularly with reference to the calculation of the starting point (see paragraphs 5.208 - 5.213 below).
- 5.15 Provided the penalties it imposes in a particular case are within the range of penalties permitted by section 36(8) of the Act and the OFT has had regard to its Penalties Guidance under section 38 of the Act, the OFT has a margin of appreciation when determining the appropriate amount of a penalty under the Act.⁶⁵⁸ Moreover, each case is specific to its own facts and circumstances and it cannot be assumed that the level of penalty appropriate for a particular party in one case (or the manner in which the Penalties Guidance has been applied) will necessarily be the same in respect of another party in another case.
- 5.16 Finally, the OFT does not accept that it is in any event bound by its decisions in relation to the calculation of penalties in previous cases. Rather, the OFT considers that, subject to the above, it is free to adapt its policy as appropriate having regard to all relevant circumstances and its overall policy objectives on financial penalties, as set out in its Penalties Guidance.⁶⁵⁹

Calculation of penalties

- 5.17 In accordance with section 38(8) of the Act, the OFT must have regard to its Penalties Guidance issued under section 38(1) of the Act, for the time being in force, when setting the amount of the penalty. The OFT's Penalties Guidance sets out five steps for determining the penalty.

⁶⁵⁸ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 168; *Holdings Ltd and others v Office of Fair Trading* [2005] CAT 22, at paragraph 102.

⁶⁵⁹ Joined cases 100/80 to 103/80 *Musique Diffusion Francaise and others v European Commission ('Pioneer')* [1983] ECR 1825, at paragraphs 101-110; Joined cases C-189/02P, C-202/02P, C-205/02P to C-208/02P and C-213/02P *Dansk Rorindustri A/S and others v European Commission* [2005] ECR I-5425, at paragraph 169.

5.18 The CAT has indicated that while the OFT must have regard to the guidance it retains a '*margin of appreciation*'⁶⁶⁰ in its interpretation and application, stating that the OFT is not '*making a series of mechanical calculations according to a predetermined mathematical formula*'.⁶⁶¹

Step 1 – Assessment of Relevant Turnover

Introduction to the assessment of relevant turnover in this case

5.19 The OFT needs to form a view of the relevant turnover affected by the alleged infringement for the purposes of assessing the appropriate level of penalties. This is because the starting point for determining the level of a financial penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.

5.20 The relevant turnover at Step 1 is the turnover of the undertaking in the relevant product market and the relevant geographic market affected by the infringement in the undertaking's last business year.⁶⁶² The OFT is only obliged to define the market where it is impossible, without such a definition, to determine whether the agreement and/or concerted practice has as its object or effect the appreciable prevention, restriction or distortion of competition.⁶⁶³ No such obligation arises in this case because it involves an agreement(s) and/or a concerted practice that had as their object the restriction of competition.⁶⁶⁴ The last business year is

⁶⁶⁰ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13 at paragraph 106-107.

⁶⁶¹ *Umbro Holdings Ltd and others v Office of Fair Trading* [2005] CAT 22 at paragraph 105.

⁶⁶² Penalties Guidance, at paragraph 2.7.

⁶⁶³ Case T-62/98 *Volkswagen AG v European Commission* [2000] ECR II-2707, at paragraph 230 and Case T-29/92 *SPO and others v Commission* [1995] ECR II-289, at paragraph 74. These cases refined the CFI's earlier position adopted in Case T-68/89 etc, *Societa Italiana Vetro SpA etc v Commission ('Italian Flat Glass')* [1992] ECR II 1403, at paragraph 159, drawing a distinction between cases involving abuse of dominance, where market definition is always a prerequisite to a finding of an infringement, and cases involving anti-competitive agreements, where the market need only be defined where it is impossible, without such a definition, to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

⁶⁶⁴ This principle has also more recently been applied by the CAT in *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 176 ('in Chapter I cases, unlike Chapter II cases, determination of the relevant market is neither intrinsic to, nor normally necessary for, a finding of infringement', and that 'it follows that in Chapter I cases involving price-fixing it would be inappropriate for the OFT to be required to establish the

the business year preceding the date of the OFT's final decision (see also the 2000 Order).

- 5.21 Therefore, the OFT must consider what products or services are most likely to comprise relevant turnover for the purposes of establishing a financial penalty. In this case, the OFT has had particular regard to the CAT and the Court of Appeal's view on relevant turnover in relation to penalties as expressed in Chapter I cases.
- 5.22 In *Argos/Littlewoods*⁶⁶⁵, the Court of Appeal held that the market which is taken for the calculation of the turnover may be properly assessed on a broad view of a particular trade which has been affected by the alleged infringement, rather than by a formal analysis such as substitutability or rather than by limiting the turnover in question to sales of the very products or services which were the direct subject of the alleged infringement.
- 5.23 In *Replica Kit (penalties)*⁶⁶⁶ the CAT confirmed the OFT's approach consisting of grouping products in one relevant market where it reflects commercial reality and it can reasonably be shown that the products were 'affected by' the infringement.
- 5.24 In this Decision the OFT sets out its final view on the commercial activities affected by the Margin Protection Initiative, in light of the representations received in response to the Statement of Objections. This analysis is set out at paragraphs 5.26 to 5.118 below.
- 5.25 The OFT concludes that the relevant turnover for the purposes of the imposition of financial penalties relates to the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the UK. The OFT finds this includes both Ad Hoc Supply and Central Supply. The OFT concludes that the Construction Industry is comprised of companies active in any or all of the design, build and post-build phases of residential and

relevant market with the same rigour as would be expected in a case involving the Chapter II prohibition. In a case such as the present, definition of the relevant product market is not intrinsic to the determination of liability ... it would be disproportionate to require the OFT to devote resources to a detailed market analysis, where the only issue is the penalty').

⁶⁶⁵ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA Civ 1318, at paragraph 173.

⁶⁶⁶ *Umbro Holdings Ltd and others v Office of Fair Trading* [2005] CAT 22, at paragraph 119

commercial property construction projects, public building construction projects and civil engineering construction projects.

The commercial activities affected by the Margin Protection Initiative

5.26 In the Statement of Objections the OFT set out its proposed view on the relevant turnover affected by the Margin Protection Initiative by identifying the activities that the Parties were seeking to protect by the Margin Protection Initiative⁶⁶⁷ This analysis is summarised in paragraphs 5.27 - 5.59 below, as follows:

- The commercial activities that the Parties were engaged in at or around the time of the Margin Protection Initiative;
- The Candidates relevant to Parc's supply to Taylor Woodrow and Vinci at or around the time of the Margin Protection Initiative; and
- The commercial activities of other Construction Companies relevant to the Margin Protection Initiative.

The commercial activities that the Parties were engaged in at or around the time of the Margin Protection Initiative

5.27 The Parties used the term 'construction recruitment' to describe themselves. Although the OFT has found that the exact meaning or use of this term can differ, it is clear from the name that the Parties gave to their group meeting which was central to the formation of the Margin Protection Initiative (the Construction Recruitment Forum) that it was their activities in the Construction Industry that defined the group.⁶⁶⁸ What these Recruitment Agencies have in common is the supply of Candidates with skills specifically required by the Construction Industry.

5.28 Recruitment Agencies that describe themselves as 'construction recruitment' agencies offer Candidates with the professional, managerial, trade and labour skills specifically required by the Construction Industry.

⁶⁶⁷ See for example paragraphs 3.149 to 3.168 of the Statement of Objections.

⁶⁶⁸ See Select Appointments (Holdings) Limited's response to question 1 of an information request of 16 October 2006 to Parties. File Reference: Select Leniency-1833. See also meeting note with Vinci plc of 28 February 2007, at paragraph 3. File Reference: Vinci Third Party Correspondence, Vinci- 273a

This can include Recruitment Agencies that supply a wide range of Candidate types and Recruitment Agencies that specialise in certain specific skills or trades.⁶⁶⁹

- 5.29 For each vacancy, Construction Companies will have specific requirements with regard to the skills and qualifications of Candidates or duration of employment (whether permanent or temporary) and not all Recruitment Agencies will be able to supply suitable Candidates for each vacancy. In fact, certain Recruitment Agencies are recognised for specialising in Candidates with particular professional skills or qualifications.
- 5.30 However, in practice Recruitment Agencies compete across a portfolio of vacancies and the relationship Recruitment Agencies have with Construction Company clients will not be limited to a specific vacancy (see further paragraphs 2.145 to 2.149 above). Rather relationships will be based on an understanding of the needs of the Construction Company and the types of Candidate a Recruitment Agency may be able to provide from time to time as vacancies arise.
- 5.31 Furthermore, in practice PSAs do not define particular types of Candidate that are covered by the agreement. The PSAs that the Parties had with Parc, Vinci and Atkins make no distinction between different types of construction roles or Candidate. In fact, the contracts are open as to the types of Candidates that may be required – referring only to the ‘assignment’ notified by the Construction Company to the Recruitment Agency.
- 5.32 Also, evidence gathered by the OFT during its investigation indicates that the Parties perceived Parc (and also intermediaries more generally) to be a threat to their business in the supply of Candidates to the Construction Industry, not to a particular subset of the Construction Industry.⁶⁷⁰

⁶⁶⁹ See response to question 1 of an OFT’s information request of 16 October 2006 to Parties. File Reference: CDI AndersElite Leniency-26, 27; Eden Brown Leniency-30; Fusion Leniency-88; Hays Leniency - 429; Henry Leniency-3c; Select Leniency-1833. See also Parc’s response to question 2 of an OFT’s information request of 25 July 2007. File Reference: Parc Third Party Correspondence- 284

⁶⁷⁰ For example, discussions during the CRF made no distinctions between candidate types (see minutes of CRF meetings; File Reference: Select Leniency – 1604 (CRF1), Select Leniency –

- 5.33 For these reasons, the OFT does not consider it would reflect commercial reality to specify a number of distinct commercial activities (each defined by the skills, experience or qualifications of the Candidates, the specialisation of certain Recruitment Agencies or duration of employment) in taking a broad view of the trade affected by the Margin Protection Initiative.
- 5.34 During its investigation the OFT asked the Parties to confirm the types of Candidates, in terms of their work and professional background, that they supplied to their clients.⁶⁷¹
- 5.35 The Parties' responses confirmed that, collectively, the following Candidate categories were supplied across the Parties: Architects, Planners, Estimators, Quantity surveyors, Project managers, Site managers, Facilities management, Land managers, Commercial managers, Building services, Engineers⁶⁷², Site foreman, Operatives / Tradesmen, Plant operators and General labourers.
- 5.36 All Recruitment Agencies confirmed that they supplied Candidates for both permanent and temporary positions.⁶⁷³

Geographic scope of the Parties' activities

1688 (CRF2), Select Leniency – 1685 (CRF3) and Select Leniency – 1624 (CRF4)). The PSA usually entered into by recruitment agencies do not distinguish between specific professions or skills (see paragraphs 2.145 to 2.149 above).

⁶⁷¹ See responses to Question 2 of Annex B of an OFT's information request of 16 October 2006 to Parties. File References AndersElite Leniency 26,27, Eden Brown Leniency 31, Fusion Leniency 89, Hays Leniency - 429, 430, 640I, Henry-Leniency – 3c and Select Leniency – 2106 respectively. In responding to this question certain of the Parties cross referred to other parts of their response and the Candidate categories outlined above takes this into account. . AWA did not provide a response to this request. This information was previously set out in Table 3.1 of the Statement of Objections.

⁶⁷² Where a Party confirmed in response to the OFT's information request that they supplied an engineering discipline, this has been recorded under the candidate category 'Engineer'. In responding to this request, Hays and CDI AndersElite stated that they supplied engineers, Fusion People confirmed that they supplied site engineers, Henry Recruitment confirmed they supplied design and structural Engineers, as well as construction, civil, commissioning, electrical and mechanical engineers. Both BBT and HMG confirmed they supplied building service engineers, as well as civil, structural and mechanical and electrical engineers.

⁶⁷³ Some Parties noted that switching between supplying permanent or temporary staff presented no difficulties for agencies already supplying construction staff -- see responses to an OFT's information request of 16 October 2006 to Parties. File Reference: CDI AndersElite Leniency - 26; Eden Brown Leniency - 30; Fusion Leniency - 88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833

- 5.37 The OFT understands that Recruitment Agencies operating in the UK will supply Construction Companies based in the UK and that Construction Companies based in the UK will use UK based Recruitment Agencies.⁶⁷⁴
- 5.38 The OFT understands that there is little presence of non-UK based Recruitment Agencies offering Candidates in the UK.⁶⁷⁵ A Construction Company has confirmed to the OFT that, where it did use non-UK labour, it recruited this through Recruitment Agencies based in the UK.⁶⁷⁶
- 5.39 Recruitment Agencies may have national coverage, supplying Candidates throughout the UK from a single office or a network of branches, or have a local or regional presence, focussing on Construction Companies and Candidates in certain areas of the UK.⁶⁷⁷
- 5.40 A key factor for a Recruitment Agency is the ability to offer suitable Candidates at the geographic location needed by the Construction Company. As set out in paragraphs 2.123 to 2.126 above, Construction Companies require labour at specific geographic locations, usually associated with particular building sites. The geographical location of demand for construction projects, and therefore the location of building sites where labour is required, will vary over time. Construction Companies may therefore operate on a national basis, possibly through a network of regional offices.
- 5.41 Just as Construction Companies can operate on a national basis, nationally based Recruitment Agencies can and do operate. Although some factors can make locally based recruitment easier for Recruitment Agencies, such as local knowledge or the logistics of interviewing

⁶⁷⁴ For example, see response from Select to question 20 of an OFT information request to leniency applicants dated 16 October 2006. File Reference: Select Leniency - 1833

⁶⁷⁵ See responses to question 26 of an OFT information request dated 16 October 2006. It was noted that the candidates themselves may come from outside of the UK. File Reference: CDI AndersElite Leniency - 26, 27; Eden Brown Leniency - 30; Fusion Leniency - 88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833.

⁶⁷⁶ See meeting note with Vinci, 28 February 2007. File Reference: Vinci Third Party Correspondence-273a

⁶⁷⁷ See responses to question 20 of an OFT information request to leniency applicants dated 16 October 2006. File Reference: CDI AndersElite Leniency - 26, 27; Eden Brown Leniency - 30; Fusion Leniency - 88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833.

Candidates,⁶⁷⁸ PSAs of Construction Companies typically include a 'depth' of Recruitment Agencies, with a mix of Recruitment Agencies covering different geographic areas⁶⁷⁹ and Candidates can either be recruited locally or are able to relocate temporarily or permanently.

- 5.42 With regard to Fee Rates, the Parties did not distinguish between regional or geographic factors⁶⁸⁰ and the fee rates specified in the PSAs with Parc, Vinci and Atkins applied nationally.
- 5.43 In the light of this, the OFT considers that the geographic market in this case is no wider than the UK. The OFT notes that none of the parties have disputed that this is the scope of the relevant geographic market in this case.⁶⁸¹

Commercial activities of the parties unaffected by the infringement

- 5.44 The OFT considers that the affected turnover does not include the supply of Candidates with IT, finance, clerical, secretarial and administrative skills.
- 5.45 The OFT also considers that the affected turnover is limited to the activities of the Parties when operating as a Recruitment Agency.

⁶⁷⁸ The majority of the Parties considered that locally based Recruitment Agencies were able to compete effectively with nationally based Recruitment Agencies in their home area. See responses to question 20 and 22 of an OFT information request to leniency applicants dated 16 October 2006. Some parties considered that trades and labour skills tended to be supplied on a more local level than professional roles. File Reference: Eden Brown Leniency-30. Henry Recruitment considered a network of offices necessary to operate effectively in a local area. File Reference: Henry Leniency - 3c. However, whether or not this is the case, local agencies would still be able to compete with nationally based agencies from time to time for specific vacancies. File Reference: Select Leniency-1833

⁶⁷⁹ See meeting note with Vinci, 28 Feb 2007 File Reference: Vinci Third Party Correspondence - 273a

⁶⁸⁰ Fee rates may vary on a bespoke basis for specific vacancy that may prove particularly difficult to fill. This may be due to shortages in skilled labour, possibly in a specific location. However, this appears to be the exception. The OFT does not consider it likely to significantly affect the ability of recruitment agencies to offer candidates across different geographic areas on an ongoing basis.

⁶⁸¹ In its paragraph 2.35 of its response to the Statement of Objections CDI AndersElite states that 'the OFT has mistakenly misconstrued the distinction between ad hoc contracts and PSAs as relating to the scope of the geographic market'. CDI AndersElite confirmed that it 'does not rely on the existence of separate local markets for ad hoc contracts (although that may be the case)'. For the avoidance of doubt, and as was set out in the Statement of Objections, it seems to the OFT that locally or regionally based Recruitment Agencies compete effectively with those providing national coverage to supply centrally negotiated contracts and local or ad-hoc business.

Discussions at CRF meetings and the resulting conduct of the Parties, and therefore the focus of this investigation, concerns the Parties' activities as Recruitment Agencies. Therefore affected turnover does not include, for example, training services, or MSP services offered by Recruitment Agencies.

The Candidates relevant to Parc's supply to Taylor Woodrow and Vinci at or around the time of the Margin Protection Initiative

- 5.46 As set out in paragraphs 4.9 to 4.18 above, a key reason for the instigation of the Margin Protection Initiative was the emergence of Parc as an intermediary supplier of Candidates in the sector. Much of the discussion at CRF Meetings focused on supply to Taylor Woodrow and Vinci, given the PSAs that Parc had agreed with these two construction companies.

Taylor Woodrow

- 5.47 At or around the time of the Margin Protection Initiative, Taylor Woodrow was one of UK's largest house builders. Its major UK subsidiary, Taylor Woodrow Development Ltd, managed its house building operations primarily under the brand Bryant Homes. It also had a general construction arm, Taylor Woodrow Construction Ltd, which carried out, for example, work on public buildings (Government offices, schools and hospitals), airports, energy and railway projects.
- 5.48 Taylor Woodrow's turnover in 2006 was £3.6 billion. Ninety-seven per cent of its profits were generated by house building, with its construction arm accounting for the remaining three per cent.⁶⁸² It employed 4,500 staff, where 2,500 work in its housing development division and 2,000 in the construction division.⁶⁸³
- 5.49 At or around the time of the Margin Protection Initiative, Taylor Woodrow had 12 UK regional offices that gave it national coverage. Seventy per cent of its turnover was generated in the UK with the remainder coming from housing operations in North America, Canada, Spain and Gibraltar.

⁶⁸² Taylor Woodrow plc Report and Accounts 2006, File Reference: Public Document-74.

⁶⁸³ See meeting note with Taylor Woodrow, 18 July 2006. File Reference: TW Third Party Correspondence-46

Vinci plc

- 5.50 At or around the time of the Margin Protection Initiative, the Vinci Group was one of the world's largest construction and associated service organisations. Its UK presence was managed through Vinci plc which has an annual turnover of £500 million and 2,500 employees ⁶⁸⁴
- 5.51 Vinci's principal trading activities were carried out by Norwest Holst Ltd and 11 other subsidiaries. ⁶⁸⁵ Its construction activities included building and civil engineering projects covering: construction of roads and improvement of traffic systems; the design and construction of bridges; constructing and improvement of water treatment and sewage works; railway construction including tunnel and bridge structures, railway stations and platforms; and regeneration of contaminated land.
- 5.52 Other Vinci subsidiaries specialised in facilities management, excavation, offshore building accommodation units, manufacturing of resin floor coating and office and retail interiors.

Parc's supply to Taylor Woodrow and Vinci

- 5.53 During its investigation the OFT obtained evidence from Parc in relation to the Candidates that Parc both expected to source ⁶⁸⁶ and actually sourced ⁶⁸⁷ from the Parties in order to meet the personnel requirements of Taylor Woodrow and Vinci.
- 5.54 Parc's response to each of these questions is set out at Table 5.1 below. Table 5.1 demonstrates that, collectively, all of the Candidate types listed were either sourced or expected to be sourced across the Parties by Parc for supply to Taylor Woodrow and Vinci.

⁶⁸⁴ See www.vinci.plc.uk/Finance/index.html

⁶⁸⁵ For more detailed information on the structure of Vinci PLC's subsidiary network:- <http://www.vinci.plc.uk/>, File Reference: Public Document 76

⁶⁸⁶ Question 7a of the OFT's information request of 25 July 2007 asked the Parc to confirm the 'types of profession or skill that you **expected** each CRF member to provide, when originally establishing a preferred supplier agreement to supply staff to Taylor Woodrow (in September 2003) and Vinci plc (in August 2004) '. File Reference: Third Party File, Parc - 281

⁶⁸⁷ Question 8a of the OFT's information request of 25 July 2007 asked Parc to confirm 'the types of profession or skill that each CRF member **actually** provided via its preferred supplied agreement to Taylor Woodrow and Vinci plc'. File Reference: Third Party File, Parc - 281

Table 5.1 – Candidates that Parc stated it expected to source and/or actually sourced from the Parties for supply to Taylor Woodrow and/or Vinci⁶⁸⁸

CANDIDATE CATEGORY	Anders		Eden		Fusion		Hays		Henry		BBT		HMG		AWA	
	Exp	Act	Exp	Act	Exp	Act	Exp	Act	Exp	Act	Exp	Act	Exp	Act	Exp	Act
Architects											n/a					
Planners											n/a					
Estimators											n/a					
Quantity surveyors											n/a					
Project managers											n/a					
Site managers											n/a					
Facilities management											n/a					
Land managers											n/a					
Commercial managers											n/a					
Building services											n/a					
Mechanical/Electrical											n/a					
Civil engineers											n/a					
Technical engineers											n/a					
Structural engineers											n/a					
Engineering & Design											n/a					
Operatives/Tradesmen ⁶⁸⁹											n/a					
Plant operators											n/a					
General labourers											n/a					

The commercial activities of other Construction Companies relevant to the Margin Protection Initiative

Construction Companies identified in the CRF Minutes

5.55 CRF Minutes record that the Parties also identified Parc as a threat to their business with certain other named Construction Companies, specifically Mowlem⁶⁹⁰, Gleeson⁶⁹¹, AMEC⁶⁹² and Amey⁶⁹³.

⁶⁸⁸ A response by Parc to the OFT's information request of 25 July 2007 that it expected to source or actually sourced a Candidate from a Party is indicated in Table 5.1 by a shaded box. The information in Table 5.1 was previously presented in Table 3.1 of the Statement of Objections, along with information on the Candidates that the Parties supplied more generally (see paragraphs 3.150 – 3.156 of the Statement of Objections). The OFT has now separated out both sets of data in the light of CDI AndersElite's representations on the Statement of Objections which queried the presentation of this combined information in Table 3.1 of the Statement of Objections. File Reference: Parc Third-Party Correspondence-281

⁶⁸⁹ References to 'trade' skills in Parc's response of 13 August 2007 have been reflected by the inclusion of the 'operatives/tradesmen' and 'plant operators' categories.

- 5.56 At or around the time of the Margin Protection Initiative, these Construction Companies had interests in some or all of the design, build and post-build phases of commercial and residential buildings, public buildings and civil engineering projects.
- 5.57 In addition, these Construction Companies employed architects, engineers, surveyors and project managers and other professionally qualified staff related to aspects of the Construction Industry.⁶⁹⁴

WS Atkins plc

⁶⁹⁰ At or around the time of The Margin Protection Initiative, Mowlem plc (Mowlem) was a subsidiary of Carillion Group (Carillion acquired Mowlem plc on 23 February 2006), a national construction company with a strong regional presence in the UK, with operations in the Middle East, Canada and the Caribbean. In 2007, Mowlem had annual revenue of around £4 billion and employed over 50,000 people. In the UK, Carillion had eight principal sectors - defence, education, health, building, facilities management, services, roads, rail and civil engineering. It described itself as a leader in Public Private Partnership projects, particularly in the Defence, Education and Health sectors in the UK. File Reference: Public Document 84 and File Reference: Public Document 85.

⁶⁹¹ At or around the time of The Margin Protection Initiative, the Gleeson Group plc (Gleeson) specialised in three core areas: urban housing regeneration including maintenance and facilities management for social landlords; commercial property development; and land trading. In 2006, Gleeson had an annual turnover of £194.3m and it employed around 500 people. During 2006 the group announced its decision to exit the commercial property development market, reflecting the belief that this market had probably peaked. As a result, the Group concentrated more on house building, increasingly focused on the regeneration sector, with particular emphasis on creating sustainable communities. In 2006, the business also had a specialist finance subsidiary which leads bids for Private Finance Initiative (PFI) and Public Private Partnerships (PPP), covering a range of public sector capital projects. File Reference: Public Document 86; and Public Document 87 & 88.

⁶⁹² At or around the time of The Margin Protection Initiative, AMEC was a leading supplier of consultancy, engineering and project management services within energy and industrial process industries worldwide. Amec is involved in designing, and managing the delivery and maintenance of physical assets such as offshore oil and gas production facilities, metals or mineral mines, or power infrastructure. At that time, AMEC employed over 16,000 people in core businesses located in the UK, US and Canada. Its clients primarily included the oil and gas industry, power and transport sectors and in process industries such as mining, food and pharmaceuticals. File Reference: Public Document 89.

⁶⁹³ At or around the time of The Margin Protection Initiative Amey plc, a subsidiary of Ferrovial one of Spain's largest construction companies, supplied design and engineering solutions for transport infrastructure (including roads and railway), covering feasibility studies and traffic management and maintenance services for the London Underground. It provided facilities management and planned maintenance services to a range of sectors including defence, education and central / local government often through public-private partnership schemes. It employed over 8000 people, Public Document 90.

⁶⁹⁴ For example, Carillion, File Reference: Public Document 92 and Atkins,, File Reference: Public Document 93, allowed a comprehensive search of staff vacancies, including a range of disciplines covering many aspects of the construction industry.

- 5.58 At or around the time of the Margin Protection Initiative, Atkins was a leading provider of professional technology based consultancy and support services, with a total turnover in 2007 of £1.3 billion.⁶⁹⁵ It was the largest UK employer of technical staff and second largest employer of civil and structural staff in the world.⁶⁹⁶
- 5.59 Most of Atkins' operations were UK based, with 85 per cent of its revenue earned in the UK.⁶⁹⁷ Its most significant overseas businesses operated in the Middle East, China and the US. Atkins' main activities were: engineering consultancy; design; planning; management and IT consultancy; asset management; environmental services (such as environmental impact assessment); project finance, project and cost management; and property services agency. The sectors in which it operated were: aviation and defence; government, education and health; highways and transportation; manufacturing, energy and utilities.

Representations from the parties on Candidates that should be excluded from the scope of relevant turnover

5.60 CDI AndersElite, Hays and Eden Brown made representations in response to the Statement of Objections that turnover from certain Candidate roles should be excluded because they were not affected by the Margin Protection Initiative, as follows:

- Hays stated that the OFT should exclude design Candidates from the scope of the Margin Protection Initiative;
- CDI AndersElite stated that the Candidates the OFT proposed to exclude from an assessment of relevant turnover was incomplete and should also exclude the following types of services/Candidates as they were not affected by the Margin Protection Initiative⁶⁹⁸:
 - Services to companies whose primary business is not construction;

⁶⁹⁵ See WS Atkins plc Annual Report 2007, File Reference: Public Document 77.

⁶⁹⁶ For example, it employed 167 qualified architects, 1383 surveying staff and 300 planning staff, File Reference: Public Document 78.

⁶⁹⁷ See WS Atkins Annual Accounts 2006, p7, File Reference: Public Document 79.

⁶⁹⁸ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.20 onwards.

- Candidates employed in relation to existing civil engineering structures and rail industry 'safety critical' jobs; and
- Turnover from ad-hoc contracts (Eden Brown also made representations that turnover from Candidates supplied on an ad-hoc basis should be excluded from relevant turnover⁶⁹⁹).

5.61 Each of these representations is considered in turn below.

Turnover from design Candidates

5.62 In response to the Statement of Objections Hays stated that it considered its infringement related solely to the supply of Candidates to Taylor Woodrow and Vinci via Parc, and that Taylor Woodrow and Vinci were both contractor clients. Hays stated that more than [...] [C] % of vacancies registered by Taylor Woodrow and Vinci in the relevant period, either directly with Hays or through Parc, were for contractor Candidates.⁷⁰⁰

5.63 Hays further submitted that given Parc was obliged to notify all first tier suppliers of all vacancies that Taylor Woodrow and Vinci required filling, it is likely that the other Parties supplied only contractor Candidates to Taylor Woodrow and Vinci.

5.64 Hays also stated that the fact that CRF discussions did not draw a distinction between design and contractor Candidates does not support a conclusion that both types of Candidates were affected.⁷⁰¹ Hays submitted that there was no need for discussions to draw such a distinction because those present were aware that their discussions related only to contractor Candidates, and submitted that there is no evidence to support the OFT's preliminary finding as set out in the Statement of Objections that design Candidates would have been

⁶⁹⁹ Eden Brown submission on 'Ad Hoc Supply' sent to the OFT on 11 February 2009.

⁷⁰⁰ Hays' written representations on the Statement of Objections, at paragraph 3.5. Hays stated that of the [...] [C] % that were not contractor Candidates, on occasion design Candidates were required to perform a particular function on a construction project and Taylor Woodrow had a small development part of their business involvement in residential house building.

⁷⁰¹ In the Statement of Objections, the OFT considered that the CRF's activities were equally relevant to 'design' Candidates, in particular, because none of the CRF discussions drew a distinction between types of Candidate – see paragraph A 4 of the Statement of Objections.

affected by the infringement.⁷⁰² Hays also noted that it disputed the OFT's preliminary finding in the Statement of Objections in relation to Atkins.⁷⁰³

5.65 The OFT does not agree with Hays that design Candidates were not affected by the infringement. The reasons for this are as follows:

- Parc expected to source and/or actually sourced design Candidates from the Parties in order to meet the personnel requirements of Taylor Woodrow and Vinci;
- Vinci has confirmed that it expected construction Recruitment Agencies to supply it with design Candidates; and
- The supply of Candidates to Atkins forms part of the Margin Protection Initiative.

Parc expected to source and/or actually sourced design Candidates from the Parties in order to meet the personnel requirements of Taylor Woodrow and Vinci

5.66 In its response to the Statement of Objections, Hays stated that '*the types of Candidates that Hays supplies to design clients are architects, consultant engineers, professional quantity surveyors and CAD technicians*'.⁷⁰⁴

5.67 As set out in Table 5.1, Parc has confirmed that it expected to source and/or actually sourced design Candidates from the Parties, including architects, quantity surveyors and engineering & design Candidates, in order to meet the personnel requirements of Taylor Woodrow and Vinci.⁷⁰⁵

5.68 Hays has itself highlighted in response to the Statement of Objections that during the relevant period [...] [C] per cent of all vacancies registered by Taylor Woodrow and Vinci, either directly with Hays or through Parc,

⁷⁰² Hays' written representations on the Statement of Objections, at paragraphs 3.8 - 3.10.

⁷⁰³ Hays' written representations on the Statement of Objections, at paragraph 3.10.

⁷⁰⁴ Hays' written representations on the Statement of Objections, at paragraph 3.3

⁷⁰⁵ See also Parc's response to question 1 of an OFT's information request of 12 December 2006. File Reference: Parc Third Party Correspondence - 168

were for contractor Candidates.⁷⁰⁶ Conversely, this shows that [...] [C] per cent of all such vacancies registered were design Candidates.

Vinci has confirmed that it expected construction Recruitment Agencies to supply it with design Candidates.

- 5.69 Vinci has also confirmed to the OFT that the design-phase is within the scope of its activities and that it would expect Recruitment Agencies to supply a broad range of Candidates, as follows:

*'[OFT] asked whether agencies supplying candidates to the design phase of projects or to post-build facilities management would be considered 'construction' agencies. [Vinci] replied that Vinci do employ design managers and assistants and they would expect an agency describing itself as a 'construction' agency to cover a broad range of skills.'*⁷⁰⁷

- 5.70 Evidence on the OFT's file also refers to design candidates being explicitly referred to in correspondence between a Party and Vinci. For example, in a letter of 25 January 2005 from John Peterson (CDI AndersElite's Managing Director) to Collin Jellicoe (Group HR Director of Vinci Group), Mr Peterson stated in relation to CDI AndersElite's activities as follows:

'In summary, AndersElite offers:

1. *250 trained recruitment consultants, many of whom have extensive knowledge of the construction industry and indeed, quite a number are professionally qualified in the disciplines involved – chartered engineers, architects, town planners etc.'*⁷⁰⁸

The supply of Candidates to Atkins forms part of the Margin Protection Initiative

⁷⁰⁶ Hays' written representations on the Statement of Objections, at paragraph 3.5

⁷⁰⁷ Meeting/Teleconference note between the OFT and Vinci dated 28 February 2006, held at Watford, at paragraph 5., Vinci Third Party Correspondence – 273 a

⁷⁰⁸ File Reference: AndersElite s26 – 56. See also meeting with Vinci of 28 February 2007, pages 1, 2 (paragraphs 3–5). File Reference: Vinci Third Party Correspondence-273a.

- 5.71 For the reasons set out in paragraphs 4.238 to 4.314 above the OFT considers that contacts between certain of the Parties (namely CDI AndersElite and BBT, BBT and Fusion People and Eden Brown and Hays) in relation to Atkins form part of the overall Target Fee Rates Initiative.
- 5.72 Information on the scope of Atkins' activities is set out in paragraphs 5.58 to 5.59. It can be seen that Atkins is active in the design field, for example its 2009 Annual Report⁷⁰⁹ confirms that '*Plan, design, enable is what we do*' and in relation to 'Design' that '*Atkins designs intellectual capital such as management systems and business processes. We also design physical structures such as office towers, schools, bridges and highways*'. A search of Atkins website reveals a number of vacancies for architectural positions of differing seniority or function.⁷¹⁰
- 5.73 Atkins has confirmed that six of the eight Recruitment Agencies that formed the CRF were on its PSL⁷¹¹. Evidence on the OFT's file also refers to design candidates being explicitly identified in correspondence between a Party and Atkins. For example, in an email of 15 July 2005 from John Peterson, Managing Director of CDI AndersElite to Atkins' Strategic Supply Director⁷¹², Mr Peterson stated in relation to CDI AndersElite's activities as follows:

'I hope and trust that my company, CDI AndersElite is known to you as a leading specialist staffing solutions company for the built environment, concentrating on sourcing professionals in a dozen or more disciplines, from architects and designers to project management, town planners, building services, civil engineers, quantity surveyors, etc'.

Services to companies whose primary business is not construction

- 5.74 CDI AndersElite submitted in response to the Statement of Objections that the OFT's definition of a Construction Company should exclude

⁷⁰⁹ See page 2 of WS Atkins plc Annual Report at <http://production.investis.com/atkins/financials>

⁷¹⁰ See results obtained from web search 18 January 2008; File Reference: Public Document-98.

⁷¹¹ See Meeting/Teleconference note of 30 July 2007: Atkins-Third Party Correspondence - 239

⁷¹² File Reference: AndersElite s27 – 142.

companies whose primary business is not '*construction*' in any or all of the design, build and postbuild phases.⁷¹³

- 5.75 In support of its argument, CDI AndersElite referred to Candidates supplied to companies in the rail industry that it considered were not in the 'construction industry' but the rail industry, as their primary business is the operation of rail transport systems. CDI AndersElite also stated that the fact that a client commissions a construction project does not make it 'active' in the construction industry.
- 5.76 The OFT does not agree that Candidates should be excluded on the basis that the company that may be undertaking or commissioning the construction activity may be perceived as being part of a different industry segment. The key consideration is whether the activity in question constitutes construction. If it does, then Candidates supplied for the purposes of that activity are relevant.
- 5.77 In the Statement of Objections the OFT set out its view on the scope of the Construction Industry,⁷¹⁴ which included the construction of residential premises, commercial premises, public building and civil engineering projects. This remains the OFT's view. The Glossary to this Decision has, however, been updated to address the representation that CDI AndersElite has made in this respect.

Candidates employed in relation to existing civil engineering structures and rail industry 'safety critical' jobs

- 5.78 In its representations on the Statement of Objections CDI AndersElite referred to the OFT's proposed approach to exclude '*ongoing or planned maintenance roles for existing residential, commercial or public buildings*' from an assessment of relevant turnover.⁷¹⁵ CDI AndersElite submitted that, by parity of reasoning, the same approach should be applied to existing civil engineering structures, as management and maintenance

⁷¹³ CDI AndersElite's written representations on the Statement of Objections, at paragraphs 2.38 – 2.40

⁷¹⁴ See paragraph 2.119 of the Statement of Objections

⁷¹⁵ Annex B6 to the Statement of Objections

roles in a civil engineering context are no different from those in a residential, commercial or public building context.⁷¹⁶

- 5.79 CDI AndersElite also submitted that in the rail industry, those who undertake maintenance of existing civil engineering structures (which CDI AndersElite stated was generally referred to as 'Safety Critical' work) should also be excluded from an assessment of relevant turnover.⁷¹⁷
- 5.80 In order to ensure a consistent approach, the OFT has clarified its assessment of Candidate roles to ensure that management and maintenance roles in relation to civil engineering structures are excluded from its assessment of relevant turnover, consistent with the treatment of these same Candidates in a residential, commercial or public building context.⁷¹⁸

Ad Hoc Supply

- 5.81 This section considers representations made by CDI AndersElite and Eden Brown in response to the Statement of Objections that turnover relating to Ad Hoc Supply (i.e. where terms of supply are negotiated as and when vacancies arise) should be excluded from the calculation of relevant turnover.
- 5.82 In the Statement of Objections the OFT confirmed that the service that is the subject of this investigation includes the supply of Candidates under both Central Supply (for example via a PSA) and Ad Hoc Supply. The OFT further stated that this is because the essential service provided

⁷¹⁶ CDI AndersElite's written representations on the Statement of Objections, at paragraphs 2.41 – 2.50

⁷¹⁷ CDI AndersElite's written representations on the Statement of Objections, at paragraphs 2.51 to 2.53.

⁷¹⁸ See the text in Section 26 Notices sent to the Parties on 8 June 2009, 11 June 2009 and 15 June 2009 regarding the definition of the 'post build phase' of a construction project. See also clarificatory letters sent to the Parties on 11 August 2009 and 14 August 2009 which confirmed that the Notices were intended to ensure consistent treatment of ongoing or planned maintenance roles by excluding such roles in relation to existing residential, commercial or public buildings and also existing civil engineering structures (such as rail). The parties were given the opportunity to provide any revised response in the light of this clarification and none did so.

by Recruitment Agencies is the same, regardless of whether it is supplied on an Ad Hoc Supply basis or via a PSA arrangement.⁷¹⁹

CDI AndersElite's representations

5.83 CDI AndersElite stated in response to the Statement of Objections that the Margin Protection Initiative '*was not capable of having either the object or the effect of restricting competition in the supply of Candidates under ad hoc contracts*' for the following reasons⁷²⁰:

- Parc neither made nor controlled the Ad Hoc Supply;
- The Parties did not make Ad Hoc Supply to Taylor Woodrow or Vinci either prior or during the course of the Margin Protection Initiative;
- The OFT's approach to Ad Hoc Supply as set out in the Statement of Objections is flawed, because Ad Hoc Supply was not affected by the Margin Protection Initiative; and
- As regards the Target Fee Rates Initiative, paragraphs 4.280 – 4.288 of the Statement of Objections '*made clear that the OFT accepts that this element of the alleged infringement concerned centrally negotiated contracts only*'.

5.84 CDI AndersElite argued that Ad Hoc Supply differs significantly from Central Supply in terms of '*the conditions of competition operating on the respective markets, the identity/type of operators and customers, prevailing prices and the nature of the services supplied*'⁷²¹, and summarised its arguments in this respect as follows:⁷²²

- Different operators: CDI AndersElite stated that the recruitment agencies that compete for Ad Hoc Supply and Central Supply are often different, as only some have the operational reach to

⁷¹⁹ See paragraph 3.168 of the Statement of Objections

⁷²⁰ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.31

⁷²¹ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.24

⁷²² In doing so CDI AndersElite summarised representations that had previously been made to the OFT on this issue, for example CDI AndersElite's response to question 4(b) of Annex A of an OFT information request dated 16th October 2006 and the letter from Blake Lapthorn to OFT dated 4th August 2006. File references: AndersElite Leniency 26 and AndersElite Leniency 3.

compete on Central Supply, which tends to be on a national or regional basis.⁷²³

- Different consultants: CDI AndersElite stated that where a recruitment agency competes to supply both Ad Hoc Supply and Central Supply, Ad Hoc Supply tends to be negotiated by lower level decision makers within the contracting parties on both sides;⁷²⁴
- Different prices: CDI AndersElite stated that Fee Rates and margins are typically higher for Ad Hoc Supply than for Central Supply with margin rates tending to be in the order of up to [...] [C] % higher for Ad Hoc Supply.⁷²⁵
- Different customers: CDI AndersElite stated that, in general terms, whether or not a client can enter into Central Supply will depend on its purchasing power, which will be related to its recruitment requirements. CDI AndersElite stated that Construction Companies that utilise Central Supply generally do not avail themselves of Ad Hoc Supply as they will lose the benefits of Central Supply, in particular the reduced Fee Rates that are available under Central Supply. CDI AndersElite also stated that doing so '*would not further the maintenance and development of a working relationship between the Construction Company and the agencies on the PSA*'.⁷²⁶
- Contractual barriers to switching: CDI AndersElite stated that a Recruitment Agency supplying a client on a Central Supply basis would not tend to make Ad Hoc Supply as to do so would '*in most cases*' be a breach of the agency's obligations under the PSA;⁷²⁷

⁷²³ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.26.1

⁷²⁴ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.26.2

⁷²⁵ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.26.3 (a)

⁷²⁶ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.26.3

⁷²⁷ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.26.3 (a)

- Different services: CDI AndersElite stated that Central Supply tends to include more value added services than Ad Hoc Supply, for example executive headhunting, outplacement services, centralised invoicing, centralised management information systems, payroll systems integration, managed staffing services and full HR outsourcing.⁷²⁸

Eden Brown's representations

5.85 Eden Brown stated that no part of the CRF concerned Ad Hoc Supply and that such arrangements were not affected by the infringement. Eden Brown stated that '*almost by definition, it is difficult to see how the CRF could have governed ad hoc arrangements*'. Eden Brown considered that Ad Hoc Supply is necessarily different from centralised arrangements, as regards '*at least the participants and the margins*'.⁷²⁹

The OFT's response to CDI AndersElite's and Eden Brown's representations on Ad Hoc Supply

- 5.86 The OFT remains of the view that Ad Hoc Supply was affected by the Margin Protection Initiative, for the following reasons:
- The evidence on the OFT's file demonstrates that Ad Hoc Supply was affected by the Margin Protection Initiative (as set out in paragraphs 5.87 - 5.98 below);
 - Grouping Ad Hoc Supply and Central Supply together reflects commercial reality (as set out in paragraphs 5.99 - 5.101 below); and
 - An infringement relating to Central Supply would affect fee rates for Ad Hoc Supply (as set out in paragraphs 5.102 – 5.117 below).

The evidence on the OFT's file demonstrates that Ad Hoc Supply was affected by the Margin Protection Initiative

⁷²⁸ CDI AndersElite's written representations on the Statement of Objections, at paragraphs 2.28 to 2.30

⁷²⁹ Eden Brown's written representations on the Statement of Objections, at paragraphs 108-110

- 5.87 There is evidence on the OFT's file of Ad Hoc Supply by certain of the Parties to Vinci at or around the time of the Margin Protection Initiative, which runs contrary to CDI AndersElite's representation that the parties did not make any Ad Hoc Supply to Taylor Woodrow or Vinci '*either prior to or during the course of the infringement*'⁷³⁰ and Eden Brown's representation that Ad Hoc Supply was not affected by the infringement.
- 5.88 The OFT notes that, given the high proportion of Ad Hoc Supply by the Parties as set out in Table 5.3 below, this evidence is unlikely to represent all Ad Hoc Supply by the Parties at or around the time of the Margin Protection Initiative.

Ad Hoc Supply from Eden Brown to Vinci

- 5.89 The agenda for CRF3 (which took place during the Margin Protection Initiative) confirms that the following item would be discussed at this meeting '**Non PSA/MV/NV Permanent Fees/Terms**' (emphasis added).⁷³¹ The reference to '*Non PSA Fees/terms*' in this agenda item would appear to be a reference to Ad Hoc Supply.
- 5.90 The CRF3 Minutes record under this agenda item the following:

'Rebates - Clients are pushing for longer Rebate Periods. All agreed as a group to resist the temptation to agree to this. If they are implemented the fees should be higher.'

- 5.91 The CRF3 Minutes also record that during this meeting Eden Brown disclosed to the other CRF members the Fee Rates at which it was supplying to Rosser and Russell (a Vinci subsidiary) on an Ad Hoc Supply basis.

⁷³⁰ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.31.2

⁷³¹ Agenda item 10 of CRF3 states: 'NON PSA/MV/NV PERMANENT FEES/TERMS

- Permanent contingency fee structure by sector
- Refund guarantee's [sic]
- Payment Terms
- Discounts'. File Reference: Select Leniency - 1611

5.92 The OFT has put this evidence to Eden Brown who has not disputed that this was Ad Hoc Supply to Vinci.⁷³² The Fee Rates for this Ad Hoc Supply were the same as those in place between Parc and other members of the CRF under the Vinci (Parc Facilitator) Agreements at that time.⁷³³

Ad Hoc Supply from Fusion People to Vinci

5.93 In March 2005 (during the Margin Protection Initiative), Fusion People supplied Norwest Holst (a Vinci subsidiary)⁷³⁴ on an Ad Hoc Supply basis at Fusion People's standard Fee Rates.⁷³⁵

5.94 The OFT has put this evidence to Fusion People who has confirmed that this was Ad Hoc Supply to Vinci.⁷³⁶ The Fee Rate for this Ad Hoc Supply was higher than those offered by Parc for the supply of Vinci in September 2004⁷³⁷, and higher than the rate agreed between Vinci and Fusion People in the Vinci (Parc Facilitator) Agreement signed by Fusion People in April 2005.⁷³⁸

Attempted Ad Hoc Supply from CDI AndersElite to Taylor Woodrow

5.95 In its representations on the Statement of Objections, CDI AndersElite itself stated that a consequence of the Margin Protection Initiative was that it attempted to supply Taylor Woodrow on an Ad Hoc Supply basis (albeit unsuccessfully in the correspondence referred to by CDI AndersElite in this example).⁷³⁹ Thus, by refusing to supply Parc, CDI AndersElite was in a position where the only means in which it could

⁷³² Eden Brown's response of 9 July 2009 to the OFT's letter of 26 June 2009. Eden Brown did however state that the rates were the same as the standard rates that Parc had with Vinci at the time and so were '*derived from a centrally negotiated contract*'.

⁷³³ See for example paragraphs 4.120 - 4.135 above.

⁷³⁴ See paragraph 5.51 for further information on Norwest Holst

⁷³⁵ File reference: Fusion leniency-50, at paragraph 7

⁷³⁶ Fusion People's response of 9 July 2009 to the OFT's information request of 26 June 2009, response to Question 16.

⁷³⁷ See Parc Third Party Correspondence-243.

⁷³⁸ The fee rate for the ad hoc placement was 18% (Fusion People's standard terms of business – see Fusion Leniency 50 at paragraph 7). The fee rates agreed in Fusion People's Vinci (Parc Facilitator) Agreement were 13.5% for salaries up to £45,000pa, and 16% for salaries above this level – see Third Party Correspondence 145. See also paragraphs 4.124 - 4.135 above.

⁷³⁹ See for example CDI AndersElite's supply proposal to Taylor Woodrow dated 18 February 2005 and Justine Brown of Taylor Woodrow's response dated 22 February 2005. File references: AndersElite s26 – 74 and 77 respectively. See also CDI AndersElite's written representations on the Statement of Objections, at paragraphs 2.26.3 (d) and Appendix 1.

supply Taylor Woodrow was on an Ad Hoc Supply basis. This was a strategy which CDI AndersElite pursued, in its own words, 'strenuously'.⁷⁴⁰

CDI AndersElite's representations on paragraphs 4.280 to 4.288 of the Statement of Objections.

- 5.96 The OFT notes CDI AndersElite's representation that paragraphs 4.280 to 4.288 of the Statement of Objections '*made clear that the OFT accepts that this element of the alleged infringement concerned centrally negotiated contracts only*'.⁷⁴¹ This is incorrect. The text from the Statement of Objections quoted by CDI AndersElite does not bear this out, as the purpose of this text was to consider whether CRF Minutes should be interpreted to support a finding that the Margin Protection Initiative extended to Fee Rates for the supply of Candidates to Construction Companies direct (as opposed to solely via intermediaries such as Parc).
- 5.97 This purpose is illustrated by both the introductory paragraph to this section (which confirmed that the OFT noted that CRF Minutes could be '*interpreted in such a way as to indicate that the Parties sought to set Target Fee Rates in relation to the supply of Candidate to Construction Companies direct*'⁷⁴² and also the quotation from correspondence in paragraph 2.286, in which Select Appointments (on behalf of HMG and BBT) assumes that PSAs invariably refer to agreements between Recruitment Agencies and Construction Companies direct.⁷⁴³
- 5.98 Contrary to what has been suggested by CDI AndersElite, the OFT considers that it is clear from the CRF3 Agenda (which indicated that Ad Hoc Supply would be discussed during this meeting⁷⁴⁴) and also the CRF3 Minutes (which record that during this meeting Eden Brown

⁷⁴⁰ See CDI AndersElite's written representations on the Statement of Objections, at paragraphs 2.26.3(d).

⁷⁴¹ CDI AndersElite's representations on the Statement of Objections, at paragraph 2.31.3

⁷⁴² Paragraph 4.280 of the Statement of Objections

⁷⁴³ Letter from Select Appointments to the OFT of 17 October 2007 which stated '*However, given that the minutes of CRF1 in November 2004 also refer to PSAs, our client therefore accepts that it is possible that the agreement was also intended to apply to fees charged direct to clients*'. File Reference: Select Leniency-2099.

⁷⁴⁴ See paragraph 5.89 above.

disclosed details of its Ad Hoc Supply to Vinci⁷⁴⁵) that Ad Hoc Supply fell within the scope of CRF3.

Grouping Ad Hoc Supply and Central Supply together reflects commercial reality

- 5.99 The Parties have confirmed that the core service provided under both Ad Hoc Supply and Central Supply is the same, namely the provision of a suitably skilled Candidate who meets the client's recruitment need.⁷⁴⁶ For this reason, the OFT considers that it would be artificial to draw a distinction between Ad Hoc Supply and Central Supply for the purposes of calculating relevant turnover.
- 5.100 The OFT notes that in effect the main difference between Central Supply and Ad Hoc Supply is that Central Supply effectively constitutes a bulk discount to a client as a reward for recruiting a volume of candidates.⁷⁴⁷
- 5.101 Consistent with the Court of Appeal's judgment in *Argos/Littlewoods* that it is appropriate to assess turnover on a '*broad view of a particular trade*', the particular '*trade*' in question in this case is the supply of suitable Candidate(s). The suitability of a Candidate for a particular vacancy does not vary according to the contractual matrix surrounding the provision of that candidate.

An infringement relating to Central Supply would affect fee rates for Ad Hoc Supply

- 5.102 The OFT considers that even if the evidence on its file solely related to Central Supply being immediately affected by the Margin Protection Initiative (which, as set out above, is not the case), it is reasonable to consider that an increase in Fee Rates for Central Supply within a Recruitment Agency would in any case subsequently affect Fee Rates

⁷⁴⁵ See paragraphs 5.90 - 5.91 above.

⁷⁴⁶ See the Parties' responses to the OFT's letter of 26 June 2009. For example, In Hay's response of 10 July 2009, Hays confirms in response to question 3 that '*Whether a client is on a centrally negotiated contract or obtains candidates on ad hoc basis has no impact on the types of candidates offered to the client*'. In Eden Brown's response of 9 July 2009, Eden Brown confirms in response to question 3 that '*Whether it is a central contract or an ad hoc placement does not affect the individual candidates that can be placed*'.

⁷⁴⁷ Although there may be some additional value added services offered as part of Central Supply these do not appear to be crucial. See paragraph 5.103.

for Ad Hoc Supply within that same agency, for the reasons set out below.

The importance of Fee Rates for Central Supply

5.103 The vast majority of the parties have confirmed that Central Supply Fee Rates will be lower than Ad Hoc Supply Fee Rates, for example:

- Eden Brown has stated that Fee Rates for Ad Hoc Supply are higher than Fee Rates for PSA Supply;⁷⁴⁸
- CDI AndersElite has also stated that the margin for Ad Hoc Supply is higher than for placements made under Central Supply, confirming that *'the whole point of central negotiation from the client's point of view is to use the inducement of high volumes of placements and a streamlined recruitment system to obtain lower margin (i.e. rates) in exchange. If they were to accept an ad hoc placement from an agency on the PSA, they would be paying over the odds for it'*.⁷⁴⁹
- Hays has stated that *'Usually, centrally negotiated contracts are requested by a client because of the more favourable pricing provided under such contracts'*.⁷⁵⁰
- BBT and HMG have stated that *'ad hoc contracts are generally higher fee rates than centrally negotiated contracts, although there is also plenty of evidence to show that some are also lower'*.⁷⁵¹

5.104 The OFT notes that CDI AndersElite has referred to the existence of certain value added services provided via Central Supply as a reason for treating Central Supply differently from Ad Hoc Supply. However, given the evidence obtained by the OFT which highlights the overriding importance of fee rates,⁷⁵² skills and timely supply⁷⁵³ to Construction

⁷⁴⁸ Eden Brown's response of 9 July 2009 to the OFT's letter of 26 June 2009.

⁷⁴⁹ CDI AndersElite's written representations on the Statement of Objections, at paragraph 2.26.3

⁷⁵⁰ Hays response of 10 July 2009 to the OFT's letter of 26 June 2009.

⁷⁵¹ BBT/HMG's response of 9 July 2009 to the OFT's letter of 26 June 2009.

⁷⁵² See paragraph 5.103 above.

⁷⁵³ See for example paragraphs 2.136 to 2.149 above.

Companies, it does not appear to the OFT that such value added services play a pivotal role in a Construction Company's purchasing decision.⁷⁵⁴

Fee Rates for Central Supply affect Fee Rates for Ad Hoc Supply and vice versa

- 5.105 Consultants negotiating Ad Hoc Supply are typically made aware of the Fee Rates negotiated under Central Supply as a result of internal disclosure of Central Supply Fee Rates (for example, a number of Parties place Central Supply terms and conditions on the company intranet or circulate them by email).⁷⁵⁵
- 5.106 Given such widespread internal disclosure within the Parties (contrary to what has been argued by CDI AndersElite in response to the Statement of Objections) it is to be expected that consultants could and would take increased Fee Rates for Central Supply into account when negotiating Fee Rates for Ad-Hoc Supply. For example, consultants, who would be made aware of the higher Fee Rates negotiated under Central Supply, would be reluctant to grant discounts on Ad-Hoc Supply below a certain level.
- 5.107 Managers and Directors within Recruitment Agencies (who typically authorise discounts on Ad Hoc Supply Fee Rates beyond a certain threshold⁷⁵⁶) would also be less inclined to authorise discounts on Ad Hoc Supply as they would want to keep Ad Hoc Supply at higher Fee

⁷⁵⁴ We note that CDI AndersElite has confirmed in paragraph 2.30 of its written representations on the Statement of Objections that '*The reason why centrally negotiated contracts tend to include one or more of these value added service is partly historical, in that originally they were added by the agencies as unique selling points to distinguish themselves from their competitors. Over time, however, clients who negotiate such contracts have come to expect them*'. The fact that clients have '*come to expect*' such value added services over time does not indicate that they have an overwhelming significance.

⁷⁵⁵ See for example Henry Recruitment's response of 8 July 2009 to the OFT's letter of 26 June 2009; Hays response of 10 July 2009 to the OFT's letter of 26 June 2009; BBT/HMG's response of 9 July 2009 to the OFT's letter of 26 June 2009; Eden Brown's response of 9 July 2009 to the OFT's letter of 26 June 2009.

⁷⁵⁶ See for example Henry Recruitment's response of 8 July 2009 to the OFT's letter of 26 June 2009; Fusion People's response of 9 July to the OFT's letter of 26 June 2009; Hays response of 10 July 2009 to the OFT's letter of 26 June 2009; BBT/HMG's response of 9 July 2009 to the OFT's letter of 26 June 2009; Eden Brown's response of 9 July 2009 to the OFT's letter of 26 June 2009.

Rates than PSA Supply (if not, this would undermine the attractiveness of Central Supply).

5.108 As Fee Rates for Central Supply are in the main lower than the Fee Rates for Ad Hoc Supply, systematic pricing of Central Supply above Ad Hoc Supply would undermine the advantage of negotiating Central Supply from a construction company's perspective and would ultimately not be consistent with the Recruitment Agencies' incentive to encourage Central Supply. Even if on occasion Ad Hoc Supply took place at lower Fee Rates than Central Supply because of specific circumstances, this would not be sustainable if on average placements made under Ad Hoc Supply were made at Fee Rates lower than for Central Supply. Therefore, in general Fee Rates for Ad Hoc Supply represent a ceiling for Central Supply Fee Rates.

5.109 In the longer term, standard terms and conditions (the starting point for consultants to negotiate Fee Rates for Ad Hoc Supply) would be expected to be reviewed and increased to reflect the increased Fee Rates for Central Supply as the gap between Fee Rates for Ad Hoc Supply and Central Supply narrowed.

5.110 Vice versa, Hays has also confirmed that the level of Fee Rates and margins for Ad Hoc Supply at the time of negotiating Central Supply influences the rates and margins agreed for Central Supply.⁷⁵⁷

Ad Hoc Supply appears to be prevalent within the CRF parties

5.111 The OFT notes CDI AndersElite's argument that the operators engaging in Ad Hoc Supply and Central Supply are '*often different*'.⁷⁵⁸ However, it appears to the OFT from evidence set out in Table 5.2 below that, as far as the Parties are concerned, they are also very often the same.

⁷⁵⁷ See Hays response of 10 July 2009 to question 12 of the OFT's letter of 26 June 2009.

⁷⁵⁸ CDI AndersElite's representations on the Statement of Objections, at paragraph 2.26.1

Table 5.2 – Ad Hoc Supply across relevant permanent and temporary staff (Relevant Turnover)⁷⁵⁹

	Relevant Turnover	Value of ad-hoc candidates	%age ad-hoc turnover
BBT	£[...] [C]	£[...] [C]	[...] [C]%
Henry Recruitment	£[...] [C]	£[...] [C]	[...] [C] ⁷⁶⁰ %
Hays	£[...] [C]	£[...] [C]	[...] [C]%
HMG	£[...] [C]	£[...] [C]	[...] [C]%
CDI AndersElite	£[...] [C]	£[...] [C]	[...] [C]%
Fusion People	£[...] [C]	£[...] [C]	[...] [C]%
Eden Brown	£[...] [C]	£[...] [C]	[...] [C]%

5.112 It can be seen that Ad Hoc Supply makes up a large proportion of relevant turnover for the majority of the parties under investigation (with the relevant turnover of BBT and Henry Recruitment being exclusively and almost exclusively comprised of Ad Hoc Supply).

5.113 The OFT notes that, were it to exclude Ad Hoc Supply from an assessment of relevant turnover, it would be necessary to increase certain of the penalties at step 3 in order to arrive at a sum that represents, for each Party, a sufficient deterrent, having regard to the seriousness of the infringement and that Party's total turnover.⁷⁶¹

The ease of switching between Central Supply and Ad Hoc Supply within the same Recruitment Agency

⁷⁵⁹ As calculated from the parties' responses to the OFT's Section 26 Notices (see footnote 810 below). Percentages have been rounded to the nearest whole number.

⁷⁶⁰ [...] [C]% of Henry Recruitment's supply was made up of Ad Hoc Supply, this figure has been rounded to the nearest whole number consistent with the other figures in Table 5.2.

⁷⁶¹ See paragraphs 5.232 – 5.284 below in relation to adjustments being made at Step 3.

5.114 The OFT notes CDI AndersElite's representation that a Recruitment Agency supplying a client via Central Supply would not tend to supply that client on an Ad Hoc Supply basis as to do so would '*in most cases*' be a breach of agency's obligations under the PSA.⁷⁶² However, evidence on the OFT's file indicates that a Recruitment Agency can make the decision to switch clients from Central Supply to Ad Hoc Supply in the event of a drop in demand, as follows:

*'There are a number of clients for whom we had agreements with but were not **providing us with enough work for the discounts that they expected**. As a result, the decision has been taken to remove these from our PSA list and to return them to normal terms of business. This is a business decision based on the fact that we no longer wish to give discounts to clients that are not prolifically using Hill Mcglynn and **therefore do not deserve any loyalty reduction**'.* (emphasis added);⁷⁶³

5.115 The OFT also considers that, where a recruitment agency does not currently engage in Central Supply, it would be able to do so if the opportunity arose. As set out in Table 5.2, in the year 2008-09 BBT did not supply any Candidates (within relevant turnover) on a Central Supply basis. However BBT has supplied on a Central Supply basis in the past.⁷⁶⁴ BBT has confirmed that such supply is dependent upon the client.⁷⁶⁵

5.116 Henry Recruitment has also confirmed that it did not supply any temporary Candidates on a Central Supply basis at the time of the Margin Protection Initiative.⁷⁶⁶ Henry Recruitment has stated that although it does not pro-actively offer Central Supply arrangements to its clients⁷⁶⁷, it is able to do so if asked.⁷⁶⁸

⁷⁶² CDI AndersElite's representations on the Statement of Objections, at paragraph 2.26.3(a)

⁷⁶³ See email from Lisa Tilley to several HMG employees of 27 September 2005; File Reference: Select Leniency-960

⁷⁶⁴ BBT's response of 9 July 2009 to the OFT's letter of 26 June 2009.

⁷⁶⁵ BBT's response of 9 July 2009 to question 1 of the OFT's letter of 26 June 2009.

⁷⁶⁶ In its response of 8 July 2009 to question 13 of the OFT's letter of 26 June 2009, Henry Recruitment confirms that '*We do not have any experience of supplying temporary staff on a centrally negotiated/PSL basis*'.

⁷⁶⁷ Henry Recruitment's response of 8 July 2009 to question 3 of the OFT's letter of 26 June 2009.

5.117 This indicates that both BBT and Henry Recruitment are able to switch from the exclusive (or almost exclusive) Ad Hoc Supply of Candidates to the supply of Candidates on both a Central Supply and Ad Hoc Supply basis.

Conclusion on relevant turnover affected by the Margin Protection Initiative

5.118 The OFT concludes that the relevant turnover for the purposes of the Margin Protection Initiative is the turnover related to the supply, by Recruitment Agencies, of Candidates with professional, managerial, trade and labour skills required by the Construction Industry in the UK. This includes both Ad Hoc Supply and Central Supply. The OFT concludes that the Construction Industry is comprised of companies active in any or all of the design, build and post-build phases of residential and commercial property construction projects, public building construction projects and civil engineering construction projects. The Candidate roles consistent with this relevant turnover are set out in Annex A.

Step 1 – The appropriate measure of turnover to use in calculating relevant turnover - Gross Turnover and Net Fees

5.119 During the course of its investigation the OFT has considered whether or not to include in its assessment of relevant turnover any revenues related to the obligation of Recruitment Agencies to pay temporary workers' wages when they supply temporary staff to Construction Companies. It has been put to the OFT that wages paid by a Recruitment Agency to temporary workers are subsequently invoiced to their Construction Company clients, who then pay the Recruitment Agency an amount corresponding to the temporary workers' wages plus a 'margin' or fee, and as such these wages should be excluded from calculation of a Recruitment Agency's relevant turnover.⁷⁶⁹

⁷⁶⁸ Henry Recruitment's response of 8 July 2009 to question 2 of the OFT's letter of 26 June 2009.

⁷⁶⁹ In the Statement of Objections the OFT stated that it understood there may be certain situations where the salaries of temporary workers may not actually be handled by the Recruitment Agencies but instead may pass from the client to the candidate via a third party and referred to an example from Hays plc's annual reports as an example of this. In Hays' response of 23 July 2009 to the OFT's Section 26 Notice of 11 June 2009 Hays confirmed that there is no third party involved in these transactions.

5.120 In light of this, the OFT has considered whether to use Gross Turnover or Net Fees in order to calculate relevant turnover at Step 1:

- Gross Turnover is revenue from services provided in the normal course of business, less discounts, value added tax and other sales related taxes. Gross Turnover includes remuneration costs of temporary staff; and
- Net Fees is Gross Turnover less the remuneration costs of temporary staff. Remuneration costs of temporary staff include related payroll costs such as payroll taxes and insurance.⁷⁷⁰

5.121 In the Statement of Objections the OFT set out its intention to use Gross Turnover for the purposes of calculating relevant turnover. A key reason for this is because the 2000 Order contains the general principle that its provisions shall be interpreted in accordance with Generally Accepted Accounting Principles (GAAP), and each Party has chosen to report their turnover in their accounts on a Gross Turnover basis.

5.122 CDI AndersElite, Eden Brown, Fusion People and Hays all made representations on this issue in response to the Statement of Objections, broadly divided into the following general categories:

- Presenting Net Fees as turnover would also be consistent with GAAP;
- Net fees, not Gross Turnover, are a true reflection of the Parties' economic value;
- Principal and agent considerations;
- Wages of temporary workers are not a 'cost' and even if they are they should be treated differently from other 'costs';

⁷⁷⁰ Not all CRF parties use the same terminology for Net Fees. Hays discloses Net Fees as 'Net Fees'; Randstad, CDI AndersElite, Fusion People and Eden Brown disclose Net Fees as 'Gross Profit'; Henry Recruitment's abbreviated accounts do not show Net Fees but Henry Recruitment's Fame report reports Net Fees as 'Gross Profit' See Hays Plc, Annual Report and Accounts 2008, p64; Randstad Holding NV, Annual Report 2007, p27; CDI AndersElite, Report and Financial Statements 2008, p21; Fusion People Limited, Financial Statements 2007, p7; Eden Brown Limited, Director's report and financial statements 2008, p6; Henry Recruitment Limited, Director's report and financial statements 2007, p5

- Using Gross Turnover would result in a discriminatory outcome, inconsistent with the OFT's penalty calculation guidelines;
- The OFT has interpreted *Endesa* incorrectly; and
- The OFT's use of Gross Turnover would be inconsistent with a decision of the French Autorité de la Concurrence.

The OFT's responses to these representations

Presenting Net Fees as turnover would also be consistent with GAAP

5.123 In the Statement of Objections the OFT confirmed that Turnover is determined consistently with the 2000 Order. On the definition of turnover, Article 2.3 of its Schedule provides that '*The applicable turnover of an undertaking, other than a credit institution, financial institution, insurance undertaking, or an association of undertakings, shall be limited to the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities... after deduction of sales rebates, value added tax and other taxes directly related to turnover.*' The 2000 Order sets out as a general principle that its provisions '*shall be interpreted in accordance with generally accepted accounting principles and practices*'.

5.124 The OFT's Penalties Guidance⁷⁷¹ mirrors these rules.

5.125 In the Statement of Objections, the OFT set out that although the revenues relating to temporary workers' wage costs are passed through to the temporary worker they are nevertheless revenues recorded by the Recruitment Agencies. In the light of this, the OFT considered that it would not be appropriate to deduct such revenues for the following reasons:

- The 2000 Order stresses that turnover is calculated based on '*generally accepted accounting principles and practices*'. Revenues made with the provision of temporary staff are included in the Recruitment Agency's sales as reported in their statutory financial

⁷⁷¹ Penalties Guidance

statements and the principle is therefore that such revenues should be similarly included in their relevant turnover;

- The 2000 Order defines turnover as the amounts derived from the sale of products and the provision of services in the ordinary business activities, without distinguishing between the origin and the nature of the sales. In particular, in the Statement of Objections the OFT confirmed that it saw no reason to exclude revenues where they correspond to certain categories of costs incurred in the course of normal business. Recruitment Agencies' costs include wage costs, payroll or any other costs incurred in supplying services. The wage costs incurred in supplying temporary workers are part of the Recruitment Agencies' ordinary business activity. Supply costs for any industry, incurred in producing goods or services, are typically paid from revenues earned. The 2000 Order does not allow for exclusion of revenues, just because they correspond to some categories of costs; and
- The only exceptions to the principles indicated above relate to '*credit institution, financial institution, insurance undertaking, or an association of undertakings*'. Recruitment Agencies are none of these and the 2000 Order makes no special allowance for Recruitment Agencies.

5.126 Given the provisions of the 2000 Order, which the OFT is required to follow, the OFT set out its proposed view in the Statement of Objections that its assessment of relevant turnover should include any revenues related to the obligation of Recruitment Agencies to pay temporary workers' wages when temporary workers are supplied to Construction Companies.

5.127 In response to the Statement of Objections, Hays submitted that it could have presented its accounts in an alternative manner, equally consistent with GAAP. Hays stated that it could have shown a 'gross revenue' figure including commission payments and salaries of temporary workers. Hays could then have also presented a 'net turnover' figure which equated to commissions only and represented the true economic value of the business.⁷⁷² Hays provided a report from its auditor,

⁷⁷² Hays' written representations on the Statement of Objections, at paragraph 4.56

Deloitte, which confirmed that such a presentation would be consistent with GAAP.⁷⁷³ Hays submitted that Gross Turnover reflects the interaction between the requirements of employment law and accounting standards and is irrelevant in the context of a fining decision.⁷⁷⁴

- 5.128 Eden Brown also submitted that it would have been possible under applicable accounting standards to use Net Fees (referred to in Eden Brown's accounts as Gross Profit) as the reported turnover.⁷⁷⁵ This argument was supported by a witness statement provided by Eden Brown's Finance Director, Michael Sterling.⁷⁷⁶
- 5.129 The OFT is not persuaded by these representations and remains of the view, for the reasons outlined in paragraphs 5.123 - 5.126 above, that the use of Gross Turnover is the appropriate measure to use in this case.
- 5.130 As the 2000 Order contains the general principle that its provisions shall be interpreted in accordance with GAAP, the OFT considers that the turnover as reported by the Parties in their accounts should be taken as the starting point for determining turnover. The Parties, with all the detailed information about their business to hand, are in the strongest position to determine the correct way to report turnover.
- 5.131 In the present case, each Party has chosen to report their turnover on a Gross Turnover basis, thereby including the wages of temporary workers. The fact that some Parties now argue that they could have used an alternative presentation, excluding the wages of temporary workers, which would also have been in accordance with GAAP, is not, in the view of the OFT, sufficient reason to depart from the turnover figure presented by all the Parties in their accounts.

Net fees are a true reflection of the Parties' economic value

- 5.132 In response to the Statement of Objections Hays submitted that the use of Gross Turnover would not be a true and fair reflection of the economic value Hays derived from its participation in the infringement.

⁷⁷³ Hays' written representations on the Statement of Objections, Annex 8

⁷⁷⁴ Hays' written representations on the Statement of Objections, at paragraph 4.56

⁷⁷⁵ Eden Brown's written representations on the Statement of Objections, at paragraph 72.

⁷⁷⁶ See paragraph 11 of Michael Sterling's witness statement, attached to Eden Brown's written representations on the Statement of Objections.

Hays stated that the presentation of Net Fees in its accounts is to give the reader of the accounts the necessary information to form a proper understanding of the true economic value of the business. Hays stated that in the commentary to its 2008 Annual reports and accounts, it makes reference to Net Fees on over 100 occasions, whilst referring to turnover only twice. According to Hays, this 'near exclusive' focus on Net Fees demonstrates that Hays and the market consider that Net Fees are the true and best measure of the economic value of the business undertaken by Hays.

- 5.133 Eden Brown submitted that turnover is used as a proxy to assess the scope of the economic activities that the undertaking is engaged in. However, Eden Brown considered it is only by having regard to the actual legal and economic arrangements for the provision of services within the service sector that the scope of the economic activities of the participants in that sector can be properly gauged.⁷⁷⁷ Eden Brown stated that it can '*compete in the relevant market over its commission rates and its provision of payroll etc. services to Clients, but it cannot compete in the market by reference to the amount of the wages of temporary Candidates; that is how Clients and Candidates compete between themselves, not Recruitment Consultants.*'⁷⁷⁸ Eden Brown also stated that using Gross Turnover increases the reliance on the wages of temporary staff instead of focussing on the commission element which reflects more precisely the actual economic activities of the Recruitment consultants on the relevant product market.⁷⁷⁹
- 5.134 Fusion People submitted that the wages of temporary staff go through Fusion People's books and hence appears in its accounts, but they do not represent any underlying economic strength.
- 5.135 Given the requirements of the 2000 Order as set out above, the OFT does not consider that these representations are material to consideration of Turnover at step 1. Turnover is a simple measure that is well-known both to the OFT and to business. It is easily ascertained from corporate accounts and is less susceptible to subjective interpretation or manipulation than measures such as profitability or

⁷⁷⁷ Eden Brown's written representations on the Statement of Objections, at paragraphs 41 and 46.

⁷⁷⁸ Eden Brown's written representations on the Statement of Objections, at paragraph 60.

⁷⁷⁹ Eden Brown's written representations on the Statement of Objections, at paragraph 68.

'value added' turnover. The argument that turnover might not be the only relevant indicator for the performance of the parties' activities is not a reason to depart from the use of turnover at Step 1. Turnover is one of the key measures (even if it is not the only one) for the parties' activities as it reflects the sales made by the parties in their ordinary activities.

5.136 In relation to Hays' representation set out in paragraph 5.132 above, given that the 2000 Order states that it shall be interpreted in accordance with GAAP, there is no reason why turnover reported in the accounts would differ from turnover as defined in the 2000 Order. In addition, the OFT notes that Hays' accounting definition of turnover⁷⁸⁰ takes into account the 'fair value' of the consideration received and represents 'the amounts received for the services'. This shows that turnover as reported in Hays' accounts is related to the economic value of the service provided.

Principal and agent considerations

5.137 Eden Brown submitted in response to the Statement of Objections that it could have reasonably considered itself for accounting purposes to be acting as an agent with regard to its dealing with temporary workers and accordingly could have adopted Net Fees as the relevant measure. Eden Brown accepted that it bears a credit risk in relation to the wages of temporary workers, but submits that this is a weak indicator of a principal relationship.

5.138 As stated above in paragraph 5.131 above all Parties have chosen to include the wages of the temporary workers in their reported turnover. By doing so, the parties have determined that the placement of temporary workers is classed as a 'principal' activity. Had they determined that the placement of temporary workers is classed as an 'agent' activity, the accounting rules would require them to exclude such wages from their turnover.⁷⁸¹

⁷⁸⁰ Hays' notes to the Consolidated Financial Statements in its 2008 Annual Report provides that 'turnover is measured at the **fair value** of the consideration received or receivable and represents **amounts receivable for goods and services provided in the normal course of business**, net of discounts, VAT and other sales related taxes' (emphasis added). Hays 2008 Annual Report and Accounts.

⁷⁸¹ See for example International Accounting Standard (IAS) 18, at paragraph 9 which states that: '*Similarly in an agency relationship, the gross inflows of economic benefits include*

- 5.139 As the 2000 Order requires the OFT to interpret turnover in accordance with GAAP, the OFT does not need in this case, to determine whether on balance the placement of temporary staff classifies a Recruitment Agency as principal or agent. It is sufficient for the OFT to refer to the Parties' determination made in their account.
- 5.140 However, the OFT notes that there are a number of differences between the placement of permanent workers and the placement of temporary workers which justifies the inclusion of wages for temporary workers and the exclusion of such wages for permanent workers in the calculation of turnover:
- paragraph 11 of The Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Regulations) provides that an employment business shall not enter into a contract '*on behalf of a work seeker or on behalf of a hirer*'. This distinguishes employment businesses from employment agencies as the Regulations specify that an agency may only enter into a contract on behalf of companies/ a work-seeker where it has authority to do so. The requirement that recruiters of temporary workers are not allowed to act '*on behalf*'⁷⁸² of their clients confirms their role as '*principal*';
 - under UK GAAP where the seller has not disclosed that it is acting as agent, this creates a rebuttable presumption that it is acting as a principal. The Parties do not hold themselves out as agents where they place temporary candidates, hence creating a presumption that they act as principal;⁷⁸³
 - when supplying temporary workers, the Parties are linked with the temporary worker by an agreement for services – there is a purchase of services by the recruitment agency from the worker, which are then supplied under a different contractual arrangement.

*amounts collected on behalf of the principal and which do not result in increases in equity for the entity. **The amounts collected on behalf of the principal are not revenue.** Instead, revenue is the amount of commission.'* (emphasis added).

⁷⁸² This requirement is relevant to Eden Brown's representation that its terms and conditions state '*we will pay the temp on your behalf*'. The use of '*on behalf*' in Eden Brown's terms and conditions does not preclude the fact that Eden Brown is not acting on behalf of its clients (if it was, Eden Brown may be in breach of the Regulation. See Eden Brown's written representations on the Statement of Objections, at paragraph 2.7

⁷⁸³ Amendment to FRS 5 'Reporting the Substance of Transaction - Revenue Recognition'

This is akin to the role of distributor (there is a 'purchase' and 'sale' of services) and not 'agent'. This contrasts with the placement of permanent staff, where an employment contract is signed between the worker and the hirer; and

- under the Regulations, employment businesses are obliged to pay workers for work done even if the client does not pay the employment businesses' invoices. The Parties therefore bear the financial risk of non-payment. Under UK GAAP and International Accounting Standards, this is one of the criteria that the Parties act as a 'principal'.

Wages of temporary workers are not a 'cost' or should be treated differently from other 'costs'

- 5.141 Hays submitted in response to the Statement of Objections that the OFT's proposed finding that the wages of temporary workers represent a cost of providing recruitment services is incorrect. Hays stated that its costs of doing business are: staff costs; depreciation; amortisation; auditor's remuneration and other external charges. Hays stated that it does not include the cost of salaries of temporary workers in its accounts as the costs of business as they are not a cost for Hays in providing Candidate placements for clients.⁷⁸⁴
- 5.142 Eden Brown submitted that wage levels of temporary workers are not controllable by the recruitment agencies. As such, this differentiates wages from other types of costs over which a company does have control.⁷⁸⁵
- 5.143 The OFT does not accept that it is correct to argue that wages of temporary workers are not costs. The OFT notes Hays' argument that Hays does not include the costs of temporary workers in its accounts as the costs of business as they are not a cost for Hays in providing Candidate placements for clients.⁷⁸⁶ However, the OFT also observes that in Hays' notes to their financial accounts⁷⁸⁷ temporary workers'

⁷⁸⁴ Hays' written representations on the Statement of Objections, at paragraphs 4.57- 4.60.

⁷⁸⁵ Eden Brown's written representations on the Statement of Objections, at paragraph 62.

⁷⁸⁶ Hays' written representations on the Statement of Objections, at paragraph 4.59.

⁷⁸⁷ Hays plc's Annual Report and accounts 2008, notes to the consolidated financial statements, definition of Turnover, p. 63

wages are referred to as 'salary costs'. Furthermore, the report provided by Deloitte to Hays in response to the Statement of Objections⁷⁸⁸ refers to the 'costs of temporary workers'. This indicates that there are instances when Hays' obligation to pay temporary workers' wages are in fact perceived by both Hays and its accounting advisers as a cost of business. Similarly Eden Brown reports temporary workers' wages as 'costs of sales' in their accounts.⁷⁸⁹

- 5.144 In relation to Eden Brown's argument that recruitment agencies do not have control over the wages paid to temporary employees and as such should be treated differently from other costs of business, the OFT does not consider that 'control' is a relevant consideration in this context. Even if different measures of control can be exercised by a Recruitment Agency over its different cost inputs, the fact remains that they remain costs nonetheless, and that consistent inclusion of such costs would be in accordance with the 2000 Order, which does not allow for exclusion of revenues just because they correspond to certain categories of costs.

⁷⁹⁰

Using Gross Turnover would result in a discriminatory outcome

- 5.145 All of the Parties that made representations in relation to the use of Gross Turnover (i.e. CDI AndersElite, Eden Brown, Fusion People and Hays) also made representations that the inclusion of temporary worker wages costs would have a discriminatory effect on those Parties that have a higher proportion of temporary placements as a result of having a significantly higher relevant turnover.
- 5.146 Eden Brown also submitted that the use of Gross Turnover would have a discriminatory effect upon those agencies which have a higher proportion of temporary workers with higher salaries.
- 5.147 This argument does not appear relevant to the consideration of relevant turnover at step 1. We note the arguments that certain Parties have

⁷⁸⁸ Hays' written representations on the Statement of Objections, at Annex 8.

⁷⁸⁹ Eden Brown Directors' report and financial statements for the year ended 31 March 2008, profit and loss accounts, p.6.

⁷⁹⁰ The OFT also notes the decision of the CFI in case T-116/04 *Wieland Werke v Commission*, 6 May 2009, at paragraph 69 where the CFI rejected a claim that production costs should be deducted from the turnover in calculating the penalty because they are 'passed on' to the client and because the intermediary has no control over the price of the raw material.

made in this respect and consider them further in relation to adjustments at step 3 of the penalty calculation, as set out below.

The OFT has incorrectly interpreted *Endesa*

- 5.148 In the Statement of Objections, the OFT noted that the judgement of the Court of First Instance in *Endesa*⁷⁹¹ supports the inclusion of such revenues relating to temporary workers' wage costs in a Recruitment Agency's turnover. Although this judgment relates to the calculation of turnover in a merger control context, the OFT noted that the drafting of 'turnover' as set out in Article 5 of the EC Merger Regulation⁷⁹² is essentially the same as that used in the 2000 Order.
- 5.149 The OFT noted that when supplying temporary workers to Construction Companies, Recruitment Agencies are linked with the temporary staff by an agreement for services or a contract of employment⁷⁹³ – there is a 'purchase' of services by the Recruitment Agency from the work-seeker which are 'supplied' to the Construction Company. Recruitment Agencies do not receive money 'on behalf of the work-seeker' but in their capacity as seller of services. Recruitment Agencies' turnover must therefore include their commission plus the money corresponding to the temporary staff's wages.
- 5.150 CDI AndersElite, Eden Brown and Hays each made representations to the effect that the OFT had incorrectly applied *Endesa*.
- 5.151 CDI AndersElite submitted that the CFI's judgement supports a finding that temporary workers' wages should be excluded from calculation of relevant turnover. In *Endesa*, the CFI rejected the argument that the

⁷⁹¹ Case T-417/05 *Endesa v. Commission*, [2006] ECR II-2533, at paragraph 213. In this case, the CFI dismissed the argument that the turnover of an intermediary should consist solely of the amount of its margin, where the intermediary supplies its products or services in its capacity as a 'distributor' (i.e. by purchasing and re-selling them) and not 'on behalf' of the supplier.

⁷⁹² European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2007), OJ C95 of 16 April 2008

⁷⁹³ See section 2 that explains the obligations on Employment Businesses.

electricity distribution companies act as mere intermediaries as they pass the cost of electricity through to the generators.⁷⁹⁴

5.152 CDI AndersElite submitted that the CFI noted that the concept of intermediaries should be narrowly construed since the category comprises an exception to the general rule that relevant turnover is to be calculated based upon the cost of sales. The CFI ultimately concluded that Endesa did not fall within the intermediary exception because it was to be regarded as selling the electricity in its own right.⁷⁹⁵

5.153 CDI AndersElite submitted that applying *Endesa* to the current case produces the opposite result and that the example given by the European Commission in its Consolidated Jurisdictional Notice⁷⁹⁶ of travel agents selling package holidays is directly analogous to the supply of services by Recruitment Agencies.

5.154 Unlike in *Endesa*, CDI AndersElite does not acquire the temporary worker for its own purpose. The Recruitment Agency only engages the temporary worker once the Construction Company has agreed to employ the worker in question. The Recruitment Agency is only liable to pay the workers' wages as a consequence of the employment rules.

5.155 Eden Brown submitted that it was critical to the reasoning of the Court in rejecting the intermediary argument that:

- the Applicant (Endesa) had an on-going obligation to supply existing end users with electricity;
- Endesa first purchased the electricity and subsequently made its own distribution supplies;
- there was no legal relationship between the end user and the supplier to Endesa;

⁷⁹⁴ CDI AndersElite's written representations on the Statement of Objections, paragraphs 5.5 and 5.6.

⁷⁹⁵ CDI AndersElite's written representations on the Statement of Objections, at paragraphs 5.8 and 5.10.

⁷⁹⁶ European Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2007), at paragraph 159

- nothing was passed on to the end user by Endesa on behalf of the electricity supply companies; and
- Endesa obtained ownership of the electricity before passing it on.⁷⁹⁷

5.156 Eden Brown submitted that none of these features appear in the present case:

- there is no obligation on Eden Brown to contract with the Client or for the temporary Candidate to contract with Eden Brown;
- Eden Brown does not contract with the temporary Candidate before it has entered into a contract with the Client;
- there is a direct relationship between the temporary Candidate and the end user Client;
- the wages element of revenue received by Eden Brown is expressly paid to the temporary Candidate 'on behalf of' the Client; and
- at no stage does Eden Brown 'own' the temporary Candidate.⁷⁹⁸

5.157 Eden Brown stated that the financial risk borne by Eden Brown given its obligation to pay the wages to the temporary Candidate is of a different nature to that in Endesa as the obligation to pay the Candidate only arises in the context of it being agreed between Eden Brown and the Client that the Client will pay all those wages to Eden Brown. Eden Brown acknowledged that bearing financial risk is an indicator of acting as a principal, however it considered that it was a weak indicator.⁷⁹⁹

5.158 Hays submitted that the facts in the present case are different to those in *Endesa* in the following material respects:

- Hays, unlike Endesa, is not requesting that the OFT look to any accounts other than its audited statutory accounts which contain the Net Fees figure;

⁷⁹⁷ Eden Brown's written representations on the Statement of Objections, at paragraph 86.

⁷⁹⁸ Eden Brown's written representations on the Statement of Objections, at paragraph 87.

⁷⁹⁹ Witness statement of Michael Sterling, at paragraph 11(b), attached to Eden Brown's written representations on the Statement of Objections.

- Hays bears no liability for the quality of service provided by the temporary worker, which is different to Endesa which was liable for failures of electricity;
- the nature of the risk borne by Hays is significantly different to that which was considered by the CFI in *Endesa*. Hays only takes on a temporary worker once it has a guaranteed placement with one of its clients. Unlike Hays, Endesa acquired the risk before it had a customer for its service.
- unlike Endesa, Hays supplies temporary workers under a contract that provides for the payment of a commission from its client;
- in contrast to Endesa there exists a relationship between the Construction Company and the temporary Candidate supplied by the Recruitment Agencies. For the purposes of employment law, Hays is considered an intermediary as it has no control of the temporary worker's day-to-day operations; and
- there is no concept of ownership of the temporary worker.⁸⁰⁰

5.159 Hays submitted that *Endesa* does not support the OFT's position, rather it supports Hays' position.

5.160 The OFT notes that *Endesa* clarifies the interpretation of turnover set out in the Jurisdictional Notice for the purpose of determining turnover in mergers having a Community dimension. *Endesa* is not binding on the OFT as it does not interpret the meaning of turnover under the 2000 Order. However, irrespective of this, the OFT considers that *Endesa* supports its analysis for the reasons listed below.

5.161 The relevant test outlined by the CFI to decide whether certain types of costs should be excluded from the turnover of Endesa is whether the activity of Endesa can be classified as the provision of services limited to supplying a product 'on behalf' of the electricity operators or whether it involves the purchase of electricity from the suppliers and the resale to the end-user. This is similar to the principal/agent test used under GAAP

⁸⁰⁰ Hays' written representations on the Statement of Objections, at paragraph 4.81.

rules to decide whether pass-through wages shall be included in the turnover.

- 5.162 The Parties' representations focus on the facts which led the EC to reject Endesa's claim. These facts are not meant to be a checklist of factors distinguishing between an agent and a principal. In the present case, the key consideration is that the inclusion of wages of temporary workers by the Parties in their turnover shows that they consider and hold themselves as principal. This is sufficient to show that the 'agent' exception set out in the merger control rules would not apply to the recruitment of temporary workers. The surrounding factual matrix, and consideration of this factual matrix vis-à-vis the factual matrix in *Endesa*, does not impact on this key consideration.
- 5.163 The OFT also notes that the European Commission has used Gross Turnover, not Net Fees, in assessing the Community dimension of the recent Randstad/Vedior merger in the recruitment sector.⁸⁰¹

The use of Gross Turnover is inconsistent with a decision of the French Autorité de la Concurrence

- 5.164 Both Hays and Eden Brown made representations concerning a recent decision of the French Autorité de la Concurrence⁸⁰² (French Competition Authority) in the recruitment sector in France.⁸⁰³
- 5.165 Both Hays and Eden Brown submitted that the Autorité de la Concurrence took into account Net Fees rather than Gross Turnover when setting the fines in that case.
- 5.166 Eden Brown considered that the decision is of high persuasive authority, both because of the similarity of circumstance and subject matter, but also because of the good sense of '*sister competition authorities in different Member States keeping broadly in sync with one another when*

⁸⁰¹ Paragraph 5 of the Decision reads: 'Undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 billion (EUR 8,186 million for Randstad and EUR 7,660 million for Vedior). The undertakings concerned each have a Community-wide turnover in excess of EUR 250 million (EUR 5,990 million for Randstad and EUR 6,133 million for Vedior)'. These figures represent Gross Turnover. Case no COMP/M.5009, Randstad/Vedior, 17 April 2008

⁸⁰² Formerly known as the Conseil de la Concurrence.

⁸⁰³ Decision 09-D-05 *relative a des pratiques mises en oeuvre dans le secteur du travail temporaire*, BOCCRF of 18 February 2009

*considering infringements of essentially the same substantive provisions in essentially the same markets at essentially the same time.*⁸⁰⁴

- 5.167 Eden Brown stated that there is a need for the OFT's penalty decision to be proportionate and the Autorité de la Concurrence determined that proportionality demanded a focus on Net Fees. It was stated that the infringements in the French case had a more serious and wide ranging effect upon the French market and economy than the infringement relating to the activities of the CRF. Against this background the Autorité de la Concurrence determined that the basic penalty should be 6% of Net Fees. Eden Brown argued that a proportionate approach to its penalty requires a significantly lower percentage of Net Fees to distinguish between the seriousness of the two infringements.⁸⁰⁵
- 5.168 Hays submitted that the decision of the Autorité de la Concurrence is consistent with Hays' representations regarding the adoption of Net Fees as the appropriate measure for calculating any fine in the current investigation.⁸⁰⁶
- 5.169 The OFT notes the representations that have been made regarding the relevance of the decision of the Autorité de la Concurrence, in particular that, to ensure consistency with the French decision, the OFT should use Net Fees in order to establish relevant turnover at step 1.
- 5.170 The OFT considers that there are material differences in how the OFT and the Autorité de la Concurrence set financial penalties which mean that it would not be meaningful or appropriate to undertake a detailed 'like for like' comparison of their respective approaches.
- 5.171 For example, unlike the OFT's approach, the French regime does not provide that an undertaking's relevant turnover (i.e. the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year) is the starting point when calculating a penalty.
- 5.172 Therefore, although it is correct that the Autorité de la Concurrence imposed a basic fine of 6% of Net Fees, the Autorité de la Concurrence

⁸⁰⁴ Letter from Eden Brown to the OFT dated 24 February 2009.

⁸⁰⁵ Letter from Eden Brown to the OFT dated 24 February 2009.

⁸⁰⁶ Letter from Freshfields to the OFT dated 23 February 2009.

used as a basis the Net Fees achieved in France by the whole group, rather than using relevant turnover, which in the present case, only represents a portion of the Parties' UK turnover.

5.173 In the light of the differences between the two regimes, it would be inappropriate to use Net Fees in CRF solely because the Autorité de la Concurrence had used Net Fees in its case.

The OFT's conclusion on the appropriate measure of turnover to use in calculating relevant turnover

5.174 Having considered the Parties' representations on this issue, as set out above, the OFT remains of the view that Gross Turnover is the appropriate measure to use in assessing relevant turnover in this case.

Turnover information gathering

5.175 In order to determine the Parties' relevant turnover for the purposes of calculating any financial penalties, in June 2009 the OFT sent Notices pursuant to section 26 of the Act⁸⁰⁷ requesting information on the Gross Turnover and Net Fees for the supply of Candidates consistent with the OFT's view of the relevant market in this case.

5.176 These Notices were sent in draft during April 2009⁸⁰⁸ to enable the OFT to take into account any representations from the parties in relation to the information requested or any other factors relevant to the collection of this information (for example the financial reporting timescales of each Party).⁸⁰⁹

⁸⁰⁷ OFT's Section 26 Notice to Fusion People of 8 June 2009, OFT's Section 26 Notice to Eden Brown of 8 June 2009, OFT's Section 26 Notice to Henry Recruitment of 8 June 2009, OFT's Section 26 Notice to CDI AndersElite of 8 June 2009, OFT's Section 26 Notice to Hays of 11 June 2009, OFT's Section 26 Notice to HMG and BBT of 15 June 2009. A Notice was not sent to AWA as it was ordered to be wound up in October 2007.

⁸⁰⁸ OFT's Draft Section 26 Notice to CDI AndersElite of 2 April 2009, OFT's Draft Section 26 Notice to Eden Brown of 2 April 2009, OFT's Draft Section 26 Notice to Fusion People of 3 April 2009, OFT's Draft Section 26 Notice to Hays of 6 April 2006, OFT's Draft Section 26 Notice to Henry Recruitment of 7 April 2009, OFT's Draft Section 26 Notice to BBT and HMG of 8 April 2009.

⁸⁰⁹ See responses of the Parties to the Draft Section 26 Notices: CDI AndersElite's response of 2 April 2009, Henry Recruitment's response of 8 April 2009, Fusion People's response of 14 April 2009, HMG and BBT's response of 21 April 2009, Eden Brown's response of 23 April 2009, Hays response of 24 April 2009.

- 5.177 Each Notice required that the Parties provide the requested information in a spreadsheet (the same spreadsheet was sent to all the Parties). Each Notice also contained the OFT's view on Candidates consistent with the relevant market in this case (which was Annex B from the Statement of Objections entitled 'Definitions of Relevant Candidate Roles and Calculation of Relevant Turnover', which is attached at Annex A to this Decision).
- 5.178 The Notice also contained additional information (again, commonly applied between the parties) on how information should be provided in response to the Notice.
- 5.179 The turnover figures relevant to the penalties outlined in this Decision have been obtained from the Parties' responses to each of these Notices.⁸¹⁰
- 5.180 Where necessary, and to ensure a consistent approach, the OFT corresponded with the Parties to confirm any outstanding points regarding the material to be provided in response to each Notice or to clarify the material that was provided in response to each Notice.⁸¹¹

⁸¹⁰ Henry Recruitment's response of 18 June 2009 to the OFT's Section 26 Notice of 8 June 2009, Fusion People's response of 22 June 2009 to the OFT's Section 26 Notice of 8 June 2009, CDI AndersElite's response of 3 July 2009 (as amended by its response of 23 July 2009) to the OFT's Section 26 Notice of 8 June 2009, Eden Brown's response of 3 July 2009 to the OFT's Section 26 Notice of 8 June 2009, HMG and BBT's response of 6 July 2009 to the OFT's Section 26 Notice of 15 June 2009, Hays' responses of 23 July 2009 and 6 August 2009 to the OFT's Section 26 Notice of 11 June 2009. AWA is in liquidation. During the course of its investigation the OFT obtained information on its 2006 turnover (AWA's response of 19 October 2007 to the OFT's request of 18 September 2007) and it is this data that is used in this decision. File Reference: AWA - General - 28A

⁸¹¹ Fusion People's letter of 27 April 2009 in response to the OFT's email of 24 April 2009, Fusion People's response of 17 August 2009 to the OFT's letters of 11 and 14 August 2009, Eden Brown's responses of 5 August 2009, 10 September 2009 and 17 September 2009 in response to the OFT's letters of 31 July 2009, 3 September 2009 and the OFT's email of 14 September 2009, CDI AndersElite's email response of 14 August 2009 to the OFT's letters of 11 and 14 August 2009 and the OFT's email response of 14 August 2009, Hays letter of 29 May 2009, Hays letter of 5 June 2009 in response to the OFT's letter of 2 June 2009, OFT's letter to Hays of 10 June 2009, Hays letter of 12 August 2009 in response to the OFT's letter of 30 July 2009, OFT's letter of 9 July 2009 in response to Hays letter of 2 July 2009, Hays letter to the OFT of 4 September 2009, HMG and BBT's letters of 6 August 2009 and 10 September 2009 in response to the OFT's letters of 31 July 2009 and 3 September 2009, Henry Recruitment's response of 18 September 2009 to the OFT's email of 16 September 2009.

Step 1 - calculation of the starting point

5.181 The starting point for determining the level of penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.⁸¹² The starting point may be any amount up to a maximum of 10 per cent of each undertaking's relevant turnover.⁸¹³

Starting Point Percentage

Seriousness of the infringement

5.182 In the Statement of Objections the OFT stated that the actual percentage to be applied to relevant turnover depends upon the seriousness of the infringement: the more serious and widespread the infringement, the higher the likely percentage rate.⁸¹⁴

5.183 In the Statement of Objections the OFT considered that the objective of the Margin Protection Initiative was to protect margins (see paragraphs 4.332 to 4.343 above) and that instead of meeting the increased competitive pressure as a result of Parc's entry into the market through the normal means of competition, such as an improved product offering or more favourable prices, the Parties chose to respond to the increased competitive pressure through explicit co-operation.

5.184 The OFT considered that the starting point in this case should reflect the single overall infringement in this case which is comprised of two elements, the Collective Refusal to Supply Parc and the Target Fee Rates Initiative.

The Collective Refusal to Supply Parc

5.185 In relation to the Collective Refusal to Supply Parc, the OFT confirmed that the CAT has stated that a collective boycott or refusal to supply involving large numbers of participants can, in itself, amount to an appreciable restriction or distortion of competition within section 2(1)(b) of the Act⁸¹⁵ and the OFT considers that the starting point in this case

⁸¹² Penalties Guidance, at paragraph 2.3.

⁸¹³ Penalties Guidance, at paragraph 2.8.

⁸¹⁴ Penalties Guidance, at paragraph 2.4.

⁸¹⁵ Case No 1003/2/1/01 *Institute of Independent Insurance Brokers v Director General of Fair Trading* [2001] CAT 4, [2001] at paragraph 189.

should reflect the fact that the Collective Refusal to Supply Parc concerns an explicit agreement by the Parties to exclude Parc from the sector.

The Target Fee Rates Initiative

5.186 In relation to the Target Fee Rates Initiative, the OFT noted that the Chapter I prohibition applies in particular where undertakings '*directly or indirectly fix purchase or selling prices or any other trading conditions*' (section 2 (2)(a)). The OFT stated in the Statement of Objections that both the OFT and the Courts have consistently found price fixing to be among the most serious infringement of competition law⁸¹⁶ and this type of infringement should be reflected in the level of the starting point.⁸¹⁷ The CAT has also commented that '*There is no doubt in our mind that hard-core cartel activities constitute a very serious infringement of the competition rules.*'⁸¹⁸

Other factors relevant to the starting point percentage

5.187 The OFT confirmed in the Statement of Objections that it also considers a number of factors, including the nature of the product/services, the structure of the market, the market shares of the undertakings involved in the infringement(s) and the effect on competitors and third parties, when making an assessment of the starting point percentage.⁸¹⁹

The OFT's view on starting point as set out in the Statement of Objections

5.188 In the Statement of Objections, the OFT considered that when both elements of the Margin Protection Initiative (namely the Collective Refusal to Supply Parc and the Target Fee Rates Initiative) are taken into account, together with the nature and structure of the market and the market shares of the Parties, the starting point is likely to fall within the upper end of the scale (the maximum being ten per cent of an

⁸¹⁶ See, Penalties Guidance, at paragraph 1.4 and, for example, OFT decision CA98/04/2006 *Agreement to fix prices and share the market for aluminium double glazing spacer bars*, 28 June 2006, at paragraph 555.

⁸¹⁷ OFT decision CA98/04/2006 *Agreement to fix prices and share the market for aluminium double glazing spacer bars*, 28 June 2006, at paragraphs 566.

⁸¹⁸ *Sepia Logistics Ltd and Precision Concepts v Office of Fair Trading* [2007] CAT 13, at paragraph 110.

⁸¹⁹ Penalties Guidance, at paragraph 2.5.

undertaking's relevant turnover), and that a starting point of 9% would appear appropriate in this case.⁸²⁰

Representations in response to the Statement of Objections

5.189 CDI AndersElite, Eden Brown, Fusion People and Hays all made representations in relation to the OFT's view on starting point percentage as set out in the Statement of Objections. The submissions were broadly to the effect that the infringement was not sufficiently serious to warrant a starting point of 9%.

5.190 Each of these Parties submitted that the proposed starting point of 9% was too high and should therefore be lowered. Broadly, these representations can be divided into the following general categories:

- The effect of the Margin Protection Initiative;
- Consistency with previous OFT cases;
- Nature of the product and structure of the market; and
- The OFT should adopt differential starting points.

5.191 Each of these categories of representation is considered in turn below.

The effect of the Margin Protection Initiative

5.192 CDI AndersElite acknowledged that the infringement had the object of restricting competition, however it also submitted that the OFT has failed to take into account that the Collective Refusal to Supply Parc did not achieve the Parties' objective of excluding Parc from the market and this failure was not due to the intervention of the OFT. CDI AndersElite stated that the Target Fee Rates Initiative had an extremely limited effect since only the prices charged to one Construction Company were affected, and the price increases were limited in magnitude and duration.⁸²¹

⁸²⁰ For example, see OFT decision No. CA98/8/2003. *Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games*. 21 November 2003 and OFT decision No. CA98/06/2003. *Price-fixing of Replica Football Kit*, 1 August 2003.

⁸²¹ CDI AndersElite's written representations on the Statement of Objections, at paragraph 4.2.

- 5.193 Eden Brown acknowledged that there was a '*serious anti-competitive object of the infringement*'.⁸²² However, Eden Brown submitted that the effect of the infringement should also be considered when determining the seriousness of the infringement. Eden Brown stated the effect on the market was limited, and that the CRF was sufficiently ineffective that it collapsed by itself before the intervention of the OFT. Thus the effect of the infringement was not as serious as it might have been had there been more participants or the participants had greater market power.⁸²³
- 5.194 Hays stated that its participation in the CRF had no appreciable effect on Parc's dealings with Taylor Woodrow. Parc's evidence was that the CRF did not affect its ability to supply Taylor Woodrow. Hays submitted that it independently determined that it would not enter into a new contract with Parc to supply Taylor Woodrow. In respect of '*technical*' staff, Hays stated that at no time did Hays cease to supply Candidates to Taylor Woodrow via Parc, and that the OFT should take this into account when assessing the seriousness of Hays' infringing conduct.⁸²⁴
- 5.195 Hays submitted that its participation in the CRF had no appreciable effect on Parc's dealings with Vinci. Hays stated that Vinci terminated its agreement with Parc after the infringing conduct had ceased and there is no evidence that the CRF was a material contributor to this decision. In the relevant period, Hays' stated that its revenues with Parc increased.⁸²⁵
- 5.196 Hays stated that the OFT has incorrectly asserted that Parc was utilised in a more limited capacity under the Vinci (Parc Facilitator) Agreement, than that envisaged in the PSA initially proposed by Parc. This assertion is unsubstantiated because:
- Hays' concerns related to the risk of having a [...] [C] to Parc and the Vinci (Parc Facilitator) Agreement afforded Hays comfort in this respect;
 - The OFT has presented no evidence of what, if any, adverse effect the Vinci (Parc Facilitator) Agreement had on Parc;

⁸²² Eden Brown's written representations on the Statement of Objections, at paragraph 13.

⁸²³ Eden Brown's written representations on the Statement of Objections, at paragraphs 23-28.

⁸²⁴ Hays' written representations on the Statement of Objections, at paragraphs 4.28 to 4.32.

⁸²⁵ Hays' written representations on the Statement of Objections, at paragraphs 4.33 (a) and (b).

- If the Vinci (Parc Facilitator) Agreement limited the capacity in which Parc was able to act, it would be reasonable to have expected Vinci to review its Neutral Vendor agreement with Parc, but there is no evidence that this occurred; and
- Parc's evidence demonstrates that it suffered no financial implications from the increased fees that Hays agreed with Vinci.⁸²⁶

5.197 Hays submitted that the CRF had no material effect on Construction Companies. Hays stated that the actions of the CRF were limited to Neutral Vendors and the OFT has not presented any evidence to demonstrate that the object of the CRF Members was to adversely affect Construction Companies.⁸²⁷

5.198 Hays stated that the evidence shows Vinci and not CRF members dictated fee rates. Hays stated that Mr Jellicoe (of Vinci) has stated he set the Fee Rates without any pressure from third parties and as an independent and credible witness, Mr Jellicoe's evidence should be given the greatest weight by the OFT.⁸²⁸ Hays further stated that the fee rates proposed by Parc were not commercially viable and would not have been accepted by CRF members. Hays stated that the OFT has sought to draw the inference from the fact that the fee rates agreed with Vinci were higher than those originally proposed by Parc that this was due to the CRF. Hays stated that the OFT has not provided any evidence or explanation as to why it accepts that the initial rates offered by Parc were commercially viable or could realistically have been achieved absent the CRF.⁸²⁹

5.199 Hays submitted that the evidence shows that Hays' participation in the CRF did not limit the ability of Taylor Woodrow to source Candidates. Hays submitted that Taylor Woodrow's ability to source Candidates from Hays was unaffected by its participation in the CRF.⁸³⁰

5.200 Hays stated that contrary to the OFT's proposed findings there was no disclosure of confidential Vinci information, referring to Mr Jellicoe of

⁸²⁶ Hays' written representations on the Statement of Objections, at paragraph 4.33(c).

⁸²⁷ Hays' written representations on the Statement of Objections, at paragraph 4.36.

⁸²⁸ Hays' written representations on the Statement of Objections, at paragraphs 4.37(a) and (b).

⁸²⁹ Hays' written representations on the Statement of Objections, at paragraph 4.37 (c).

⁸³⁰ Hays' written representations on the Statement of Objections, at paragraph 4.38(a).

Vinci's evidence that he indicated to each of Vinci's proposed First tier suppliers that they were all being offered the same terms and that he did not consider it a breach of Vinci's confidence if those terms were communicated amongst the First tier suppliers.⁸³¹

5.201 Hays submitted that there is no evidence that any agreement between Hays and Eden Brown regarding Atkins (the existence of which Hays has disputed) had any effect on Hays' or Eden Brown's commercial dealings with Atkins.⁸³²

5.202 Eden Brown also stated that there is no evidence of any appreciable effect of the CRF on end users, and thus there was no appreciable damage to consumers.⁸³³ Hays submitted that the services the subject of the CRF were offered on a business to business basis in which there was the exercise of a significant degree of countervailing buyer power. Thus, in the present case a lower starting point is justified than in a case involving mass consumer goods. Hays submitted that there is no evidence or suggestion that the CRF had any effect on ultimate consumers.⁸³⁴

The OFT's response to these representations

5.203 The OFT notes that the evidence outlined in section 4 of this decision indicates that the CRF may have had some effect on fee rates. However as the OFT considers that this infringement had the object of preventing, restricting or distorting competition it does not need to conclude as to whether the CRF had any effect on competitors or third parties.

5.204 During the course of its investigation, the OFT asked Parc to confirm the impact that the Vinci (Parc Facilitator) Agreement had on the business. Parc confirmed that it had been undermined by these arrangements, stating as follows:

[The Vinci (Parc Facilitator) Agreement] meant that these agencies had a direct contract with [Vinci] and not Parc, enabling a greater level of direct contact and meetings. This

⁸³¹ Hays' written representations on the Statement of Objections, at paragraph 4.38(b).

⁸³² Hays' written representations on the Statement of Objections, at paragraph 4.38(c).

⁸³³ Eden Brown's written representations on the Statement of Objections, at paragraphs 22-23.

⁸³⁴ Hays' written representations on the Statement of Objections, at paragraphs 4.7 - 4.9.

*undermined Vinci in their attempt to outsource recruitment through one provider and undermined Parc, as they would see Vinci as the owner and not Parc, and we would have little opportunity to police the authorised process...Also other agencies then wanted the ability to deal directly, thus removing the controls and centralisation that Vinci had wanted by engaging Parc in the first place.*⁸³⁵

- 5.205 The OFT also notes that, according to Parc, at the time of entering into PSAs with Taylor Woodrow and Vinci, Parc expected to source a larger number of Candidates from the Parties than it considers were actually sourced in practice (as set out in Table 5.1 above).
- 5.206 The OFT notes Hays' submission that the fee rates proposed by Parc were, in any event, not commercially viable from Vinci's perspective and would not have been accepted by CRF members.⁸³⁶ Hays stated in response to the Statement of Objections that '*the OFT has not provided any evidence or explanation as to why it accepts that the initial rates offered by Parc were commercially viable or could realistically have been achieved in the absence of CRF's activities*'.
- 5.207 The OFT notes that two of the Parties did in fact accept Parc's Fee Rates of 10% for the supply of Candidates to Vinci and one of the Parties accepted Parc's Fee Rates for the supply of Candidates to Taylor Woodrow.⁸³⁷ However, given the Parties then decided to form a cartel, instead of letting market forces run their course, it is unclear to the OFT what the Fee Rates would have been absent the Margin Protection Initiative.

Consistency with previous OFT cases

- 5.208 Eden Brown stated in response to the Statement of Objections that the OFT's proposed starting point leaves too little room for a higher starting point percentage in other serious object cases with a greater effect upon competition and consumers. Eden Brown referred to the starting point affixed for Allsports, JJB and Manchester United in the *Replica Kit*

⁸³⁵ See Third Party Correspondence-168.

⁸³⁶ Hays written representations on the Statement of Objections, at paragraphs C(i) to C (iii) (page 35)

⁸³⁷ See Parc Third Party Correspondence 243.

decision which was 9%, but in that case there was a significant effect upon competition.⁸³⁸ Eden Brown submitted that a more appropriate starting point would be 8%.

- 5.209 CDI AndersElite also referred to the *JJB* decision where the OFT was of the view that the seriousness of the infringement was aggravated by the fact that the products were mass market consumer products and that many consumers were children.⁸³⁹
- 5.210 Hays stated that in past OFT decisions of *Toys and Games* and *Replica Kit* the OFT treated the fact that the relevant product was a mass consumer good was an indicator of a more serious price fixing arrangement.⁸⁴⁰
- 5.211 Hays submitted that the OFT has in previous decisions identified that certain market structures indicate a certain type of infringement is more serious. In *Replica Kit* and *Toys and Games* the fact that a number of the infringing companies were 'price leaders' was considered by the OFT to give rise to the real risk that their conduct resulted in artificially high prices across the market more generally. In *Aluminium Spacer Bars*, where a 7% starting point was applied, the OFT referred to the highly concentrated nature of the market as being a relevant factor. Hays submitted that in *Aluminium Spacer Bars* the existence of high barriers to entry was identified by the OFT as a factor suggesting a more serious infringement.⁸⁴¹
- 5.212 Hays submitted that an analysis and application of 'each and every' seriousness factor to the facts of the investigation demonstrates that Hays' infringement is of a less serious kind when compared to other OFT investigations. Therefore in order to ensure that the fines in this case are proportionate with other OFT investigations the OFT must adopt a starting point of not more than 6%.⁸⁴²

The OFT's response to these representations

⁸³⁸ Eden Brown's written representations on the Statement of Objections, at paragraphs 25-28.

⁸³⁹ CDI AndersElite's written representations on the Statement of Objections; at paragraph 4.2.

⁸⁴⁰ Hays' written representations on the Statement of Objections, at paragraph 4.8.

⁸⁴¹ Hays' written representations on the Statement of Objections, at paragraphs 4.11 – 4.19.

⁸⁴² Hays' written representations on the Statement of Objections, at paragraph 4.6.

5.213 As stated in paragraphs 5.14 - 5.16 above the OFT does not accept that it is bound by its previous decisions in relation to the calculation of penalties in previous cases. Rather, the OFT considers that, it is free to adapt its policy as appropriate having regard to all relevant circumstances and its overall policy objectives on financial penalties, as set out in its Penalties Guidance.⁸⁴³

Nature of the product and structure of the market

5.214 Eden Brown submitted in response to the Statement of Objections that the relevant market is one in which i) there are many other competitors; ii) some of those competitors are sizeable and iii) the market share of the non-infringing competitors combined is more than 6 times larger than that of the infringing Parties combined.⁸⁴⁴

5.215 Hays stated that the construction recruitment market is highly fragmented and the CRF members only represent a small proportion of the total construction recruitment industry. Furthermore, the manner in which Construction Companies negotiate and engage Recruitment Agencies does not lend itself to any form of price leadership. Hays stated that the OFT should treat the infringement as less serious and therefore should apply a lower starting point percentage than in cases involving concentrated markets.⁸⁴⁵

5.216 Hays stated that the construction recruitment industry does not have high barriers to entry. The evidence presented by the Parties, including Parc, indicates that there are low barriers to entry. As there are low barriers to entry, the infringement in this investigation must be treated of a less serious kind with a lower starting point percentage than other investigations where there were significant barriers to entry.⁸⁴⁶

The OFT's response to these representations

⁸⁴³ Joined cases 100/80 to 103/80 *Musique Diffusion Francaise and others v European Commission ('Pioneer')* [1983] ECR 1825, at paragraphs 101-110; Joined cases C-189/02P, C-202/02P, C-205/02P to C-208/02P and C-213/02P *Dansk Romindustri A/S and others v European Commission* [2005] ECR I-5425, at paragraph 169.

⁸⁴⁴ Eden Brown's written representations on the Statement of Objections, paragraph 20.

⁸⁴⁵ Hays' written representations on the Statement of Objections, paragraphs 4.10 – 4.18.

⁸⁴⁶ Hays' written representations on the Statement of Objections, paragraphs 4.19 to 4.23.

- 5.217 According to the Recruitment and Employment Confederation's (REC) Annual Industry Turnover and Key Volumes Survey 2006/07 the overall turnover from both permanent and temporary/contract recruitment in the UK's recruitment industry for the period from April 2006 to March 2007 reached £26.7 billion. Total turnover relating to construction, technical and engineering roles was estimated at about £4.6 billion.⁸⁴⁷
- 5.218 In the Statement of Objections the OFT noted that Construction Companies can face serious consequences if they are unable to secure appropriately skilled labour. The OFT further noted that during the period at or around the time of the Margin Protection Initiative the evidence available to the OFT indicates that Construction Companies were faced with a challenging labour market and were reliant on using Recruitment Agencies (alongside other methods) to secure the skilled staff necessary to their business.⁸⁴⁸
- 5.219 The OFT does not dispute that the infringement concerns business to business services and not mass market consumer products. However, the OFT considers that such infringements should still be considered serious and can result in harm.
- 5.220 The OFT does not dispute that the recruitment sector is fragmented. In the Statement of Objections the OFT stated that the market shares of the Parties could be estimated on the basis of publicly available information to be 'at the very least 13.6%'.⁸⁴⁹ However, the OFT notes

⁸⁴⁷ Source, Recruitment and Employment Confederation (REC) Annual Industry Turnover and Key Volumes survey 2006/07, File Reference: Public Document 94.

⁸⁴⁸ See the analysis set out in Section 1 C of this Decision (previously set out in the Statement of Objections), 'Industry structure and the conditions of competition at or around the time of the Margin Protection Initiative'. For example, Construction Skills, which is the main Sector Skills Council for the construction industry in the UK, reported in its Business Plan 2006-10: 'a situation in which some parts of the industry are operating under conditions approaching full employment at the professional, managerial and craft levels. This comes with some of the associated imperfections and difficulties that employers find in matching demand with appropriately skilled labour.' File Reference: Public Document 96.

⁸⁴⁹ In the Statement of Objections the OFT confirmed that it had used appropriate publicly available estimates of turnover within the UK's recruitment industry to produce an estimate of the combined market share of the Parties. The OFT considered that, at the very least, the Parties can be estimated to have held over 13.6 per cent market share in 2006/07. This publicly available data does not exactly match the OFT's view on the relevant market in this case, however as both the publicly available industry turnover figures and publicly available company turnover figures include turnover for candidates that do not fall within the OFT's view of the relevant market in this case, the OFT considers that the use of this data is likely to present a reasonable approximation of market share. See REC Annual Industry Turnover

that some of the participants in the CRF were the biggest players in what was a sizable market.⁸⁵⁰ It also notes the evidence of Colin Jellicoe of Vinci that he '*wanted the big agencies on board*'⁸⁵¹ in relation to the Vinci (Parc Facilitator) Agreement and that the only agencies that were offered a Vinci (Parc Facilitator) Agreement were members of the CRF. Furthermore, one of the stated aims of the CRF organiser (HMG) was to involve the '*key players within the contracting market*'.⁸⁵²

- 5.221 The OFT does not agree that there are limited barriers to entry. The OFT considers that the need for specialised industry knowledge, the time taken to establish a database of suitably qualified Candidates and reputation are all barriers to entry.⁸⁵³
- 5.222 It appears to the OFT that Recruitment Agencies require a specialised knowledge of the industry to effectively select and match Candidates.⁸⁵⁴ This may include an understanding of qualifications and requirements of particular vacancies, which Recruitment Agencies in other sectors would not have. Specialised knowledge would have to be acquired by hiring consultants from those already providing 'construction recruitment' services.⁸⁵⁵
- 5.223 It has also been put to the OFT that the need for an established reputation with Construction Companies and Candidates is a barrier to entry.⁸⁵⁶ This has been described as a catch-22 situation with new

and Key Volumes Survey 2006/07 (estimates of turnover for the construction, technical and engineering recruitment sectors) and REC Top 250 Report - 2007 (The Top 10 - Construction and The Top 20 - Technical): File Reference: Public Documents 94, 94a & 94b.

⁸⁵⁰ Annual Industry Turnover and Key Volumes Survey 2006/07 and REC lists of the top ten companies (which include CDI AndersElite, Eden Brown, Hays and Select) by turnover in construction, technical and engineering roles and permanent and temporary recruitment. File Reference: Public Documents 94a & 94b

⁸⁵¹ Vinci Third Party Correspondence 54.

⁸⁵² Transcript of Steven Ware's interview at page 9; File Reference Select Leniency 1859.

⁸⁵³ See responses from the Parties to an OFT information request of 16 October 2006. File Reference: CDI AndersElite Leniency - 26, 27; Eden Brown Leniency - 30; Fusion Leniency - 88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833

⁸⁵⁴ See responses to annex A, question 17 to an OFT information request of 16 October 2006. File Reference: CDI AndersElite Leniency - 26, 27; Eden Brown Leniency-30; Fusion Leniency-88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833

⁸⁵⁵ See Hays response to 16 October 2006 information request that notes that training or hiring recruitment consultants is needed to gain this knowledge in order to expand into different segments. File Reference: Hays Leniency - 429

⁸⁵⁶ See responses to annex A, question 17 of an information request of 16 October 2007. File Reference: CDI AndersElite Leniency - 26, 27; Eden Brown Leniency - 30; Fusion Leniency - 88; Hays Leniency - 429; Henry Leniency - 3c; Select Leniency - 1833

Recruitment Agencies being unable to attract a sufficient number of Candidates or Construction Companies.⁸⁵⁷ Building a database of Candidates and Construction Companies is therefore likely to take time.

The OFT should adopt differential starting points

5.224 Fusion People submitted that in *Replica Kit* the OFT assessed the seriousness of the infringement for each undertaking so as to determine a starting point for each undertaking. In *Replica Kit*, certain parties to the infringement were described as '*reactive participants*' and '*economically weaker players*' such as to justify a lower starting point. Fusion People submitted that the OFT ought to have conducted a similar approach in the present case which would have revealed similar individual circumstances which would make appropriate a starting point for Fusion People that is lower than the 9% in the Statement of Objections.⁸⁵⁸

5.225 Fusion People also submitted that in circumstances where the OFT has calculated the individual market shares of the Parties to an infringement the undertakings with a lower market share have been subject to a lower starting point. For example, in *Hasbro (distributors)* the low market share of the distributors justified a starting point between 5 and 8%. Fusion People submitted that its share of the overall market held by CRF members will be comparable to that of the distributors in *Hasbro (distributors)*, making a substantially lower starting point appropriate in this case.⁸⁵⁹

The OFT's response to these representations

5.226 The OFT considers that differential starting points may be relevant in the circumstances where the infringing parties had an obviously different role in the cartel such that they were engaged in different economic

⁸⁵⁷ For example, Eden Brown state '*Overall we believe supplying different skill sets would be difficult because agencies will be faced with the 'Catch 22' situation where they are unable to provide sufficient workers with the relevant skill set to clients on a consistent basis unless they can first attract sufficient employees with the skill set in question. However, they are unlikely to be able to attract sufficient employees with the appropriate skill set until they are able to provide those employees with sufficient vacancies. You cannot have one (employees with the skill set) without already having the other (vacancies for that skill set) and vice versa.*' See responses to question 17, annex A of an information request of 16 October 2006. File Reference: Eden Brown Leniency - 30

⁸⁵⁸ Fusion People's written representations on the Statement of Objections, paragraphs 59 – 60.

⁸⁵⁹ Fusion People's written representations on the Statement of Objections, paragraph 61.

activities (e.g. a distributor vis-à-vis a manufacturer in a price fixing cartel). In the present case, all the Parties were engaged in the same economic activity.⁸⁶⁰ The OFT does not therefore consider it appropriate to apply different starting point percentages between the Parties.

The OFT's conclusion on starting point percentage

5.227 The OFT considers that this is a very serious infringement, which is a combination of price-fixing and a collective boycott, both of which in themselves can amount to a serious infringement of the Act.

5.228 For the reasons identified in the Statement of Objections and after consideration of the Parties' responses to the Statement of Objections as set out above, the OFT remains of the view that a 9% starting point is appropriate.

Step 2 – adjustment for duration

5.229 The starting point under Step 1 may be adjusted to take into account the duration of the infringement.⁸⁶¹

5.230 The OFT's finding of the duration of each party's involvement in the infringement is set out in paragraphs 4.344 to 4.388 above. For all but two of the Parties, the OFT finds that the duration of the infringement, as based on the evidence on the OFT's file, was more than one year but less than two years.

5.231 The OFT has decided to treat part years within these durations in terms of quarter years. Therefore, where the duration of the infringement is less than one year (as applies in the cases of AWA and Henry Recruitment) the OFT has made an upward adjustment for duration to one full year. Where the duration of each Party's participation in the infringement exceeds one year but is less than one and one quarter year (as applies in the cases of CDI AndersElite, BBT, HMG, Eden Brown, Fusion People and Hays) the OFT has made an upward adjustment for duration to the next quarter year.

⁸⁶⁰ HMG's role as an instigator of the cartel is discussed in step 4 of the penalty calculation.

⁸⁶¹ Penalties Guidance, at paragraph 2.10.

Step 3 – adjustment for other factors

5.232 As set out in the OFT's Penalties Guidance⁸⁶², the penalty may be adjusted as appropriate after Step 2, to achieve the policy objectives outlined in paragraph 1.4 of the Penalties Guidance, in particular in order to ensure that the threat of penalties deter undertakings from engaging in anti-competitive practices including other undertakings which might be considering activities which are contrary to the Chapter I prohibition.

5.233 In the Statement of Objections, the OFT set out its provisional view on adjustments at Step 3. The OFT stated that it would only be able to assess the need for any adjustment at step 3 once it has received the required financial information from all of the Parties.⁸⁶³

5.234 In this Section, the OFT sets out its final view, in light of the representations and evidence received in response to the Statement of Objections, grouped into the following categories:

- Deterrence;
- Financial position and ability to pay;
- Nil turnover; and
- Consideration of Net Fees.

Deterrence

5.235 In the Statement of Objections the OFT stated that the penalty may be adjusted, after Step 2, to achieve the policy objectives of, particularly, deterring undertakings from engaging in anti-competitive practices (including, importantly, other undertakings who may be considering such anti-competitive practices).⁸⁶⁴

5.236 The OFT confirmed that where a Party is significantly engaged in economic activities that fall outside of the OFT's assessment of the relevant market, that Party's relevant turnover will form a relatively small proportion of its turnover. Therefore, the financial penalty calculated at

⁸⁶² Penalties Guidance, at paragraph 2.11

⁸⁶³ Paragraph 5.90 of the Statement of Objections

⁸⁶⁴ Paragraph 5.81 of the Statement of Objections

the end of Step 2 of the calculation may represent a relatively low proportion of the undertaking's world wide turnover.

5.237 The OFT indicated that in such a case, the penalty figure reached at the end of Step 2 may not represent a significant sum for that Party, and it may therefore be necessary to increase the Party's penalty at Step 3 to arrive at a sum that represents a sufficient deterrent, having regard to the policy objectives as set out in paragraph 1.4 of the Penalties Guidance.

5.238 The Statement of Objections confirmed that where penalties are increased to ensure deterrence, the amount of any increase will in each case take the level of the penalty to a sum equivalent to a fixed proportion of their total turnover (to be known as the Minimum Deterrence Threshold ('MDT')). The penalty would be increased to the level that would have been reached after Steps 1 and 2 if the undertaking concerned had derived in the relevant market a sufficient percentage of its total turnover. The same MDT would be applied to all Parties involved in an equally serious infringement. The MDT would be calculated having regard to the seriousness of the infringement to which it is applied and the total turnover of each undertaking. The OFT stated in the Statement of Objections that this approach has been applied in a previous OFT decision,⁸⁶⁵ and endorsed by the CAT.⁸⁶⁶

5.239 In response to the Statement of Objections, Hays⁸⁶⁷, Eden Brown⁸⁶⁸ and CDI AndersElite⁸⁶⁹ submitted that the infringement had little or no effect and therefore no uplift for deterrence is necessary. Hays submitted that it derived no economic benefit from its participation in the Margin Protection Initiative.

5.240 As outlined at paragraphs 4.396 - 4.406 above, the Margin Protection Initiative is a restriction by object. The OFT has not concluded as to whether the CRF had any effect on competitors and third parties and the

⁸⁶⁵ OFT Decision, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006, Case CA98/01/2006.

⁸⁶⁶ *Makers UK Limited v Office of Fair Trading* [2007] CAT 11.

⁸⁶⁷ Hays' written representations on the Statement of Objections, paragraph 4.88. See also paragraph 4.97.

⁸⁶⁸ Eden Brown's written representations on the Statement of Objections, at paragraph 132.

⁸⁶⁹ CDI AndersElite's written representations on the Statement of Objections, paragraph 6.2.

OFT is not required to do so. Whilst any such effect cannot be ruled out, this is not the basis for an upward adjustment to ensure deterrence. Nor is the OFT applying a deterrence multiplier on the basis of economic gain.

- 5.241 Henry Recruitment⁸⁷⁰ and Fusion People⁸⁷¹ both indicated that the infringement was committed through naivety and as a result of being led by large corporate corporations, rather than as a result of an intention to commit competition infringement. Hays⁸⁷² and Fusion People⁸⁷³ highlighted that they have taken steps to guarantee future compliance. They submitted that no increased penalty is necessary in order to achieve a future deterrence.
- 5.242 In relation to these submissions, the OFT notes that these factors have been taken into account at Step 4 of the penalty calculation as aggravating and mitigating factors (see paragraphs 5.285 - 5.346 below), therefore the OFT does not consider that they are relevant to Step 3.
- 5.243 Fusion People⁸⁷⁴ and Hays⁸⁷⁵ submitted that the publicity surrounding the Statement of Objections has damaged their reputation and their dealings with their clients to the extent that they are already fully deterred from engaging in similar activity. Hays submitted that some of its clients have assumed that Hays' infringement related to the whole of its business rather than just one division which has had a considerable adverse reputation effect on Hays. Henry Recruitment⁸⁷⁶ noted that it had incurred considerable legal expenses and management time in defending the allegations and this is sufficient deterrent.

⁸⁷⁰ Henry Recruitments' written representations on the Statement of Objections, paragraph 37.

⁸⁷¹ Christopher James Fenn's witness statement, annexed to Fusion People's written representations on the Statement of Objections, para 10;

⁸⁷² Hays' written representations on the Statement of Objections, paragraph 4.97.

⁸⁷³ Christopher James Fenn's witness statement, annexed to Fusion People's written representations on the Statement of Objections, para 11.

⁸⁷⁴ Christopher James Fenn's witness statement, annexed to Fusion People's written representations on the Statement of Objections, para 23 to 30.

⁸⁷⁵ Hays' written representations on the Statement of Objections, paragraph 4.98.

⁸⁷⁶ Henry Recruitment's written representations on the Statement of Objections, paragraph 42.

- 5.244 The OFT does not consider that legal and management time expended in co-operating with an investigation into a suspected breach of the Act, or any publicity deriving from awareness of a company's involvement in such an investigation, are pertinent to consideration of whether an upward adjustment at step 3 to ensure deterrence is required in this case.
- 5.245 The OFT considers that deterrence is an important part of its fining policy, vis-à-vis both the Parties subject to the Decision and other undertakings which might be considering activities contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibition. The need for effective deterrence in the present case is essential in view of the fact that the Parties have been engaged in a very serious infringement for the reasons outlined at paragraph 1.1 above.
- 5.246 The OFT is of the view that the penalties for Randstad (as the ultimate parent of BBT and HMG) and Hays (as the ultimate parent of Hays Specialist Recruitment) at the end of Step 2 represent a low proportion of each Party's total turnover. These proportions are set out in Table 5.3 below.

Table 5.3 – Proportion of total turnover generated in the relevant market⁸⁷⁷

	Proportion of total turnover generated in the relevant market
Henry Recruitment	[...] [C]%
Fusion People	[...] [C]%
Eden Brown	[...] [C]%
CDI Corp	[...] [C]%
Hays	[...] [C]%
Randstad⁸⁷⁸	[...] [C]%
AWA	N/A

5.247 The OFT therefore increases the Penalty of both Randstad and Hays at Step 3 to arrive at a sum that represents, for each Party, a sufficient deterrent, having regard to the seriousness of the infringement and that Party's total turnover.

5.248 For reasons of consistency, the OFT also applies an MDT for AWA given that the OFT has no historic information on AWA's relevant turnover upon which it can rely.

Minimum Deterrence Threshold

5.249 As outlined in the Statement of Objections⁸⁷⁹, in order to ensure equal treatment, the amount of the upward adjustment will be calculated using an MDT. The same MDT will be applied to both Randstad and Hays.

⁸⁷⁷ Percentages have been rounded to the nearest whole number.

⁸⁷⁸ This turnover was generated by BBT and HMG. Randstad has confirmed to the OFT (email to the OFT of 29 June 2009) that only one of its other 24 other UK subsidiaries was potentially relevant, but that it does not specialise in recruitment to the construction industry, and therefore it is unlikely that more than just a very few, if any, relevant placements were made by this subsidiary during 2008. For the reasons set out in paragraph 5.250 below, HMG and BBT's relevant turnover is expressed as a proportion of Vedior NV's total turnover.

5.250 In its calculation of the MDT, the OFT has used that part of Randstad's turnover which is attributable to the activities of Vedior NV only. Whilst Randstad Holding NV has been held jointly and severally liable for the infringement, the OFT considers that it would not be appropriate to include turnover from Randstad Holding NV's activities which were not part of the Vedior NV Group at the time of the infringement. Randstad has been held liable for the infringement only as its capacity as the successor of Vedior NV. If Vedior NV was still in existence, it would have been held liable for the infringement. Including turnover in respect of Randstad Holding NV could result in a penalty that is more than necessary to achieve deterrence because it would penalise Randstad Holding NV in respect of a part of its business which had no involvement in the infringement.⁸⁸⁰

5.251 Regarding the level of the MDT, the OFT has a margin of appreciation in assessing the appropriate penalty level for achieving deterrence in any particular case.⁸⁸¹ In the circumstances of this case, the OFT considers that an upward adjustment of 15% is appropriate to achieve the policy objectives outlined in paragraph 1.4 of the Penalties Guidance.

Risk of a penalty that is more than necessary in order to achieve deterrence

5.252 In the Statement of Objections, the OFT stated that for other Parties (for example those whose economic activities are relatively concentrated in the relevant market), the financial penalty calculated at the end of Step 2 may be more than necessary to achieve deterrence. The OFT indicated that in such a case, it may consider a downward adjustment at Step 3.

5.253 In decreasing the level of any financial penalties in accordance with the preceding paragraph, the OFT outlined in the Statement of Objections that it would consider whether the penalties are excessive given the

⁸⁷⁹ See paragraph 5.86 of the Statement of Objections.

⁸⁸⁰ Given that Vedior is no longer in existence, the OFT has used the turnover figures reported in its last accounts available, which is the financial year ended December 2007. In this Decision the OFT has also considered the penalty as a proportion of Vedior NV's Net Fees and total turnover.

⁸⁸¹ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 168; *Umbro Holdings Ltd and others v Office of Fair Trading* [2005] CAT 22, at paragraph 102; *Makers UK Limited v Office of Fair Trading* [2007] CAT 11, at paragraph 117.

infringement and the penalties to be imposed on other Parties.⁸⁸² Any adjustments would only be made if consistent with the OFT's policy to set penalties at a level that is necessary in order to ensure deterrence.

5.254 It can be seen from Table 5.3 above that Eden Brown, Fusion People and Henry Recruitment generate particularly large proportions of turnover in the relevant market (between [...] [C] % and [...] [C] % respectively). The OFT considers that levying a penalty on the basis of the turnover made in the relevant market without any adjustment for these Parties would result in an excessive penalty, as the penalties would be greater than necessary in order to achieve deterrence. A penalty may be considered excessive if it significantly exceeds the equivalent penalties for other parties in the same case that were involved in the same infringement and is well above the level necessary to ensure deterrence.

5.255 Adjusting the penalty for Parties that generate particularly large proportions of turnover in the relevant market is supported by case law, in particular the CAT judgment in *Umbro*.⁸⁸³

Level of the downward adjustment to ensure the penalty is not excessive

5.256 The OFT makes a downward adjustment to the penalties of each of Eden Brown, Fusion People and Henry Recruitment to narrow the range of penalties imposed on all Parties.

5.257 As set out in Table 5.3, [...] [C] % of Henry Recruitment's total turnover is generated in the relevant market. The OFT considers it is appropriate to grant Henry Recruitment a reduction of [75-85] [C] % of the penalty at Step 3 to take this into account.

5.258 As set out in Table 5.3, [...] [C] % of Fusion People's total turnover is generated in the relevant market. The OFT considers it is appropriate to grant Fusion People a reduction of [55-65] [C] % of the penalty at Step 3 to take this into account.

⁸⁸² *Sepia Logistics Ltd and Precision Concepts v Office of Fair Trading*, [2007] CAT 13, paragraph 111.

⁸⁸³ *Umbro Holdings Ltd and others v Office of Fair Trading*, [2005] CAT 22, at paragraphs 169, 176 and 177

5.259 As set out in Table 5.3, [...] [C] % of Eden Brown's total turnover is generated in the relevant market. The OFT considers it is appropriate to grant Eden Brown a reduction of [35-45] [C] % of the penalty at Step 3 to take this into account.

5.260 The OFT considers that these downward adjustments are appropriate in terms of each Party, in order to achieve the policy objectives set out in paragraph 1.4 of the Penalties Guidance.

Financial position and ability to pay

5.261 In the Statement of Objections, the OFT confirmed that a further consideration at Step 3 may include the financial position of the undertakings in question.⁸⁸⁴

5.262 With respect to the principles applicable to an adjustment for financial hardship, the OFT has noted the following two principles adopted by the CAT and set out in the following extracts from the CAT's judgment in *Sepia Logistics*.

5.263 Firstly, where an economic undertaking comprises more than one legal entity, it is necessary for the undertaking to provide evidence of the financial position of all of its various component parts, in order for the OFT to be able to assess whether there is genuine financial hardship for the undertaking as a whole.⁸⁸⁵

5.264 Secondly, the onus is upon the party in question to provide information sufficient for the OFT to make a proper assessment of its financial hardship – it is not the OFT's responsibility to search for this information or make additional enquiries of the party.⁸⁸⁶

5.265 In response to the Statement of Objections, [...] [C] and [...] [C] made representations in relation to their financial position and ability to pay any financial penalty, which the OFT cross checked against publicly filed accounts available from Companies House.

⁸⁸⁴ Penalties Guidance, at paragraph 2.11.

⁸⁸⁵ *Sepia Logistics Limited and Precision Concepts Limited v Office of Fair Trading* [2007] CAT 13 at paragraph 98.

⁸⁸⁶ *Sepia Logistics Limited and Precision Concepts Limited v Office of Fair Trading* [2007] CAT 13, at paragraphs 100 to 101.

- 5.266 For these two Parties, the OFT has assessed whether there was sufficient indication that the penalty which the OFT is imposing would threaten the viability of the undertaking concerned.
- 5.267 In making its assessment, the OFT has had regard in particular to the following three factors:
- The level of net current assets relative to the size of penalty for the undertaking;
 - The level of net assets, adjusted to take account of dividend payments made out of the undertaking in the last three years, relative to the size of penalty for the undertaking; and
 - The level of profit (or loss) after tax averaged over the last three years for which accounts were available.
- 5.268 In light of this, and after consideration of the strong and compelling evidence provided by [...] [C] in respect of its financial position, the OFT has applied a [30-40][C]% reduction to [.....] [C] penalty on the basis of its financial position, to bring the penalty to a level that would not seriously threaten the viability of the company.
- 5.269 With respect to [...] [C], the OFT considers that there is not sufficient indication that the penalty as calculated would seriously threaten the viability of the company.
- 5.270 Therefore the OFT considers that no adjustment for financial hardship is necessary for [...] [C]. The OFT notes that no other Parties made any representations in relation to financial position in response to the Statement of Objections.

Nil turnover

- 5.271 In the Statement of Objections the OFT stated that in a scenario where an undertaking has ceased trading, but the OFT has historic information that could be used to determine that undertaking's relevant turnover, this historic information can be relied upon.
- 5.272 AWA did not trade in the business year preceding the date of the OFT's decision. As set out in the Statement of Objections, where no accounts have been published or prepared in recent years, the OFT is using the

turnover figures from the most recent period of more than six months in which they have been published or prepared.

Consideration of Net Fees

- 5.273 Eden Brown⁸⁸⁷ and CDI AndersElite⁸⁸⁸ both submitted that the inclusion of temporary candidates wages in the relevant turnover would significantly increase the level of any Penalty relative to their turnover and that this should be taken into account at Step 3.
- 5.274 Eden Brown⁸⁸⁹ submitted that it is particularly concentrated on temporary workers with relatively higher wages rather than permanent candidates and it is therefore likely that a higher penalty will be levied on Eden Brown as a proportion of its turnover. Eden Brown stated that a downward adjustment should be made to take account of this.
- 5.275 Hays⁸⁹⁰ submitted that the OFT will need to apply a significant downward adjustment to make any penalty reflective of any benefit the OFT considers Hays to have obtained from its infringement. Hays stated that as any benefit could only be in the form of an increase in Net Fees, the only way for the OFT to impose a proportionate penalty is for it to ensure the absolute level of the penalty is proportionate to Hays' Net Fees.
- 5.276 Hays⁸⁹¹ further argued that the principle of equal treatment will not be met if the penalty is based on Gross Turnover as the penalty will be a reflection of the mix of temporary and permanent candidate placements rather than its culpability or gain from the infringement. In particular, a company with a higher proportion of temporary workers will be hit more heavily than a company which places a higher proportion of permanent workers although its participation in the cartel would be identical.
- 5.277 Hays referred to CAT judgments and in particular to *Richard W Price (Roofing Contractors) Ltd v OFT* where the CAT held that *'in calculating*

⁸⁸⁷ Eden Brown's written representations on the Statement of Objections, paragraph 129.

⁸⁸⁸ CDI AndersElite's written representations on the Statement of Objections, paragraph 6.2 and 6.3.

⁸⁸⁹ Eden Brown's written representations on the Statement of Objections, paragraph 130.

⁸⁹⁰ Hays' written representations on the Statement of Objections, paragraphs 4.87 to 4.89.

⁸⁹¹ Hays' written representations on the Statement of Objections, paragraphs 4.92.

the penalties those undertakings must be treated like for like' and to *Umbro Holdings Ltd v OFT*⁸⁹² judgment where the CAT held that a company should not face a penalty which is more severe as a proportion of their UK revenues simply because of differences in the 'mix' of turnover.

- 5.278 As set out in paragraph 5.174, the OFT has used Gross Turnover at step 1 for the purposes of calculating financial penalties in this case.
- 5.279 The OFT notes Hays' submission that any benefit from the infringing conduct would be in the form of an increase of Net Fees and therefore a penalty needs to proportionate to Hays' Net Fees. However in any price-fixing arrangement, the benefit from the infringing conduct would be net of any costs of sales (unless the purchasing price was also part of the cartel arrangement).
- 5.280 Moreover the OFT considers that the principle of equal treatment set out in the case law and in particular in the *Umbro* judgment⁸⁹³ does not require the OFT to adjust penalties simply because some parties are more concentrated on the placement of temporary candidates than others. In *Umbro*, the difference in the 'mix' of turnover between the companies related to the difference in the level of concentration in the relevant market, and not the 'mix' of turnover which forms the relevant turnover. In any industry each undertaking will derive its turnover from the sale of a variety of goods or services, some having a larger margin than others. Each undertaking would have a different mix of goods or services in the relevant market. There is nothing specific to the recruitment sector and it would not be appropriate to adjust the penalties on the basis that companies with a higher proportion of temporary workers will have higher relevant turnover.
- 5.281 For these reasons, the OFT does not consider it appropriate to make any specific downward adjustment given the use of Gross Turnover at Step 1. If the OFT were required to do so, it would simply invalidate to a large extent the use of turnover at Step 1.

⁸⁹² *Umbro Holdings Ltd and others v Office of Fair Trading* [2005] CAT 22, at paragraph 176.

⁸⁹³ *Umbro Holdings Ltd and others v Office of Fair Trading* [2005] CAT 22 at paragraph 176.

- 5.282 However, given the representations received from the Parties in relation to consideration of Net Fees as set out above, the OFT has also, for completeness, assessed the level of penalties across the Parties as a proportion of each Party's Net Fees.
- 5.283 The OFT finds that the penalties expressed as a proportion of Net Fees fall within a range [...] % and [...] [C] % of Net Fees across the Parties.⁸⁹⁴
- 5.284 The OFT considers that these penalties are appropriate in terms of each Party, to achieve the policy objectives as set out in paragraph 1.4 of the Penalties Guidance.

Step 4 – adjustment for aggravating and mitigating factors

- 5.285 The OFT has the power to increase the penalty where there are aggravating factors, or decrease it where there are mitigating factors.⁸⁹⁵ Examples of aggravating and mitigating factors are set out in the OFT's Penalties Guidance.⁸⁹⁶

Aggravating factors

Intentional or negligent

- 5.286 The OFT considers that an infringement committed intentionally, rather than negligently, may be an aggravating factor.⁸⁹⁷ In the Statement of Objections, the OFT set out that it considered that the nature of the infringement was such that the Parties must have been aware, or could not have been unaware, that their conduct had the object or would have

⁸⁹⁴ The penalty of CDI Corp after Step 5 represents [...] [C] % of CDI Corp's Net Fees. The penalty of Eden Brown after Step 5 represents [...] [C] % of Eden Brown's Net Fees. The penalty of Fusion People after Step 5 ([...] [C]) represents [...] [C] % of Fusion People's Net Fees. The penalty of Hays after Step 5 represents [...] [C] % of Hays' Net Fees. The penalty of Henry Recruitment after Step 5 represents [...] [C] % of Henry Recruitment's Net Fees. The penalty after Step 5 represents [...] [C] % of Vedior NV's Net Fees (see paragraph 5.250 above). The OFT's notes that AWA's penalty as expressed as a proportion of its Net Fees is [...] [C] % and is therefore outside this range. The OFT notes the specific circumstances in relation to AWA (in particular that AWA's penalty is based on 2006 turnover figures, that it went into liquidation on 31 October 2007 and that it is due to be dissolved on 21 October 2009) which do not apply to any of the other Parties. Given these circumstances, the OFT does not consider that the fact that AWA's penalty as expressed as a proportion of Net Fees is outside this range has a bearing on its assessment of proportionality as set out above.

⁸⁹⁵ Penalties Guidance, at paragraph 2.14.

⁸⁹⁶ Penalties Guidance, at paragraphs 2.14 to 2.16

⁸⁹⁷ Penalties Guidance, at paragraph 2.15.

the effect of preventing, restricting or distorting competition.⁸⁹⁸

Accordingly the OFT considered that the infringement was committed intentionally and this may be reflected in the penalties.

- 5.287 The OFT remains of the view that the infringement was committed intentionally, for the reasons set out below. However, the OFT has not exercised its discretion to apply an uplift on the basis that the infringement was committed intentionally.
- 5.288 Section 4 of this Decision cites evidence that each Party could not have been unaware that its conduct had the object or could have the effect of restricting, preventing or distorting competition. For example, the parties received the CRF1 Agenda prior to CRF1 and so were aware that during this meeting the participants would consider 'the rise (and fall) of Parc (Taylor Woodrow/Vinci Agreements)', the 'benefits of a united front, common goals and actions' and 'proposed benchmarks to entry – Fees and margin percentages'.

Hays' Representations and the OFT's response

- 5.289 Hays made a number of representations in response to the Statement of Objections to the effect that its infringement was negligent rather than intentional, and as such no aggravating factor should be applied. Henry Recruitment also made representations to the effect that it had not intentionally infringed the Act, and that its infringement was as a result of naivety rather than intent.
- 5.290 Hays submitted that Mr Cheshire, Hays' representative at the CRF, attended the CRF because he had '*identified a number of legitimate issues that needed to be addressed in the construction recruitment industry.*'⁸⁹⁹ Hays also submitted that the evidence shows that Mr Cheshire continued to attend the CRF not because of the discussion about Parc, but rather because of all the other legitimate industry issues that were discussed at the CRF meetings.

⁸⁹⁸ *Napp Pharmaceutical v Director General of Fair Trading* [2002] CAT 1, at paragraphs 453 to 457. See also *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at paragraph 221.

⁸⁹⁹ Hays' written representations on the Statement of Objections, paragraph 4.101.

5.291 Hays also stated that there was no intention on Mr Cheshire's part to get involved in a cartel, and he did not '*appreciate that his mere presence in those discussions could be an infringement even if Hays did not implement the matters being discussed.*'⁹⁰⁰

5.292 Hays submitted that Mr Cheshire's evidence is that he did not read any of the CRF materials and there is no evidence that Mr Cheshire had read the agenda prior to attending CRF1.

5.293 Hays therefore stated that Hays' participation in the CRF through Mr Cheshire should be characterised as negligent, rather than intentional. In all the circumstances '*the correct assessment is that Mr Cheshire 'ought to have known' rather than 'he must have been aware' that his conduct could encourage a restriction or distortion of competition.*'⁹⁰¹

5.294 The OFT does not accept Hays' representations in this regard. In its guideline *Enforcement*⁹⁰² the OFT sets out its position on the circumstances in which the OFT might find that an infringement has been committed intentionally. These include:

- the agreement or conduct has as its object the restriction of competition;
- the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out; or
- the undertaking could not have been unaware that its agreement or conduct would have the effect of restricting competition, even if it did not know that it would infringe Article 81, Article 82, the Chapter I and/or Chapter II prohibition.

5.295 The CAT held in *Napp* that to find that an infringement had been committed intentionally:

'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

⁹⁰⁰ Hays' written representations on the Statement of Objections, paragraph 4.105.

⁹⁰¹ Hays' written representations on the Statement of Objections, paragraph 4.109.

⁹⁰² OFT 407, *Enforcement* (December 2004) at paragraphs 5.9-5.11.

*undertaking also knew that it was infringing the Chapter I or Chapter II prohibition.*⁹⁰³

- 5.296 Thus, the intention relates to the facts and not the law. Ignorance or mistake of law is no bar to a finding of an intentional infringement.⁹⁰⁴
- 5.297 Accordingly, even if the representatives attending CRF meetings were not aware that such activity could constitute an infringement of the Act, this is irrelevant to the consideration of whether the infringement was intentional. What is relevant is whether these representatives could not have been unaware that this conduct had either the object (or effect) of preventing, restricting or distorting competition. Given the nature of the infringement in this case (which involved a price fix and collective boycott), the OFT considers that the Parties could not have been unaware that their conduct had the object (or effect) of preventing, restricting or distorting competition.
- 5.298 Accordingly, the OFT considers that the infringement was committed intentionally rather than negligently.
- 5.299 During the course of its investigation the OFT has also obtained evidence suggesting that the existence of the CRF and its aim(s) be kept secret, namely a handwritten minute taken at CRF1 that the CRF should be mindful 'not to let it get out that we are a cartel'.⁹⁰⁵ The OFT notes that Hays, Fusion People and Henry Recruitment have disputed whether this statement was made. For example, Hays has submitted that this statement has not been corroborated by any other party and therefore is only evidence of the intention of HMG and does not show that Hays intended or agreed to keep the CRF a secret.⁹⁰⁶
- 5.300 The OFT considers that this statement is a relevant part of the evidential matrix to this investigation. However, the OFT notes that there is sufficient evidence to show that the infringement was committed intentionally, even without this statement.

⁹⁰³ *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director of Fair Trading* [2002] CAT 1, at paragraph 46

⁹⁰⁴ OFT 407, *Enforcement* (December 2004) at paragraph 5.10.

⁹⁰⁵ Handwritten notes of CRF1 (taken by Karen Harris, the minute taker) (see paragraph 4.193).

⁹⁰⁶ Hays' written representations on the Statement of Objections at paragraphs 4.107 – 4.108.

5.301 Given the overall levels of penalties in this case, the OFT has not exercised its discretion to apply an uplift on the basis that the infringement was committed intentionally.

Role of the undertaking as leader/instigator

5.302 The OFT has confirmed that the role of an undertaking as a leader in, or an instigator of, an infringement may be an aggravating factor.⁹⁰⁷ This position is confirmed by both UK and European case law.⁹⁰⁸

5.303 The OFT finds that HMG can be assessed as being a leader and/or instigator of the infringement in this case.

5.304 HMG's conduct went beyond initial contact or being the first to suggest collusion.⁹⁰⁹ HMG played the principal role in initiating and organising the CRF and for suggesting and developing the conduct adopted by its members.

5.305 HMG decided which companies to invite to CRF1, made the invitations and produced and circulated the agenda for this meeting. This agenda suggested the 'united front' approach to be adopted in relation to both the emergence of Parc and pressures upon Fee Rates and by including such items within the agenda HMG sought to persuade or encourage others to support and adopt such an approach. HMG has stated that one of its concerns regarding the emergence of Parc's Neutral Vendor model was the pressure it placed on HMG's margins and internal HMG communications record a fear of 'Parc taking over' (see paragraph 4.13 above). HMG sought to address these concerns via the instigation and encouragement of a 'united front' in the form of the Collective Refusal to Supply Parc and the Target Fee Rates Initiative within the CRF (see

⁹⁰⁷ Penalties Guidance, at paragraph 2.15. See also OFT decisions in Football Kit Price Fixing case reference: CA98/06/2003, Aluminium Spacer Bars, case reference: CA98/04/2006, Hasbro UK Ltd/Argos Ltd/Littlewoods Ltd, case reference: CA98/8/2003.

⁹⁰⁸ See for example *Umbro Holdings Ltd and others v Office of Fair Trading* [2005] CAT 22, Judgement of the Court of First Instance (Fifth Chamber) 18 June 2008 in Case T-410/03 *Hoechst GmbH, v Commission of the European Communities* at paragraph 423, Case T-15/02 *BASF v Commission* [2006] ECR II 497

⁹⁰⁹ The OFT has made clear that it considers that leading or instigation is more than merely being the first to make contact or to suggest collusion in the OFT decision *Felt and single ply flat-roofing contracts in the North East of England*, at paragraph 284.

paragraph 4.26 above). HMG also took notes of the CRF Meetings and circulated these meeting notes to the other CRF Members.

- 5.306 Once CRF had been established, HMG took the lead in providing information on Fee Rates achieved to the CRF, thus providing incentives to other Parties to seek to obtain the same rates and encouraging them to do so.⁹¹⁰
- 5.307 Although HMG 'cheated' on the agreement not to deal with Parc that had been reached at CRF1, CRF2 Minutes record that HMG claimed it had only entered a PSA with Parc in order '*to go for an inside view on how Parc operate, understand their financial model and work to bring about their downfall from within*' and that Steven Ware of HMG agreed to circulate to the other CRF Members full details of this agreement, once again providing incentives to other Parties to seek to obtain the same rates and encouraging them to do so. The OFT considers that this is further evidence of HMG taking responsibility for developing and suggesting the conduct to be adopted by the CRF as a whole. See minutes of CRF2 at paragraph 4.113 above.
- 5.308 For the avoidance of doubt, the OFT does not consider that a finding of leadership and instigation of this infringement amounts to coercion, and its roles as a leader and/or instigator does not therefore alter HMG's status as an immunity applicant.⁹¹¹ Furthermore, the OFT does not consider that the fact that HMG led and/or instigated the infringement in any way diminishes the culpability of each of the other Parties. Accordingly, the OFT has increased the penalty for HMG as a result of its role as the instigator and/or leader of the infringement but has not decreased the penalty for any other Parties.

⁹¹⁰ For example, in the CRF Conference Call of 7 January 2005, Steven Ware of HMG (and Simon Cheshire of Hays) relayed to the other Parties involved in the call details of the increased Fee Rates which Colin Jellicoe of Vinci had said would be available to the first tier Recruitment Agencies who now signed the agreement with Parc for the supply of Candidates to Vinci; File Reference: AndersElite Leniency – 137 and at CRF 4 on 27 September 2005 HMG gave a presentation on Parc's activities with other Recruitment Agencies and provided details of the rates that Parc had in place with HMG and Hays at the time. File Reference: Select Leniency – 1624.

⁹¹¹ See OFT436 *Leniency in cartel cases* (March 2005) and OFT 803 *Leniency and no-action: OFT's guidance note on the handling of applications* (December 2008). An undertaking cannot qualify for total immunity from financial penalties for an infringement of the Chapter I prohibition and/or Article 81 if it has taken steps to coerce another undertaking to take part in that infringement (although reductions in penalty of up to 50 per cent may be available in some circumstances).

- 5.309 In the Statement of Objections, the OFT set out its preliminary view that HMG could be assessed as being either a leader and/or instigator of the infringement. Randstad (on behalf of HMG) made no representations to the contrary in its response to the Statement of Objections.
- 5.310 Therefore the OFT finds that HMG was a leader and/or instigator of the infringement and that this is an aggravating factor in relation to the application of step 4 in this case. The OFT therefore will apply a [5-15][C]% uplift at Step 4 of the penalty calculation for Randstad's penalty for HMG being the leader/instigator of the infringement.

Involvement of directors or senior management

- 5.311 The OFT considers that the involvement of company directors or senior management in the infringement is an aggravating factor. This is in line with the OFT's Penalties Guidance and the approach taken by the OFT in its previous decisions, see for example those relating to the roofing sector.⁹¹² The OFT considers that the positions occupied and functions performed by company directors and senior management mean they have a duty to act responsibly, to set an example to those whose actions they direct and manage and to comply with the law.
- 5.312 In the Statement of Objections, the OFT set out its preliminary view that all Parties were represented at CRF meetings by individuals of authority who the OFT considered may reasonably be regarded as occupying directorial or senior management roles.⁹¹³
- 5.313 Hays, Fusion People and Eden Brown each made representations in relation to the involvement of directors and/or senior managers in the infringement in their response to the Statement of Objections. AWA, CDI AndersElite, Henry Recruitment, BBT and HMG did not make any representations on this issue in their responses to the Statement of Objections.

Hays' representations and the OFT's response

⁹¹² Penalties Guidance, at paragraph 2.15 and CA98/01/2006 *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, at paragraph 758, for example.

⁹¹³ See Annex C for the job titles of the people who attended the CRF meetings.

- 5.314 Hays submitted in response to the Statement of Objections that at the time of the infringement Hays Specialist Recruitment had 15 to 16 divisions, one of which was the Construction and Property Division. Mr Cheshire was the Operational Director for Hays' Construction and Property division with responsibility for the south east region of the UK. Mr Cheshire was not a director of any Hays company.⁹¹⁴
- 5.315 Hays submitted that Mr Cheshire had no individual authority to make any decisions that affected the Construction and Property division's business on a national level. Hays submit that '*At most, Mr Cheshire could be described as a mid-level divisional manager with responsibilities in a small part of the Hays Specialist Recruitment business.*'⁹¹⁵
- 5.316 However, the OFT notes that at the relevant time Mr Cheshire reported directly to Robert Smith,⁹¹⁶ who in turn reported to Denis Waxman, CEO of Hays Specialist Recruitment. Mr Smith was the Chief Executive of Hays Construction and Property (C&P) and was also himself a member of Hays Specialist Recruitment Ltd's board.
- 5.317 In interview, Mr Cheshire stated that he 'ran the South East which went as far as Cambridge to Bournemouth' and that he had 'a number of regional managers or regional directors that reported to me'⁹¹⁷ and that he sat on C&P's 'board'.⁹¹⁸
- 5.318 In terms of the extent of his authority, Mr Cheshire stated that he had the authority to make decisions about matters that related to individual offices, but matters affecting C&P on a nationwide basis were determined by the C&P board (upon which he sat).

⁹¹⁴ Hays written representations on the Statement of Objections, at paragraphs 4.111 and 4.114.

⁹¹⁵ Hays written representations on the Statement of Objections, at paragraph 4.117.

⁹¹⁶ Transcript of interview of Simon Cheshire dated 2 August 2006 at p2; File Reference: Hays Leniency 660.

⁹¹⁷ Transcript of interview of Simon Cheshire dated 2 August 2006 at page 3; File Reference: Hays Leniency-660

⁹¹⁸ As Hays Construction & Property did not have its own legal personality, this 'board' was not a board in the legal sense of a board of directors. However it was Construction & Property's main decision making body. Denis Waxman, CEO of Hays Specialist Recruitment would on occasion attend these meetings. These meetings were minuted with the heading 'Hays Construction & Property – Board Meeting' – see for example page 16 of Hays Leniency 663.

- 5.319 Mr Cheshire stated that collectively he, Mr Smith and Tim Cook, determined C&P's sales strategy, including the preparation of annual strategic plans, targeting of key clients, which neutral vendors to deal with and national sales incentives.⁹¹⁹
- 5.320 Given that Mr Cheshire reported directly to the Chief Executive of C&P and was responsible for the South East region of C&P, and that he sat on C&P's 'board', the OFT considers Mr Cheshire to be a senior manager of C&P.
- 5.321 A review of Hays' annual reports for 2005 and 2006 reveal that in 2005, Hays' UK & Ireland Construction and Property division represented 29.2% of Hays Specialist Recruitment Ltd's Net Fees for the UK & Ireland, and 22% of total Net Fees for Hays Specialist Recruitment worldwide. In 2006, the figures were 26.8% and 18.9% respectively.⁹²⁰ Furthermore, Hays plc states on its website:

*'At the heart of Hays are three large specialist businesses, representing our longest established, largest and most successful business units; these are Accountancy & Finance, Construction & Property and Information Technology which operate across 27 countries.'*⁹²¹

- 5.322 Thus, on this basis, the OFT considers that Hays Construction & Property division makes up a significant proportion of Hays Specialist Recruitment's business.

- 5.323 Accordingly, taking into account the following:

- that Mr Cheshire directly reported to a board member of Hays Specialist Recruitment Ltd, who was also the Chief Executive of the Construction and Property Division;

⁹¹⁹ Transcript of interview of Simon Cheshire dated 2 August 2006 at pages 4 and 5; File Reference: Hays Leniency 660.

⁹²⁰ See Hays plc's 2005 and 2006 Annual Reports. In 2005, C&P's Net Fees were £103.6 million, Hays Specialist Recruitment Net Fees were £354.7 million (for the UK and Ireland) and £470.6 million (worldwide). The figures for 2006 were £101.6 million, £378.4 million and £538.2 million respectively.

⁹²¹ Taken from Hays plc's website on 24 March 2009.

- that Mr Cheshire sat on the 'board' of Hays Construction and Property, a division which made up a significant proportion (> 20%) of Hays Specialist Recruitment's Net Fees; and
- that Mr Cheshire formed part of a collective decision making body that decided, inter alia, which neutral vendors to contract with.

the OFT considers that Mr Cheshire was a senior manager of Hays.

Fusion People's submissions and the OFT's response

5.324 Fusion People has submitted that the involvement of its directors in the infringement ought not to be an aggravating factor. Fusion People has stated that, as opposed to the larger addressees of the Statement of Objections, it was only a small or medium sized business – it was in its first year of operation at the commencement of the CRF, having turnover of £7 million, compared to CDI AndersElite, BBT and HMG all having turnover in excess of £100 million.⁹²²

5.325 Fusion People has stated that in a smaller business, such as Fusion People, it is much more likely that board directors will be involved with the day to day running of the business, unlike some of the larger Parties to the infringement who would not have directors or senior managers involved in the infringing activity. As such, the OFT's proposed approach would wrongly discriminate against small and medium sized businesses by including an aggravating factor that could not be expected to arise for larger businesses.⁹²³

5.326 However, the OFT notes that in the present case, both Steven Ware and John Petersen were board members of HMG and CDI AndersElite respectively. Ian Wolter, who attended CRF4, was a board member of Eden Brown. Thus, representatives at the CRF of some of the 'larger businesses' (as described by Fusion People) were in fact members of those Parties' boards.

5.327 The OFT also notes that in this case it has found that all Parties were represented at the CRF by either director(s) and/or senior manager(s) (see paragraph 5.334 below). Since all Parties were represented by

⁹²² Fusion People's written representations on the Statement of Objections at paragraph 77.

⁹²³ Fusion People's written representations on the Statement of Objections at paragraphs 78-79.

either director(s) and/or senior manager(s), it is appropriate to apply an uplift to all Parties.

5.328 The OFT set out in the Statement of Objections that it considers the involvement of directors or senior management might act as an aggravating factor because the *'positions occupied and functions performed by company directors and senior management mean they have a duty to act responsibly, to set an example to those whose actions they direct and manage and to comply with the law.'* The OFT remains of this view.

5.329 This duty applies irrespective of the size of the business. Therefore, even if directors are more likely to be involved in the day to day operations of the business in small and medium enterprises, the duty on senior managers/directors still applies.

Eden Brown representations and the OFT's response

5.330 Eden Brown has accepted that directors and senior management were involved in and knew of the infringement in this case. Eden Brown also accepts that in some cases such involvement can amount to aggravation.⁹²⁴

5.331 Eden Brown submit that Ian Wolter only attended CRF meetings in his capacity as non executive director of the REC as it had been suggested the CRF may become affiliated with the REC.⁹²⁵

5.332 However, the OFT notes that in the minutes of CRF4, Ian Wolter is recorded as being from Eden Brown, rather than being from the REC. Furthermore, at this meeting the Parties agreed to *'maintain [their] stance and not support Parc.'* This meeting clearly represents a continuation of the infringement to which Eden Brown was a party. Ian Wolter failed during the course of the meeting to publicly distance Eden Brown from the infringing conduct that formed part of the meeting.

5.333 Furthermore, the OFT considers that other representatives of Eden Brown who attended the CRF, including: Tony Pearce (Sales Director)

⁹²⁴ Eden Brown's written representations on the Statement of Objections, paragraph 139.

⁹²⁵ Eden Brown's written representations on the Statement of Objections, paragraph 140.

who attended CRF1 and CRF2 and Andrew Thorpe (Divisional Director) who attended CRF3 and CRF4 are senior managers of Eden Brown.

Conclusion on involvement of directors and senior managers

5.334 On the basis of the above information, the OFT finds that directors and/or senior management of each of the Parties were therefore involved in the infringement. The OFT finds that this is an aggravating factor in relation to the application of step 4 in this case. Accordingly, the OFT applies an uplift of [5-15][C]% at Step 4 of the penalty calculation for each Party for the involvement of directors and/or senior managers in the infringement.

Mitigating factors

Compliance

5.335 The OFT considers that where a Party can demonstrate that it has taken adequate steps with a view to ensuring compliance with the Chapter I and Chapter II prohibitions and Article 81 and 82 of the EC Treaty, this may amount to a mitigating factor.⁹²⁶ In the Statement of Objections, the OFT stated that it was of the view that in order to obtain a discount, a Party would need to show that it has introduced a compliance policy and communicated this to all appropriate members of staff since it first became aware of the OFT's investigation.

5.336 CDI AndersElite, Eden Brown, Fusion People, Henry Recruitment and Hays made submissions regarding the existence of a compliance policy, in their responses to the Statement of Objections.

5.337 Following an assessment of these submissions the OFT considers that each of these Parties have adequately demonstrated that they have taken appropriately active measures to introduce compliance measures that are appropriate for the size of the company or company group in question.

5.338 The OFT will therefore apply a [0-10]% reduction at Step 4 of the penalty calculation for each of the Parties referred to in paragraph 5.336 above.

⁹²⁶ Penalties Guidance, at paragraph 2.16.

5.339 Neither BBT, HMG nor AWA made any representations regarding a compliance policy, and as such no discount will be applied to the penalty calculations of these Parties.

Cooperation

5.340 The OFT considers that cooperation which enables the enforcement process to be concluded more effectively and speedily is a mitigating factor.⁹²⁷ If any Party has provided voluntary cooperation above and beyond its legal obligations, the OFT will consider whether it should reduce that Party's penalty. Undertakings that already benefit from the leniency programme will not receive any additional reduction in financial penalties to reflect general cooperation as such cooperation is a condition of the grant of leniency.

5.341 In the present case, all Parties other than AWA have been granted leniency. The OFT does not consider that AWA have provided voluntary co-operation enabling the enforcement process to be concluded more effectively such that would warrant a mitigating factor.

5.342 Accordingly, no Party will benefit from a reduction in their penalty for co-operation.

Other mitigating factors

5.343 Hays has also made representations to the effect that there are other mitigating factors such that would warrant a reduction in the penalty at step 4. These are:

- Hays terminated the infringement prior to the OFT's investigation;
- There was genuine uncertainty as to the legal position; and
- Hays has not previously infringed any competition law.

Termination of the infringement prior to the OFT's investigation

5.344 The OFT does not consider that the fact that the Parties terminated their involvement in the infringement prior to the OFT's investigation amounts

⁹²⁷ Penalties Guidance, at paragraph 2.16.

to a mitigating factor in this case. All parties ceased their involvement in the infringement prior to the OFT's investigation and this appears to have been prompted by the CRF not being as effective as the Parties had hoped, not for any reason which might constitute a mitigating factor.⁹²⁸ The OFT does not grant any discount in this regard.

There was genuine uncertainty as to the legal position

5.345 Paragraph 2.16 of the Penalties Guidance states that a '*genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement*' may be a mitigating factor. Taking into account the nature of the infringement in this case, being a price fix and a collective boycott, the OFT does not consider that an undertaking could have held the view that there was uncertainty as to whether the agreement reached between the Parties would amount to a breach of the Chapter I prohibition. Accordingly, the OFT does not grant any discount in this regard.

Hays has not previously infringed competition law

5.346 The OFT does not consider the fact that Hays may not have infringed the Chapter I prohibition previously is sufficient to amount to a mitigating factor and therefore does not grant any discount in this regard.

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

5.347 The OFT may not fix a penalty that exceeds 10 per cent of the total turnover of the undertaking in its last business year before the date of the OFT's final Decision, calculated in accordance with the provisions of the 2000 Order.⁹²⁹ The section 36(8) turnover is not restricted to a Party's turnover in the relevant product market and relevant geographic market.⁹³⁰

⁹²⁸ For example, at CRF3 the minutes record: '*It is evident that as a group we don't actually have as much ability to control things as we first thought.*' Item 3.3.

⁹²⁹ Section 36(8) of the Act and the 2000 Order.

⁹³⁰ Penalties Guidance, at paragraph 2.17.

5.348 The OFT has assessed each of the Parties' penalties against the tests set out in the preceding paragraph (as applicable). This assessment has not necessitated any reductions to penalties at step 5 of the penalty calculation.

5.349 Also, the OFT must, when setting the amount of a penalty for a particular agreement (or concerted practice), take into account any penalty or fine that has been imposed by the European Commission or by a court or other body in another Member State in respect of the same agreement (or concerted practice).⁹³¹ The OFT is not aware that any such adjustment is necessary for assessing penalties this case.

Parties that did not trade in the business year preceding the decision

5.350 AWA did not trade in the business year preceding the date of the OFT's decision.

5.351 The statutory instrument which sets out the basis of calculation of turnover for the purposes of section 36(8) of the Competition Act, SI2000/309 (as amended by SI2004/1259), defines 'business year' as '*a period of more than six months in respect of which an undertaking publishes accounts or, if no such accounts have been published for the period, prepares accounts*'. Where no accounts have been published or prepared in recent years, for the purposes of assessment at step 5 of the penalty calculation the OFT is therefore using the turnover figures from the most recent period of more than six months in which they have been published or prepared. This is also consistent with the position in European case law.⁹³²

Application of the OFT's Leniency Policy

5.352 Randstad Holding NV (the ultimate parent of BBT and HMG) was granted Type A immunity.⁹³³ Accordingly Randstad has been granted immunity from paying any penalty and as a result its penalty has been reduced by 100% to zero.

⁹³¹ Penalties Guidance, at paragraph 2.20.

⁹³² Case C-76/06 *Britannia Alloys v Commission*, 7 June 2007.

⁹³³ See paragraph 1.6 of OFT 803 *Leniency and no-action: OFT's guidance note on the handling of applications* (December 2008) for the definition of Type A immunity.

5.353 CDI Corp (the ultimate parent of CDI AndersElite Ltd), Eden Brown Limited, Fusion People Limited, Hays plc (the ultimate parent of Hays Specialist Recruitment Limited) and Henry Recruitment Limited were each granted Type C leniency.⁹³⁴ The Penalties for these Parties have been reduced by the amounts listed below:

- CDI Corp – 30%
- Eden Brown Limited – 35%
- Fusion People Limited – 20%
- Hays plc – 30%
- Henry Recruitment Limited – 25%.

5.354 The key criteria for determining the level of the reduction percentage to be applied to Leniency Parties was the overall value added by a Leniency Party to the OFT's investigation and is applied at the end of the calculation.⁹³⁵ The Penalties Guidance notes that the overall value provided by the Leniency Party and any reduction in financial penalty will generally be calculated taking into account the stage at which the undertaking comes forward, the evidence already in the OFT's possession and the probative value of the evidence provided by the undertaking.⁹³⁶ The OFT has assessed the value added to the OFT's investigation provided by each Leniency Party according to these factors, in particular:

- a) The clarity and extent of admissions made by the Leniency Parties;
- b) Conduct which the OFT would not have been able to investigate but for the evidence of that Leniency Party;
- c) The information provided by the Leniency Party that assists the OFT in determining whether an infringement occurred, and the time

⁹³⁴ See paragraph 1.6 of OFT 803 *Leniency and no-action: OFT's guidance note on the handling of applications* (December 2008) for the definition of Type C leniency

⁹³⁵ See paragraph 4.37 which identifies the Leniency Parties.

⁹³⁶ OFT 803 *Leniency and no-action: OFT's guidance note on the handling of applications* (December 2008) at paragraph 5.5.

at which this information was provided in relation to other information obtained by the OFT; and

- d) Whether the Leniency Party has challenged the evidence obtained by the OFT.

Penalty for A Warwick Associates Ltd

Step 1 – Calculation of the Starting Point

5.355 AWA's financial year ran from January to December. As noted above, AWA was placed in liquidation on 31 October 2007. Accordingly, AWA's turnover in the relevant product and geographic market for the business year preceding this decision, January to December 2008, is zero.

5.356 Because AWA's relevant turnover is zero, the starting point for AWA is also zero.

Step 2 – Adjustment for Duration

5.357 As stated in paragraph 5.231 above the OFT has made an upward adjustment to AWA's duration to one year. Thus no uplift is applied to AWA's starting point.

5.358 However, as AWA's penalty after Step 1 is zero, its penalty after Step 2 is also zero.

Step 3 – Adjustment for other factors

5.359 As AWA's did not trade in the business year preceding the date of the OFT's decision, the OFT use its turnover figures which have been reported in the accounts for the year 2006.

5.360 In the business year running from January to December 2006, AWA reported a total turnover of £222,401.

5.361 Therefore the OFT will apply a Minimum Deterrence Threshold at 15% on £222,401. As a result, the penalty after Step 3 is £3,002.

Step 4 – Adjustment for aggravating and mitigating factors

Aggravating factors

5.362 The OFT considers that AWA was represented at the CRF by directors of AWA and therefore uplifts the penalty at Step 4 by [5-15][C]% for this involvement.

Mitigating factors

5.363 The OFT does not consider that there are any mitigating factors for AWA, so no reduction is made at step 4.

Conclusion

5.364 As a result of the preceding paragraphs, AWA's penalty will be uplifted by [5-15][C]% at Step 4. Accordingly, AWA's penalty after step 4 is £3,303.

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

5.365 For the purposes of assessment at Step 5 of the penalty calculation, the OFT is using the turnover figures from the most recent period of more than six months in which they have been published or prepared.

5.366 AWA's total turnover in the 2006 business year was £222,401. Accordingly, pursuant to section 36(8) of the Competition Act 1998, the maximum penalty that can be imposed upon AWA is £22,240.

5.367 As AWA's penalty after step 4 of the penalty calculation is £3,303, no adjustment needs to be made to AWA's penalty at Step 5.

5.368 AWA's penalty after Step 5 represents 1.5% of AWA's total turnover in 2006.

Penalty for CDI AndersElite Ltd/CDI Corp

Step 1 – Calculation of the Starting Point

5.369 CDI Corp's business year runs from January to December. Accordingly the relevant business year is January to December 2008.

5.370 CDI Corp's relevant turnover in the 2008 business year was £[...] [C]. Multiplying this by the starting point percentage of 9%, CDI Corp's penalty after step 1 is £[...] [C].

Step 2- Adjustment for Duration

5.371 As stated in paragraph 5.231 CDI AndersElite's duration has been rounded up to 1.25 years. Accordingly, CDI Corp's penalty after step 1 is uplifted by 25% as an adjustment for duration.

5.372 Accordingly, CDI Corp's penalty is £[...] [C] after step 2.

Step 3 – Adjustment for other factors

5.373 No adjustment has been made to the penalty of CDI Corp at Step 3. Therefore, CDI Corp's penalty is £[...] [C] after Step 3.

Step 4 – Adjustment for aggravating and mitigating factors

Aggravating factors

5.374 The OFT considers that CDI Corp was represented at the CRF by a director of CDI AndersElite and therefore uplifts the penalty at Step 4 by [5-15][C]% for this involvement.

Mitigating factors

5.375 The OFT considers that CDI Corp has implemented measures with a view to ensuring compliance with the Chapter I and Chapter II prohibitions. Accordingly, CDI Corp is granted a [0-10][C]% reduction to its penalty for these measures.

Conclusion

5.376 CDI Corp's penalty is uplifted by [0-15][C]% as a result of aggravating and mitigating factors. Accordingly, CDI Corp's penalty after step 4 is £10,861,127.

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

5.377 CDI Corp's total turnover in the 2008 business year was £605,599,959.⁹³⁷ Accordingly, pursuant to section 36(8) of the Competition Act 1998, the maximum penalty that can be imposed upon CDI Corp is £60,559,996.

5.378 As CDI Corp's penalty after step 4 of the penalty calculation is £10,861,127, no adjustment needs to be made to CDI Corp's penalty at Step 5.

5.379 CDI Corp's penalty after Step 5 represents 1.8% of CDI Corp's total turnover.

Leniency

5.380 CDI Corp was granted a 30% reduction in the level of a financial penalty under the OFT's leniency programme so long as it complied with certain conditions. The OFT is satisfied that CDI Corp has complied with the conditions for leniency. Accordingly, the financial penalty is therefore reduced to £7,602,789.

Penalty for Eden Brown Ltd

Step 1 – Calculation of the Starting Point

5.381 Eden Brown's business year runs from April to March. Accordingly the relevant business year for Eden Brown is April 2008 to March 2009.

5.382 Eden Brown's relevant turnover for this year was £[...][C]. Multiplying this by the starting point percentage of 9%, Eden Brown's penalty after step 1 is £[...][C].

Step 2- Adjustment for Duration

5.383 As stated in paragraph 5.231 above, Eden Brown's duration has been rounded up to 1.25 years. Accordingly, Eden Brown's penalty after step 1 is uplifted by 25% as an adjustment for duration.

5.384 Accordingly, Eden Brown's penalty is £[...][C] after step 2.

⁹³⁷ This is calculated based upon CDI Corp's total turnover of USD\$ 1,118,597,000 converted to GBP(£) at the ECB exchange rate.

Step 3 – Adjustment for other factors

5.385 As stated in paragraph 5.259, the OFT has granted Eden Brown a reduction of [35-45][C]% of its penalty at Step 3 to ensure that the penalty is not excessive (given Eden Brown's large proportion of total turnover generated in the relevant market) but is still sufficient in order to achieve deterrence.

5.386 Accordingly Eden Brown's penalty is £[...][C] after Step 3.

Step 4 – Adjustment for aggravating and mitigating factors

Aggravating factors

5.387 The OFT considers that Eden Brown was represented at the CRF by a director and/or senior manager of Eden Brown and therefore uplifts the penalty at Step 4 by [5-15][C]% for this involvement.

Mitigating factors

5.388 The OFT considers that Eden Brown has implemented measures with a view to ensuring compliance with the Chapter I and Chapter II prohibitions. Accordingly, Eden Brown is granted a [0-10][C]% reduction to its penalty for these measures.

Conclusion

5.389 Eden Brown's penalty is uplifted by [0-15][C]% as a result of aggravating and mitigating factors. Accordingly, Eden Brown's penalty after step 4 is £1,649,336.

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

5.390 Eden Brown's total turnover in the 2008/2009 business year was £[...][C]. Accordingly, pursuant to section 36(8) of the Competition Act 1998, the maximum penalty that can be imposed upon Eden Brown is £[...][C].

5.391 As Eden Brown's penalty after step 4 of the penalty calculation is £1,649,336, no adjustment needs to be made to Eden Brown's penalty at Step 5.

5.392 Eden Brown's penalty after Step 5 represents [...] [C] % of Eden Brown's total turnover.

Leniency

5.393 Eden Brown was granted a 35% reduction in the level of a financial penalty under the OFT's leniency programme so long as it complied with certain conditions. The OFT is satisfied that Eden Brown has complied with the conditions for leniency. Accordingly, the financial penalty is therefore reduced to £1,072,069.

Penalty for Fusion People Ltd

Step 1 – Calculation of the Starting Point

5.394 Fusion People's business year runs from January to December. Accordingly the relevant business year for Fusion People is January to December 2008.

5.395 Fusion People's relevant turnover for this year was £[...] [C]. Multiplying this by the starting point percentage of 9%, Fusion People's penalty after step 1 is £[...] [C].

Step 2- Adjustment for Duration

5.396 As stated in paragraph 5.231 above, Fusion People's duration has been rounded up to 1.25 years. Accordingly, Fusion People's penalty after step 1 is uplifted by 25% as an adjustment for duration.

5.397 Accordingly, Fusion People's penalty is £[...] [C] after step 2.

Step 3 – Adjustment for other factors

5.398 As stated in paragraph 5.258 above, the OFT has granted Fusion People a reduction of [55-65] [C] % of its penalty at Step 3 to ensure that the penalty is not excessive (given Fusion People's large proportion of total turnover generated in the relevant market) but is still sufficient in order to achieve deterrence.

5.399 [...] [C].

5.400 Accordingly, Fusion People's penalty is £[...] [C] after Step 3.

Step 4 – Adjustment for aggravating and mitigating factors

Aggravating factors

5.401 The OFT considers that Fusion People was represented at the CRF by a director of Fusion People and therefore uplifts the penalty at Step 4 by [5-15] [C] % for this involvement.

Mitigating factors

5.402 The OFT considers that Fusion People has implemented measures with a view to ensuring compliance with the Chapter I and Chapter II prohibitions. Accordingly, Fusion People is granted a [0-10] [C] % reduction to its penalty for these measures.

Conclusion

5.403 Fusion People's penalty is uplifted by [0-15] [C] % as a result of aggravating and mitigating factors. Accordingly, Fusion People's penalty after step 4 is £156,277.

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

5.404 Fusion People's total turnover in the 2008 business year was £[...] [C]. Accordingly, pursuant to section 36(8) of the Competition Act 1998, the maximum penalty that can be imposed upon Fusion People is £[...] [C].

5.405 As Fusion People's penalty after step 4 of the penalty calculation is £156,277 no adjustment needs to be made to Fusion People's penalty at Step 5.

5.406 Fusion People's penalty after Step 5 represents [...] [C] % of Fusion People's total turnover.

Leniency

5.407 Fusion People was granted a 20% reduction in the level of a financial penalty under the OFT's leniency programme so long as it complied with

certain conditions. The OFT is satisfied that Fusion People has complied with the conditions for leniency. Accordingly, the financial penalty is therefore reduced to £125,021.

Penalty for Hays Specialist Recruitment Ltd/Hays Specialist Recruitment (Holdings) Ltd/ Hays plc

Step 1 – Calculation of the Starting Point

5.408 Hays' business year runs from July to June. Accordingly the relevant business year for Hays is July 2008 to June 2009.

5.409 Hays' relevant turnover for this year was £[...] [C]. Multiplying this by the starting point percentage of 9%, Hays' penalty after step 1 is £[...] [C].

Step 2- Adjustment for Duration

5.410 As stated in paragraph 5.231 above, Hays duration has been rounded up to 1.25 years. Accordingly, Hays' penalty after step 1 is uplifted by 25% as an adjustment for duration.

5.411 Accordingly, Hays' penalty is £[...] [C] after step 2.

Step 3 – Adjustment for other factors

5.412 As stated in paragraphs 5.5.249-249 – 5.251 above, Hays' penalty has been uplifted to a level that would have been reached after Steps 1 and 2 if Hays had derived 15% of its turnover in the relevant market, so as to ensure that it reaches a level sufficient to achieve deterrence.

5.413 Hays' turnover for this year was £2,447,700,000. Accordingly Hays' penalty is £41,304,938 after Step 3.

5.414 This level of MDT results in a penalty after Step 3 which is 1.69% of Hays' total turnover.

Step 4 – Adjustment for aggravating and mitigating factors

Aggravating factors

5.415 The OFT considers that Hays was represented at the CRF by a senior manager of Hays Specialist Recruitment Ltd and therefore uplifts the penalty at Step 4 by [5-15][C]% for this involvement.

Mitigating factors

5.416 The OFT considers that Hays has implemented measures with a view to ensuring compliance with the Chapter I and Chapter II prohibitions. Accordingly, Hays is granted a [0-10][C]% reduction to its penalty for these measures.

Conclusion

5.417 Hays' penalty is uplifted by [0-15][C]% as a result of aggravating and mitigating factors. Accordingly, Hays' penalty after step 4 is £43,370,184.

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

5.418 Hays' total turnover in the business year ended June 2009 was £2,447,700,000. Accordingly, pursuant to section 36(8) of the Competition Act 1998, the maximum penalty that can be imposed upon Hays is £244,770,000.

5.419 As Hays' penalty after step 4 of the penalty calculation is £43,370,184, no adjustment needs to be made to Hays' penalty at Step 5.

5.420 Hays's penalty after Step 5 represents 1.8% of Hays' total turnover.

Leniency

5.421 Hays was granted a 30% reduction in the level of a financial penalty under the OFT's leniency programme so long as it complied with certain conditions. The OFT is satisfied that Hays has complied with the conditions for leniency. Accordingly, the financial penalty is therefore reduced to £30,359,129.

Penalty for Henry Recruitment Ltd

Step 1 – Calculation of the Starting Point

5.422 Henry Recruitment's business year runs from January to December. Accordingly the relevant business year for Henry Recruitment is January to December 2008.

5.423 Henry Recruitment's relevant turnover for this year was £[...][C]. Multiplying this by the starting point percentage of 9%, Henry Recruitment's penalty after step 1 is £[...][C].

Step 2- Adjustment for Duration

5.424 As stated in paragraph 5.231 above, Henry Recruitment's duration has been rounded up to one year. Accordingly, no multiplier is applied to Henry Recruitment's penalty for duration. Accordingly, Henry Recruitment's penalty after step 2 is £[...][C].

Step 3 – Adjustment for other factors

5.425 As stated in paragraph 5.257 above, the OFT has granted Henry Recruitment a reduction of [75-85][C]% of its penalty at Step 3 to ensure that the penalty is not excessive (given that all Henry Recruitment's turnover is generated in the relevant market) but is still sufficient in order to achieve deterrence.

5.426 Accordingly, Henry Recruitment's penalty is £[...][C] after Step 3.

Step 4 – Adjustment for aggravating and mitigating factors

Aggravating factors

5.427 The OFT considers that Henry Recruitment was represented at the CRF by a director of Henry Recruitment and therefore uplifts the penalty at Step 4 by [5-15][C]% for this involvement.

Mitigating factors

5.428 The OFT considers that Henry Recruitment has implemented measures with a view to ensuring compliance with the Chapter I and Chapter II prohibitions. Accordingly, Henry Recruitment is granted a [0-10][C]% reduction to its penalty for these measures.

Conclusion

5.429 Henry Recruitment's penalty is uplifted by [0-15][C]% as a result of aggravating and mitigating factors. Accordingly, Henry Recruitment's penalty after step 4 is £144,057.

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

5.430 Henry Recruitment's total turnover in the 2008 business year was £[...][C]. Accordingly, pursuant to section 36(8) of the Competition Act 1998, the maximum penalty that can be imposed upon Henry Recruitment is £[...][C].

5.431 As Henry Recruitment's penalty after step 4 of the penalty calculation is £144,057, no adjustment needs to be made to Henry Recruitment's penalty at Step 5.

5.432 Henry Recruitment's penalty after Step 5 represents [...][C]% of Henry Recruitment's total turnover.

Leniency

5.433 Henry Recruitment was granted a 25% reduction in the level of a financial penalty under the OFT's leniency programme so long as it complied with certain conditions. The OFT is satisfied that Henry Recruitment has complied with the conditions for leniency. Accordingly, the financial penalty is therefore reduced to £108,043.

Penalty for Beresford Blake Thomas Ltd/Hill McGlynn & Associates Ltd/Randstad UK Holding Ltd/Randstad Holding NV

Step 1 – Calculation of the Starting Point

5.434 Randstad's business year runs from January to December. Accordingly the relevant business year for Randstad is January to December 2008.

5.435 Randstad's relevant turnover for this year was £[...][C]. Multiplying this by the starting point percentage of 9%, Randstad's penalty after step 1 is £[...][C].

Step 2- Adjustment for Duration

5.436 As stated in paragraph 5.231 above, Randstad's duration has been rounded up to 1.25 years. Accordingly, Randstad's penalty after step 1 is uplifted by 25% as an adjustment for duration.

5.437 Accordingly, Randstad's penalty after step 2 is £[...] [C].

Step 3 – Adjustment for other factors

5.438 As stated in paragraph 5.249 - 5.251, Randstad's penalty has been uplifted to a level that would have been reached after Steps 1 and 2 if Randstad⁹³⁸ had derived 15% of its turnover in the relevant market, so as to ensure that it reaches a level sufficient to achieve deterrence.

5.439 In 2007, Vedior NV reported a turnover of £5,770,354,880.⁹³⁹ Accordingly Randstad's penalty is £97,374,739 after Step 3.

5.440 This level of MDT results in a penalty after Step 3 which is 1.69% of Vedior NV's total turnover.

Step 4 – Adjustment for aggravating and mitigating factors

Aggravating factors

5.441 The OFT considers that Randstad was represented at the CRF by a director and / or a senior manager of both HMG and BBT. Randstad's penalty is therefore uplifted at Step 4 by [5-15] [C] % for this involvement.

5.442 The OFT considers that HMG was the leader/instigator of the infringement and further uplifts Randstad's penalty by [5-15] [C] %.

Mitigating factors

5.443 The OFT does not consider there are any mitigating factors for Randstad.

Conclusion

⁹³⁸ The OFT has used Vedior NV's turnover at Step 3 – see paragraph 5.250 above.

⁹³⁹ This is calculated based upon Vedior NV's turnover of 8,432,000,000 Euros converted to GBP (£) at the ECB exchange rate.

5.444 Randstad's penalty is uplifted by [10-30][C]% as a result of aggravating and mitigating factors. Accordingly, Randstad's penalty after step 4 is £116,849,686.

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

5.445 Randstad's total turnover in the 2008 business year was £11,178,497,152.⁹⁴⁰ Accordingly, pursuant to section 36(8) of the Competition Act 1998, the maximum penalty that can be imposed upon Randstad is £1,117,849,715.

5.446 As Randstad's penalty after step 4 of the penalty calculation is £116,849,686, no adjustment needs to be made to Randstad's penalty at Step 5.

5.447 Randstad's penalty after Step 5 represents 1% of Randstad's total turnover. Randstad's penalty after Step 5 represents 2% of Vedior's total turnover.

Leniency

5.448 Randstad was granted a 100% reduction in the level of a financial penalty under the OFT's leniency programme so long as it complied with certain conditions. The OFT is satisfied that Randstad has complied with the conditions for leniency. Accordingly, the financial penalty for Randstad is therefore reduced to zero.

C Payment of penalty

5.449 The OFT therefore requires the Parties to pay the penalties set out in Table 5.4.

5.450 The penalties will become owed to the OFT in their entirety on 2 December 2009, and must be paid to the OFT by close of banking business on that date.⁹⁴¹ If the penalty is not paid, and either an appeal against the imposition or amount of that penalty has not been made or

⁹⁴⁰ This is calculated based upon Randstad's turnover of 14,038,400,000 Euros converted to GBP (£) at the ECB exchange rate.

⁹⁴¹ Details of how to pay are notified in the letter accompanying this Decision.

such an appeal has been made and determined in the OFT's favour, the OFT may commence proceedings to recover the amount as a civil debt.

Table 5.4 – Payment of penalty

Party	Penalty pre-discount	Penalty payable
A Warwick Associates Ltd	£3,303	£3,303
CDI AndersElite Ltd CDI Corp	£10,861,127	£7,602,789
Eden Brown Ltd	£1,649,336	£1,072,069
Fusion People Ltd	£156,277	£125,021
Hays Specialist Recruitment Ltd Hays Specialist Recruitment (Holdings) Ltd Hays plc	£43,370,184	£30,359,129
Henry Recruitment Ltd	£144,057	£108,043
Beresford Blake Thomas Ltd Hill McGlynn & Associates Ltd Randstad UK Holding Ltd Randstad Holding NV	£116,849,686	£0



Heather Clayton on behalf of the Office of Fair Trading
Senior Director

29 September 2009

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ANNEX A DEFINITIONS OF RELEVANT CANDIDATE ROLES AND CALCULATION OF RELEVANT TURNOVER

- A.1 In this Annex the OFT sets out its findings on the relevant candidate roles consistent with the OFT's assessment of relevant turnover.
- A.2 The OFT's assessment of relevant turnover is turnover for the supply by Recruitment Agencies in the UK of Candidates with professional, managerial, trade and labour skills required by the Construction Industry related to the design, build and post-build work of residential and commercial premises, public buildings and civil engineering projects.
- A.3 The Construction Industry requires a range of Candidates with different skills and qualifications that suit the specific needs of each role or vacancy. The OFT has found it is common practice for a wide range of terms, job titles or role profiles to be used by the Construction Industry or by Recruitment Agencies to describe job vacancies. In some cases Candidates may be fulfilling similar roles albeit with different job titles. This can result in confusion or ambiguity over the nature or relevance of certain Candidates.
- A.4 In order to ensure a consistent treatment of relevant turnover for all Parties subject to this Decision, the OFT has devised a range of definitions for professional, managerial, trade and labour skills, and revenue derived from supply of these types of Candidate should therefore be included in relevant turnover. These roles include:
- Architectural roles;
 - Planning and Estimating roles;
 - Quantity and commercial surveyors or cost control roles;
 - Other surveyors, including: Building, Building Control, Land surveyor;
 - Inspection / quality assurance roles;
 - Management roles: Project, Site, Commercial, Facilities, and Land;
 - Engineers, in particular: Civil, Structural, Mechanical and Electrical, Geo-technical and Water / Drain;
 - Building Services and Building Services Engineer; and
 - Trade Skills: Site foremen, Trades skills / operatives, Plant Operators, General Labourers.

A.5 To identify relevant candidates some general principles apply:

- The functions, role, responsibility and qualifications of Candidates are the most appropriate factors to assess the relevant of Candidates. As noted above job titles may not be a good guide to the roles of Candidates;
- Relevant Candidates include those involved in the design, construction and post-build (fitting out and facilities management) of building and civil engineering projects;
- All Candidates that meet the definitions, or fulfil the same functions, irrespective of the client recruiting the Candidate are included. This includes any client involved with residential and commercial premises, public buildings and any type of civil engineering project. For the avoidance of doubt this includes civil engineering work related to railway construction, maintenance or refurbishment (e.g. field engineers, rail project engineers, P-WAY design engineer, rail surveyors etc.) and civil engineering relating to highways (e.g. highways infrastructure engineer);
- The definitions include Candidates for all grades or seniority of role, from junior, trainee or apprentice staff to senior management.

A.6 The OFT's work on assessing relevant turnover identified a number of roles which the OFT considers do not fall within the relevant market as these are roles not required by the Construction Industry in either the design, build or post build stages. These roles include: environmental and planning enforcement roles; specialist environmental surveying (e.g. flood risk specialists); housing management for existing residential housing stock (e.g. social landlord housing management staff or for MoD defence estates) and building surveyors supplied for management of existing residential housing stock; ongoing or planned maintenance roles for existing residential, commercial or public buildings and also civil engineering structures; and operational roles for management of utilities (e.g. waste water or network modeller)

A.7 Further, the OFT has considered a number of roles related to Intelligent Transport Systems (ITS). The OFT excludes ITS roles from estimation of relevant turnover.

Definitions

Architectural roles

- A.8 'Architectural' includes roles focusing on the design phase of specific building or civil engineering projects and those dealing with the project management or build phase. A number of different roles may be included in the architectural category, reflecting different levels of responsibility or role profile including for example: Architects, Architectural Assistants, Architectural Technicians, Computer Aided Design (CAD) Technicians and Design or Planning Manager / Co-ordinator.
- A.9 Architects may design building structures preparing detailed drawings and specifications, choose building materials and inspect on-site building work. Architects are likely to liaise regularly with the client, engineers, and the construction team. They will also deal with the local authorities to obtain planning permission. It is likely that most architectural work will be off site although occasional visits are necessary.
- A.10 A degree in architecture, recognized by the Royal Institute of British Architects (RIBA), as well as work experience in an architectural office is necessary to become qualified. For roles focused on project management or the build phase of construction, an HNC or similar construction-focused qualification may be more relevant.
- A.11 Landscape architects design and develop the landscape around buildings. Knowledge of soils, environment and horticulture. Qualifications required include NVQs and professional qualifications accredited by the Landscape Institute.

Planning and Estimating Roles

- A.12 Planners set out precise plans for a project or in response to an invitation to pre-qualify or tender. The planners' role is to ensure the project is completed on time, within budget and to agreed quality. Estimators will approximate total costs from contract drawings and from buyer's prices. These roles provide a structured approach to the development and management of the project time-model and methodology that includes

identification of all constraints, risks, health and safety, environmental, customer, third party and supply chain issues for all project phases.

- A.13 It appears to the OFT that ideally, candidates should have experience in the construction services sector, and most are trained in an aspect of construction or building to ensure full understanding of methods and processes.

Quantity and commercial surveyors or cost control roles

- A.14 This category includes cost managers and commercial managers or buyers involved either with the design or development of a construction project or the day to day cost management of a project. A quantity / commercial surveyor plays a key role in the financial management of a construction project to ensure they run on time and to budget, arranging contracts, negotiating payments and settling accounts. The role may involve negotiation with contractors/subcontractors to get best value. Qualifications may include membership / fellowship of the Chartered Institute of Building (CIOB) or Royal Institute of Chartered Surveyors (RICS) obtained through further education or vocational training.

Other Surveyors

- A.15 Surveyors have a broad knowledge of all stages of the building process, including the legal and technical aspects of building. They will assist the delivery team to ensure that a building project is operating effectively and efficiently and will usually be working on site.
- A.16 Degree qualifications are usually required, most often covering surveying or civil engineering. Professional exams are set by the Royal Institute of Chartered Surveyors (RICS) or in some cases by the Chartered Institute of Buildings, the Institution of Civil Engineering Surveyors, the Association of Building Engineers or Institute of Building Control. Specific types of surveyors includes:

- Building surveyor

Building surveyors ascertain the physical state of a building and ensures it is structurally sound. As such, they may be involved in the design, maintenance, alteration, repair and refurbishment of a

building. Building surveyors may carry out structural surveys and prepare plans and specifications for new or existing buildings.

- Building control surveyor

The role of a building control surveyor is to ensure building regulations are met as a building project is undertaken. It includes reviewing plans for buildings and on-site inspection. Regulations can cover public access, health and safety and energy conservation.

- Land surveyor

The land surveyor informs the planning of construction or civil engineering works through recording and measuring landscape features. This may include the use of Global Positioning System (GPS) and Geographic Information System (GIS) software to analyse and interpret site features.

Inspection / quality assurance roles

- A.17 Inspection roles are based on-site and focus on testing the quality of work and materials used in a building or civil engineering project. These roles require knowledge of building regulations and the ability to understand site plans. The role may be termed Clerk of Works or Site Inspector. Qualifications include a construction-related background, relevant NVQ and / or professional qualifications awarded by the Institute of Clerks of Works.

Management roles

- A.18 Management roles related to construction or civil engineering will cover all or specific stages of a project to ensure that it runs smoothly, meeting cost and schedule requirements and the expectations of the client. The responsibilities and objectives of a role may vary considerably, depending upon the specific nature of the construction or civil engineering project at hand. Management roles can be involved from the design phase through to completion, fitting out and management of a building.

A.19 Those in management roles will be experienced in the industry with relevant vocational qualification and degree qualifications. Professional qualifications may be gained through the Chartered Institute of Building. Various management roles include at least:

- Project managers

Project Managers are usually the most senior staff on site and have overall responsibility for the planning, management and financial control of a construction project. Depending on the project, the role can cover all aspects from the design and pre-build stages to the end of the project. They will ensure expectations; quality standards, schedules and budgets are met.

- Site/Construction managers

As the Project Manager's main partner, the Site Manager will manage on-site production and resolve all problems that arise. The site manager would be involved in preparing a site, planning the delivery and storage of equipment and making inspections to ensure the relevant policies and regulations are met.

- Commercial managers

Commercial Managers are responsible for effectively managing the commercial resources of a project throughout the project lifecycle in order to ensure success of the project objectives and maximise profit.

- Facilities managers

Facilities Managers' role starts when the building is finished and the occupiers are ready to move in by implementing solutions for the client. They will ensure that the building function properly, from security, general maintenance, IT and the layout of the interior.

- Land managers

Land managers identify development opportunities and negotiate their acquisition with the aim of maximizing returns. They will have

strong commercial awareness and in depth of knowledge of planning and other relevant laws.

Engineering roles

A.20 Engineering is the design, analysis, and/or construction of works for practical purposes. Engineers apply scientific method to decide between different design choices and choose the solution that best matches the requirements. Engineering roles cover the range of activities from design and project roles to site based roles supervising construction.

A.21 Qualifications will typically require a relevant degree or relevant vocational qualification and professional qualifications through a relevant body including the Association of Building Engineers, the Institution of Civil Engineers, the Institution of Structural Engineers, the Institution of Mechanical Engineers or the Institution of Engineering and Technology or accredited by the Engineering Council UK.

A.22 This broad discipline includes a wide range of specialised engineers:

- Civil engineering

Civil engineers are involved in the design and construction of a variety of infrastructure projects in the built and natural environment. Many will specialise in a particular branch such as marine, highways, waterways or transport and may include Geo-technical engineers and water / drainage engineers. Civil engineers are active in the design and construction of buildings, dams, railways and roads, ensuring projects are safely and effectively completed.

- Structural engineering

Structural engineering is concerned with the structural design and structural analysis of buildings, bridges, tunnels and other structures. Their role involves calculating the stresses and forces that act upon or arise within a structure, and designing the structure to successfully resist those forces and stresses. During the construction stages, they will be involved in inspecting work and advising contractors.

- Building engineering

The building engineer can be involved in a broad range of activities to do with the planning, design, construction and maintenance of the built environment. A range of disciplines may be needed to allow project design, project management, cost evaluation, surveys and site inspections.

- Site engineering

Site engineers (also referred to as setting-out engineer) set out the plans for access and infrastructure for a building site (roads, drains, utility supply etc). In this role a site engineer will perform technical, supervisory and organisational functions, forming part of the management of a construction site. Suitable qualifications can range from vocational diplomas to degrees in a relevant discipline such as building & constructions, civil or structural engineering.

- Mechanical and Electrical Engineering

These roles cover a broad range of disciplines and functions at the design and project stage of construction and civil engineering projects. Mechanical engineers can be involved in design and on-site functions to design, install, operate and maintain plant and machinery. Electrical engineers are involved in the design and installation of electrical systems (lighting, air conditioning, door entry systems). Some Water / Drain engineer roles may fall into this discipline.

Building services / Building services engineer

A.23 This role is involved with the design, installation and maintenance of essential services like gas, electricity, water and heating. The role may require work with other members of the project delivery team, e.g. architect, engineers. Develops and manages a network of Mechanical and Electrical suppliers for the client / contractor.

Trade skills

Site / General foreman

- A.24 The site/general foreman is responsible for site and labour supervision, and takes charge of the day to day running of a construction site. Specific knowledge of certain construction techniques are required and ONC/HNC qualifications in construction may be advantage.

Trade skills / operatives

- A.25 This term applies to all skilled or semi-skilled labour with a trade skill related to construction such as carpentry/joinery, bricklaying, painting, plastering, roofing, flooring, glaziers, electricians, plumbers. Operatives will usually possess suitable vocational qualifications.

Plant operators

- A.26 These roles involve the use of heavy machinery on site. They include plant hire controllers, who will organize equipment to be in place at the right time, plant mechanics that look after the equipment and plant operators who operate the machinery, including cranes, forklift trucks, bulldozers and so on. Health and safety training is essential.

General Labourers

- A.27 This includes 'hands on' duties, including: moving materials around site, cleaning (not sanitary), stacking timber, assisting in fence erection, emptying skips and other ad hoc duties. Employers usually require candidates to have a Construction Skills Certification Scheme (CSCS) card as proof of competence and awareness of health and safety.

ANNEX B THE ACCURACY OF THE CRF MINUTES

B.1 The OFT has relied upon the minutes of CRF meetings as part of the evidence relevant to the infringement finding. Certain parties, namely Fusion People, Henry Recruitment and Hays, have to a greater or lesser extent questioned the accuracy of the CRF minutes and therefore the OFT's ability to rely upon the minutes as evidence. Fusion People has disputed the accuracy of the minutes, while Henry Recruitment and Hays have suggested that the level of agreement stated in the minutes was exaggerated. Paragraphs B.2 to B.21 below deal with the queries raised by the parties and the OFT's response to those queries.

Fusion People

B.2 Fusion People has strongly challenged the accuracy of the CRF minutes. Paul Metcalfe of Fusion People stated that he believed that the minutes did not '*reflect the actual meeting*'⁹⁴² and that there was no consensus between CRF members as to what appears in the minutes.⁹⁴³ In relation to the reference in CRF1 minutes to a minimum of 12.5% on permanent placements, he stated that this represented HMG's '*wish list*'.⁹⁴⁴ This view was supported by Paul Scott of Fusion People who stated that the minutes represented what '*Steven Hill [sic] of Hill McGlynn wanted to achieve.*'⁹⁴⁵

B.3 In its formal leniency application, Fusion People went further, stating:

'Fusion notes that the minutes of the CRF meetings suggest that agreement was reached on fees to be charged. However, these reflect Steven Ware's wish to agree fees rather than the reality of what was discussed.'

⁹⁴² Transcript of OFT interview with Paul Metcalfe (Fusion People) dated 7 September 2006 at p14. File Reference: Fusion Leniency-186.

⁹⁴³ Transcript of OFT interview with Paul Metcalfe (Fusion People) dated 7 September 2006, at pp16-17. File Reference: Fusion Leniency-186.

⁹⁴⁴ Transcript of OFT interview with Paul Metcalfe (Fusion People) dated 7 September 2006, at p22. File Reference: Fusion-Leniency-186.

⁹⁴⁵ Transcript of OFT interview with Paul Scott (Fusion People) dated 7 September 2006, at p16. File Reference: Fusion Leniency-141a.

*The agenda drawn up by Steven Ware for the first meeting of the CRF demonstrates that he wanted from the start to discuss price fixing, since it mentions ' Proposed benchmarks to entry – Fee and margin percentages'. There is no reason to suppose that the minutes of the CRF's meetings are accurate in purporting to record agreements to fix prices. Notes were taken at the meetings by Karen Harris, who at the relevant time was the personal assistant to Mark Bull of Hill McGlynn and the minutes were produced and circulated by Steven Ware himself. As a result it is clear how their contents have come to reflect what Steven Ware would have liked to have seen discussed at the meetings rather than what was in fact discussed.*⁹⁴⁶

- B.4 Fusion People stated that the CRF members were not asked to approve the minutes at subsequent CRF meetings and that Paul Metcalfe and Paul Scott did not read the minutes until they were sent to them before the start of the OFT investigation.⁹⁴⁷
- B.5 However, the OFT notes that Karen Harris emailed the members of the CRF, including Paul Metcalfe of Fusion People, attaching a copy of the CRF1 Minutes at 15:30 on 3 December 2004.⁹⁴⁸ In response to this email, at 16:22 on the same day, Paul Metcalfe emailed Karen Harris stating '*about time*'.⁹⁴⁹ Furthermore, at 10:47 on 3 March 2005, Karen Harris emailed the members of the CRF, including Paul Metcalfe of Fusion People, attaching a copy of the CRF2 minutes. At 14:51, Paul Metcalfe responded to Karen Harris stating '*about time too*'.⁹⁵⁰
- B.6 At no time did any representative of Fusion People object to the content of the minutes.

⁹⁴⁶ Fusion People's Formal Leniency Application at paragraphs 12-13; File Reference: Fusion Leniency-162.

⁹⁴⁷ Fusion People's Formal Leniency Application at paragraph 14; File Reference: Fusion Leniency-162.

⁹⁴⁸ Email from Karen Harris to CRF members dated 3 December 2004; File Reference: Select Leniency- 173.

⁹⁴⁹ Email from Paul Metcalfe to Karen Harris dated 3 December 2004; File Reference: Select Leniency- 173.

⁹⁵⁰ Email from Paul Metcalfe to Karen Harris dated 3 March 2005; File Reference: Select Leniency- 468.

Henry Recruitment

B.7 Henry Recruitment has questioned the accuracy of the minutes, but in a more limited way than Fusion People. Henry Recruitment's objections to the minutes relate more to the level of agreement reflected in the minutes rather than disputing the minutes as a whole.

B.8 During interview, Nick McCaffrey of Henry Recruitment stated:

*'I have to say to you that when I actually went through and studied the Minutes to answer your questions ... for my submission and I actually looked in black and white what was written, umm, and what was minuted, umm, you know, I personally felt that they weren't representative of the general discussions that, that happened at the time.'*⁹⁵¹

B.9 In a letter clarifying some of the responses provided to the OFT, Henry Recruitment (Nick McCaffrey) also stated that *'...with the benefit of hindsight I recognise that they [the CRF minutes] portray a false sense of agreement and unity amongst the members...My own personal view is that they are more a reflection of what the Chairman wanted since it was his secretary who wrote up the minutes...the minutes do not fully reflect the situation.'*

B.10 Henry Recruitment has stated that in terms of the figures referred to in the minutes they were accurate:

*'As to the accuracy of the minutes I believe that the minutes reflect what was said by Mr Ware as the Chairman of the meetings and broadly represented the points that were discussed by those participating at the relevant meetings in terms of fee levels.'*⁹⁵²

B.11 However, Henry Recruitment confirmed that Nick McCaffrey read the minutes of the previous CRF meeting at the time of the next CRF

⁹⁵¹ Transcript of OFT interview with Nick McCaffrey (Henry Recruitment) dated 25 September 2006 at p12. File Reference: Henry Leniency-49a.

⁹⁵² Letter from Henry Recruitment to OFT dated 18 April 2007; File Reference: Henry Leniency-45.

meeting.⁹⁵³ At no time did any representative of Henry Recruitment object to the content of the minutes.

Hays

- B.12 Hays' concerns regarding the accuracy of the minutes were raised by Simon Cheshire during interview.
- B.13 During interview, Simon Cheshire of Hays queried the accuracy of the CRF minutes in relation to the level of agreement reached, which he believed was '*over-exaggerated*'⁹⁵⁴ and that he did not see in the meeting the level of consensus that the minutes made out.⁹⁵⁵
- B.14 Simon Cheshire believed that there was no agreement that all members of the CRF would work within a permanent fee band of 12.5-15%. He did accept that it was possible that such a figure may have been raised during the meeting (although he personally could not remember it being raised).⁹⁵⁶
- B.15 In relation to CRF2 minutes, Simon Cheshire accepted that the minutes were accurate in relation to '*the big subjects*'.⁹⁵⁷

Other CRF members

- B.16 However, other members of the CRF have confirmed that they believe the minutes of the CRF were accurate record of the meetings. During interview, it was put to Steven Ware of HMG that the minutes were what he wanted to achieve, rather than what was agreed, to which he responded:

⁹⁵³ Evidence Table relating to Fees at p8; File Reference: Henry Leniency-39.

⁹⁵⁴ Transcript of OFT interview with Simon Cheshire (Hays) dated 2 August 2006 at p31; File Reference: Hays Leniency 660.

⁹⁵⁵ Transcript of OFT interview with Simon Cheshire (Hays) dated 2 August 2006 at p30; File Reference: Hays Leniency 660.

⁹⁵⁶ Transcript of OFT interview with Simon Cheshire (Hays) dated 2 August 2006 at p33; File Reference: Hays Leniency 660.

⁹⁵⁷ Transcript of OFT interview with Simon Cheshire (Hays) dated 2 August 2006 at p45; File Reference: Hays Leniency 660.

*'That's a load of rubbish. I try for the minutes to be a fair reaction [sic] to what the meeting's about.'*⁹⁵⁸

B.17 Mike Kenrick of BBT stated that he believed the minutes of the CRF meetings were accurate⁹⁵⁹ and confirmed his recollection of an agreement to have a minimum fee of 12% on permanent business for neutral vendors and 17% on freelance staff.⁹⁶⁰

B.18 In interview, Tony Pearce of Eden Brown accepted that *'what is in the minutes is what was agreed and minuted.'*⁹⁶¹ He stated that:

*'It is fair to say that we did finally conclude at an operating level of 12.5% for example for permanent recruitments. As a caveat at the time, I am quite clear in that I said that I would be happy to commit to it as a guideline but if we were given the opportunity to work with a company on a sole basis for example below that then we would have the right to exercise that decision and to go below the guideline.'*⁹⁶²

B.19 The accuracy of the minutes of CRF1 is also supported by the contemporaneous handwritten notes taken by Karen Harris at CRF1 (for example see paragraph 4.58 above).

B.20 The minutes of the CRF meetings were circulated to the parties on the following dates: CRF1 – 3 December 2004; CRF2 – 3 March 2005; CRF3 – 26 May 2005 and CRF4 – 3 October 2005. Despite being sent the minutes of the previous meeting prior to the following meeting, at no time did any of the members of the CRF challenge the accuracy of the minutes or request any amendments to be made to the minutes.

B.21 Accordingly, taking into account the following:

⁹⁵⁸ Transcript of OFT interview with Steven Ware (HMG) dated 14 November 2006 at p13; File Reference: Select Leniency – 1859.

⁹⁵⁹ Transcript of OFT interview with Mike Kenrick (BBT) dated 13 November 2006 at p10. File Reference: Select Leniency - 1859

⁹⁶⁰ Transcript of OFT interview with Mike Kenrick (BBT) dated 13 November 2006 at p14. File Reference: Select Leniency - 1859

⁹⁶¹ Transcript of OFT interview with Tony Pearce (Eden Brown) dated 27 September 2006 at p7. File Reference: Eden Brown Leniency – 50c

⁹⁶² Transcript of OFT interview with Tony Pearce (Eden Brown) dated 27 September 2006 at p8. File Reference: Eden Brown-Leniency – 50c

- that no objections were ever made by any CRF member regarding the accuracy of the minutes until after the commencement of the OFT's investigation;
- the evidence of HMG, BBT and Eden Brown stating that the minutes were an accurate record of the CRF meetings;
- the handwritten meeting notes taken by Karen Harris of HMG at the CRF meetings;
- the evidence of Henry Recruitment and Hays in that their concerns regarding the minutes related more to the level of agreement reached rather than what was discussed; and
- that, following the CAT's decision in *JJB Sports plc v OFT*,⁹⁶³a document prepared at the time is likely to be more credible than explanations given later;

the OFT is satisfied that the minutes of the CRF meetings are an accurate record of what was discussed at CRF meetings.

⁹⁶³ [2004] CAT 17 at para 287.

ANNEX C KNOWLEDGE OF AND ATTENDANCE AT CRF MEETINGS

Table C.1 – Dates of agendas, meetings and minutes

Meeting	Agenda Sent	Date of Meeting	Minutes Sent
CRF1	1 October 2004	12 November 2004	3 December 2004
CRF2	22 February 2005	24 February 2005	3 March 2005
CRF3	18 May 2005	19 May 2005	26 May 2005
CRF4	22 August 2005	27 September 2005	3 October 2005
CRF5	18 May 2006	22 May 2006	

Table C.2 – Knowledge of and attendance at CRF1

CRF Member	Who Received Agenda	Who Attended Meeting	Who Received Minutes
CDI AndersElite	Thomas Young (Director – Business Development, CDI AndersElite) ⁹⁶⁴	Thomas Young, John Petersen (Managing Director, CDI AndersElite)	Thomas Young, John Petersen
AWA	Adrian Warwick (Managing Director, AWA (until July 2005))	Adrian Warwick	Adrian Warwick
BBT	Mike Kenrick (Operations Director, BBT)	Mike Kenrick	Mike Kenrick
Eden Brown	Zerin Drury (Tony Pearce’s PA)	Tony Pearce (Sales Director, Eden Brown)	Tony Pearce
Fusion People	Anne Edwards (Paul Metcalf’s PA)	Paul Metcalfe (Managing Director, Fusion People), Paul Scott (Director, Fusion People)	Paul Metcalfe, Paul Scott
Hays	Claire McKernan (Simon Cheshire’s PA)	Simon Cheshire (Director – South East, Hays)	Simon Cheshire
Henry Recruitment	Kathryn Marks (Nick McCaffrey’s PA)	Nick McCaffrey (Managing Director – Henry Recruitment), Chay Smalls (Sales Director – Henry Recruitment)	Nick McCaffrey
HMG	Prepared by HMG	Steven Ware, Mark	Minutes prepared

⁹⁶⁴ Job titles are the titles of the parties at the time of the infringement.

		Bull (Operations Director 2004 – May 2005, Joint Managing Director May 2005 onwards, HMG) and Karen Harris (PA to Mark Bull) (as minute taker).	by HMG.
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Table C.3 – Knowledge of and attendance at CRF2

CRF Member	Who Received Agenda	Who Attended the Meeting	Who Received Minutes
CDI AndersElite	Thomas Young, John Petersen	Thomas Young, John Petersen	Thomas Young, John Petersen
AWA	Adrian Warwick	Did Not Attend	Adrian Warwick
BBT	Mike Kenrick	Mike Kenrick	Mike Kenrick
Eden Brown	Zerin Drury	Tony Pearce	Tony Pearce
Fusion People	Paul Metcalfe and Paul Scott	Paul Metcalfe, Paul Scott	Paul Metcalfe, Paul Scott
Hays	Claire McKernan	Simon Cheshire	Simon Cheshire
Henry Recruitment	Kathryn Marks	Nick McCaffrey, Chay Smalls	Nick McCaffrey
HMG	Prepared by HMG	Steven Ware, Karen Sims (National Operations Manager – HMG) and Karen Harris (as minute taker).	Minutes prepared by HMG.

Table C.4 – Knowledge of and attendance at CRF3

CRF Member	Who Received Agenda	Who Attended the Meeting	Who Received Minutes
CDI AndersElite	John Petersen	John Petersen	Thomas Young, John Petersen
AWA	Adrian Warwick	Adrian Warwick	Adrian Warwick
BBT	Mike Kenrick	Mike Kenrick	Mike Kenrick
Eden Brown	Andrew Thorpe (Divisional Director – Technical Division, Eden Brown), Dave Gibbons (Managing Director, Eden Brown)	Andrew Thorpe	Andrew Thorpe, Dave Gibbons

Fusion People	Paul Metcalfe and Paul Scott	Paul Metcalfe, Paul Scott	Paul Metcalfe, Paul Scott
Hays	Simon Cheshire	Simon Cheshire	Simon Cheshire
Henry Recruitment	Nick McCaffrey	Nick McCaffrey, Chay Smalls	Nick McCaffrey, Chay Smalls
HMG	Prepared by HMG	Steven Ware, Mark Bull and Karen Harris (as minute taker).	Minutes prepared by HMG.

Table C.5 - Knowledge of and attendance at CRF4

CRF Member	Who Received Agenda	Who Attended the Meeting	Who Received Minutes
CDI AndersElite	John Petersen	John Petersen, John Seasman (Regional Director, CDI AndersElite)	John Petersen, John Seasman
AWA	Raymond Coe (Managing Director, AWA (from July 2005))	Raymond Coe	Raymond Coe
BBT	Mike Kenrick, Astrid Warmington (Sales Director, BBT)	Astrid Warmington	Mike Kenrick, Astrid Warmington
Eden Brown	Andrew Thorpe, Dave Gibbons, Ian Wolter (Chairman and Chief Executive, Eden Brown)	Andrew Thorpe, Ian Wolter	Andrew Thorpe, Ian Wolter
Fusion People	Paul Metcalfe, Paul Scott	Paul Metcalfe, Paul Scott	Paul Metcalfe, Paul Scott
Hays	Prepared by Hays	Simon Cheshire	Claire McKernan
Henry Recruitment	Nick McCaffrey, Chay Smalls	Nick McCaffrey, Chay Smalls	Nick McCaffrey, Chay Smalls
HMG	Karen Harris, Steven Ware, Mark Bull	Steven Ware, Jasmit Kalra (Regional Director, HMG) and Karen Harris (as minute taker).	Minutes prepared by HMG.

Table C.6 – Knowledge of and attendance at CRF5

CRF Member	Who Received Agenda	Who Attended the Meeting	Who Received Minutes
CDI AndersElite	John Petersen, John Seasman	John Petersen	John Petersen
AWA	Raymond Coe	Raymond Coe	Raymond Coe
BBT	Mike Kenrick	Did not attend	Did not receive
Eden Brown	Ian Wolter (Prepared by Eden Brown)	Ian Wolter	Ian Wolter, Andrew Thorpe
Fusion People	Paul Metcalfe, Paul Scott	Paul Metcalfe	Paul Metcalfe
Hays	Tim Cook (Deputy Managing Director, Hays Construction and Property)	Tim Cook	Tim Cook
Henry Recruitment	Nick McCaffrey, Chay Smalls	Did not attend	Did not receive
HMG	Steven Ware, Mark Bull	Did not attend	Did not receive

ANNEX D GLOSSARY

Term	Definition
2000 Order	Competition Act 1998 (determination of turnover for penalties) Order 2000 (SI 2000/309) as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) 2004 (SI 2004/1259))
Act	Competition Act 1998
Ad Hoc Supply	Ad Hoc Supply refers to a contract between a Construction Company and a Recruitment Agency where the terms of supply are negotiated as and when vacancies arise.
Assignment	A specific vacancy that arises requiring certain professional skills or qualifications as decided by the Construction Company.
AWA	For company details see section 2 'The Parties'.
BBT	For company details see section 2 'The Parties'.
Candidates	Individuals put forward by a Recruitment Agency to a Construction Company that are successfully placed with that Construction Company (i.e. meeting the skill or professional requirements of an Assignment and subsequently employed by the Construction Company) for permanent or temporary positions.
CDI AndersElite	For company details see section 2 'The Parties'.
Central Supply	Central Supply refers to a contract where the terms of supply are agreed in advance of any placements and cover any placements made by the recruitment agency to the construction company during the period of the contract. A Preferred Supplier Agreement (PSA) is an example of a Central Supply.
CFI	European Court of First Instance
Collective Refusal to Supply Parc	An agreement between the Parties to withdraw and/or refrain from entering into contracts in which Parc was acting as a Neutral Vendor for the supply of Candidates to Construction Companies in the UK.
Construction Company	A company active in any or all of the design, build, and post-build phases of residential and commercial property construction projects, public building construction projects and civil engineering construction projects. For the avoidance

	of doubt, this may encompass the construction activities of a company whose primary business is not construction.
Construction Industry	The description attached to the total activities of Construction Companies.
CRF	Construction Recruitment Forum, the name given to the group of Recruitment Agencies that met formally on five occasions between 12 November 2004 and 22 May 2006.
CRF Members	The Recruitment Agencies that were involved in the CRF, i.e. CDI AndersElite, AWA, BBT, Eden Brown, Fusion People, Hays, Henry Recruitment and HMG.
CRF1	Meeting of the CRF of 12 November 2004
CRF1 Minutes	Minutes circulated to the CRF following CRF1
CRF2	Meeting of the CRF of 24 February 2005
CRF2 Minutes	Minutes circulated to the CRF following CRF2
CRF3	Meeting of the CRF of 19 May 2005
CRF3 Minutes	Minutes circulated to the CRF following CRF3
CRF4	Meeting of the CRF of 27 September 2005
CRF4 Minutes	Minutes circulated to the CRF following CRF4
CRF5	Meeting of the CRF of 22 May 2006
CRF5 Minutes	Minutes circulated to the CRF following CRF5
CRF Conference Call	The Conference Call between all CRF Members (with the exception of AWA) that took place on 7 January 2005
Eden Brown	For company details see section 2 'The Parties'
Fee Rates	The remuneration (most often a percentage commission) that a Recruitment Agency receives for the supply of Candidates to a Construction Company.
First tier supplier	A Recruitment Agency on a PSL that receives notifications of vacancies in advance of second tier suppliers, usually benefiting from a period of exclusivity in which to introduce prospective Candidates to a Construction Company.
Fusion People	For company details see section 2 'The Parties'
GAAP	Generally accepted accounting principles
Gross Turnover	Revenue from services provided in the normal course of business, less discounts, value added tax and other sales related taxes. For the avoidance of doubt, Gross Turnover includes remuneration costs of temporary staff.
Hays	For company details see section 2 'The Parties'
Henry Recruitment	For company details see section 2 'The Parties'

HMG	For company details see section 2 'The Parties'
Leniency Parties	The Parties who have been granted leniency in this case, who are CDI Corp (CDI AndersElite Ltd), Eden Brown Ltd, Fusion People Ltd, Hays plc (Hays Specialist Recruitment Ltd, Hays Specialist Recruitment (Holdings) Ltd, Henry Recruitment Ltd and Randstad Holding NV (Randstad UK Holding Ltd, Hill McGlynn & Associates Ltd and Beresford Blake Thomas Ltd)
Margin Protection Initiative	The description given to the single overall infringement comprised of the Collective Refusal to Supply Parc and the Target Fee Rates Initiative.
Master Vendor	A Master Vendor acts as an MSP (i.e. it supplies Candidates to Construction Companies) and in so doing operates as a Recruitment Agency in its own right. This means that a Master Vendor will supply their own Candidates to a Construction Company in preference or in addition to other Candidates sourced from other Recruitment Agencies.
Master Vendor Agreement	An agreement between a Master Vendor and a Construction Company under which Candidates are sourced for that Construction Company.
MSPs	Managed Service Providers, which are organisations that manage recruitment for a Construction Company, including sourcing Candidates from Recruitment Agencies to fill vacancies. An MSP may act as either a Master Vendor or a Neutral Vendor.
Net Fees	Gross Turnover less the remuneration costs of temporary staff. Remuneration costs of temporary staff include related payroll costs such as payroll taxes and insurance.
Neutral Vendor	A Neutral Vendor acts as an MSP (i.e. it supplies Candidates to Construction Companies) and in so doing will rely on Candidates sourced from third party Recruitment Agencies. A Neutral Vendor will not usually operate as a Recruitment Agency in its own right.
Neutral Vendor Agreement	An agreement between a Neutral Vendor and a Construction Company under which Candidates are sourced for that Construction Company.
Parc	Parc UK Ltd, trading as Parc Resource Management. Parc operates amongst other things as a Neutral Vendor for Construction Companies.
Penalties	OFT 423 <i>OFT's Guidance as to the appropriate amount of a</i>

Guidance	<i>Penalty</i> (December 2004)
PSA	Preferred Supplier Agreement
PSL	Preferred Supplier List
Recruitment Agency	An organisation that searches for and selects Candidates on behalf of Construction Companies for permanent or temporary vacancies. Includes both Employment Businesses and Employment Agencies as defined in the Employment Agencies Act 1973.
Regulations	The Employment Agencies Act (EAA) 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Regulations).
Relevant Period	The period of the infringement from 21 October 2004 to 26 January 2006. The exact duration of a Party's involvement in the infringement will vary by Party.
Statement of Objections	The OFT's Statement of Objections, issued on 21 October 2008, setting out the OFT's provisional findings.
Target Fee Rates Initiative	An agreement and/or concerted practice between the Parties to fix target Fee Rates for the supply of Candidates to Neutral Vendors and Construction Companies in the UK.
Taylor Woodrow	Taylor Woodrow plc, at or around the time of the Margin Protection Initiative, was one of the UK's largest house builders. In July 2007 Taylor Woodrow merged with George Wimpey plc. With effect from 1st January 2009, Taylor Woodrow became a trading entity of VINCI Construction UK Limited. All references in the contemporaneous and documentary evidence on the OFT's file are to Taylor Woodrow. For reasons of clarity and consistency all references in this Decision are to Taylor Woodrow.
Vinci	The Vinci Group, one of the world's largest construction and associated service organisations, whose principal trading activities are carried out by Norwest Holst and 25 other subsidiaries.
Vinci (Parc Facilitator) Agreement	An agreement entered into between certain CRF Members and Vinci direct. Under this agreement Parc had a more limited role as an intermediary in the supply of Candidates to Vinci than it would do under a Neutral Vendor Agreement.