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IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1140/1/1/09
1141/1/1/09
1142/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

1 April 2011

Before:

THE HONOURABLE MR JUSTICE ROTH (Chairman)
MICHAEL DAVEY
DR VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

EDEN BROWN LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

(1) CDI ANDERSELITE LIMITED
(2) CDI CORP

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) HAYS PLC
(2) HAYS SPECIALIST RECRUITMENT LIMITED
(3) HAYS SPECIALIST RECRUITMENT (HOLDINGS) LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 26 to 29 July 2010

JUDGMENT

APPEARANCES

Mr Paul Harris (instructed by Addleshaw Goddard LLP) appeared on behalf of Eden Brown Limited.

Ms Ronit Kreisberger (instructed by Blake Lapthorn) appeared on behalf of CDI AndersElite Limited and CDI Corp.

Mr Mark Brealey Q.C., Lord David Pannick Q.C. and Mr Paul Harris (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of Hays plc, Hays Specialist Recruitment Limited and Hays Specialist Recruitment (Holdings) Limited.

Mr David Unterhalter S.C., Ms Maya Lester, Mr Alan Bates and Mr Gerard Rothschild (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Office of Fair Trading.

I. INTRODUCTION

1. By its decision of 29 September 2009 in Case CE/7510-06 *Construction Recruitment Forum* ("the Decision"), the Office of Fair Trading ("OFT") found that a number of undertakings engaged in the supply of recruitment services to the construction industry in the United Kingdom had infringed the Chapter I prohibition imposed by section 2 of the Competition Act 1998 ("the Act"). Pursuant to section 36 of the Act, penalties were imposed on seven undertakings (some of them comprising associated companies which together constitute a single undertaking), save that in one case the undertaking was granted 100% immunity under the OFT's leniency programme. Three of those seven undertakings have appealed against the amount of the penalty imposed: Hays plc and its subsidiaries Hays Specialist Recruitment Limited and Hays Specialist Recruitment (Holdings) Limited (together, "Hays"); CDI Corp and its subsidiary CDI AndersElite Limited (together, "CDI"); and Eden Brown Limited ("Eden Brown"). Hays also sought by its notice of appeal to challenge one aspect of the finding of infringement made against it, but that ground of appeal was not pursued.

2. The appeals of Hays, CDI and Eden Brown are separate appeals which require separate determination. However, since several of the main grounds of appeal are common to all three Appellants, the appeals were heard together and it is convenient to deal with them in a single judgment. Accordingly, Hays, CDI and Eden Brown are together referred to in this judgment as the "Appellants", save where it is necessary to distinguish between them. By their appeals, the Appellants ask the Tribunal to set aside or substantially reduce the penalties imposed by the OFT.

3. The Chapter I prohibition is imposed by section 2 of the Act, which provides, so far as material:

> "(1) … agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited …"

4. The infringement found in the Decision involved both price-fixing and the collective boycott of another company, Parc UK Ltd ("Parc"). The OFT concluded that this conduct formed a single, overall infringement, 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.[1]

5. The financial penalties, with the reductions for leniency, imposed on the infringing undertakings were as follows:

Undertaking	**Penalty (before leniency)**	**Leniency reduction**	**Penalty (after leniency)**
A Warwick Associates Ltd	£3,303		£3,303
CDI	£10,861,127	30%	£7,602,789
Eden Brown	£1,649,336	35%	£1,072,069
Fusion People Ltd	£156,277	20%	£125,021
Hays	£43,370,184	30%	£30,359,129
Henry Recruitment Ltd	£144,057	25%	£108,043
Beresford Blake Thomas Ltd, Hill McGlynn & Associates Ltd, Randstad UK Holding Ltd & Randstad Holding NV (together, "Randstad")	£116,849,686	100%	£0

6. Each of the Appellants challenge common elements of the OFT's penalty calculation, including, in particular, the measure of turnover used as the starting point for determining the appropriate level of penalty, and the application by the OFT of a "Minimum Deterrence Threshold" to adjust the penalties imposed on infringing undertakings in order to deter undertakings from engaging in anti-competitive behaviour. These errors, assert the Appellants, have resulted in manifestly unfair and

[1] The Decision found that the infringement was not capable of giving rise to an appreciable effect on trade between Member States of the EU, with the consequence that Article 101(1) TFEU was inapplicable: see para 4.393.

disproportionate penalties. There are also a number of grounds of appeal which relate to the individual circumstances of each Appellant.

II. THE FACTUAL BACKGROUND

7. Before dealing with the substance of the appeals, it is necessary briefly to describe the factual background and the nature of the infringement. What follows is necessarily an abbreviated account of an extremely detailed Decision in which the factual account and findings alone comprise over 400 paragraphs, plus several appendices.

The construction recruitment sector

8. The recruitment industry is governed by the Employment Agencies Act 1973 ("the EAA") and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 ("the Regulations"). The business of supplying workers to be engaged and directly paid by the client is termed an "employment agency" whereas the business of supplying workers who are under contract to the person carrying on the business for them to act for, and under the control of, the client is termed an "employment business": EAA section 13(2)-(3). Under the Regulations, an employment business must not withhold from the worker whom it has supplied to a client any part of his or her remuneration on the grounds that it has not received payment from the client: reg. 12(a). In effect, an employment business is the arrangement used for the supply of temporary workers, by contrast with permanent workers who are supplied by an employment agency. An employment agency and an employment business are often carried on by the same undertaking and, for convenience, in the remainder of this judgment the expression "recruitment agency" is used to cover both kinds of activities.

9. In 2006, construction output in Great Britain is estimated to have been £114 billion[2]. Construction companies require workers with a range of craft and trade skills (e.g. bricklayers and electricians) and professional qualifications (e.g. surveyors)[3]. Recruitment agencies are a principal source of workers for the construction industry

[2] Decision, para 2.119.
[3] Decision, para 2.123.

and the use of agencies has increased over the last decade[4]. Each of the Appellants (save for the parent companies of CDI and Hays) is a recruitment agency active in the UK market and providing a variety of personnel (permanent and temporary) to the construction industry.

10. Recruitment agencies perform two functions for their clients: first, the identification and sourcing of potential candidates and, secondly, the selection and matching of the most suitable candidates with the appropriate skills to specific vacancies (together, "recruitment services")[5]. Agencies may offer other services as well, such as salary and package surveys; training for recruiting managers or skills training for candidates; head-hunting or executive searches; and a range of outsourcing services[6].

11. Construction companies may use a number of competing recruitment agencies at the same time. Similarly, candidates may register with as many agencies as they wish[7].

12. Construction companies enter into a contractual relationship with recruitment agencies, paying a fee which is usually dependent upon the successful appointment of a candidate[8]. The terms on which services are to be provided by the recruitment agency are typically contained in a contract with the construction company. Contracts may have a fixed duration or may remain in force indefinitely subject to cancellation periods[9]. The fee rates between recruitment agencies and construction companies may be negotiated periodically and may apply to all positions filled over the duration of that agreement.

13. A feature of the industry of particular significance for these appeals is the distinction between arrangements where the position filled by the recruitment agency is permanent (which includes short- or fixed-term employment contracts) and where it is temporary. In the case of permanent candidates, the construction company pays a fee for the recruitment services and is responsible for paying the candidate's wages directly[10]. Where a candidate is placed in a temporary position, the recruitment agency is also paid

[4] Decision, para 2.141.
[5] Decision, para 2.128.
[6] Decision, para 2.142.
[7] Decision, para 2.135.
[8] Decision, para 2.136.
[9] Decision, para 2.143.
[10] Decision, para 2.135.

a fee by the client, but the agency, since it is functioning as an "employment business", is responsible for the payment of the wages to the candidate.

14. The fee charged to a client construction company is usually contingent on the successful appointment of a candidate. For permanent positions, the fee is usually a percentage commission based on a full year's salary of the candidate. For temporary positions, the charge to the client comprises two elements: the fee retained by the business and the payroll costs of the candidate. Payroll costs cover the candidate's wage, contribution to paid holiday and national insurance (in the case of PAYE: a significant proportion of candidates receive payment to a limited company which they own). The fees are usually a percentage commission based on the full year's basic wage. Fees for providing temporary workers are typically higher than for permanent positions given that placements are shorter and the recruitment agencies incur additional costs such as operating the payroll[11]. The fee rates between construction companies and recruitment agencies are negotiated periodically and will generally apply to all positions filled over the duration of the agreement. Competition between agencies on price and quality of service typically takes place over a period of time, through filling a number of vacancies, rather than on a vacancy-by-vacancy basis.

15. 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.

16. A construction company may appoint a "Managed Service Provider" ("MSP") to manage its recruitment activities including its recruitment through recruitment agencies[12]. The function of a MSP is to be responsible for all aspects of the commercial relationship that a construction company would otherwise have with recruitment agencies[13]. This will typically include decisions on which agencies will be on its PSL, negotiating terms of supply, managing the recruitment process and invoicing of the construction company. MSPs are able to manage costs from recruitment more efficiently given their ability to spread common costs (e.g. IT

[11] Decision, paras 2.136-8.
[12] Decision, para 2.130.
[13] Decision, para 2.153.

systems) across construction companies and pool candidates from multiple agencies to fill vacancies[14]. An MSP will in practice sign different PSAs with specific recruitment agencies for the supply of candidates to construction companies[15].

17. There are two types of MSPs: Neutral Vendors and Master Vendors. Both source candidates from other recruitment agencies in order to meet the personnel needs of construction companies but a Master Vendor also operates as a recruitment agency in its own right and so supplies its own candidates in addition to third party candidates[16]. Parc, the victim of the collective boycott, is an MSP which acts as a Neutral Vendor. The OFT was told that Neutral Vendors may be advantageous for construction companies in so far as they source candidates from all recruitment agencies on an equal basis.

Summary of the infringement

18. Parc entered the market in late 2003 to act as an MSP to the construction industry. The recruitment agencies were concerned that intermediaries, such as Parc, threatened their margins. The OFT found that eight[17] recruitment agencies formed a cartel (the "Construction Recruitment Forum" or "CRF") in response to Parc's market entry. In the context of the CRF, the recruitment agencies met five times between 2004 and 2006. The OFT found that both through these meetings and separate bilateral communications, they engaged in the following anti-competitive conduct:

    • 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 (the "Collective Refusal to Supply Parc").

    • 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 (the "Target Fee Rates Initiative").

[14] Decision, para 2.158.
[15] Decision, para 2.160.
[16] Decision, para 2.159.
[17] Two of the eight undertakings came under common ownership after the infringement and so the decision imposed penalties only on seven groups of companies (i.e. undertakings).

19. The Decision held that the Collective Refusal to Supply Parc and the Target Fee Rates Initiative formed a single overall agreement and/or concerted practice ("the Margin Protection Initiative"). Both infringements were formed at the same time and pursued the same common objective, namely to protect margins. The period of involvement of each of the various undertakings in the infringement varied slightly, but all three Appellants were found to have been involved for periods of between one and 1¼ years, commencing in October/November 2004.

20. The Decision concluded that the Margin Protection Initiative had the object of preventing, restricting or distorting 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. Further, the impugned conduct was capable of achieving that object to an appreciable extent. Accordingly, this was an "object" rather than an "effect" infringement in terms of the alternative formulation in section 2(1)(b) of the Act.

III. THE LEGAL FRAMEWORK

The statutory framework

21. The OFT's power to impose penalties arises under section 36 of the Act, which provides:

> "(1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article [101](1), the OFT may require an undertaking which is a party to the agreement to pay to the OFT a penalty in respect of the infringement.
>
> …
>
> (3) The OFT may impose a penalty on an undertaking under subsection (1) or (2) only if the OFT is satisfied that the infringement has been committed intentionally or negligently by the undertaking."

22. The Decision held that the infringing undertakings must have been aware, or could not have been unaware, that price-fixing or excluding a new entrant could result in a restriction of competition and concluded that the infringement was intentional. There is no challenge to that conclusion in any of these three appeals.

23. Section 36(8) of the Act provides that penalties cannot exceed 10% of the turnover of the undertaking, determined in accordance with such provisions as may be specified in an order made by the Secretary of State.

24. The relevant order for these purposes is the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (S.I. 309 of 2000) ("the Maximum Penalties Order"), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (S.I. 1259 of 2004). Article 3 of the Maximum Penalties Order (as amended) provides as follows:

> "The turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it."

25. Paragraph 3 of the Schedule to the Maximum Penalties Order (as amended) provides:

> "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."

26. Section 38 of the Act requires the OFT to prepare and publish guidance as to the appropriate amount of any penalty, with the approval of the Secretary of State. It may at any time alter its guidance, but such alteration must be published and, again, the Secretary of State's approval is required. Pursuant to section 38(6), in preparing or altering its guidance, the OFT "must consult such persons as it considers appropriate."

27. Section 38(8) provides:

> "When setting the amount of a penalty under this Part, the OFT must have regard to the guidance for the time being in force under this section."

28. Accordingly, the guidance as to a penalty has an enhanced status compared to the general advice and guidelines that the OFT is required to publish by section 52 of the Act on the application of the Chapter I and Chapter II prohibitions and their enforcement. In *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318, at [161] the Court of Appeal stated that the language of section 38(8) does not bind the OFT to

follow its statutory guidance in all respects in every case, but it must give reasons for any significant departure from that guidance.

The Guidance

29. The relevant guidance as to the appropriate amount of a penalty for the purpose of the Decision and these appeals is the revised guidance in OFT 423, published in 2004 ("the Guidance"). This states, at para 1.4, the twin policy objectives of the OFT's policy on financial penalties, as follows:

> "• to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
>
> • to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices."

30. The Guidance proceeds to set out a five step process for determining the amount of the penalty. It will be necessary to examine aspects of the Guidance in more detail, but in summary those steps are as follows:

Step 1: calculation of the starting point having regard to the seriousness of the infringement and the "relevant turnover" of the undertaking. The starting point may never exceed 10 per cent of that relevant turnover.

Step 2: adjustment for duration: penalties for infringements that last for more than one year may be multiplied by not more than the number of years of infringement and part years may be treated as full years for this purpose.

Step 3: adjustment for other factors: the penalty derived from Steps 1 and 2 may be adjusted "as appropriate" to achieve the policy objectives set out above.

Step 4: adjustment for further aggravating and mitigating factors.

Step 5: adjustment to prevent the statutory maximum penalty of 10 per cent of worldwide turnover being exceeded and to avoid double jeopardy where a penalty has been imposed by the European Commission or in another EU Member State in respect of the same agreement or conduct.

31. Further, the Guidance sets out a leniency policy operated by the OFT that provides for immunity from or a reduction in financial penalty in cartel cases. An undertaking which is the first to provide the OFT with evidence of cartel activity in a market before the OFT has commenced an investigation will benefit from total immunity provided that certain conditions are fulfilled: para 3.9 of the Guidance. After an investigation has been commenced, an undertaking may still receive a discretionary reduction from the financial penalty that would otherwise be imposed of up to 100 per cent if it is the first to come forward before the OFT has issued a statement of objections, and satisfies certain conditions; and a reduction of up to 50 per cent if it is not the first to come forward (or does not satisfy those conditions) but provides evidence of cartel activity before a statement of objections is issued. The extent of reduction is calculated taking into account the stage at which the undertaking comes forward, the evidence in the OFT's possession and the evidence provided by the undertaking: paras 3.11-3.14 of the Guidance.

32. In cases where an undertaking is granted leniency, the OFT first calculates the penalty that would have been imposed and then applies the reduction for leniency. In the Decision, Randstad was granted 100 per cent immunity and the Appellants were granted leniency reductions of 30 or 35 per cent, as set out in the table at para 5 above. There is no appeal against the percentage of those reductions.

The approach to a penalty appeal

33. Under Part I of Schedule 8 to the Act, the Tribunal on an appeal may "revoke, or vary the amount of, a penalty": para 3(2)(b). The OFT's Guidance is not binding on this Tribunal, which is not even under any statutory obligation to have regard to it. However, it would clearly be inappropriate to decide an appeal without consideration of the Guidance which creates a statutory obligation on the OFT in its determination of the penalty against which the appeal is brought. The relevance of the Guidance for its own decisions was considered by this Tribunal in *Napp* in a passage quoted with approval by the Court of Appeal in *Argos* (at [162]):

> "499. It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised

> by the Director is entitled to have that penalty reviewed *ab initio* by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment.
>
> 500. That said, it does not seem to us appropriate to disregard the Director's Guidance, or the Director's own approach in the Decision under challenge, when reaching our own conclusion as to what the penalty should be. The Director's Guidance will no doubt over time take account of the various indications given by this Tribunal in appeals against penalties.
>
> 501. We emphasise, however, that the only constraint on the amount of the penalty binding on this Tribunal is that which flows from the Maximum Penalties Order… It is clear from that Order that Parliament intended that it is the overall turnover of the undertaking concerned, rather than its turnover in the products affected by the infringement, which is the final determinant for the amount of the penalty…
>
> 502. We agree with the thrust of the Director's Guidance that while the turnover in the products affected by the infringement may be an indicative starting point for the assessment of the penalty, the sum imposed must be such as to constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct. The policy objectives of the Act will not be achieved unless this Tribunal is prepared to uphold severe penalties for serious infringements. As the Guidance makes clear, the achievement of the necessary deterrent may well involve penalties above, often well above, 10 per cent of turnover in the products directly concerned by the infringement, subject only to the overall 'cap' imposed by the Maximum Penalties Order. The position in this respect is no different in principle under Article 15(2) of Council Regulation no. 17, albeit that the applicable maximum penalty under that provision is differently calculated."

34. Further, the Tribunal has recognised that the OFT enjoys a margin of appreciation, both as to the interpretation of the Guidance and as regards the level of fine the OFT considers appropriate for a particular infringement: *Umbro Holdings Ltd v Office of Fair Trading ("Replica Kits")* [2005] CAT 22, at [102]. That does not mean that the appellate scrutiny is of the lesser standard applied on an application for judicial review. As the Tribunal there stated, after referring to its earlier observations in *Napp*:

> "104. … in our view it is not appropriate to seek to analyse each individual "Step" of the *Guidance* in isolation from the other Steps. For example, the starting percentage rate used under Step 1, and the multiplier used under Step 3, involve the exercise of judgment, it being open to the OFT to adopt various figures within a range to give rise to an amount which, in the OFT's view, is appropriate to the gravity of the infringement and the need for deterrence. However, it is the combined effect of the Step 1 and Step 3 calculation which determines the order of magnitude of the penalty. In addition, the various adjustments for aggravating and mitigating factors under Step 4 are in our view bound to have regard to the question whether the final figure to be arrived at is proportionate to the infringements involved, looking at the matter in the round.

> 105. In other words, although each Step of the *Guidance* is formally distinct, the *Guidance* in our view cannot be treated as if the OFT is merely making a series of mechanical calculations according to a predetermined mathematical formula. Although no doubt the OFT's calculations should be carried out as objectively as possible, the *Guidance* contains, rightly in our view, a number of subjective and interrelated areas of judgment which necessarily play a part in fixing the final penalty.
>
> 106. In our view in those circumstances the Tribunal should focus primarily on whether the overall penalty imposed is appropriate for the infringements in question. In our view, provided that the OFT has remained within its margin of appreciation in applying the *Guidance*, the Tribunal's primary task is to assess the justice of the overall penalty, rather than to consider in minute detail the individual Steps applied by the OFT."

IV. THE APPEALS

35. In the present appeals, the Appellants challenge in various ways the approach taken by the OFT in the Decision as regards Steps 1, 3 and 4. However, they also contend that the resulting penalties, viewed as a whole, are manifestly excessive and disproportionate. The Appellants made their submissions on the basis of the penalties as calculated before the reductions for leniency and the OFT did not seek to resist that approach.

36. The infringement established in the Decision was undoubtedly of a very serious nature, as discussed further below. However, it lasted for less than 15 months, was not shown to have had significant effects on the market – it was clearly unsuccessful in forcing out Parc as a MSP – and came to an end before the start of the OFT's investigations.

37. The scale of the penalties imposed can be ascertained by the figure of well over £116 million imposed as a penalty upon Randstad. Even allowing for the fact that a company within this undertaking was found to be the leader/instigator of the infringement (leading to an uplift in the penalty of 10 per cent), we consider this, on any view, to be a wholly disproportionate penalty for the present infringement. Unsurprisingly, having received total immunity, Randstad has not appealed but the methodology used by the OFT to compute Randstad's fine is the same as that applied in the other cases. Similarly, adopting an overall view of the position, the penalty for Hays of over £43 million is, in our judgment and as explained further below, clearly too high for conduct of the scale and impact of the infringement in question.

38. Since there is no criticism by any of the Appellants of the Guidance as such, we proceed to consider the specific challenges made by the Appellants to the methodology used by the OFT in the Decision before determining what, overall, is the appropriate penalty for each of the three Appellants. The challenges may be grouped under the following five heads:

(1) the use of gross rather than net turnover in the computation of "relevant turnover" under Step 1 ("the gross/net issue");

(2) the use of turnover from the year preceding the date of the decision as the relevant year rather than the year preceding the end of the infringement ("the relevant year"): this ground was raised only by Eden Brown;

(3) the percentage applied to the relevant turnover as regards seriousness, again under Step 1 ("the seriousness percentage");

(4) the application of a "Minimum Deterrence Threshold" to revise the figure under Step 3 ("the MDT");

(5) a series of particular issues by way of aggravating and mitigating factors relating to the individual Appellants under Step 4.

We shall discuss the appeals by reference to those headings (taking into account also a particular ground raised by CDI regarding an error in the calculation of relevant turnover in its case).

1. The Gross/Net Issue

39. Step 1 is described as the "starting point" for determination of the level of penalty. The Guidance states that the "more serious and widespread the infringement, the higher the starting point is likely to be": para 2.4. "Relevant turnover" for the purpose of Step 1 is defined as:

> "the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year" (para 2.7).

40. There is no issue in the present case that the relevant product market is the market for the supply, by recruitment agencies, of candidates with professional, managerial, trade and labour skills required by the construction industry (Decision, para 5.25); and that the relevant geographic market was no wider than the United Kingdom.

41. However, the OFT used as the relevant turnover for each undertaking the gross turnover which it achieved, thereby including for temporary workers the element in the charges to clients that represents the wages costs of those workers that were paid directly by the agency: see paras 13-14 above. The Appellants all submitted that the relevant turnover for the purpose of Step 1 was the net turnover, i.e. the turnover that represents the fees retained by them, excluding charges that were simply a "pass through" of wages of temporary workers.[18] The Appellants complain that the OFT adopted an overly formalistic approach, treating turnover recorded in their statutory accounts (which, in their submission, could have legitimately been drawn up on a different basis) as "relevant turnover". Since a substantial proportion of the business of each of the Appellants in the relevant market comprised the placing of temporary workers, the use of gross as opposed to net fees had a dramatic effect, increasing the computation of relevant turnover over four-fold.

42. Hays and Eden Brown pointed to the definition of "applicable turnover" in the Schedule to the Maximum Penalties Order as "the amounts derived by the undertaking from the sale of products or the provision of services falling within the undertaking's ordinary activities" and sought to argue that payments on account of temporary workers' wages, for which the agency acts merely as a 'conduit', do not constitute amounts "derived … from the provision of services". We do not agree. All the Appellants state their turnover in their audited accounts on the basis of gross fees, and such statements therefore recognise that these are sums derived from the provision by them of services as part of their business (and it was not of course suggested that the provision of recruitment services for temporary workers fell outside their ordinary activities). See the definition of "turnover" in Part 15 of the Companies Act 2006 (concerning accounts and reports) at section 474(1) (previously section 262(1) of the Companies Act 1985).

[18] See Decision, para 5.120, for the OFT's definition of gross turnover and net fees.

43. However, it is necessary to have regard to the purpose of "relevant turnover" in computing the starting point of a penalty. Para 2.9 of the Guidance provides as follows:

> "Where an infringement involves several undertakings, an assessment of the appropriate starting point will be carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition."

See also the OFT's Defences to the present appeals, where it states that the use of "relevant turnover" reflects "the scale of the undertaking in the relevant market": Defence to Hays, paras 113, 115; Defence to Eden Brown, paras 71, 73; Defence to CDI, paras 72, 74.

44. In other words, relevant turnover is used to reflect the effective scale of activity of each undertaking, and thus where several undertakings are involved, to achieve the appropriate relationship between the penalties imposed on each of them. In general, it is no doubt appropriate for this measure to be derived from the statement of turnover in the undertaking's audited accounts. However, in the construction recruitment industry with which the Decision is concerned, and indeed the recruitment industry as a whole, it is relevant that the measure generally applied for consideration of the realistic scale of an undertaking's operations, and the growth (or decline) from one year to the next, is net fees not gross turnover. The accounts of the Appellants thus include a statement of net fees, in some cases described as "gross profits". Hays pointed to the emphasis placed in the annual reports of Hays plc on net fees as the relevant measure of its activity. For example, the 2009 annual report, in its opening presentation of "Financial and Operational Highlights" sets out for 2009 and 2008 the net fees along with other relevant metrics (profits, earnings per share, etc) but does not there mention gross turnover at all, and the same is the case for its presentation of the group profile split by area of specialism. We recognise that the position is not so clear in the annual reports of the other two Appellants. However, as an analyst from UBS explained in his evidence, it is net fees not gross turnover that is the measure which all recruitment industry analysts use "to assess the actual economic performance and activity of the business carried out by recruitment agencies [since] the salaries of temporary workers, which effectively pass through the recruitment agencies' accounts … are irrelevant to such an assessment." He continued: "Due to the characteristics of the recruitment

industry, the market considers the Net Fees figure to be the equivalent of the turnover figure for most other industries".

45. Moreover, different recruitment agencies may have a different proportion within their business of permanent and temporary placements, with correspondingly different impact on their gross turnover. Both the OFT and Hays instructed accountancy experts for these appeals, and the joint statement of the two accountants records their agreement that:

> "…Net Fees is the figure used by the market and by the industry to compare the value and performance of recruitment agencies, as the mix of business as regards permanent and temporary placements included in the Turnover figure differs between entities, and that, therefore, Net Fees is a sensible basis for comparison between entities."

Since one of the purposes of 'relevant turnover' in Step 1 is to reflect the relative sizes of several infringing undertakings, in our judgment this strongly supports the use of net fees as the appropriate measure in this case.

46. The OFT submitted that temporary workers' wages are simply one cost borne by a recruitment agency passed on in its charges, such that it would be no more appropriate to discount for that element in computing turnover than other input costs over which an undertaking has no control. It referred to the judgment of the Court of First Instance in Case T-127/04 *KME Germany v Commission* [2009] ECR II-1167,[19] determining an appeal against a fine imposed by the Commission in the industrial tubes cartel case. The Commission, in applying its 1998 penalty guidelines, took account of the size of the market affected by the infringement. Dismissing the argument that the Commission should have deducted the cost of copper, which represented about two thirds of the final price paid by their customers, from the calculation of the manufacturers' turnover, and used only their processing margin, the Court stated (at paras 91 and 93):

> "… there is no valid reason to require that the turnover of a relevant market be calculated excluding certain production costs. As the Commission has rightly pointed out, there are in all industries costs inherent in the final product which the manufacturer cannot control but which nevertheless constitute an essential element of its business as a whole and which, therefore, cannot be excluded from its turnover when fixing the starting amount of the fine …. The fact that the price of copper constitutes an important part of the final price of industrial tubes or that

[19] On appeal on other grounds, Case C-272/09P, not yet decided.

> the risk of fluctuations of copper prices is far higher than for other raw materials does not invalidate that conclusion.
>
> …
>
> It is undeniable that, as a factor for assessing the seriousness of the infringement, the turnover of an undertaking of a market is necessarily vague and imperfect. It does not make a distinction either between sectors with a high added value and those with a low added value, or between undertakings which are profitable and those which are less so. However, despite its approximate nature, turnover is currently considered, by the Community legislature, the Commission and the Court, as an adequate criterion, in the context of competition law, for assessing the size and economic power of the undertakings concerned [referring inter alia to Article 15(2) of Regulation 17 and Articles 14 and 15 of Regulation 139/2004 ("the Merger Regulation")]."

47. However, the charges made by recruitment agencies to their clients in respect of the wages paid to temporary workers cannot, in our view, be compared to a manufacturing input cost. The former are not inputs which the agency is purchasing, in order to supply a fresh product incorporating those inputs to its clients. The economic service provided by the agency, for which it employs its own staff and whose salaries are indeed part of its costs, is to find candidates who can provide the labour services which its clients require and then, when (and only when) the candidate has been accepted by the client, the agency engages that individual and pays him the wages which the client has agreed to reimburse.

48. Nor do we accept the OFT's argument, put forward in its Defences, that the business of temporary worker recruitment "differs fundamentally" from the business of permanent worker recruitment: Defence to Hays, para 78; Defence to Eden Brown, para 37; Defence to CDI, para 42. It is true that the agency bears the credit risk as regards the payment of temporary workers, a risk which it does not have as regards permanent workers. But that does not alter the essential nature of the agency's business or its relations with its clients, at least in the construction industry sector. In the Decision, the OFT significantly held that the supply by recruitment agencies of candidates (in the relevant fields) required by the construction industry in the UK is a single market, without distinguishing between the supply of permanent and temporary workers: para 5.25. The essential feature of the business, as noted by the OFT, is the recruitment and supply of candidates with skills specifically required by the construction industry. Indeed, the OFT expressly found that it would not reflect commercial reality to make a distinction between the agencies' commercial activities according to the duration of

employment being offered: para 5.33. This accords with the evidence that we heard from executives of the Appellants regarding the conduct of their business. The agencies recruit and supply *candidates* to their clients. They are not supplying, or responsible for, a labour force. Temporary workers, like permanent workers, work under the control, supervision and direction of the client and are paid remuneration determined by the client not the agency. In that respect, the role and responsibility of a recruitment agency towards its clients are very different from those of a main contractor towards its employer as regards the position of sub-contractors.

49. The judgment in *KME Germany* quoted above significantly refers to the Merger Regulation in its discussion of the appropriate concept of turnover to be applied. Article 5 of the Merger Regulation concerns the calculation of turnover for the purpose of assessing whether a concentration has a Community dimension, and defines turnover in the same terms as are used in the Maximum Penalties Order. In its Consolidated Jurisdictional Notice, OJ 2008 C95, the Commission explains that an exception may apply to the way in which this turnover is calculated:

> "(157) The concept of turnover as used in Article 5 of the Merger Regulation comprises 'the amounts derived […] from the sale of products and the provision of services'. Those amounts generally appear in company accounts under the heading 'sales'. In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership.
>
> (158) In the case of services, the method of calculating turnover in general does not differ from that used in the case of products: the Commission takes into consideration the total amount of sales. However, the calculation of the amounts derived from the provision of services may be more complex as this depends on the exact service provided and the underlying legal and economic arrangements in the sector in question. Where one undertaking provides the entire service directly to the customer, the turnover of the undertaking concerned consists of the total amount of sales for the provision of services in the last financial year.
>
> (159) In other areas, this general principle may have to be adapted to the specific conditions of the service provided. In certain sectors of activity (such as package holidays and advertising), the service may be sold through intermediaries. Even if the intermediary invoices the entire amount to the final customer, the turnover of the undertaking acting as an intermediary consists solely of the amount of its commission. For package holidays, the entire amount paid by the final customer is then allocated to the tour operator which uses the travel agency as distribution network. In the case of advertising, only the amounts received (without the commission) are considered to constitute the turnover of the TV channel or the magazine since media agencies, as intermediaries, do not constitute the distribution channel for the sellers of advertising space, but are chosen by the customers, *i.e.* those undertakings wishing to place advertising.

> (160) The examples mentioned show that, due to the diversity of services, many different situations may arise and the underlying legal and economic relations have to be carefully analysed. Similarly, specific situations for the calculation of turnover may arise in the areas of credit, financial services and insurance."

50. The concept of sale through intermediaries was considered by the Court of First Instance in its judgment in Case T-417/05 *Endesa SA v Commission* [2006] ECR II-2533, at paras 207-211. The case concerned the proposed acquisition in Spain of Endesa, one of the principal Spanish electricity operators. The level of Endesa's turnover in Spain was critical for the Commission's decision that the merger did not have a Community dimension. On appeal, Endesa argued, *inter alia*, that since electricity distribution companies are required to collect certain sums from their customers and then pass them on to electricity generators and network operators, those sums should be deducted from the revenue shown in Endesa's accounts because they do not constitute turnover within the terms of Article 5 of the Merger Regulation.

51. The Court dismissed the appeal and upheld the Commission's refusal to exclude from the determination of turnover the cost of the purchase of electricity. Examining Endesa's argument that the Commission should have made a 'pass through' adjustment, the Court stated (at para 209):

> "… the requirements of legal certainty and speed which apply in the context of control of concentrations mean that both undertakings and competition authorities can in principle rely on a foreseeable criterion and immediate access. In those circumstances, the turnover to be taken into account in order to determine the authority competent to examine a concentration must, as a rule, be calculated on the basis of the published annual accounts. It is therefore only by way of exception, where particular circumstances so justify, that certain adjustments should be made in order to best reflect the financial position of the undertakings concerned."

52. After referring to the passage in the then applicable Commission Notice (the forerunner of the Notice quoted in para 49 above), the Court continued:

> "211 It should be noted first of all that this paragraph of the Notice concerns a particular category of intermediaries within the services sector only, whose sole remuneration is the amount of commission they receive. It is therefore an exception to the general rule that the relevant turnover must be calculated on the basis of the total amount of sales. The concept of intermediary must therefore be interpreted strictly.
>
> 212 It should also be observed that the applicant is not claiming that under Spanish law its activity is carried on under an agency contract or commission contract, or any other similar form of contract. The fact remains that the applicant

> does not sell electricity to the end customer on behalf of the electricity generators or network operators."

The Court proceeded to hold that Endesa did not operate as an intermediary either as a matter of law (since an electricity distributor became the owner of the electricity prior to onward sale to its customers) or as a matter of fact (since the distributor bore the risk of non-payment by its customers and the method used to calculate payment meant that the distributor's remuneration was affected by its own efficiency).

53. The Commission's Notice and the judgment in *Endesa* were relied on, in particular by CDI, to argue that it should be regarded as an intermediary. The other two Appellants associated themselves with that submission.

54. Clearly, the situation in the present case is far removed from that of *Endesa*, but it is notable that the Court in its reasoning relied on the combined effect of a number of considerations, both legal and factual, all related closely to the particular circumstances.

55. We do not consider that it is either necessary or appropriate to determine whether, in paying the wages of temporary workers, the Appellants should be classified as "intermediaries" within the terms of the Commission's Notice regarding the Merger Regulation, since the EU Merger Regulation manifestly involves a different statutory regime. The requirements of speed and legal certainty, to which the Court referred in *Endesa* as regards merger control, do not apply in the very different context of the determination of turnover in order to calculate a penalty for past infringements. However, even under the merger regime, with the particular constraints to which the Court referred, the Commission's Notice, in its reference to advertising and the supply of package holidays, illustrates the importance of looking at the underlying economic reality of the business where the remuneration for services supplied is based on commission fees. As a general approach, we consider that applies with equal, if not greater, force to the determination of 'relevant turnover' as a measure of the scale and impact of infringing activity for the purpose of calculating the appropriate penalty.

56. We consider that the OFT was wrong to find in this regard that "[t]here is nothing specific to the recruitment sector": Decision, para 5.280. In our judgment, the particular arrangements made as regards the remuneration of temporary workers

supplied by recruitment agencies to their clients, which result in part from the legal requirements placed upon an "employment business", mean that there are specific features which may not be unique but which make net fees rather than gross turnover the meaningful measure of the scale of activity by participants in the market for the supply by recruitment agencies of candidates for the construction industry (as defined by the OFT). The use of net fees accordingly also avoids a distorted view of the relative degree of involvement (and thus capacity for anti-competitive impact) by different participants according to their particular mix of permanent and temporary placements at any period. That is reflected in the prevailing view of those who participate in this market and of those who analyse it from outside. Given the purpose of "relevant turnover" in Step 1 of the Guidance, we find that net fees accordingly represent the measure that should here be used.

57. We should add that it is not necessary for the purpose of these appeals to determine whether gross turnover or net fees should be used to determine the penalty cap under the Maximum Penalties Order (and thus at Step 5). However, we do not see any difficulty if a different measure is used for "relevant turnover" for the purpose of Step 1 of the Guidance from that applied to determine the penalty cap since the two measures have different purposes. Step 1 is designed, as discussed above, to establish the scale of activity by the undertaking in the relevant market: that is the sense in which the turnover is "relevant". By contrast, the penalty cap imposed by section 36(8) of the Act is determined by reference to the entirety of the undertaking's business, in all product and geographic markets, and thus prevents a penalty for violation of competition law from imposing an excessive burden on the undertaking. We note that Article 23(2) of Regulation 1/2003 similarly constrains the maximum fine that may be imposed by the Commission.

58. The Schedule to the Maximum Penalties Order states, at para 2, that the provisions of the Schedule are to be interpreted "in accordance with generally accepted accounting principles and practices" ("GAAP"). On this basis, both Hays and the OFT adduced extensive evidence from expert accountants as to whether, in accordance with GAAP (whether the UK or international standards), Hays could have expressed turnover in its accounts on the basis of net fees, and Eden Brown led evidence from its finance director addressed to the same point. Aside from the possibility that "relevant

turnover" in Step 1 might have a different interpretation in any event, we did not find this evidence of any real assistance. The fact is that all the Appellants expressed their turnover in their reports and accounts on the basis of gross fees, while also setting out their net fees or gross profits. Unsurprisingly, none of the Appellants suggested that their accounts were not prepared in accordance with GAAP, and all their accounts were signed off by well-respected auditors.

59. Under GAAP, whether UK standards (Financial Reporting Standards or FRS) or international accounting standards (IAS), when a recruitment agency is acting as an agent and not a principal in the supply of temporary workers, the net fees charged to the client (ie excluding the wages paid to the worker) represent the turnover from that supply. As a matter of law, when a recruitment agency supplies a worker to a client and charges that client an amount that covers the wages that it will then itself pay to the worker, either it is acting as an agent or it is not. The position is the same, as we understand it, if the matter is regarded not strictly as a question of law but in terms of the applicable accountancy standards that look to "the substance" of the transaction. It may be that in some cases this question is not easy to answer or the facts come close to the line (having regard to such matters as the credit risk). However, the statements in their statutory accounts reflect the determinations made by the management of the companies concerned, on which they advised their auditors, that in their supply of temporary workers they were acting as principals. We do not consider that it is appropriate for the purpose of calculating the penalty to be imposed on those companies to inquire whether an alternative view might have been possible or preferable, on the basis of a close scrutiny of the various terms and conditions employed in the companies' contracts to which we were taken. Nor do we think that the OFT can be expected to conduct such an exercise when calculating penalties. However, for the reasons we have set out, such an exercise is unnecessary in order to reach the correct view as to the appropriate measure of turnover: that is based on the nature of the business of a recruitment agency, as set out in the Decision.

2. The Relevant Year

60. For relevant turnover in Step 1, the OFT used the turnover in the undertaking's business year preceding the date of the Decision ("pre-decision turnover"). We understand that

this is now its general practice. In that respect, it follows the turnover year applied for the purpose of the penalty cap in section 36(8) of the Act, as specified in the current version of the Maximum Penalties Order: see para 24 above.

61. However, previously the OFT did not under Step 1 use the pre-decision turnover. Prior to amendment with effect from 1 May 2004, Article 3 of the Maximum Penalties Order specified the turnover for the purpose of section 36(8) as the business year preceding "the date when the infringement ended" ("pre-end of infringement turnover"). In its infringement decisions taken prior to 1 May 2004, the OFT used the pre-end of infringement turnover for the purpose of computing the starting point for a penalty.[20] Eden Brown, by its appeal, contended that the OFT was wrong to change its practice and that pre-end of infringement turnover remains the appropriate one to use. As stated above, this was not a ground advanced by either of the other two Appellants in their notices of appeal.

62. This issue does not turn on the wording of the Guidance. The terms of para 2.7 of the current Guidance, set out at para 39 above, are virtually identical to those of the previous guidance published under section 38 by the then Director General of Fair Trading in 2000 when the Act came into force.

63. Eden Brown's submission is essentially very simple. It points out that the relevant turnover is used at Step 1 in order to determine "the real impact of the infringing activity" as part of the measure of culpability. That relates to the position of the undertaking at the time of the infringement not at the time when it has to pay the fine. By contrast, the penalty cap, imposed by section 36(8), is intended to ensure that the fine is not excessive, which therefore relates to the position of the undertaking at the time it has to pay the fine. Accordingly, it was wrong for the OFT to change its practice as regards the "relevant turnover" at Step 1 just because the definition of turnover was changed for the very different purpose of the penalty cap.

[20] The OFT pointed out that in its decision in CA98/08/2004 *Desiccants* taken in November 2004, it applied the pre-end of infringement turnover: the Statement of Objections in that case had been issued before May 2004 while the 2000 version of the Maximum Penalties Order was still in force and had used that formulation. The OFT's practice only changed in December 2004.

64. We accept this argument, which admits of little elaboration. It is rightly acknowledged by the OFT that there is no legal requirement to apply the same year for turnover under Step 1 as is specified for the purpose of the penalty cap. Mr Unterhalter SC for the OFT submitted that adopting the year of turnover in the Maximum Penalties Order when applying Step 1 of the Guidance was a coherent interpretation having regard to the "hierarchy of statutory norms." However, once it is recognised that the use of turnover in those two circumstances is for two quite different purposes, the normative superiority of the statutory order is not engaged.

65. The OFT submitted that its current approach "has the benefit that the impact of the penalty and, in particular, the specific deterrent effect, is calibrated to recent rather than historic levels of turnover": Defence to Eden Brown, para 88. However, Step 1 is designed to relate not to the impact of the penalty but the impact of the infringement. Deterrence is specifically addressed under Step 3. When it comes to consideration of whether the sum should be increased to provide effective deterrence, it is then appropriate to have regard to the undertaking's current financial position by reference to its last business year prior to the Decision. But that is in a different context.

66. Nor do we see any practical difficulty in using different years for these different purposes. The measure of "relevant turnover" under Step 1 will in any event almost always be different from the applicable turnover under the penalty cap since the former is restricted to turnover in the relevant market. It was not suggested to us that the OFT experienced any particular practical difficulty in operating its Guidance in this regard prior to the change made in 2004. In a case where figures for the last year before the end of the infringement are not available, the OFT will be justified in using the best available alternative.

67. It is clear that the change made by ministerial amendment to the Maximum Penalties Order was designed to coincide with the grant of power to the OFT to impose penalties for infringement of EU as well as UK competition law, and therefore bring the penalty cap in line with the cap imposed by Article 23(2) of Regulation 1/2003 that applies to the pre-decision turnover: see the Explanatory Note to The Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004. However, the Commission's Guidelines on the method of setting fines under Reg 1/2003, OJ 2006 C

> "In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement."

68. Accordingly, under the fining methodology applied by the EU institutions, the pre-end of infringement turnover is used for the purpose of the starting point whereas the pre-decision turnover is used to determine the statutory maximum fine. That supports the logic of this approach.

69. Although raised by Eden Brown, the point is clearly of general application. We have considered whether it would therefore be appropriate to apply the same adjustment to the penalties of the other two Appellants. It may be said that it is unattractive for the Tribunal, in a case where three appeals are being heard together, to apply a penalty to two appellants according to an approach which the Tribunal holds, on the appeal by the third appellant, to be mistaken. We accordingly raised this issue with Hays and CDI, and with the OFT, in the course of the hearing. Hays and the OFT submitted that whatever the Tribunal's decision regarding Eden Brown, it should not interfere with the year of assessment applied in the other cases. CDI, by contrast, submitted that it should also have the benefit of the earlier year if that was found to be appropriate, relying on the principle of equality of treatment as applied under EU law.

70. We have, on reflection, concluded that it would not be right to interfere with the penalties applied to Hays and CDI on this basis. First, the Tribunal is required to determine an appeal "by reference to the grounds set out in the notice of appeal": para 3(1) of Schedule 8 to the Act. Although heard together for convenience, these are three distinct appeals and this point is not a ground of appeal in the notices of either Hays or CDI. For that reason, moreover, the principle of equality, even if it applies in a purely domestic law context, is not engaged. Secondly, and following on from that, we have considered whether if CDI had applied at the end of the hearing for permission to amend its notice of appeal to introduce this ground, we would have permitted it to do so. It was pointed out to us that calculation of "relevant turnover" in this case was a far

from straightforward matter and had involved much discussion prior to the Decision between each party and the OFT. The exchanges since the hearing between CDI and the OFT on this issue served to demonstrate the complexity of the exercise, which involves a considerable level of detail as to what should and what should not be included. We do not think it is appropriate for that exercise to be undertaken, or to impose that burden again on the OFT, after the conclusion of the hearing in respect of a party who had not previously raised that as a ground of appeal. Accordingly, having regard to all the circumstances, we would not have permitted CDI to amend its notice of appeal in this respect. However, as a result of our judgment (along with those of other panels of the Tribunal before whom this issue has been raised in the appeals against the OFT's *Bid rigging in the construction industry in England* decision[21]), the position to be applied by the OFT under this aspect of Step 1 is now clear for the future.

3. The Seriousness Percentage

71. Under its Guidance, to calculate the starting point under Step 1 the OFT applies a percentage to the relevant turnover to reflect the seriousness of the infringement. The Guidance states:

> "2.4 … The more serious and widespread the infringement, the higher the starting point is likely to be. Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements of Article [101] and/or the Chapter I prohibition. Conduct which infringes Article [102] and/or the Chapter II prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have a particularly serious effect on competition, for example, predatory pricing, is also one of the most serious infringements.
>
> 2.5 It is the OFT's assessment of the seriousness of the infringement which will be taken into account in determining the starting point for the financial penalty. When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment will be made on a case by case basis for all types of infringement, taking account of all the circumstances of the case."

72. The maximum percentage that can be applied is 10: para 2.8.

[21] See *Kier Group plc and Others v OFT* [2011] CAT 3

73. In the Decision, the OFT determined that 9% was the appropriate figure to reflect seriousness. It held that this was "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": para 5.227.

74. All the Appellants submitted that it was clearly wrong to apply a percentage only one point removed from the maximum that would apply to the most heinous infringement of the Chapter I prohibition. Pointing to para 2.5 of the Guidance, the Appellants stressed that many of the factors there mentioned were absent from this infringement. In particular, the parties had a low market share, there was little evidence of any anti-competitive effect, the arrangement collapsed of its own accord, and the services in question were not "mass consumer services". CDI argued in addition that so far as it was concerned, its participation in the infringement led it to terminate its relationship with only a single construction company, Taylor Woodrow.

75. However, in our judgment the OFT was right to emphasise that agreements with the object of price-fixing and a collective boycott of a new entrant into the market are of their nature among the most serious kinds of infringement. Although the combined market share of the parties to the CRF was estimated by the OFT to be only "at least 13.6%"[22], this was a highly fragmented market. The infringement comprised the largest players in the market: Decision, para 5.220. Indeed the participants were selected by the director of Hill McGlynn & Associates Ltd who organised their meeting at the outset on the basis that they were the key players in the sector and the agencies likely to be involved in Master Vendor and Neutral Vendor arrangements: Decision, paras 4.19 to 4.20. In evidence called by Hays for its appeal, a director of Vinci plc testified that the participants in the infringement included the agencies whom he regarded as important for any PSL put forward.[23]

76. Moreover, Mr Unterhalter submitted that the construction industry is an important part of the UK economy and the supply of labour by recruitment agencies is a key service for that industry. The entry of Parc into the market was designed to enable larger construction companies to enhance their recruitment arrangements and challenge

[22] Decision, para 5.220.
[23] For PSL, see para 15 above.

existing levels of fee rates. The deliberate intention of the infringing arrangement was to stifle that significant competitive development. We accept those submissions.

77. The Appellants also submitted that the OFT's determination of 9% for seriousness in this case is out of line with its approach in other penalty decisions under Chapter I. For example, *Replica Kits*, where 9% was determined as the appropriate starting point for the retailers and Manchester United (which in part was also a retailer) involved price-fixing of a popular product that was considered to have had a significant effect on competition and a direct impact on the retail price charged to consumers, many of whom were children (or those buying for children).

78. The OFT is not bound by its previous decisions as the Appellants recognise, but we accept that there should be broad consistency in the OFT's approach. However, when it comes to assessment of seriousness in this context, each case is very dependent on its facts. We agree with the OFT that the seriousness percentage is not to be approached as an exercise of box-ticking of various elements, and para 2.5 of the Guidance makes clear that the enumerated factors are not the only considerations. We have been supplied with a table prepared by the OFT setting out its previous decisions imposing penalties under Chapter I. Although there has been dispute with Hays over the description of some of the features of those cases, it is evident that the OFT has in previous decisions applied the full 10% multiplier in circumstances of market-sharing and price-fixing.[24] The fact that the infringement did not last very long is taken into account in the adjustment for duration and does not therefore go to this factor.

79. Having regard to all the circumstances, we do not regard a seriousness factor of 9% as so out of line or inappropriate as to amount to a misapplication by the OFT of its Guidance. The fact that, for reasons explained later in this judgment, we are substantially reducing the penalties imposed by the OFT, should not detract from the appreciation that the Margin Protection Initiative was a very serious violation of competition law.

[24] E.g., *Market sharing by Arriva plc and FirstGroup plc*, Decision of the Director General of Fair Trading No. CA98/9/2002, 30 January 2002 (Case CP/1163-00).

80. Nor do we accept the submission, advanced in particular by CDI, that the OFT should have drawn a distinction as regards seriousness as between the different participants in the infringement and applied a lesser percentage to CDI because its involvement affected its relationship with only one major construction group and not two as was the case for some of the other participants. In the first place, this infringement violated the Chapter I prohibition on the basis of object not effect. Secondly, we accept the submission of the OFT that the seriousness percentage is not designed to reflect all the particular circumstances of each undertaking's unlawful conduct but rather "to assign the infringement a categorisation which reflects its seriousness and the scale of the undertaking in the relevant market": Defence to CDI, para 74. In the present case, it was therefore appropriate to apply the same percentage to all the participants in the cartel.

4. The MDT

81. Under Step 2, the OFT adjusted the figure derived as a starting point for duration by applying a multiplier of 1.25 to each of these Appellants on the basis that their participation in the infringement lasted more than one year but less than one and a quarter years. There is no challenge to that uplift.

82. The OFT then considered the resulting figure under Step 3 to determine whether it was sufficient to achieve the policy objective of deterrence. The Guidance addresses the approach that will be applied as regards deterrence in paras 2.11 to 2.12 which state, insofar as material:

> "…The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article [101], Article [102], the Chapter I and/or Chapter II prohibition. Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial position of the undertaking in question. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration.
>
> 2.12 The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking. This step may result in either an increase or reduction of the financial penalty calculated at the earlier step."

83. In the Decision, the OFT adopted an approach which it summarised as follows:

> "…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."[25]

84. As regards the level of the MDT, the Decision states that the OFT has a margin of appreciation in assessing the appropriate penalty level for achieving deterrence in any particular case; and that in the circumstances of this case the OFT considered that "an upward adjustment of 15% is appropriate" to achieve its policy objectives.[26]

85. Since the figures arrived at as regards both Randstad and Hays were significantly below the sums that would have been reached if each had derived 15% of its total turnover in the relevant market, the OFT substituted that percentage of turnover for the relevant turnover, and then applied the 9% multiplier for seriousness and 1.25 multiplier for duration to those substituted figures.

86. The consequence for both Randstad and Hays was a dramatic increase in the level of the penalty. In the case of Hays, with which we are directly concerned, the figure went up by over 170%. It is therefore technically not correct for the OFT to have spoken of an "upward adjustment of 15%". The 15% refers to the substituted figure used for turnover; the actual upward adjustment that this caused to the penalty of Hays (and Randstad) in this case was very substantially higher.

87. As regards CDI, the MDT methodology did not lead to any alteration under Step 3. However, Eden Brown derived a much more substantial part of its total turnover in the relevant market. So also did two other addressees of the Decision that were subject to penalties. The OFT therefore considered that levying a penalty on the basis of relevant turnover without any adjustment would result in an excessive penalty being imposed on

[25] Decision, para 5.238.
[26] Decision, para 5.251.

those parties as it would be greater than necessary in order to achieve deterrence. The Decision states:

> "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."[27]

88. Accordingly, the OFT made a downward adjustment to those penalties. In the case of Eden Brown, the OFT considered that a reduction of 40% was appropriate. Although it was not so analysed in the Decision, if one applies the logic of the MDT methodology, the result was to produce a figure that corresponded to that which would have been arrived at if Eden Brown had generated a little over 19% of its total turnover in the relevant market.

89. Eden Brown accordingly challenged the reduction made under Step 3 in its case as too low. But it supported Hays in making a more fundamental attack on the whole methodology of the 15% MDT as applied by the OFT. CDI also, as a precautionary ground of appeal, supported those arguments in the event that the calculation of its penalty was reduced by reason of the use of net fees instead of gross turnover at Step 1. In that event, CDI submitted, it would be wrong to adjust it back upwards by applying a 15% MDT.

90. The OFT's policy objectives as set out in para 1.4 of the Guidance were not challenged by any of the Appellants and we consider that they are clearly appropriate and reasonable. Moreover, it was accepted that the need for adequate deterrence means that where only a small part of an undertaking's total business is carried out in the relevant market, the figure arrived after Steps 1 and 2 may require a significant upward adjustment to produce a penalty that has a real financial impact on the undertaking in the context of its business. It was the approach adopted by the OFT to achieve that objective which was the subject of forceful criticism as mechanistic, disproportionate and irrational.

91. The parties' challenges to the MDT were naturally developed on the basis of the very large penalties in financial terms that resulted (or in CDI's case, could result). Consistently with its approach at Step 1, the OFT took the undertaking's total turnover

[27] Decision, para 5.254.

as gross turnover not net fees, to which the 15% proportion was applied. It follows from our reasoning and conclusion on the Gross/Net issue, that net fees is the more appropriate measure in determining the relationship of the penalty to the total scale of the businesses of the Appellants. Accordingly, even if the OFT's MDT of 15% continued to be used, since a significant part of the business of the three undertakings that brought these appeals involves recruitment of temporary staff, the substitution of net fees in the total turnover calculation dramatically reduces the level of the penalties. In practical terms, the level of concern expressed by the Appellants about the application of the MDT may therefore be appeased. But the grounds of challenge under the various appeals to the MDT raise important issues of principle which must be addressed.

92. We agree with the Appellants that to determine the penalty on a fixed percentage of worldwide turnover, regardless of the scale or area of infringement, and without consideration of any other features of the undertaking subject to the penalty, is an inappropriately mechanistic and narrow approach. As the Court of Justice ("ECJ") stated in the *Pioneer* case, Joined Cases 100-103/80 *Musique Diffusion Française v Commission* [1983] ECR 1825 (at para 121):

> "It follows that, on the one hand, it is permissible, for the purpose of fixing the fine to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. That is particularly the case where the goods concerned account for only a small part of that figure. It is appropriate for the Court to bear in mind those considerations in its assessment, by virtue of its powers of unlimited jurisdiction, of the gravity of the infringements in question."

93. The Appellants submitted that the OFT's application of an MDT effectively disregarded Steps 1 and 2 of the Guidance. That is not correct since the seriousness percentage calculated under Step 1 and the full duration uplift under Step 2 are still applied. However, use of the MDT does disregard the "relevant turnover" as specified in the Guidance under Step 1 whenever that turnover is below 15% of the undertaking's total turnover.

94. The objectives set out in para 1.4 of the Guidance are twin objectives and it is important that the one is not lost sight of in pursuit of the other. The real impact of the infringing activity is a relevant consideration when considering the overall gravity of the infringement, as Step 1 of the Guidance recognises in incorporating the concept of "relevant turnover". However, the substitution of a fixed percentage of worldwide turnover of all the undertaking's businesses for "relevant turnover" manifestly takes that element out of account.

95. Moreover, if the infringing activity is carried out in the United Kingdom by the English subsidiary of a large foreign or multi-national company, which may be involved in diverse fields of activity but which nonetheless constitutes a single undertaking, application of the MDT can produce an enormous figure for the penalty. In the Decision as regards Randstad, the "relevant turnover" in the United Kingdom of the two English subsidiaries applied under Step 1 was well under £200 million whereas the worldwide turnover attributable to the Dutch parent company was over £5.7 billion. It was for that reason that application of the MDT led to imposition of a penalty (before immunity) of almost £117 million. That demonstrates the disproportionate nature of the OFT's approach. Although the absolute figures are less extreme, the same vice is evident in the case of Hays. The total worldwide turnover of Hays plc, which had operations at the relevant time in 28 countries around the world, was £2.45 billion, a figure over 18 times its "relevant turnover" (calculated on the basis of gross fees). We accept the submissions of the Appellants, and of Hays in particular, that use of the MDT approach in this manner is disproportionate.

96. In seeking to uphold its methodology, the OFT relied strongly on the judgment of this Tribunal in *Makers UK Ltd v OFT* [2007] CAT 11, [2007] CompAR 699. Makers was found by the OFT to have infringed the Chapter I prohibition by agreeing with other roofing contractors to fix bids for various flat roof and car-parking contracts. Makers was an English private company and its "relevant turnover" in the affected market was £130,000. Since the seriousness percentage was assessed by the OFT at 5% and there was no adjustment for duration, the result would have been a penalty of £6,500. Makers' total turnover was over £69 million, and the OFT applied an MDT of 15% to recalculate the penalty at Step 3 to £526,500. On appeal, Makers challenged the uplift at Step 3, and the MDT methodology used by the OFT became clear only in its defence

to the appeal. While criticising the OFT's decision for lack of reasoning on that account, the Tribunal rejected the challenge to the use of the MDT as such. It stated, at para [134]:

> "The adoption of the Minimum Deterrent Threshold is, in our view, an appropriate way in which to ensure that the overall figure of the penalty meets the objective of deterrence referred to in the Guidance."

97. We do not consider that this statement in *Makers* provides authority for the general use of the MDT method in all cases or, indeed, for the general application of 15% as the appropriate percentage to be applied when that method is used. Decisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case. Although sometimes it is clear that the Tribunal in its judgment is setting out principles of more general application, we do not regard the brief statement quoted above from *Makers* as an expression of that kind. Makers was itself a subsidiary company and its ultimate parent was Keller Group plc: judgment, para [10]. The parent company was not there also an addressee of the decision, but if it had been (on the basis that it and Makers were part of the same undertaking), as Ms Kreisberger for CDI pointed out by reference to the annual report of Keller Group plc, since its turnover in 2005 was a little over £685 million, application of the MDT could have led to a penalty of over £5.1 million, representing a deterrence 'uplift' at Step 3 of well over 78,000%.[28] We cannot imagine that the Tribunal would have regarded that as appropriate or proportionate.

98. Moreover, the Guidance refers at para 2.11 to consideration of "the size and financial position of the undertaking in question." In making its "adjustment" for deterrence by reference to worldwide turnover, the OFT has used only one aspect of the undertaking's financial position to the exclusion of all others and thus committed the error identified by the ECJ in *Pioneer*. We do not suggest that worldwide turnover, as a measure of the total size of the undertaking, is irrelevant, or indeed that gross turnover should be disregarded altogether, although for these undertakings net fees provide a more meaningful measure of scale. Furthermore, we accept that it will often be just and proportionate to impose a higher penalty on a larger undertaking than a smaller undertaking involved in the same infringement, not only because the impact on the

[28] In fact, although the OFT's decision in *Makers* was taken on 22 February 2006, the OFT used turnover figures for the year ended 31 December 2004. On that basis, since the turnover of Keller Group plc in 2004 was £596 million, a penalty calculated on the basis of the MDT would have been £4.47 million. But this does not affect the force of the argument.

market is likely to have been greater but because a higher financial penalty is required in order to achieve the required deterrent effect, in particular on senior management. However, other aspects of the undertaking's financial position, where reliable information is made available, should also be considered. We do not consider that it is appropriate to be prescriptive about this since the circumstances will vary from case to case, and even for individual undertakings in the same case. But such matters as the profit margin (both in the UK and world-wide) for the undertaking individually and the industry generally, and any unusual features of the year in question, may be relevant considerations.

99. Furthermore, in having regard to the need for deterrence, it is important not to lose sight of the need for the penalty properly to reflect also the culpability of the undertaking in terms of the seriousness, and hence the scale and effect of the infringement. In short, determination of the penalty requires a refined consideration and assessment of all the relevant circumstances, and the element of deterrence, while undoubtedly one of those circumstances, should not lead to the level of penalty being calculated according to a mathematical formula. See in that regard the observations of the Court of Appeal (Criminal Division) in *R v Martin* [2006] EWCA Crim 1035, [2007] 1 Cr App R (S) 3 at para [21].

100. Once account is taken of all the various aspects that relate to the individual undertaking, it is then necessary to 'step back' and consider what figure involves a fair uplift on the amount calculated at Steps 1 and 2 to meet the twin objectives of culpability and deterrence. The assessment which, in our judgment, is required should take into account the various circumstances of the individual undertaking instead of imposing a mechanistic and artificially narrow formula. Such an assessment should ensure that a penalty is determined that is proportionate. It may be that this can be characterised as a subjective evaluation by the decision-maker but, as Mr Unterhalter recognised, the selection by the OFT of 15% for the MDT was in itself subjective. Moreover, an assessment by an experienced decision-maker that has regard to all the relevant circumstances of the particular case is a familiar part of the assessment of the appropriate penalty in many fields of the law. Specifically in the field of cartel violations of competition law, we note in that regard the approach to deterrence of the

European Commission in Case COMP/38.695 *Sodium Chlorate*[29] where the penalty determined for Elf Aquitaine (prior to leniency) was increased from €22.7 million to €38.59 million to achieve deterrence. This increase of 70% was on account of the fact that the total worldwide turnover of Elf Acquitaine was €139.4 billion. Accordingly, the increased fine, which the Commission considered was appropriate for a sufficient deterrent effect in that case, represented under 0.03% of Elf Acquitaine's worldwide turnover.

101. We should add that although Hays and Eden Brown submitted that the level of penalty determined at Step 3 should also have regard to their introduction of a compliance programme for the future, we consider that the OFT was correct in regarding that as a factor to be brought into account as possible mitigation in Step 4. It is not something that additionally affects the adjustment for deterrence at Step 3.

102. Finally, we should state for completeness that Hays' notice of appeal contended that the adoption by the OFT of the MDT was unlawful as an alteration of, or departure from, the Guidance. However, that submission was expressly not pursued in oral argument and therefore it is not necessary to address it.

103. We turn to consider the particular position of each of the three Appellants.

Hays

104. Following the approach of the Guidance, the relevant turnover of Hays determined on net fees instead of gross turnover was calculated by the OFT as £33,562,059 in 2008/09[30]. Applying a seriousness percentage of 9% and a multiplier of 1.25 for duration leads to a figure, after Steps 1 and 2, of £3,775,732. On the question of deterrence, that figure has to be considered in the context of a group with total turnover of £2.45 billion and net fees of £670.8 million in that year. In the UK and Ireland, the net fees earned were £330.7 million. Its worldwide operating profits for the same year were £158 million, of which the UK and Ireland accounted for £63.5 million.[31]

[29] Decision of 11 June 2008: see at paras 545-549.
[30] This incorporates an adjustment by the OFT to the figure of £33,295,599 put forward by Hays.
[31] Although Hays cited to us figures for post-tax profits, we consider that operating profit before tax is the more appropriate figure to take into account.

105. Taking all those matters into account, we consider that a very substantial uplift on account of deterrence is necessary. In our judgment, the appropriate and proportionate penalty, having regard to the seriousness of the infringement and the need for deterrence but before any particular aggravating and mitigating factors are taken into account (and before leniency) is £8 million.

Eden Brown

106. For the reasons set out above, the year for which relevant turnover is to be assessed at Step 1 in the case of Eden Brown is 2004/05. The relevant turnover in that year calculated on the basis of net fees is £5,306,181. Applying a seriousness percentage of 9% and a multiplier of 1.25 for duration leads to a figure, after Steps 1 and 2, of £596,945.

107. Although we have held that the appropriate year for determination of relevant turnover is the final year before the end of the infringement, when it comes to the issue of deterrence we consider that the more pertinent financial information is that for the year before the decision. The focus of relevant turnover is on the scale of the infringement and (where the infringement has come to an end) it is therefore retrospective. By contrast, the focus of deterrence is on the future conduct of the undertaking itself, and the message sent to other undertakings, and it is therefore prospective. Accordingly, at Step 3, it is appropriate to have regard to the most recent financial statements of the undertaking and financial information from earlier years is generally of less relevance.

108. Eden Brown's total gross turnover in 2008/09 was a little over £73 million and its net fees were over £15 million. Eden Brown made an operating loss for that year as set out in its accounts of £427,854. The Decision records that Eden Brown generated a significantly higher proportion of its turnover in the relevant market than the other two Appellants. All of Eden Brown's trading was in the United Kingdom.

109. Taking these factors into account, we consider that some uplift for deterrence is necessary but, given the financial size of Eden Brown and the fact that the figure derived from Steps 1 and 2 is directly related to the whole area of its business, the degree of uplift should be much smaller than in the case of Hays. In our judgment, the

appropriate and proportionate penalty, having regard to the seriousness of the infringement and the need for deterrence but before any particular aggravating and mitigating factors are taken into account (and before leniency) is £700,000.

110. It was submitted to the Tribunal that the penalty for Eden Brown should be reduced to take account of the company's financial circumstances in the year ended March 2010, which are markedly different from those pertaining in 2004/05. We accept that in certain circumstances an undertaking's current financial position will be relevant to the assessment of the penalty, if it can demonstrate genuine financial hardship. The OFT indeed recognised this in the Decision.[32] But as we understood the submission on behalf of Eden Brown, it was not suggesting to the Tribunal that a penalty at the level we have determined would cause it genuine financial hardship. Secondly, we think that such a consideration should in principle apply to the penalty as finally calculated, after any reduction for leniency, since that is the amount which the undertaking will actually have to pay. Thirdly, Eden Brown did not advance this as an argument to the OFT before the imposition of the penalty nor was it raised in Eden Brown's notice of appeal. Although the Tribunal has full jurisdiction to revoke or vary the amount of the penalty, this is nonetheless an appellate jurisdiction and we have reservations about the extent to which we should have regard to matters arising since the decision appealed against, save in exceptional circumstances. However, it is not necessary to reach a concluded view on that question in this case since for the first two reasons we are clear that Eden Brown has not established a basis for a further reduction on this ground.

CDI

111. Before considering the penalty calculation, it is necessary to address the ground of appeal advanced by CDI that the OFT erred in the calculation of its relevant turnover, i.e. turnover in the market affected by the infringement. Specifically, CDI submits that the OFT failed to make a deduction to exclude turnover attributable to management and maintenance roles in relation to civil engineering structures (including safety critical roles in the rail industry). The OFT accepted in the Decision that for the computation of relevant turnover, such turnover should be excluded.[33]

[32] Decision, paras 5.261 et seq.
[33] Decision, paras 5.78-5.80.

112. It became clear on the appeal that the computation made by the OFT did not fully exclude such categories in the case of CDI. CDI contended that this was because the OFT failed to seek the correct information, whereas the OFT submitted that the failure was on CDI's part in failing to supply it despite having repeated opportunities to do so.

113. We do not think that we need to establish in this judgment which side bears more or less responsibility for the erroneous result. It is acknowledged by the OFT that the figure which it used for CDI did not exclude this category and there is no dispute as to the adjustment necessary to achieve the correct figure. This was a case where a great deal of detailed information was requested from, and submitted by, the parties for the purpose of calculating the relevant turnover. The OFT was prepared to accept for the purpose of the present appeal that it was appropriate for the Tribunal to make the adjustment sought, while expressing concern that a party should not be able to neglect proper cooperation with the OFT in supplying full or adequate information, relying on the fact that it can subsequently appeal to this Tribunal to remedy the position. We understand that concern which we regard in principle as legitimate. The acceptance of CDI's appeal on this ground should not be regarded as establishing a precedent for the future. As we have observed, the approach adopted by the OFT to this issue means that we did not have to determine whether the error in the figure used could be attributed to the undertaking which is subject to the penalty, but such an exercise may have to be undertaken in a subsequent case.

114. Accordingly, for the relevant turnover for CDI in 2008, which on net fees would be £19,888,063, there is to be substituted £19,047,743. Applying a seriousness percentage of 9% and a multiplier of 1.25 for duration leads to a figure, after Steps 1 and 2, of £2,142,871.

115. CDI AndersElite Limited is a wholly owned subsidiary of CDI Corp, a Pennsylvania corporation, and together they constitute a single undertaking. By reason of the activity of its American parent, the global worldwide gross turnover of CDI in 2008 was £605.6 million, and the figure for net fees was £252.3 million. The figures for CDI AndersElite Limited, representing the UK business, were: gross turnover £111.2 million; and net fees £22.5 million. The operating profits were £13.7 million for CDI as a group and CDI AndersElite Limited reported a small operating loss.

116. In the light of these figures, we do not regard it necessary to make an adjustment to the penalty so calculated on the grounds of deterrence. If we were to consider the UK business alone, it might be arguable that the penalty calculated after Steps 1 and 2 should be reduced as it represents such a high proportion of the net fees of CDI AndersElite Limited. But given that this company is part of a much larger undertaking, we do not consider that any reduction is justified. Accordingly, and using a rounded figure as we are taking a broad, overall view, we determine the appropriate and proportionate penalty, before any particular aggravating and mitigating factors are taken into account (and before leniency) as £2.1 million.

5. Step 4: aggravating and mitigating factors for the individual Appellants

117. We here consider the grounds of appeal that are particular to Hays and Eden Brown as regards the aggravating and mitigating factors to be applied at Step 4.

Hays: Involvement of senior management

118. The OFT applied an uplift of 10% on account of the involvement of a "senior manager", Mr Simon Cheshire. Hays contended that this was fundamentally misplaced since Mr Cheshire "was by no stretch of the imagination actually a senior manager". Hays submitted that Mr Cheshire would be more aptly characterised as a regional sales manager or "middle manager" with responsibilities for sales representatives in South-East England. In addition to its contention about Mr Cheshire's responsibilities, Hays relied on the fact that Mr Cheshire was not (despite his working title "for customer presentation purposes") a director of the company, his remuneration level and his lack of relevant management training. Further, the chairman of Hays, Mr Robert Lawson, gave evidence that at the time the reporting lines within the company were unusually "flat" so that although Mr Cheshire reported to a Mr Robert Smith who sat on the board of Hays Specialist Recruitment Ltd and reported directly to the CEO of Hays plc, a more accurate reflection of Mr Cheshire's position emerges from the corporate restructuring that has followed the growth in Hays' business. Under the present structure, a person in Mr Cheshire's role and having his responsibilities at the time of

the infringement would have […][**C**][34] reporting lines between him and the CEO of Hays plc.

119. However, we consider that Hays understated the role carried out by Mr Cheshire at the time. He was not only the regional sales manager for South-East England, which represented a significant proportion of the business of Hays Construction & Property ("C&P") division in the United Kingdom, but he also had an overall responsibility for national accounts from at least June 2004 to June 2005. The National Accounts Director of Hays Specialist Recruitment over the period, Mr Duncan Collins, gave evidence that he reported to Mr Cheshire, whom he generally met monthly to discuss national accounts. National accounts in Hays' C&P division of course would be some of the most important accounts. It was presumably on the basis of that role that Mr Cheshire was the person invited to attend the CRF meetings, of which the first took place in November 2004. As Mr Lawson accepted in his oral evidence, Hays' submission that Mr Cheshire had no responsibilities outside South-East England was incorrect.

120. Further, we consider that the OFT was entitled to rely on the reporting lines for Mr Cheshire as they were at the material time, as opposed to those on a later corporate re-structuring. We note that Mr Lawson said that at the time of the infringement there were some 70 individuals at Mr Cheshire's level of seniority in Hays globally. That is in a business which at that time operated in some 20 countries and employed over 6,000 staff.[35]

121. Having regard to all these matters, we consider that the OFT was fully justified in regarding Mr Cheshire as a "senior manager" in terms of an aggravating factor to be applied under Step 4. It is not a pre-requisite for an uplift to the penalty on account of the individual's role in the company that he is a board director in the legal sense. Moreover, an uplift on this basis can be for more than 10%: in its decision in *Football Replica Kit*[36], the OFT increased several of the penalties by 20% because of the

[34] Information excised having regard to para 1 of Schedule 4 to the Enterprise Act 2002.
[35] Figures taken from Hays' annual report for 2005/06. The 2004/05 report was not in evidence.
[36] Case CA98/06/2003: see the summary in *Umbro v OFT* [2005] CAT 22, [2005] CompAR 1060 at paras [33] to [72].

involvement of individuals at the highest levels in the undertakings concerned. In the present case, we consider that an uplift by 10% for Hays was appropriate.

Hays and Eden Brown: compliance programmes

122. The OFT found that five of the addressees of the Decision, including all three Appellants, had 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."[37] On that score, the OFT applied a 5% reduction in the penalty calculation. Both Hays and Eden Brown challenge that as inadequate. Each argued that the particular facts of its case merited a larger reduction.

123. Hays submitted that it should have received a 10% reduction in fine. It gave evidence of the full and detailed compliance programme that it subsequently put in place and emphasised that:

(i) the measures have been rolled out worldwide with a sector-specific focus;

(ii) there is a clear programme for monitoring active participation in the measures by all employees: the measures are dynamic and personnel are subject to annual training and testing;

(iii) the measures have been personally implemented by the General Legal Counsel of Hays Group under the instruction of the Board, and have involved the application of very considerable time and other resources, including from senior Hays personnel.

124. Further, Hays pointed to the fact that it immediately accepted responsibility for the infringement at the highest levels and has demonstrated an "unwavering commitment to avoiding future infringements".

125. Eden Brown argued that the OFT was wrong to apply the same reduction of 5% to each party in respect of compliance and submitted that it should have received a relatively

[37] Decision, para 5.337.

higher reduction since it has gone significantly further than those other parties. It emphasised that it had accepted responsibility for, and apologised for its participation in, the infringement; introduced a significant compliance policy since the start of the OFT's investigation that was communicated to all appropriate members of staff; and offered to assist with education in the recruitment consultant sector and, more widely, with relevant industry training via the Recruitment and Employment Confederation ("REC"), so as to minimise future risks of infringement. The fact that no steps had been taken in that regard since the offer was made in December 2008 was explained on the basis that Eden Brown was still waiting for the REC to suggest dates for such training sessions.

126. Eden Brown submitted that the OFT refers in the Decision only to "compliance measures" and does not give Eden Brown credit for having gone further in this regard. Eden Brown referred in particular to the Tribunal's penalty judgment in *Replica Kit* at paras [265] and [266], where the Tribunal expressed its view that the adoption of a strengthened compliance programme, coupled with acceptance of responsibility, could justify a reduction in penalty in the range of 5 to 10%.

127. By the Decision, the OFT granted a modest penalty reduction as appropriate in connection with compliance measures implemented subsequent to the investigation. We do not see any features in the compliance response of either Hays or Eden Brown that warrant a larger reduction on this account. Undertakings should be incentivised to adopt strong compliance measures *before* any infringement occurs. Taking steps to put right the failures that led to the infringement, and to prevent repetition, are normally to be regarded as the appropriate action of any responsible undertaking following an investigation revealing violation of competition law. That the cost of introducing an effective programme is significantly higher for a larger undertaking, such as Hays, than for a smaller one is inevitable. That is reflected in the financial value of the reduction, since the penalty (before reduction) will generally be higher on the larger undertaking and the reduction is set as a percentage. Moreover, we agree with the OFT that it is not required to carry out a detailed evaluation of an undertaking's compliance measures, which would be disproportionate to the OFT's task of setting penalties. The availability of a modest reduction for introducing a compliance programme is sufficient to encourage an undertaking to take prompt steps to do so, and indeed the undertaking

draws other benefits from doing so, by reducing its risk of being found responsible for future infringements.

128. As regards the parties' acceptance of responsibility, we consider that the OFT is correct in its submission that in the present case this is reflected in the leniency discounts awarded to each of Hays and Eden Brown and does not warrant any separate and additional discount. The position is here different in that respect from the situation of Manchester United considered by the Tribunal in the passages from the *Replica Kit* judgment on which Eden Brown, in particular, relied. It is to be noted that Eden Brown received a greater reduction for leniency, by an additional 5%, than any of the other parties (apart from Randstad which received 100% immunity).

V. CONCLUSION

129. In the light of the above, we resolve the three appeals as follows.

Hays

130. The penalty on Hays is determined as £8 million, plus an uplift of 10% less a reduction of 5%. The penalty is further reduced by 30% on account of leniency. Accordingly, it is fixed at £5,880,000.

131. To that extent, the appeal by Hays is allowed. Subject to that, Hays' appeal is dismissed.

Eden Brown

132. The penalty on Eden Brown is determined as £700,000, plus an uplift of 10% less a reduction of 5%. The penalty is further reduced by 35% on account of leniency. Accordingly, it is fixed at £477,750.

133. To that extent, the appeal by Eden Brown is allowed. Subject to that, Eden's Brown appeal is dismissed.

CDI

134. The penalty on CDI is determined as £2.1 million, plus an uplift of 10% less a reduction of 5%. The penalty is further reduced by 30% on account of leniency. Accordingly, it is fixed at £1,543,500.

135. To that extent, the appeal by CDI is allowed. Subject to that, CDI's appeal is dismissed.

136. In each case, subject to any representations by the parties, the penalties will be subject to interest at 1 per cent above Bank of England base rate from 2 December 2009 to the date of payment or the date of any relevant judgment obtained by the OFT under section 37(1) of the Act.

137. The decision of the Tribunal is unanimous in each case.

Mr Justice Roth Michael Davey Vindelyn Smith-Hillman

Charles Dhanowa
Registrar

Date: 1 April 2011