

Case CMP/01-2016/CA98

Competition Act 1998: Decisions of the Financial Conduct Authority

Anti-competitive conduct in the asset management sector

21 February 2019

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The names and specific roles of individuals mentioned in the original version of the decisions have been removed from the published version. Names and specific roles have been replaced with [name] and [role] or a general descriptor of the individual's role such as [fund manager] or FM.

Contents

1	Introduction and executive summary.....	10
2	The FCA’s investigations	12
	Introduction	12
	Competition Act investigation	12
	Initiation and investigation	12
	Statement of Objections and Letters of Fact	12
	Draft Penalty Statement	13
	The FSMA investigation	14
3	The Chapter I prohibition and Article 101 TFEU	16
	Overview	16
4	The parties to the investigation.....	18
	‘Undertakings’ under competition law	18
	Meaning	18
	Parent and subsidiary liability	18
	Conduct of employees	19
	Parties to the investigation	20
	Asset management	20
	Artemis and Affiliated Managers Group Inc.	20
	Hargreave Hale	21
	Newton and BNYM Corp	21
	RAMAM and RAM Group	22
5	The IPO and placing process	24
	Introduction	24
	The decision to raise equity capital	24
	The book-building process for IPOs	26
	Participants in the book-building process	26
	Key stages in the book-building process	27
	Information flows in IPOs	29
	Price-setting within IPOs	33
	Secondary issues including placings	37
	Price-setting in placings	38
	Asset managers’ incentives to compete during the book-building process	38
	The potential adverse effects of bid disclosure on competition between asset managers	43
	Party submissions and the FCA’s view of them	46

Artemis	46
Hargreave Hale	47
RAMAM	48
The FCA’s view of party submissions	49
6 Market definition	52
Introduction	52
Market definition in Chapter I/Article 101 TFEU ‘object’ cases	52
The starting point for the FCA’s analysis	53
Individual transactions	53
Asset managers as suppliers of equity capital	54
Analytical framework for the analysis of the relevant market	55
Relevant product market	56
Equity versus debt capital	56
Individual equity transactions	57
Primary versus secondary issues, other forms of secondary issues and industry sector	58
Market capitalisation	59
FCA findings on relevant product market	61
Relevant geographic market	61
Party submissions and FCA view of those submissions	62
Artemis	62
Hargreave Hale	63
RAMAM	63
FCA view of party submissions	66
Conclusions on the relevant product and geographic market	67
7 The facts	68
Introduction	68
Market Tech placing	68
Background	68
Newton	68
RAMAM	71
Hargreave Hale	71
Final allocations	71
On the Beach IPO	72
Background	72
Newton	73
RAMAM	73
Hargreave Hale	74
Other firms	75
Final allocations	76
Card Factory IPO	76
Background	76
Final allocations	79

8	The law applicable to ‘concerted practices’	80
	Concerted practice	80
	‘Discussions’	81
	The type of information that can reduce uncertainty between competitors	81
	Request for, or acceptance of, strategic information	84
	Single occasion	88
	Between two or more actual or potential competitors	88
	Subsequent conduct on the market	89
	A relationship of cause and effect between the discussions and that conduct	90
	The presumption of causation	90
	Rebutting the presumption	92
	Summary of the elements comprising a concerted practice	94
9	Object of preventing, restricting or distorting competition	95
	Introduction	95
	Party submissions	96
	Artemis	96
	Hargreave Hale	97
	RAMAM	98
	FCA findings	99
	Object of the practice	99
	The potential harm of the practice	100
	Novelty	102
	Supplier or customer	102
10	Other legal aspects of an infringement of the Chapter I prohibition and/or Article 101 TFEU.....	104
	Introduction	104
	Appreciability	104
	Effect on trade	104
	Exemption, legal exception and exclusion	105
	Burden and standard of proof	105
11	Market Tech: Newton/Hargreave Hale concerted practice ‘by object’	107
	Introduction	107
	Concerted practice	107
	Discussions	107
	The information that Newton disclosed to Hargreave Hale	107
	Request and/or acceptance	110
	Between two or more actual or potential competitors	115
	Subsequent conduct on the market	115
	A causal connection	116

Application of the presumption	116
Rebutting the presumption	117
Conclusion	119
'Object' of preventing, restricting or distorting competition	119
Content and objectives of the concerted practice and its legal and economic context	120
<i>NFM1's</i> intent	120
Hargreave Hale's submissions on 'object' and the FCA's view of them	122
Fragmented market	122
Unilateral or one-off disclosures	122
Innocent recipient/no Hargreave Hale intent	122
<i>NFM1's</i> intent	123
Newton's disclosed strategy was against Hargreave Hale's commercial interests	123
Disclosure is part of price formation	124
220p bid would have missed	124
Attempt to influence is not concerted practice	125
Effect analysis	125
Novelty	126
Conclusion on 'Object'	126
12 Market Tech: Newton/RAMAM concerted practice 'by object'	127
.....	
Introduction	127
Concerted practice	127
Discussions	127
The information that Newton disclosed to RAMAM	128
Request and/or acceptance	129
Between two or more actual or potential competitors	131
Subsequent conduct on the market	132
A causal connection	132
Application of the presumption	133
Rebutting the presumption	133
Conclusion	134
Object of preventing, restricting or distorting competition	135
FCA findings	135
Content and objectives of the concerted practice and its legal and economic context	135
<i>NFM1's</i> intent	136
RAMAM submissions on 'object' and the FCA's view of them	136
Conclusion on Object	140
13 On the Beach: Newton/Hargreave Hale concerted practice 'by object'	141
.....	

Introduction	141
Concerted practice	141
Discussions	141
The information that Newton disclosed to Hargreave Hale	141
Request and/or acceptance	145
Between two or more actual or potential competitors	149
Subsequent conduct on the market	149
A causal connection	150
Application of the presumption	150
Rebutting the presumption	151
Conclusion	153
'Object' of preventing, restricting or distorting competition	153
FCA findings	153
Content and objectives of the concerted practice and its legal and economic context	154
<i>NFM1's</i> intent	154
Hargreave Hale submissions on 'object' and the FCA's view of them	155
Fragmented market	155
Unilateral or one-off disclosures	155
Information disclosed must be considered in context	156
Bids determined by market factors	156
<i>NFM1's</i> intent	157
Hargreave Hale did not intend or wish to align its prices with Newton	157
Market efficiencies	157
Conclusion on Object	158
14 On the Beach: Newton/RAMAM concerted practice 'by object'	159
.....	
Introduction	159
Concerted practice	159
Discussions	159
The information that Newton disclosed to RAMAM	159
The information that RAMAM disclosed to Newton	160
Request and/or acceptance by RAMAM	161
Request and/or acceptance by Newton	162
Between two or more actual or potential competitors	162
Subsequent conduct on the market	163
A causal connection	163
Application of the presumption – RAMAM and Newton	164
Rebutting the presumption – RAMAM	164
Rebutting the presumption – Newton	166
Conclusion	166
Object of preventing, restricting or distorting competition	167

FCA findings	167
Content and objectives of the concerted practice and its legal and economic context	167
<i>NFM1</i> 's intent	168
RAMAM submissions on 'object' and the FCA's view of them	168
Conclusion on 'Object'	168
15. Card Factory: Newton/Artemis 'concerted practice' 169	
Introduction	169
Concerted practice	169
Discussions	169
The information that Newton disclosed to Artemis and the information that Artemis disclosed to Newton	169
Conclusion	172
16. Assessment: Appreciability, Effect on Trade and Exclusion or Exemption 173	
Introduction	173
Appreciability	173
Effect on trade	174
Effect on trade within the UK	175
Effect on trade between Member States	175
Party submissions and the FCA's views of them	176
Exclusion or exemption	176
FCA findings	176
Party submissions and the FCA's view of them	177
Contribution to improving production or distribution or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit	178
Do not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives	179
Do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question	179
17 The FCA's action 180	
Decisions regarding infringement of the Chapter I prohibition and Article 101 TFEU	180
Market Tech and OTB	180
Card Factory	180
Directions	180
Financial penalties: legal framework	181
Introduction	181
FCA's margin of appreciation in determining the appropriate penalty	181
Intention or negligence	182
Calculation of penalties	182

Calculation of penalty for RAMAM	183
Summary	183
Imposition of any penalty on RAMAM	184
Single penalty	184
Intention or negligence	185
Step 1 – Starting point	185
Seriousness of the infringement and the need for general deterrence	186
Step 2 – adjustment for duration	189
Party submissions and the FCA’s view of them	189
Step 3 – adjustment for aggravating and mitigating factors	189
Mitigating factor – cooperation	190
Mitigating factor – compliance	190
Mitigating factor – the role of undertaking	191
Step 3 summary	191
Step 4 – adjustment for specific deterrence and proportionality	191
Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy	192
Step 6 – application of reductions for leniency and settlement	192
Financial hardship	192
Conclusion	192
Calculation of penalty for Hargreave Hale	192
Summary	192
Imposition of any penalty on Hargreave Hale	193
Single penalty	194
Intention or negligence	195
Step 1 – Starting point	197
Relevant turnover	197
Step 2 – adjustment for duration	201
Step 3 – adjustment for aggravating and mitigating factors	202
Mitigating factor – the role of the undertaking	202
Mitigating factor – genuine uncertainty	202
Mitigating factor – cooperation	203
Mitigating factor – compliance	203
Mitigating factor – termination of infringement	203
Step 4 – adjustment for specific deterrence and proportionality	204
Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy	206
Step 6 – application of reductions for leniency and settlement	207
Financial hardship	207
Equal treatment	207
The use of different turnover calculation methodologies	207
The differences in the total turnover calculated	208

Conclusion	209
Payment of penalties	209

Annex 1

Newton
Hargreave Hale
RAMAM

Annex 2

Newton
Hargreave Hale
RAMAM
Communications with third parties
Henderson
BlackRock
Old Mutual

Annex 3

Artemis and Newton

1 Introduction and executive summary

- 1.1 The Financial Conduct Authority ('FCA') has decided that the following undertakings infringed the prohibition (the 'Chapter I prohibition') imposed by section 2(1) of the Competition Act 1998 ('the Act') and Article 101 of the Treaty on the Functioning of the European Union ('TFEU'):
- Hargreave Hale Limited ('Hargreave Hale');
 - Newton Investment Management Limited ('Newton'); and
 - River and Mercantile Asset Management LLP ('RAMAM').
- 1.2 These undertakings infringed the Chapter I prohibition and Article 101 TFEU by participating in concerted practices which had as their object the prevention, restriction or distortion of competition in relation to the supply of equity capital in the primary capital market to small and mid-cap companies in the UK.
- 1.3 The four infringements set out at paragraph 1.5 consisted of the sharing of strategic information, on a bilateral basis, between competing asset management undertakings during one initial public offering (IPO) and one placing, shortly before the share prices were set. The undertakings disclosed and/or accepted otherwise confidential bidding intentions, in the form of the price they were willing to pay and sometimes the volume they wished to acquire. This allowed one undertaking to know another's plans during the IPO or placing process when they should have been competing for shares. This information sharing reduced the strategic uncertainty between the relevant undertakings that is central to competition during the IPO or placing process and had the object of restricting competition.
- 1.4 Asset managers bid for the shares they want in IPOs and placings against competing asset managers, under prevailing market practice. If asset managers share detailed and otherwise confidential information about their bids with each other, they undermine the process by which prices are properly set. This can reduce pressure to make bids that reflect what they really think the company is worth. This could reduce the share price achieved by the IPO or placing and so raise the cost of equity capital for the issuing company. Companies rely on such capital as a way of financing investments, so unlawful information sharing could increase the cost of related investments or even make them unviable.
- 1.5 The information sharing occurred:
- a. in July 2015, between (i) Newton and Hargreave Hale and (ii) Newton and RAMAM in relation to the Market Tech Holdings Limited ('Market Tech') placing; and
 - b. in September 2015, between (i) Newton and Hargreave Hale and (ii) Newton and RAMAM in relation to the IPO of On the Beach Group plc ('OTB').
- 1.6 The FCA has imposed a financial penalty under section 36 of the Act in respect of participation in the relevant infringements as follows:
- a. Hargreave Hale must pay £306,300; and
 - b. RAMAM must pay £108,600.

- 1.7 The FCA has not imposed a fine on Newton, or its ultimate parent company The Bank of New York Mellon ('BNYM Corp') including its controlled entities, because they were given immunity under the competition leniency programme.
- 1.8 The FCA has decided that there are no grounds for action in respect of conduct between Artemis Investment Management LLP ('Artemis') and Newton that took place between April and May 2014 in relation to the IPO of Card Factory plc ('Card Factory').

2 The FCA's investigations

Introduction

- 2.1 This Section summarises the main steps and key events in the investigation of the matters that are the subject of this decision and the procedural steps that took place. It also outlines a separate FCA investigation under the Financial Services and Markets Act 2000 ('FSMA') into one of the individuals who took part in some of the conduct that is the subject of this decision.

Competition Act investigation

Initiation and investigation

- 2.2 In October 2015, the FCA initiated a review in relation to concerns around the sharing of certain confidential information in several primary market activities. BNYM Corp successfully applied to the Competition and Markets Authority ('CMA') for leniency on behalf of itself and its controlled entities, employees, directors and former employees and directors, including its subsidiary, Newton.
- 2.3 In March 2016, the CMA allocated the matter to the FCA. The FCA launched a formal investigation under section 25 of the Act. In June 2016, the FCA sent case initiation letters to, and requested information under section 26 of the Act ('section 26 notices') from, Artemis, Hargreave Hale and RAMAM and others. The FCA also sent voluntary requests for information to Newton and section 26 notices to several third parties. During the investigation, the FCA held two 'state of play' meetings with each of Artemis, Hargreave Hale, Newton and RAMAM.
- 2.4 The FCA held compelled interviews under section 26A of the Act between October 2016 and January 2017 and in September 2017. It also interviewed two Newton employees voluntarily: *NFM1*, a fund manager, in November 2016 and January 2017 and a second employee in September 2017. *NFM1* gave the FCA two witness statements on 23 June 2017.

Statement of Objections and Letters of Fact

- 2.5 On 29 November 2017, the FCA issued a Statement of Objections to Artemis, Hargreave Hale, Newton and RAMAM ('Statement of Objections'). It appointed a Competition Decisions Committee ('CDC') to act as the decision-maker on whether or not the legal test for establishing an infringement of the Chapter I prohibition and/or Article 101 TFEU had been met, and on the appropriate amount of any penalty.¹

¹ The role of the CDC is described in FCA Guidance *FG15/8: The FCA's concurrent competition enforcement powers for the provision of financial services*, sections 5 and 6.

- 2.6 Artemis submitted written and oral representations on the Statement of Objections on 7 February 2018² and 6 March 2018³, respectively, and submitted further written representations to the FCA on 27 March 2018.⁴ Hargreave Hale submitted written and oral representations on the Statement of Objections on 7 February 2018⁵ and 7 March 2018⁶ respectively, and submitted further written representations to the FCA on 27 March 2018.⁷ RAMAM submitted written and oral representations on the Statement of Objections on 12 February 2018⁸ and 7 March 2018⁹ respectively, and submitted further written representations to the FCA on 15 March 2018¹⁰. Newton did not contest the findings in the Statement of Objections.¹¹
- 2.7 The FCA issued a first letter of facts to the parties under investigation on 11 May 2018. Hargreave Hale and RAMAM submitted written representations on the letter of facts to the FCA on 1 June 2018¹² and Artemis submitted written representations on the letter of facts to the FCA on 6 June 2018.¹³ Newton did not make any representations on the FCA's first letter of facts.¹⁴
- 2.8 The FCA held a further state of play meeting with each of Artemis, Hargreave Hale, Newton and RAMAM in June 2018.
- 2.9 The FCA issued a second letter of facts to Hargreave Hale, Newton and RAMAM on 28 August 2018. RAMAM submitted written representations on the second letter of facts to the FCA on 10 September 2018¹⁵ and Hargreave Hale submitted written representations on the second letter of facts to the FCA on 17 September 2018.¹⁶ Newton did not make any representations on the FCA's second letter of facts.

Draft Penalty Statement

- 2.10 The FCA issued a Draft Penalty Statement to each of Hargreave Hale¹⁷ and RAMAM¹⁸ on 5 July 2018.

² UUID 65230003, Artemis' written submission on the Statement of Objections, 7 February 2018 ('Artemis Submission on Statement of Objections').

³ UUID 77090001, transcript of Artemis' oral hearing on the Statement of Objections, 6 March 2018 ('Artemis Oral Hearing Transcript').

⁴ UUID 74290001, Artemis' written submission following the oral hearing on the Statement of Objections, 27 March 2018 ('Artemis Further Submission').

⁵ UUID 65220012, Hargreave Hale's written submission on the Statement of Objections, 7 February 2018 ('Hargreave Hale Submission on Statement of Objections').

⁶ UUID 77120003, transcript of Hargreave Hale's oral hearing on the Statement of Objections, 7 March 2018 ('Hargreave Hale Oral Hearing Transcript').

⁷ UUID 74300001, Hargreave Hale's written submission following the oral hearing on the Statement of Objections, 27 March 2018.

⁸ UUID 66450010, RAMAM's written submission on the Statement of Objections, 12 February 2018 ('RAMAM Submission on Statement of Objections').

⁹ UUID 77130003, transcript of RAMAM's oral hearing on the Statement of Objections, 7 March 2018 ('RAMAM Oral Hearing Transcript').

¹⁰ UUID 71940003, RAMAM's written submission following the oral hearing on the Statement of Objections, 15 March 2018 ('RAMAM Further Submission').

¹¹ UUID 65240005, Newton's written submission on the Statement of Objections, 7 February 2018 ('Newton Submission on Statement of Objections').

¹² UUID 84280027, RAMAM's written submission on the first letter of facts, 1 June 2018 ('RAMAM Submission on First Letter of Facts'); UUID 84270004, Hargreave Hale's written submission on the first letter of facts, 1 June 2018 ('Hargreave Hale Submission on First Letter of Facts').

¹³ UUID 85300011, Artemis' written submission on the first letter of facts, 6 June 2018 ('Artemis Submission on First Letter of Facts').

¹⁴ UUID 85330001, email from Allen & Overy LLP to the FCA, 4 June 2018 at 19:54.

¹⁵ UUID 107760003, RAMAM's written submission on the second letter of facts, 10 September 2018 ('RAMAM Submission on Second Letter of Facts').

¹⁶ UUID 107720003, Hargreave Hale's written submission on the second letter of facts, 17 September 2018 ('Hargreave Hale Submission on Second Letter of Facts').

¹⁷ UUID 94360009, draft penalty statement issued to Hargreave Hale ('Hargreave Hale Draft Penalty Statement'), 5 July 2018.

¹⁸ UUID 94350016, draft penalty statement issued to RAMAM ('RAMAM Draft Penalty Statement'), 5 July 2018.

2.11 Hargreave Hale and RAMAM provided written representations on the matters set out in the Draft Penalty Statements on 26 July 2018¹⁹ and on 13 July 2018²⁰ respectively, and Hargreave Hale made oral representations on the matters set out in the Hargreave Hale Draft Penalty Statement on 18 October 2018.²¹ Hargreave Hale submitted further written representations on the matters discussed at the oral hearing on the Hargreave Hale Draft Penalty Statement on 19 November 2018.²²

The FSMA investigation

2.12 The FCA opened an investigation under FSMA into an individual in April 2016 in relation to some of the conduct investigated under the Act. The FSMA investigation concerned potential breaches of the FCA's Statement of Principles and Code of Practice for Approved Persons ('APER') by *NFM1*. The FCA issued a Decision Notice to *NFM1* on 18 December 2018²³ ('FSMA Decision Notice') following its investigation, finding that his conduct was:

- contrary to Statement of Principle 3, as *NFM1* failed to observe proper standards of market conduct by attempting to influence fund managers at competitor firms so that they would cap their orders for an allocation of shares at the same price limit as his order; and
- contrary to Statement of Principle 2, as *NFM1* demonstrated a lack of due skill, care and diligence by failing to give adequate consideration to the risks associated with engaging in communications with fund managers at competitor firms in this way and for these purposes.²⁴

2.13 As part of the FCA's access to file procedure in its investigation under the Act, the FCA disclosed to the parties under investigation *NFM1*'s written and oral submissions made to the FCA in the context of the FSMA investigation.

2.14 Hargreave Hale made an application to the Procedural Officer on 3 October 2018 for the disclosure to it of certain disciplinary notices issued by the FCA to *NFM1* in the ongoing FSMA investigation. The Procedural Officer decided on 22 October 2018 that these disciplinary notices related to matters referred to in the Statement of Objections and should be disclosed to Hargreave Hale.

2.15 In November 2018, the FCA disclosed to the parties to the investigation under the Act disciplinary notices issued by the FCA to *NFM1* in the FSMA investigation. In December 2018, the FCA disclosed to the parties to the investigation the FSMA Decision Notice (together with the disciplinary notices, the 'FSMA Notices'). The FSMA Notices contain findings and decisions in relation to *NFM1*'s conduct under APER.

2.16 In the context of the investigation under the Act:

¹⁹ UUID 98600006, Hargreave Hale's written submission on the Hargreave Hale Draft Penalty Statement, 26 July 2018 ('Hargreave Hale Submission on DPS').

²⁰ UUID 96510011, RAMAM's written submission on the RAMAM Draft Penalty Statement, 13 July 2018 ('RAMAM Submission on DPS').

²¹ UUID 117550002, transcript of Hargreave Hale's oral hearing on the Hargreave Hale Draft Penalty Statement, 18 October 2018 ('Hargreave Hale DPS Oral Hearing Transcript').

²² UUID 118990004, Hargreave Hale's written submission following the oral hearing on the Hargreave Hale Draft Penalty Statement, 19 November 2018 ('Hargreave Hale Further DPS Submission').

²³ UUID 126220001, FSMA Decision Notice, 18 December 2018. The FCA published the final version of this Notice issued to *NFM1* (the Final Notice) on 5 February 2019.

²⁴ Newton dismissed *NFM1* for his involvement in the conduct that is the subject of this decision in August 2017. On 23 July 2018, the Employment Tribunal dismissed a claim brought by *NFM1* against Newton for unfair and wrongful dismissal (*NFM1 v Newton Investment Management Ltd*: [case reference]).

- a. Hargreave Hale and RAMAM provided written representations to the FCA on the disciplinary notices (and on *NFM1*'s written and oral submissions) in the FSMA investigation on 13 December 2018²⁵ and 21 December 2018²⁶ respectively.
- b. Hargreave Hale submitted written representations on 8 January 2019 on the transcript of the oral hearing held with *NFM1* in the FSMA investigation.²⁷
- c. Hargreave Hale submitted written representations on the FSMA Decision Notice on 18 January 2019.²⁸

²⁵ UUID 124970001, Hargreave Hale's first written submission on the FSMA Documents, 13 December 2018 ('Hargreave Hale First Submission on FSMA Documents').

²⁶ UUID 127350001, RAMAM's first written submission on the FSMA Documents, 21 February 2018 ('RAMAM First Submission on FSMA Documents').

²⁷ UUID 128920001, Hargreave Hale's written submission on the transcript of an oral hearing held with *NFM1* in relation to the FSMA investigation, 8 January 2019 ('Hargreave Hale Second Submission on FSMA Documents').

²⁸ UUID 131090001, Hargreave Hale's written submission on the FSMA Decision Notice, 18 January 2019 ('Hargreave Hale Third Submission on FSMA Documents').

3 The Chapter I prohibition and Article 101 TFEU

Overview

- 3.1 The Chapter I prohibition prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices between undertakings which may affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition within the UK, unless an applicable exclusion is satisfied or the behaviour in question is exempt in accordance with the provisions of Part 1 of the Act. The Chapter I prohibition applies only where the agreement, decision or concerted practice is, or is intended to be, implemented in the UK.²⁹
- 3.2 Section 9 of the Act provides that agreements, decisions or concerted practices that have as their object or effect an appreciable prevention, restriction or distortion of competition are exempt from, and therefore do not infringe, the Chapter I prohibition where certain criteria are met (see further Section 16).
- 3.3 Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the European Union ('EU'). Such agreements, decisions or concerted practices are prohibited unless exempt, excepted or excluded in accordance with the provisions of Article 101(3) TFEU, which mirror those of section 9 of the Act.
- 3.4 Section 60 of the Act provides that the FCA must act (so far as it is compatible with the provisions of Part I of the Act) with a view to securing that there is no inconsistency with the principles laid down by the TFEU and the European Courts (the Court of Justice of the European Union ('Court of Justice') and the General Court of the European Union ('General Court')), and any relevant decision of the European Courts. The FCA must, in addition, have regard to any relevant decision or statement of the European Commission ('Commission').
- 3.5 The Chapter I prohibition and Article 101 TFEU contain several elements that must be satisfied or present for conduct to amount to an infringement of the Chapter I prohibition and Article 101 TFEU. The FCA has considered the elements applicable to this case. The Chapter I prohibition and Article 101 TFEU:
- a. apply to 'undertakings';
 - b. prohibit 'concerted practices';
 - c. that have the object of preventing, restricting or distorting competition;
 - d. to an appreciable extent;
 - e. that affect trade within the UK or between member states, respectively; and

²⁹ Sections 2(3) and 2(7) of the Act.

f. there is no applicable exemption, legal exception and exclusion.

3.6 This decision considers each of these elements in turn, in respect of the conduct concerned, in light of the legal and economic context in which it occurred.

4 The parties to the investigation

'Undertakings' under competition law

- 4.1 Competition law applies to 'undertakings'. This Section describes what an undertaking is, specifies the parties to the FCA's investigation, and describes their relevant activities at a high level.

Meaning

- 4.2 The Chapter I prohibition and Article 101 TFEU apply to agreements and concerted practices between 'undertakings'. The Court of Justice has defined 'undertaking' to cover '*...every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed...*'.³⁰ The concept also covers an economic unit, even if in law that unit consists of several natural or legal persons.³¹

Parent and subsidiary liability

- 4.3 Given the requirement to impute an infringement to a legal entity or entities to whom an infringement decision is to be addressed and (if any) on whom fines are to be imposed, the FCA must identify the relevant legal persons that form part of the undertaking in question.³²
- 4.4 The conduct of a subsidiary may be imputed to its parent company where, although having a separate legal personality, that subsidiary does not decide independently its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities.³³ This is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore a single undertaking for the purposes of competition law.³⁴
- 4.5 The Competition Appeal Tribunal ('CAT'), the Court of Justice and the General Court have made it clear that where a parent company owns all or almost all of a subsidiary which has infringed the competition rules, that parent company is able to exercise 'decisive influence' over the conduct of its subsidiary and there is a rebuttable presumption that the parent company does in fact exercise such decisive influence over the conduct of its subsidiary, such that the two entities can be regarded as a single economic unit and are therefore jointly and severally liable.³⁵

³⁰ Judgment in *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.

³¹ Judgment in *Akzo Nobel NV v Commission*, C-97/08 P, EU:C:2009:536 ('*Akzo Nobel*'), paragraph 55.

³² *Akzo Nobel*, paragraph 57.

³³ Judgment in *Evonik Degussa GmbH v Commission*, C-155/14 P, EU:C:2016:446 ('*Evonik*'), paragraph 27 and the case law cited. See also *Alliance One and others v Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 43 citing, amongst others, *Akzo Nobel*, paragraph 58; *Durkan v Office of Fair Trading* ('*Durkan*') [2011] CAT 6 paragraphs 15-22.

³⁴ *Evonik*, paragraph 27.

³⁵ *Evonik*, paragraph 28 and the case law cited; *Alliance One and others v Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraphs 46-48; *Akzo Nobel*, paragraphs 60-61. See also judgment in *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, C-107/82, EU:C:1983:293, paragraph 50; *Durkan*, paragraphs 15-18; judgment in *Arkema France and others v Commission*, T-217/06, EU:T:2011:25, paragraph 53; *Arkema France, Altuglas International SA, Altumax Europe SAS v Commission*, T-217/06, EU:T:2011:25, paragraph 53.

- 4.6 In such circumstances, it is sufficient for the FCA to prove that the subsidiary is wholly-owned by the parent company in order to presume that the parent exercises a decisive influence over the conduct of the subsidiary, subject to rebuttal of that presumption. It is for the party in question to rebut the presumption by adducing sufficient evidence to show that its subsidiary acts independently on the market.³⁶ A parent company must put forward any evidence relating to the organisational, economic and legal links between its subsidiary and itself which are such as to demonstrate that they do not constitute a single economic entity.³⁷ The presumption also applies to situations where the parent company indirectly holds 100% of a subsidiary, for example, via one or more intermediary companies.³⁸
- 4.7 The FCA may also rely on additional indicators of decisive influence, other than the parent's shareholding in the subsidiary,³⁹ such as instructions being given by a parent to a subsidiary⁴⁰ or the two entities having shared directors.⁴¹
- 4.8 The General Court has held that the presumption of actual exercise of decisive influence can also be applied to parent companies that hold nearly 100% of the subsidiary's shares.⁴²

Conduct of employees

- 4.9 While competition law applies only to undertakings, such undertakings act through their employees. The Court of Justice stated that:

*'An employee performs his duties for and under the direction of the undertaking for which he works and, thus, is considered to be incorporated into the economic unit comprised by that undertaking. [...] For the purposes of a finding of infringement of EU competition law any anti-competitive conduct on the part of an employee is thus attributable to the undertaking to which he belongs and that undertaking is, as a matter of principle, held liable for that conduct.'*⁴³

- 4.10 It is not necessary for the managers in the undertaking concerned to have any knowledge of the illegal conduct of its more junior employees for the undertaking to be held liable: action by a person who is authorised to act on behalf of the undertaking suffices.⁴⁴ The FCA considers this further in paragraphs 8.36 to 8.38.

³⁶ *Alliance One and others v Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 47 and the case law cited. See also *Durkan*, paragraphs 19-21.

³⁷ Judgment in *General Química and others v Commission*, C-90/09 P, EU:C:2011:21, paragraph 51 and the case law cited. See also *Durkan*, paragraphs 19-20.

³⁸ *Evonik*, paragraph 28; judgment in *General Química and others v Commission*, C-90/09 P, EU:C:2011:21, paragraphs 86-87.

³⁹ *Akzo Nobel*, paragraphs 60-62; judgment in *Stora Kopparbergs Bergslags AB v Commission*, C-286/98 P, EU:C:2000:630, paragraph 29; judgment in *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*, C-107/82, EU:C:1983:293, paragraph 50, paragraphs 49-50. See also *Durkan*, paragraph 22.

⁴⁰ Judgment in *ICI Limited v Commission*, C-48/69, EU:C:1972:70, paragraphs 132-133.

⁴¹ *Sepia Logistics Ltd and another v Office of Fair Trading* [2007] CAT 13, paragraphs 77-80.

⁴² The General Court has held that the presumption of actual exercise of decisive influence can also be applied to parent companies that hold nearly 100% of the subsidiary's shares, see the judgment in *Arkema France, Altuglas International SA, Altumax Europe SAS v Commission*, T-217/06, EU:T:2011:25, paragraph 53.

⁴³ See judgment in *VM Remonts and others v Konkurences padome*, C-542/14, EU:C:2016:578, paragraphs 23-24.

⁴⁴ Judgment in *SA Musique Diffusion française and others v Commission*, C-100-103/80, EU:C:1983:158, paragraph 97.

Parties to the investigation

Asset management

- 4.11 The parties to the FCA's investigation are all asset managers. Asset managers invest their clients' funds, consisting of the savings and pensions of millions of people.⁴⁵ Asset managers seek to generate returns for their clients by investing in a wide variety of UK and international enterprises. More broadly, by directing funding to firms which they consider have the potential to grow and generate returns, asset managers support growing businesses which in turn provide jobs and drive economic growth. Asset managers also have an important role in the corporate governance of the businesses they fund.⁴⁶
- 4.12 Asset management firms vary in size and legal structure. Some firms offer asset management services in isolation, whereas others are vertically integrated and offer other services such as investment consulting, platforms, access to other asset managers (e.g. through a multi-manager fund) or offer a greater variety of products, such as insurance products or pensions administration services. Firms may specialise in certain asset classes (such as equities), investment strategies (active asset management or passive products or a blend of these⁴⁷) or in the types of investor clients they cater to (such as retail clients or institutional clients).⁴⁸
- 4.13 The UK's asset management industry is the second largest in the world, managing around £6.9 trillion of assets. Over £1 trillion is managed for UK retail (individual) investors and £3 trillion on behalf of UK pension funds and other institutional investors. The industry also manages around £2.7 trillion for overseas clients.⁴⁹ In the four years between 2015 and 2018, there were 571 new listings⁵⁰ on the LSE markets,⁵¹ with £31.1bn raised in new investment.^{52, 53}

Artemis and Affiliated Managers Group Inc.

- 4.14 Artemis is an investment and asset management services firm,⁵⁴ authorised and regulated for these purposes by the FCA.⁵⁵ It is a limited liability partnership registered in England and Wales with company number OC354068. Artemis' registered address is 57 Cassini House, St. James's Street, London, SW1A 1LD. It had a turnover of £184.9 million in the financial year ended 31 December 2017.⁵⁶
- 4.15 Artemis is part of the Artemis group, whose ultimate parent company is Affiliated Managers Group Inc ('AMG'). AMG is incorporated in Delaware, United States of America and its address is 777 South Flagler Drive, West Palm Beach, Florida 33401, United States of

⁴⁵ The services offered to investors involve searching for return, risk management, and administration.

⁴⁶ FCA, MS15/2.3, *Asset Management Market Study Final Report*, June 2017 ('FCA Asset Management Market Study Report'), paragraph 1.1.

⁴⁷ Passive investment management is where a fund will use a systematic process to follow an index (e.g. the FTSE 100 index). In active management, the manager aims to achieve a particular result by taking considered positions in particular markets, sectors or securities.

⁴⁸ An institutional client is an investing legal entity which pools money from various sources to make investments. Pension funds are the largest single institutional client type. Retail clients are typically individual consumers.

⁴⁹ FCA Asset Management Market Study Report, paragraph 1.2.

⁵⁰ Companies admitted to the LSE markets for the first time and where capital is raised through the sale of new and/or existing shares

⁵¹ UK main market, AIM, International main market and the Specialist Fund Segment (formerly the Specialist Fund Market)

⁵² Excluding transfers between LSE markets.

⁵³ London Stock Exchange, statistics on new and further issues. Available at: <https://www.londonstockexchange.com/statistics/new-issues-further-issues/new-issues-further-issues.htm>

⁵⁴ www.artemis.co.uk.

⁵⁵ FCA firm reference number 523180.

⁵⁶ Artemis' published accounts for the year ending 31 December 2017.

America. It had a turnover of USD 2,305 million⁵⁷ in the financial year ended 31 December 2017.⁵⁸

- 4.16 The FCA has decided that there are no grounds for action with respect to Artemis' conduct in relation to the Card Factory IPO and so there is no liability it need attribute.

Hargreave Hale

Background

- 4.17 Hargreave Hale is an investment management, stock broking, and asset management firm headquartered in Blackpool, with nine branches across England and Wales⁵⁹ and is authorised and regulated for these purposes by the FCA.⁶⁰ It is a private limited company, registered in England and Wales with company number 03146580. The registered address of Hargreave Hale is Talisman House, Boardmans Way, Blackpool, FY4 5FY. It had a turnover of £55.7 million in the financial year ended 31 March 2018.⁶¹
- 4.18 During the course of the FCA's investigation, in September 2017, Canaccord Genuity Group ('Canaccord') acquired Hargreave Hale.^{62,63} At the time of the two infringements to which Hargreave Hale was a party (see Sections 11 and 13), Investec had a minority shareholding of approximately 32% in Hargreave Hale.

Attribution of liability

- 4.19 Hargreave Hale is an undertaking for the purposes of competition law and was the legal entity that was directly involved in the infringements in relation to each of Market Tech and OTB and participated in each transaction. Accordingly, the FCA finds Hargreave Hale liable for these infringements and this decision is addressed to it. Canaccord's acquisition of Hargreave Hale occurred after the infringements. As the original entity liable for the infringements in question still exists, liability remains with it and the new parent will not usually be liable for infringement predating the acquisition.⁶⁴ The FCA has not found Canaccord liable for Hargreave Hale's infringements.

Newton and BNYM Corp

Background

- 4.20 Newton is one of BNYM Corp's global investment management firms and is based in the City of London.⁶⁵ It is authorised and regulated for these purposes by the FCA.⁶⁶ Newton is a private limited company, registered in England and Wales with company number 01371973. The registered address of Newton is BNY Mellon Centre, 160 Queen Victoria

⁵⁷ This is approximately £1,627 million (based on a yearly average using the Bank of England daily spot rates).

⁵⁸ AMG Annual Report 2017.

⁵⁹ <https://www.canaccordgenuity.com/wealth-management-uk/>

⁶⁰ FCA firm reference number 209741.

⁶¹ Hargreave Hale's published annual accounts for the financial year ending 31 March 2018.

⁶² [www.canaccordgenuity.com/wealth-management-uk.](https://www.canaccordgenuity.com/wealth-management-uk/)

⁶³ Canaccord, along with Shore Capital, was Joint Global Coordinator and Joint Bookrunner in the Market Tech placing in 2015. Canaccord did not own or control Hargreave Hale at that time.

⁶⁴ See *Dairy retail price initiatives*, No CA98/03/2011, Case CE/3094-03, paragraph 2.6; *Bid rigging in the construction industry in England*, No CA98/02/2009, Case CE/4327-04, paragraphs II.294-II.295.

⁶⁵ www.newton.co.uk.

⁶⁶ FCA firm reference number 119331.

Street, London, EC4V 4LA. It had a turnover of £213.8 million in the financial year ended 31 December 2017.⁶⁷

- 4.21 At the time of the infringements in which Newton participated (see Sections 11 to 14), Newton formed, and continues to form, part of the Bank of New York Mellon group, ultimately owned and controlled by BNYM Corp. The registered address of BNYM Corp is 225 Liberty Street, New York, New York 10286, United States of America. It is registered in the UK as a UK establishment of an overseas office with company number FC005522. It had a turnover of USD 15,543 million⁶⁸ in the financial year ended 31 December 2017.⁶⁹

Attribution of liability

- 4.22 Newton is an undertaking for the purposes of competition law and was the legal entity that was directly involved in the infringements in relation to each of Market Tech and OTB. Accordingly, the FCA finds Newton liable for each of these infringements.
- 4.23 Newton was an indirectly wholly-owned subsidiary of BNYM Corp at the time of the infringements.⁷⁰ As a result of its indirect 100% ownership, BNYM Corp therefore had the ability to exercise decisive influence over Newton. Given that BNYM Corp ultimately held 100% of the shares in Newton, the FCA applies the presumption that BNYM Corp did in fact exercise decisive influence over Newton.
- 4.24 In addition, since March 2015, there have been two 'BNY Mellon' directors on Newton's board.⁷¹ BNY Mellon is the corporate brand name for BNYM Corp.⁷² Moreover, BNYM Corp also applied for immunity on its own behalf including its controlled entities, employees, directors and former employees and directors, of which Newton forms part.
- 4.25 Against this background, the FCA finds that, at the time of the infringements in relation to Market Tech and OTB, Newton and BNYM Corp formed part of the same undertaking. The FCA therefore finds Newton and BNYM Corp jointly and severally liable for those infringements and this decision is addressed to them together.⁷³
- 4.26 The FCA has decided that there are no grounds for action with respect to Newton's conduct in relation to Card Factory.

RAMAM and RAM Group

Background

- 4.27 RAMAM is an investment and asset management services firm based in the City of London,⁷⁴ authorised for these purposes by the FCA.⁷⁵ RAMAM is a limited liability partnership, registered in England and Wales with company number OC317647. RAMAM's registered address is 30 Coleman Street, London, EC2R 5AL. It had a turnover of £29.9 million in the financial year ended 31 March 2018.⁷⁶

⁶⁷ Newton's published annual accounts for the financial year ending 31 December 2017.

⁶⁸ This is approximately £11,296 million (based on a yearly average using the Bank of England daily spot rates).

⁶⁹ BNY Mellon Annual Report 2017.

⁷⁰ UUID 14950013, BNYM Corp/Newton Organisational structure chart for the period 20 April to 20 May 2014; UUID 14950015, BNYM Corp/Newton Organisational structure chart for the period 1 to 30 September 2015; UUID 14950017, BNYM Corp/Newton Organisational structure chart for the period 1 to 15 July 2015.

⁷¹ Newton, 'Newton appoints two independent non-executive directors to its Board', press release, 17 March 2015.

⁷² <https://www.bnymellon.com/emea/en/home.jsp>

⁷³ The FCA has decided that there are no grounds for action with respect to Newton's conduct in relation to the Card Factory IPO.

⁷⁴ www.riverandmercantile.com.

⁷⁵ FCA firm reference number 453087.

⁷⁶ RAMAM's published annual accounts for the financial year ending 31 March 2018.

4.28 At the time of the two infringements in which RAMAM participated (see Sections 12 and 14), RAMAM formed, and continues to form, part of the River and Mercantile group, ultimately owned and controlled by RAM Group. RAM Group is registered at Companies House with company number 04035248. The registered address of RAM Group is 11 Strand, London, WC2N 5HR. It had a turnover of £74.8 million in the financial year ended 30 June 2018.⁷⁷

Attribution of liability

4.29 RAMAM is an undertaking for the purposes of competition law and was the legal entity directly involved in two infringements in relation to Market Tech and OTB. Accordingly, the FCA finds RAMAM liable for each of these two infringements.

4.30 RAMAM was an indirectly wholly-owned subsidiary of RAM Group at the time of the infringements.⁷⁸ As a result of its indirect 100% ownership, RAM Group therefore had the ability to exercise decisive influence over RAMAM. Given that RAM Group ultimately held 100% of the shares in RAMAM, the FCA applies the presumption that RAM Group did in fact exercise decisive influence over RAMAM.

4.31 Against this background, the FCA finds that, at the time of the infringements in relation to Market Tech and OTB, RAM Group and RAMAM formed part of the same undertaking. The FCA finds RAM Group and RAMAM jointly and severally liable for those infringements and this decision is addressed to them together.

⁷⁷ RAM Group's published annual accounts for the financial year ending 30 June 2018.

⁷⁸ UUID 13900002, RAM Group ownership table.

5 The IPO and placing process

Introduction

- 5.1 The information sharing investigated occurred between asset managers in the context of two IPOs and one placing. This Section describes:
- a. how companies decide to raise equity capital (paragraphs 5.3 to 5.7);
 - b. the book-building process for IPOs, including the participants in the process, its key stages, information flows and price setting (paragraphs 5.8 to 5.48);
 - c. secondary issues including placings, including price setting (paragraphs 5.49 to 5.56);
 - d. asset managers' incentives to compete during the book-building process (paragraphs 5.57 to 5.72); and
 - e. the potential adverse effects of bid disclosure on competition between asset managers (paragraphs 5.73 to 5.83).
- f. It sets out the parties' submissions to the FCA on the IPO and placing process (paragraphs 5.84 to 5.93) and
- g. the FCA's view on these submissions (paragraphs 5.94 to 5.105).
- 5.2 This Section describes the common process for, and competition within, book-building for IPOs and placings in the primary market prevailing at the time of the conduct set out in Section 7. This description is not an endorsement by the FCA of any specific model or of the practices described. These processes were (and are) also subject to regulatory rules which include the EU Market Abuse Regulation,⁷⁹ the Conduct of Business sourcebook and the Senior Management Arrangements, Systems and Controls sourcebook in the FCA Handbook and requirements implementing the Markets in Financial Instruments Directive (MIFID II).⁸⁰ Some of these have been amended or introduced since 2015. In this context, the FCA has since this time imposed a number of additional rules to change and improve the IPO process, and MIFID II also has introduced more granular requirements with respect to the rules on underwriting and placing. This Section does not describe that regulation, either at the time of that conduct, or as it has developed since.

The decision to raise equity capital

- 5.3 Companies may decide to raise capital for several reasons, including to fund investments, acquisitions or expansions, to restructure the current mix of capital within the company (for example reducing the amount of debt held by the company by raising the amount of equity capital it holds), or to allow initial investors to realise their investment.

⁷⁹ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

⁸⁰ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

- 5.4 When a company decides to raise capital, it has three broad options:⁸¹
- a. internal finance, such as divesting parts of the business or increasing retained earnings;
 - b. raising debt finance, such as bank loans or issuing bonds; or
 - c. raising equity capital, such as through IPOs, placings, rights issues and open offers.
- 5.5 The decision on the type of finance that the company raises depends on several factors, both internal and external to the company. Importantly, the options available to the company depend on the reason for raising the capital, the amount to be raised and the company's own financing position.⁸² For example, the company may be unable to raise further capital through debt because it already holds large amounts of debt (the company is said to be 'highly geared'), so that its decision is restricted to either internal finance or equity capital. The company may also make these choices because of its own considerations, by for example limiting itself to a certain proportion of debt as a share of its total capital, irrespective of the options it has in capital markets. The reason for the funding also matters, since larger or riskier investments are typically financed through internal financing or more likely through equity.⁸³
- 5.6 The cost of the different available sources of capital will affect the company's choice. For example, in deciding whether to undertake an investment, the company may consider the cost of financing the investment through debt and equity capital. It would then set the cost of funding the investment against the expected returns to the company and its owners (for example in the form of higher dividends). Therefore, the cost of capital of the different sources of finance can affect the decision to invest and the scope or scale of the investment.⁸⁴ From the perspective of the investors, the cost of capital is the return they require for providing capital to the company.⁸⁵ Investors acquire shares for two main reasons. First, owning the company's shares entitles investors to receive any dividends paid, i.e. part of the company's future profits. Second, investors might benefit from any capital gain of their shares, i.e. rises in the value of the shares that reflect any overall rise in the value of the company. Equally, however, they are exposed to any reduction in capital value.
- 5.7 The cost of debt to a company is the return that it must pay the lenders, typically calculated as the yield or the interest rate payable over the period of the debt.⁸⁶ Similarly, the cost of equity is the return required by the investors who receive shares in the company. Whereas the cost of debt is explicitly set out in the initial agreement, equity capital does not place explicit obligations on the company raising the capital: it has no obligation to pay dividends. However, when raising equity capital, the owners of the company offer a share of the company in return for the capital, and the rate of exchange is the share price. By raising equity capital and selling shares in the company, the owners forego a proportion of any future earnings from dividend payments and possible future appreciation in the value of the shares. Therefore, the equity investors look to make a return on their capital

⁸¹ Office of Fair Trading, *Equity underwriting and associated services: An OFT market study*, January 2011 ('OFT Equity Underwriting Market Study'), paragraph 3.4.

⁸² OFT Equity Underwriting Market Study, paragraph 3.4.

⁸³ OFT Equity Underwriting Market Study, paragraph 3.4.

⁸⁴ A simple framework for capital budgeting by the company is making additional investments as long as the marginal return from investments is higher than the marginal cost of the investments. Typically, marginal returns are thought to decrease as good investment opportunities are exhausted. The cost of capital increases as the company raises more capital (for example holds increasing amounts of debt), meaning there is a hypothetical optimum where the marginal return is equal to the marginal cost of capital and beyond which additional investments are too costly to the company.

⁸⁵ CFA, *Corporate Finance and Portfolio Management*, CFA Program Curriculum Volume 4, 2008, Page 38.

⁸⁶ More specifically this is the ratio of the sum of discounted future payments (for example bond repayments including the final redemption value of the bond) over the current value of the debt.

through the appreciation in value of the shares and/or the payment of dividends.⁸⁷ Changes to the share price affect the cost of raising equity capital – for example a lower share price in effect raises the cost of equity capital.⁸⁸ This in turn may affect the company's ability to raise capital, make investments and generate returns for its owners.⁸⁹

The book-building process for IPOs

- 5.8 A company that decides to raise equity capital could sell shares on a private basis via a bilateral contract with one or more investor (i.e. a 'placing'). However, the company may seek to reach a broader population of investors by issuing shares and making them available to trade on a stock market (and so more tradeable and potentially more attractive to investors). When a company's shares are made available to investors in the market for the first time, this is known as an IPO.⁹⁰ This establishes a market for the shares, and a market price, as buyers and sellers subsequently routinely trade on public platforms.
- 5.9 A common method of conducting an IPO in the UK is through a private placement, following a 'book-building' exercise, where the company offers shares only to institutional investors such as investment banks, pensions or mutual funds. Book-building is a competitive process in which the company invites bids from rival potential investors, each wanting to obtain shares in return for the capital they are willing to supply. Its purpose is to establish the demand for the shares at different price points, so that the owners of the company can see if it can raise the equity capital they want in return for a proportion of the company that they are prepared to surrender.

Participants in the book-building process

- 5.10 Figure 1 shows that the key participants in an example book-building process are:
- the existing shareholders who own the issuing company;
 - corporate finance advisors who guide the issuing company through the IPO process. Corporate finance advisors provide advice at critical stages in the book-building process, including pricing, allocations of shares and on the appointment of book-builders (also known as 'book runners' or 'book makers');⁹¹
 - intermediaries which include the book-builders and the other members of the underwriting syndicate (see paragraph 5.11), and
 - institutional investors.

⁸⁷ Equity investors may decide to sell some or all of the shares in the secondary capital market, realising any returns.

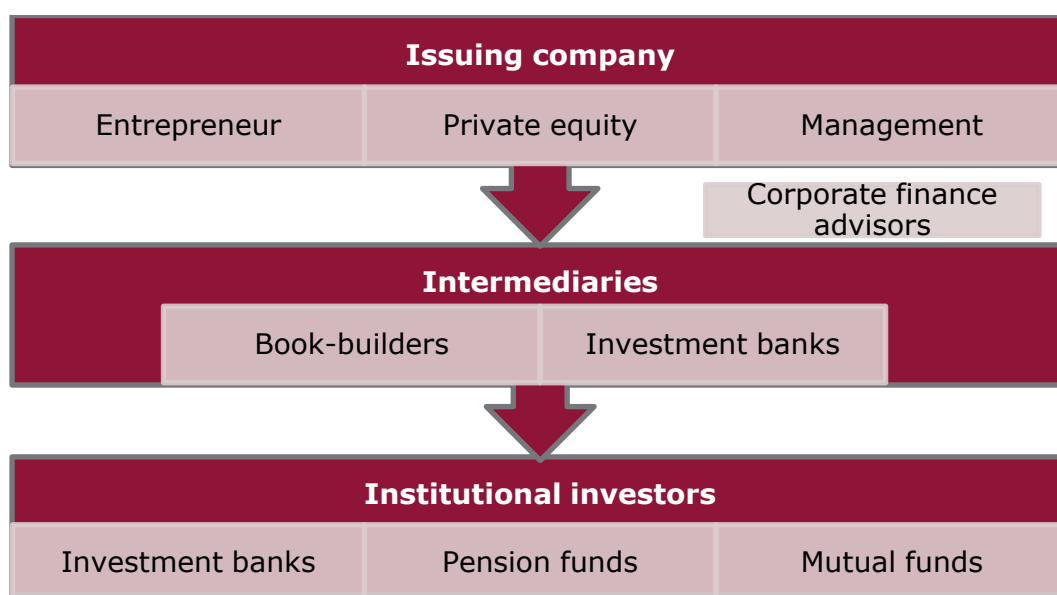
⁸⁸ This can be seen using the dividend discount model formula for the annual cost of equity: $r_e = \frac{D_1}{P_0} + g$, where r_e is the cost of equity, D_1 are dividends in the next period, P_0 is the current share price and g is the (assumed) constant growth rate of dividends. See CFA, Corporate Finance and Portfolio Management, CFA Program Curriculum Volume 4, 2008 Page 54.

⁸⁹ See footnote 84.

⁹⁰ IPOs and placings are both primary capital market transactions. In primary capital markets, investors (including asset managers) provide capital to an issuing company directly in return for shares in that company. By contrast, secondary capital markets are where investors trade already-issued shares among themselves, with the issuing company not involved in those transactions.

⁹¹ FCA, Occasional Paper 15, *Quid pro quo? What factors influence IPO allocations to investors?*, October 2016 ('FCA Occasional Paper 15'), page 16.

Figure 1: The key participants in an example book-building process



- 5.11 Companies typically need external expertise to undertake an IPO, and so appoint market intermediaries to manage the capital-raising process and guide them through the process. This group of investment banks are also known as the underwriters (or the underwriting syndicate)⁹² and are responsible for marketing and allocating the shares to institutional investors. The issuing company will appoint one or more of these investment banks as the book-builder(s), responsible for managing and leading the offering.
- 5.12 The final group of key participants in IPOs are the investors who may want to acquire shares in the issuing company. These investors vary in their size, coverage of the market and risk appetite, meaning that their degree of interest in any one IPO could vary significantly. This means that their valuations of the issuing company's shares are also likely to vary. The book-building process seeks to identify the level of demand by different investors at different price points. Book-builders may have existing relationships with investors, meaning that the book-builder can introduce the issuing company to its network of institutional investors.⁹³

Key stages in the book-building process

- 5.13 The IPO process typically begins with the issuing company gauging investor interest in its shares in principle, and then proceeds through more rigorous and formal stages, which culminate in specific numbers of shares being sold to specific investors, but each pay the same price per share.
- 5.14 The public phase of the IPO formally starts when the company announces its intention to float ('ITF'), which sets out its plans for the IPO. In advance of taking any decision to undertake a transaction, prospective issuers considering an IPO typically hold meetings

⁹² Members of the underwriting syndicate technically 'buy' the shares from the issuer for onward sale to investor at the end of the book-building process. The difference between the price they pay to the issuer, and the price charged to investors is their 'gross spread' or fee. See UUID 66450014, a note prepared by Professor Tim Jenkinson of Oxera on the equity issuance process for RAMAM's written submission on the Statement of Objections, 12 February 2018 ('RAMAM Equity Issuance Note'), paragraph 3.4.

⁹³ Aside from managing the book-building process, members of the underwriting syndicate are also important for certifying the issuer's quality, providing information to the issuer (for example on expected share prices and allocations), providing liquidity in the aftermarket once shares are listed and provide analyst coverage.

with institutional investors. These meetings may be referred to as 'early look', 'pilot fishing' or 'anchor investor' meetings. They are intended to inform investors about the company and gauge interest before a decision is made on whether an IPO is likely to be the most appropriate means of raising capital.⁹⁴ The issuer shares deal logistics⁹⁵ with investors, and issuers may also share information relating to the company's existing financial operating metrics, along with forward-looking information about its strategy and capital structure.⁹⁶

- 5.15 Following the ITF, it is common practice in the UK for the book-builder to publish 'connected' research by its analysts.⁹⁷ The book-builder then imposes a 'blackout' period of 10 to 14 calendar days during which it releases no new information. It then circulates a draft unapproved prospectus, known as the 'pathfinder' prospectus, which usually contains an indicative price range.⁹⁸ This price range frames discussions with potential investors and allows some investors to submit 'strike bids', whereby the investor bids for a number of shares and is willing to pay up to the maximum of the indicative price range. Alternatively, the investor can offer an amount of capital, with the number of shares allocated depending among other things on the final price, determined by the book-builder and issuing company at the end of the process.
- 5.16 Once the pathfinder prospectus is released to potential investors, the formal book-building process begins, which includes the issuer company management's roadshows with institutional investors (essentially a marketing exercise which typically lasts around two weeks). At such 'shows' (i.e. meetings) the issuer's management present the company, its plans and prospects to potential investors and answers their questions.
- 5.17 During the book-building process, potential investors place bids for shares offered in the IPO. They indicate to the book-builder the number or value of shares that they are interested in, and at which share price. These orders can be amended by the investor at any time up until the book closes. At the end of the book-building process, the share price is determined (i.e. the 'final' or 'strike' price) and allocation then takes place. All investors who receive an allocation pay the same price for the shares, irrespective of their bids. In principle, the company issuing shares has the final say over issue price and allocation. In practice, however, the price and allocation decisions are often made jointly between the company and book-builder and, in some cases, corporate finance advisers.
- 5.18 Issuers and book-builders typically consider a range of factors when determining allocations, including, for example, whether prospective investors are likely to be stable and supportive long-term holders of the issuer's shares. Previous FCA work⁹⁹ found that book-builders made favourable allocations of shares at IPOs to those who:
- a. assist in the price discovery process – in particular investors who submit price-sensitive bids and those who attend meetings with the issuer (see paragraphs 5.40 and 5.47);

⁹⁴ FCA, CP17/5, *Reforming the availability of information in the UK equity IPO process*, March 2017, paragraph 2.38.

⁹⁵ Such as the amount to be raised through the IPO, the relevant Exchange or other market or platform on which admission to trading is to be sought, the listing authority, and a projected timetable of key events for the transaction. See FCA, CP17/5 *Reforming the availability of information in the UK equity IPO process*, March 2017, paragraph 2.40.

⁹⁶ Pilot fishing and anchor investor meetings are usually expected to be made on a 'wall-crossed' basis, with investors being 'made insiders'. See FCA, CP17/5, *Reforming the availability of information in the UK equity IPO process*, March 2017, paragraphs 2.41-2.42.

⁹⁷ For more information see FCA, DP16/3, *Availability of information in the UK Equity IPO process*, April 2016, chapter 2.

⁹⁸ Some IPOs and prospectuses do not provide indicative price ranges prior to the book-building process. This can be because forming an indicative price range may require gathering information in the pre-market (for example research or through meetings with informed investors) and the issuer together with the book-builder(s) decide to let the book-building process progressively define the price for the shares. The literature suggests that there is a trade-off between investing in pre-market price refinement and allowing the book-building process to come up with a price. In the latter case, the issuer would be required to under-price the shares more significantly, as a reward to investors in playing a greater role in the price discovery process. See: Hanley, Kathleen W., Hoberg, Gerard, 2010, The information content of IPO prospectuses, *Review of Financial Studies* 23, page 2827. See also footnote 103.

⁹⁹ See the FCA Occasional Paper 15.

- b. generate greatest revenues from elsewhere in the book-builders' business;
- c. submit larger bids during the book-building process; and
- d. are long-only investors (i.e., expect to retain the shares rather than selling them quickly after the IPO), rather than others such as hedge funds.

Note paragraph 5.2 regarding the possible current appropriateness of such factors.

- 5.19 The book-building process helps the issuing company to determine whether it can raise the capital it wants for the proportion of equity it is willing to surrender. It therefore determines whether investors are willing to provide equity capital in return for shares in the company, and seeks to match the supply of equity capital with the company's demand for such capital. The key factors in this process are the volume of shares issued (i.e. the proportion of the company sold), the volume of shares that each investor is willing to acquire within the price range, the price of those shares and the individual allocation to any one investor.
- 5.20 The information flows and the price-setting process in IPOs are described in the following subsections.

Information flows in IPOs

- 5.21 Alongside raising capital for the issuing company, the book-building process is designed to allocate the issuing company's shares to investors on the basis of several considerations, but particularly on their valuations of the shares. As described in paragraphs 5.6 and 5.7, the issuing company's main aims are to raise the required equity capital at a low cost of capital by achieving a high share price. The issuing company may have other aims, such as allocating a greater proportion of shares to certain types of investors, meaning its pricing and volume decisions may deviate somewhat from those achieved if it were purely seeking to maximise the share price on issue. However, these considerations are likely to be secondary. See also paragraph 5.72.
- 5.22 The investors' valuations in turn depend on their expectations of the prospects for the issuing company, such as its future profits, growth prospects and likely shareholder dividends. However, investors may face significant uncertainties¹⁰⁰ about the actual prospects of the company and part of the book-building process can be thought of as an information discovery process. This means that the various participants gradually reveal their valuations and the demand for shares at various price points in order to facilitate the issuance of shares.
- 5.23 Under asymmetric information, potential investors lack information which is internal to the company and this reduces the value they place on the shares.¹⁰¹ This means that in the aggregate, investor bids are lower and the issuing companies have to price their shares lower to attract bids.¹⁰² Alongside applicable regulation, this gives the issuing company an

¹⁰⁰ For example, one paper found that uncertainty in IPOs was much higher than in seasoned equity offerings. The standard deviation of the issue price relative to the range mid-point in IPOs was found to be five times that in SEOs. See: Cornelli, F. and Goldreich, D. (2003), *Bookbuilding: How Informative Is the Order Book?*, The Journal of Finance ('Bookbuilding: How Informative Is the Order Book?'), page 7.

¹⁰¹ As a hypothetical example, with information asymmetries, buyers in a market may become very cautious in their bidding behaviour for fear of buying a product of lower quality. Over time, sellers realise that bidding is cautious and sellers of high quality products may decide to withdraw products from the market for fear of completing a loss-making sale (i.e. the winning bid is below the seller's minimum required price). This means that overall, the quality of products coming to market declines over time and the number of transactions declines as well.

¹⁰² The literature posits that this could be part of a longer-term strategy, whereby issuing companies with shares of high quality underprice during IPOs and aim to recover the lost revenues in future issuing activity, favourable responses to market

incentive to limit (or eliminate) the under-pricing that arises from asymmetric information, by undertaking research and disclosing information about itself to potential investors prior to the book-building process. Viewed this way, the research and disclosure aim to generate more accurate indicative share prices prior to the book-building process.

- 5.24 The issuing company can choose to 'reward' investors during the book-building process by under-pricing its shares more significantly. Therefore (within the bounds of the applicable regulation), there is a trade-off between the amount of pre-market research the issuing company undertakes and discloses, and its reliance on investors during the book-building process as ways for the company to price its shares, overcome the information asymmetries,¹⁰³ and encourage high valuations.
- 5.25 A related view of the under-pricing that occurs in IPOs is that potential investors are better informed than company owners about some of the determinants of share prices and they are better able to indicate the likely prospects of shares once they are traded in the stock market. This means that the issuing company and the book-builder face a 'placement problem', whereby they are uncertain about the optimal pricing strategy, i.e. they lack information about the level of demand at different price points.¹⁰⁴ From the investor perspective, they are likely to be concerned about the risk of bidding more for the shares than they are worth and being allocated shares at an elevated price (known as the 'winner's curse' in auction arrangements). This may occur when investors assess the investment case differently and so have different valuations.¹⁰⁵
- 5.26 Under both these situations, the under-pricing is a way for the issuing company to reward potential investors that are particularly important to share price discovery, particularly during the book-building process. Previous work by the FCA has found support for this theory, with investors that are particularly important to the price discovery process receiving favourable allocations following the book-building process.¹⁰⁶

announcements and favourable analyst coverage. See Ritter, Jay R., Welch, Ivo, 2002, A review of IPO activity, pricing, and allocations, *Journal of Finance* 57, page 1803.

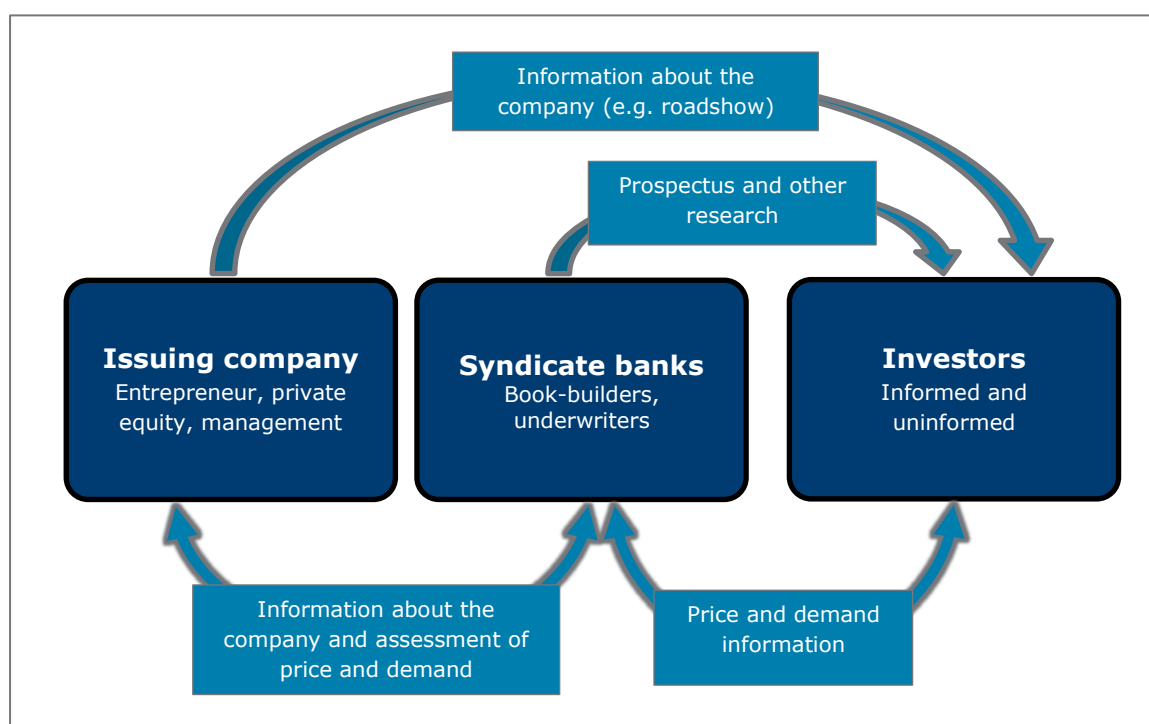
¹⁰³ For example, Hanley and Gerard (2010) decompose the content of prospectuses in a sample of 2,112 US IPOs between January 1996 and October 2005, into informative and standard content. They test the hypothesis that issuers who choose to invest in more information production and as such produce informative prospectuses, are less reliant on the book-building process. The authors find that greater use of informative content in prospectuses is associated with a smaller change in the issue price compared to the filing mid-point and the degree of under-pricing. See Hanley, Kathleen W., Hoberg, Gerard, 2010, The information content of IPO prospectuses, *Review of Financial Studies* 23, pages 2860-2864.

¹⁰⁴ Ritter, Jay R., Welch, Ivo, 2002. A review of IPO activity, pricing, and allocations, *Journal of Finance* 57, pages 1804-1807.

¹⁰⁵ Ritter, Jay R., Welch, Ivo, 2002. A review of IPO activity, pricing, and allocations, *Journal of Finance* 57, pages 1804-1807.

¹⁰⁶ FCA, Occasional Paper 15, page 32 which states that '[...] in the overall sample we find that price sensitive bids receive around a 7% higher allocation'.

Figure 2: Key information flows in IPOs



- 5.27 Figure 2 summarises information flows between the various participants in an example IPO. This process of information exchange begins several months before the IPO date, with the issuing company meeting analysts within prospective syndicate banks as part of the process of choosing the underwriting syndicate members, including the book-builders. As part of this process, the issuing company assesses the prospective underwriters for their approach to valuing the IPO and expectations of the demand for the shares using their expertise in the sector of the issuing company.¹⁰⁷
- 5.28 Having appointed a book-builder,¹⁰⁸ the next stage is for the issuing company to draft the prospectus for the IPO and then present information from the draft prospectus to the analysts employed by the syndicate banks. As mentioned in paragraph 5.15, these analysts use the information to produce 'connected research' (research prepared by the analysts of the book-builder) and then impose a 'blackout period' of 10 to 14 calendar days, during which it releases no new information. Prior to publication of the prospectus, the book-builders may have meetings with individual 'informed investors', i.e. investors identified as potential long-term investors who are experienced at valuing companies in the sector concerned.¹⁰⁹ These meetings allow the book-builder and issuer to establish an initial indicative price range for the shares, which is included in the draft unapproved prospectus, commonly known as the 'pathfinder prospectus'.¹¹⁰
- 5.29 Once the pathfinder prospectus is released to potential investors, the formal book-building process begins, which includes the issuer management's roadshow with institutional investors, where management presents information on the company to potential investors

¹⁰⁷ For more information see FCA, DP16/3, *Availability of information in the UK Equity IPO process*, April 2016, paragraphs 2.21-2.23.

¹⁰⁸ The issuing company may appoint multiple book-builders. For example, during 2007, the average number of book-builders in European IPOs was 1.3; see Jenkinson, Tim and Jones, Howard (2008), *Competitive IPOs*, page 7.

¹⁰⁹ See footnote 96.

¹¹⁰ See FCA, DP16/3, *Availability of information in the UK Equity IPO process*, April 2016.

and answers their questions. This typically lasts around two weeks. At this stage, investors focus on understanding the company, its background, its markets and its prospects.¹¹¹

- 5.30 During the book-building process, potential investors place orders for shares offered in the IPO. They indicate to the book-builder the number or value of shares that they are interested in and at what share price. These orders can be amended by the investor until the book closes.
- 5.31 As part of the book-building process, investors may obtain a certain amount of information on the book from the book-builder. In issuing shares whose true value is uncertain, the issuing company and book-builder have incentives to present an optimistic view of that value, and encourage potential investors to be optimistic too. This is called 'talking up the book'.¹¹² 'Talking up the book' gives asset managers further incentives to seek out comprehensive, accurate, and independent information to allow them to form their own valuations of the company. While such information might come from rival asset managers (see paragraphs 5.34 to 5.36), rival asset managers do not need to know each other's bidding intentions or conduct in any given book-build to form their own valuation (or to counter the book-builder's optimism). As set out at paragraphs 5.66 and 5.67, a competitive book-building process depends on asset managers formulating and submitting bids based on their own knowledge, expertise and requirements.
- 5.32 The book-builder typically discloses details such as its expected general valuation level or the number of bids submitted so far. Previous FCA research has found that an important indicator of the level of demand for the shares is how quickly the IPO is fully subscribed at the bottom of the price range and the book-builders typically announce this event to the market.¹¹³ This information forms part of an ongoing dialogue between investors and the book-builder which is used by the book-builder to encourage investment in the issuing company. The disclosure of information remains at the discretion of the book-builder and varies from transaction to transaction. The book-builder does not need to disclose specific details on individual bids submitted to other investors for it to carry out its role. The disclosure of non-specific information by the book-builder is often referred to as 'market colour'.
- 5.33 From the issuing company's perspective, the dialogue with investors is important for reducing the information asymmetry that investors face regarding the investment case in the company and reducing the under-pricing that this could produce (see paragraph 5.23). From the investors' perspective, information on the development of the book reduces the risk of over-bidding.
- 5.34 The book-building process does not provide for information sharing between asset managers interested in bidding for shares. However, asset managers that frequently bid on the same IPOs may have repeated interactions with each other, such as during the marketing phase of IPOs (see paragraph 5.16). RAMAM told us that the London Stock Exchange's ('LSE') *Guide to Listing on the London Stock Exchange* states that focussing the marketing process on investors who are thought leaders and highly experienced will make a company's shareholders more likely to grasp the company's investment case.¹¹⁴ It said that this guide clearly expects information to be shared among investors and that

¹¹¹ The pathfinder prospectus is unlikely to change significantly from the final approved prospectus. See FCA, DP16/3, *Availability of information in the UK Equity IPO process*, April 2016, paragraph 2.27.

¹¹² However, there are strict requirements on the information provided to potential investors in the prospectus, such as the type of information to be provided, the accuracy of the information and the presentation of the information, which investors can rely on to derive a view on the prospects of the shares. For example, the directors of the company are required to take responsibility for the contents of the prospectus. See Taylor Wessing's [Secondary Issues](#), July 2016, page 18.

¹¹³ See FCA Occasional Paper 15, page 31.

¹¹⁴ [Guide to Listing on the London Stock Exchange](#), page 59 (accessed 19 February 2019).

this sharing of information is beneficial to the issuing company. It said that investors share information during the IPO process is also assumed or explicitly recognised in the economics literature.¹¹⁵

- 5.35 In terms of information shared, the FCA notes that the LSE guide does not encourage disclosure of individual bidding conduct or intentions between potential investors. Further, the economic literature suggests that free communication between bidders can be contrary to the interests of the issuer, since it can lead to informational disadvantages and IPO failure.¹¹⁶ However, investors may obtain indicators of the general level of demand from the book-builder and other market participants. Such indicators may also allow the issuer and book-builder to achieve sufficient demand to cover the book, a consideration which is likely very important in cold IPOs (i.e. ones with low levels of interest, that may struggle to raise the desired amount of capital for the shares on offer). It therefore can be in the interests of the issuer and the book-builder to share information with potential investors on the coverage of the book as book-building develops.¹¹⁷
- 5.36 The incentives of asset managers to share their views with other asset managers on particular IPOs may vary, for example on their perceived level of demand for shares and whether they risk missing out being allocated shares. If an asset manager has invested resources in assessing an issuing company, and it discloses that information, it gives away the product of that investment and so, potentially, its informational advantage (see paragraphs 5.64 and 5.66). If an asset manager obtains another asset manager's views, it free-rides on that other's expertise, experience or analysis.¹¹⁸ Just as book-builders have incentives to talk up the book (paragraph 5.31), potential investors have incentives to talk it down, since they can generate returns by acquiring shares at a lower price and realising returns once the shares begin trading.¹¹⁹ Likewise, absent competition law and regulation, they may have incentives, at least in the short term, to collaborate to depress issue prices.
- 5.37 Shortly after book-building is complete, the book-builder decides, in consultation with the issuer and its corporate finance adviser, on pricing and allocations and the final approved prospectus is published.¹²⁰ Once the final price is set, the book-builder confirms with the investors that they are prepared to pay the final price for the shares they have been allocated.¹²¹

Price-setting within IPOs

- 5.38 During the book-building process, investors submit bids of their demand for the company's shares at a certain price point within the indicative price range. Investors can withdraw or revise their bids until the book closes. At that point, they become binding. For the issuing company and the book-builder, bids from potential investors allow them to establish the demand for the stock at different price points and make decisions about the optimal pricing strategy and the subsequent allocation of shares to the investors. The bids show what

¹¹⁵ UUID 66450014, RAMAM Equity Issuance Note, paragraph 3.19.

¹¹⁶ Handbook of Corporate Finance, Volume 1, edited by B. Espen Eckbo, page 413. See also Welch, I. (1992), 'Sequential Sales, Learning, and Cascades', The Journal of Finance, 47:2, pages 695-732.

¹¹⁷ Another view of the under-pricing that occurs in IPOs is that 'informational cascades' can develop in some IPOs, if investment decisions are made sequentially and which affect the decisions of later investors. Because the investment decisions of early investors are particularly important to the success of the IPO, issuers have a strong incentive to offer them lower share prices, resulting in overall under-pricing (since the IPO process does not allow price discrimination and all investors end up paying the same share price). While these models are not directly applicable to IPOs and placings managed through a book-building process, they explain that the issuers have an incentive to share information on the development of the book and that this information can replace the investor's own information.

¹¹⁸ See UUID 66450014, RAMAM Equity Issuance Note, paragraph 2.4.

¹¹⁹ The incentives of asset managers are described in paragraphs 5.57-5.72.

¹²⁰ FCA DP16/3 *Availability of information in the UK Equity IPO process*, April 2016, paragraph 2.30.

¹²¹ UUID 66450014, RAMAM Equity Issuance Note, paragraph 3.10.42

different investors (each with their own experience, expertise, risk appetite, and private valuations based on information provided by the issuing company, and their own research) are willing to pay for a share of the company.

- 5.39 Price-setting in book-building processes is an iterative process as the book-builder gauges the level of demand of different investors at different price points and provides feedback to potential investors on the level of demand, as a way of encouraging bids as described in paragraph 5.32. The final share price of the IPO depends on how much the company aims to raise, the level of demand expressed by investors, and current market conditions. In theory, it is in the issuing company's interest to obtain as high a share price as possible, as this implies a greater value for the company as a whole. However, in practice the aim is often to achieve some level of over-subscription at the chosen price level; that is, where the number of shares issued is less than the number investors would be willing to have at that price level (see paragraph 5.44).
- 5.40 Investors can submit different types of bids in IPOs and these have different effects on book-builders' understanding the demand for the shares.¹²² Investors may indicate a cap on the amount that they are willing to pay for a certain number of shares, known as a 'limit bid'. Similarly, 'stepped bids' indicate the investor's demand schedule at different price limits.¹²³ Limit and stepped bids are particularly important to the price discovery process in book-building,¹²⁴ as they show what the investor is willing to invest at different share price points. FCA research has found that the issuers and book-builders typically reward price sensitive bidders (i.e. those making limit or stepped bids) with higher final allocations of shares, particularly in IPOs over-subscribed at the final price.¹²⁵
- 5.41 Investors willing to pay up to the top of the book-building range (as indicated in paragraph 5.15) may alternatively place bids which do not include a price limit for a certain number of shares. This is known as a 'strike bid'.
- 5.42 According to the bids received, the book-builder may have to revise the initial price range upwards or downwards, which can result in an extension to the book-building period. The book-builder, by collecting the various bids of investors is building a demand curve for the shares – that is the level of demand at various possible share price points.
- 5.43 An important stage in the process of building a demand curve for the shares is the moment when the issue is fully subscribed at the bottom of the indicative price range, since the timing of this is an important signal of the level of demand to investors and this is typically communicated by the book-builder.¹²⁶ IPOs which are quickly fully subscribed at the bottom of the indicative price range are referred to as 'hot'; those that achieve full subscription slowly are 'cold' (see paragraph 5.35). This could for example be because investors view the speed of full subscription as indicating the likelihood that the shares will perform well once they are open for trading. This knowledge likely reinforces the attractiveness of shares in hot IPOs and may lead to more aggressive bidding by the investors.
- 5.44 Once the book-builder finishes collecting bids and determining the level of demand, the book-builder and the issuing company agree the final issue price. They do not typically set the final issue price at the level at which total investor demand exactly equals the number of shares being offered (i.e., the market-clearing price). Instead, the book-builder and

¹²² Investors may also place conditions on their bids such as requiring the full exit of some or all existing shareholders. These are typically referred to as 'conditional bids' and are a subset of other types of bids.

¹²³ FCA Occasional Paper 15, page 23.

¹²⁴ FCA Occasional Paper 15, page 8.

¹²⁵ FCA Occasional Paper 15, page 32.

¹²⁶ FCA Occasional Paper 15, page 31.

issuer set a lower issue price. This leads to the book being over-subscribed.¹²⁷ FCA research found that IPOs using book-building were over-subscribed by around 4.5 times on average and the median over-subscription was 2.8 times.^{128, 129} However, over-subscription is secondary to the importance of price sensitive bids in the formation of the final price – that is limit prices (see paragraph 5.40) are particularly important to the book-building and price discovery process.¹³⁰ The same research found that larger (price-sensitive) bids and more frequent bidders in the sample of IPOs, have a stronger effect on the final issue price.¹³¹

5.45 Figure 3 shows a simplified version of the price-setting process in an example book-building process, during which the key stages are as follows:

Stage 1: The book-builder and the company set the initial price range for the shares to assist the book-building process (for example allowing investors to place 'strike bids', i.e. a sum to buy shares, or a number of shares, anywhere within that range). The company also identifies the initial amount of shares on the basis of the initial price range and the desired level of equity capital it aims to raise.¹³²

Stage 2: The book-builder begins the book-building process by collecting bids from potential investors. The bids could be limit bids, strike bids or stepped bids. Depending on the development of bidding by potential investors, the book-builder may actively encourage changes to these bids, by for example providing general information on the development of the book.

Stage 3: Having collected sufficient bids for shares to cover the desired allocation of shares, the book-builder and company agree on the final issue price and allocations. The final issue price may be set below the market-clearing price, resulting in excess demand for the shares, such that the book-builder and issuer have scope to flex allocations on the basis of preferences the issuer has for the investor mix. The degree of flex will depend on the preferences of the issuer but also on the strength of demand for the shares.

¹²⁷ FCA Occasional Paper 15, page 8.

¹²⁸ FCA Occasional Paper 15, page 25.

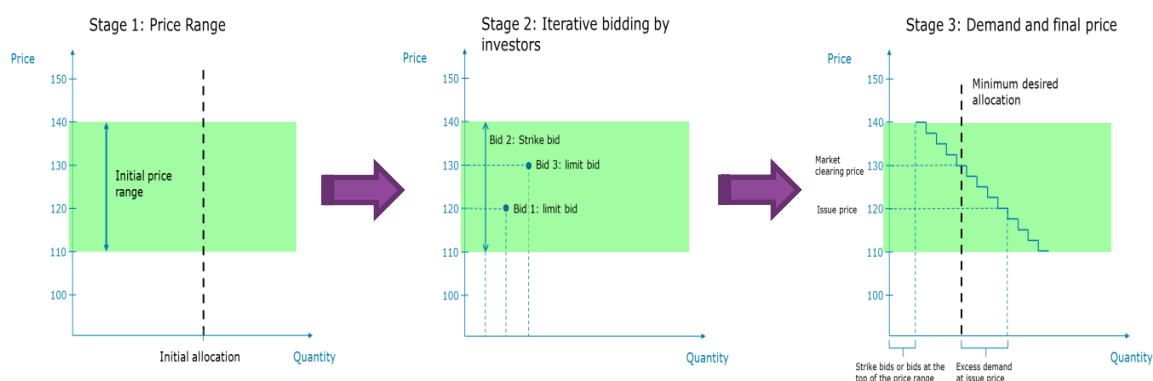
¹²⁹ The same research found that initial returns for the IPOs in the sample were 4.8% and 5.4% for the first day and first week respectively. FCA Occasional Paper 15, page 26.

¹³⁰ Research has found that the average limit price in a sample of European IPOs explained significantly more in the variation of issue prices than the level of over-subscription, with both factors having a significant effect. *Bookbuilding: How Informative Is the Order Book?*, page 1423.

¹³¹ *Bookbuilding: How Informative Is the Order Book?*, page 1428.

¹³² Simplistically, the share price times the number of shares equals the equity capital. See footnote 389.

Figure 3: The price-setting process in book-building



- 5.46 As the final pane of Figure 3 indicates, strike bids do not provide the book-builder and company much information for the price-setting process. This is because these bidders have indicated their willingness to acquire a certain amount of shares (or invest a certain sum) within the indicative share price range and do not add to the further refinement of the final share price. In contrast, limit bids and stepped bids inform the price-setting process, since the book-builder and issuer can decide the price which achieves the desired allocation of equity capital. Research has shown that the issue price in a sample of IPOs was set very close to the weighted average of all limit prices.¹³³
- 5.47 The literature on IPOs describes this information as a key part of the book-building process. Investors which provide this information through their bids are 'rewarded' by:
- Setting the issue price below the market-clearing price. This is described in the literature as the issuers 'leaving money on the table', since they are not maximising the amount of capital they are drawing from the investors by setting the share price to the market clearing price – that which equates the supply and demand of the shares.
 - Allocating shares to investors who have contributed to the price discovery process. This contribution arises through the investors placing price sensitive bids¹³⁴ or participating in meetings, the latter being an indicator of the provision of information.
- 5.48 Aside from the degree of over-subscription to the IPO at the issue price, another indicator of the level of confidence that investors have in the IPO is the prevalence and dispersion of price-sensitive bids. IPOs in which investors are uncertain about the true value of IPOs are likely to see greater dispersion around fewer price-sensitive bids.¹³⁵ The patterns of prices are a result of investor uncertainty leading to fewer and more disperse attempts at judging the true value of the shares. Conversely, a greater preponderance of price sensitive bids which are close to each other should mean that investors are more confident of the true valuation of shares, overall leading to more elastic demand. In such cases, the

¹³³ *Bookbuilding: How Informative Is the Order Book?*, page 1423.

¹³⁴ This could for example be as an incentive to reveal their price sensitivity during the book-building process, which would not otherwise be in the interest of the investor – for example they could reveal they are willing to pay above other bidders. Investors may also undertake research on the company prospects, which is costly and the under-pricing is a way for the book-building process to award those firms which invest in coming up with a specific price. See Ritter, Jay R., Welch, Ivo, 2002, A review of IPO activity, pricing, and allocations, *Journal of Finance* 57, pages 1805-1810.

¹³⁵ *Bookbuilding: How Informative Is the Order Book?*, page 1421.

book-builder's ability to flex prices is likely more limited.^{136, 137} Research by the FCA has found that price-sensitive bids are more likely in cold IPOs.¹³⁸

Secondary issues including placings

- 5.49 When a company whose shares are already traded or quoted in a stock exchange wants to raise capital it again has two options: to borrow money or sell further parts of itself, or in other words, issue debt or more shares. Issuing more shares is called a secondary issue.
- 5.50 As with an IPO, companies choose to issue further shares to raise capital for specific or general purposes, such as repaying debt, satisfying capital adequacy requirements, funding acquisitions, or creating working capital. Alternatively, a company may issue further shares in lieu of a dividend to existing holders of shares in proportion to their holdings. The most common types of secondary issue in the UK are placings, rights issues, and open offers.¹³⁹
- 5.51 Placings are similar to IPOs in that shares are offered to only a small number of selected investors (often existing shareholders), such as large banks, mutual funds, insurance companies, pension funds, and wealthy individuals. Given that not all existing shareholders are given the right to participate, there are greater restrictions on the amount of shares and the discount at which they may be acquired.¹⁴⁰ Placings are different from public offerings, including IPOs, in that they are generally quicker, cheaper and more straightforward to execute. A prospectus may not be required, and the process may take place in a matter of days. Companies therefore may choose this approach when there is an immediate need of financing and debt financing is not possible.
- 5.52 Larger placings may be carried out by way of a book-building process, in a similar way to an IPO. Typically, this happens more quickly than an IPO – over a couple of days rather than weeks. It is, therefore, called an 'accelerated book-build'.
- 5.53 Rights issues and open offers both involve offering new shares to existing shareholders in proportion to their existing shareholdings, commonly at a substantial discount to their market price. In a rights issue, shareholders are able to sell their rights during the issue period, and monetise the discount, without having to take up the new shares themselves. In an open offer, this cannot be done and therefore a shareholder must either participate in the offer or lose the benefit of any discount at which the new shares are offered.¹⁴¹ Open offers can often happen more quickly than a rights issue.
- 5.54 Which type of secondary issue a company will choose often depends on a variety of factors, including on whether a prospectus and/or shareholder meeting will be required (as these can both lengthen the timetable), the purpose of the share issue (for example, whether it is to strengthen the balance sheet or to finance an acquisition), the size of the proposed issue relative to the existing share capital and the proposed discount to share price.¹⁴²

¹³⁶ This is because high elasticity of demand means that price changes are associated with significant changes in demand. This can be seen by a significant number of bids being close to each other, meaning that price increases above this level would mean a large share of the bids would drop from the investor base.

¹³⁷ Research has also found that IPOs with greater divergence in price-sensitive bids are associated with lower returns in the post IPO period. The researchers explain this by arguing that the uncertainty in pricing during book-building persists once the stock begins trading in the open market. See *Bookbuilding: How Informative Is the Order Book?*, pages 1435-1436.

¹³⁸ See FCA Occasional Paper 15, Table 3.

¹³⁹ For an overview, see Taylor Wessing's *Secondary Issues*, July 2016.

¹⁴⁰ OFT Equity Underwriting Market Study, paragraph 4.13.

¹⁴¹ For this reason, there is often a limit to the maximum size of discount that can be offered.

¹⁴² See Taylor Wessing's *Secondary Issues*, July 2016.

Price-setting in placings

- 5.55 Secondary issues, including placings, take place in a different context to IPOs, since there is already a market price for the existing shares. This means that investors (both existing and potential) have some understanding of the market valuation of the shares, and so the book-building process is not establishing market price for shares for the first time.¹⁴³ Placings are typically undertaken using an accelerated book-building approach (usually in one or two days).¹⁴⁴ Further, significant discounts to the shares in the placings may have an effect of diluting the value of shares of the existing shareholders who do not participate in the placing and do not gain additional shares as compensation. Therefore, discounts from the subsequent market price are typically limited (5% to 10%) and the amount of capital to be raised is typically small, usually less than 5% of the company's issued share capital.¹⁴⁵
- 5.56 Similar to the book-building process in IPOs, accelerated book-building in placings is aimed at discovering the demand for the shares by investors at different prices. Given the presence of an existing market for the firm's shares, the information asymmetries which play an important role in the context of IPOs, are smaller for placings. This means that the under-pricing that occurs in IPOs, including as a way to give investors incentives to reveal favourable information to the issuer, are less prevalent in placings. For example, a study of SEOs in the US between 1980 and 1998 found that under-pricing was on average 2.2 percent, having generally increased over the sample.¹⁴⁶ By comparison, average IPO under-pricing in the US was 21% during the 1990's.^{147, 148} The degree of uncertainty is still an important determinant of the degree of under-pricing in placings. Other factors, which reflect pricing pressure, such as the size of the placing and the elasticity of demand, affect the degree of under-pricing.¹⁴⁹

Asset managers' incentives to compete during the book-building process

- 5.57 The book-building process is designed to provide information to the book-builder and the issuer on the level of demand for the company's shares at different price points. It is the continuation of the price discovery process which begins with the formation of the indicative price range, following early indications by potential investors who have some information on the potential demand for the shares at different prices. Information revelation (both by the issuer and book-builder of information regarding the company, and by asset managers regarding what they think the company is worth) is particularly important in the context of IPOs, since the shares are not traded in the stock market and there is greater uncertainty around the true valuation of the shares. The process is designed to elicit the firm views of potential investors on the value of the company coming to market for the first time, which are expressed by means of the bids they submit.
- 5.58 When determining how to allocate typically under-priced shares, within applicable regulation, the issuer and the syndicate banks may take into account the quality of feedback received by different investors and their understanding of the company and the

¹⁴³ See Taylor Wessing's *Secondary Issues*, July 2016.

¹⁴⁴ UUIID 66450014, RAMAM Equity Issuance Note, paragraph 2.11.

¹⁴⁵ OFT Equity Underwriting Market Study, paragraph 4.12 and footnote 41.

¹⁴⁶ Corwin, S., 2003, *The determinants of underpricing for seasoned equity offers*, Journal of Finance 58, page 25.

¹⁴⁷ Handbook of Corporate Finance, Volume 1, Edited by B. Espen Eckbo, page 378.

¹⁴⁸ FCA research has found that the average under-pricing of 'hot' IPOs was 9.3% compared with 2.1% for 'cold' IPOs. See FCA Occasional Paper 15, pages 31-32.

¹⁴⁹ Corwin, S., 2003, *The determinants of underpricing for seasoned equity offers*, Journal of Finance 58, page 25.

sector, and by favouring investors who have actively engaged in the price discovery. Therefore, asset managers play an important role in determining the prices of shares prior to their trading on the stock market and are rewarded through the returns on the shares.

- 5.59 The incentives of the asset managers, as the investors obtaining shares, are to generate high returns for their funds under management. This is because asset managers manage the investments made by their customers and have an incentive to increase the value of assets they manage on behalf of customers. Asset managers typically charge investors a percentage of assets under management on an ongoing basis, referred to as the 'ad valorem' pricing model. Although firms' costs grow with an increase in assets under management, this is generally at a slower rate than the revenue growth. Asset management firms therefore typically benefit from economies of scale. As a result, in order to increase or maintain profitability, firms have incentives to increase or retain assets under management.
- 5.60 Asset managers compete with each other both to attract money from investors and also to invest in specific opportunities with the money they succeed in attracting. Asset managers may compete directly against each other for investment opportunities even if they seek to attract different investors. For example, an asset manager operating a pooled fund focusing on UK all-cap companies may compete to attract different investors than an asset manager operating a pooled fund focusing on UK small-cap companies, but they compete against each other for investment opportunities in UK small-cap companies.
- 5.61 The FCA's Asset Management Market Study Report (June 2017) found that for investors choosing products and providers, past performance, reputation and charges matter, and institutional investors are more sensitive to price than retail investors.¹⁵⁰ Therefore, asset managers can increase the value of assets under management, by showing that they have a strong track record of delivering returns for investors in the funds that they manage. These incentives apply to individuals at the asset management firms, meaning that they are very important to the industry. For example, individual fund managers are typically remunerated based on performance or contribution to firm profits. They are typically assessed on performance relative to peers or benchmarks over various time periods, and how closely they comply with mandates and risk budgets. Discretionary bonuses are widespread, and penalties for underperformance or requirements to co-invest in funds are rare.¹⁵¹
- 5.62 In the context of IPOs and placings, asset managers can deliver returns to their investors, by investing in assets that contribute positively to the returns of their funds. To this end, asset managers may focus on the following factors in deciding whether to participate in individual IPOs and placings:
- a. the expected future performance of the issuing company – asset managers are often relatively long-term holders of assets¹⁵² and therefore are interested in companies they believe will deliver long-term sustainable growth in excess of their benchmark;
 - b. the proportion of their fund they wish to invest in that IPO/placing – asset managers may consider what proportion of their fund they wish to invest in a particular IPO or placing. They may have an upper limit as to the proportion of their fund they can

¹⁵⁰ FCA Asset Management Market Study Report, chapter 4; FCA MS15/2.2 *Asset Management Market Study – Interim Report*, November 2016, chapter 4.

¹⁵¹ FCA Asset Management Market Study Report, chapter 4; FCA MS15/2.2 *Asset Management Market Study – Interim Report*, November 2016, chapter 4.

¹⁵² See Oxera, *The contribution of asset management to the UK economy* – Prepared for the Investment Association, July 2016. Oxera estimates that, over the period 2011-14, the average holding period was estimated to be 6.3 years for asset managers (including both passive and active strategies).

invest in any given company¹⁵³ or may be less interested in an IPO or placing if any likely allocation would be too small relative to the size of their fund to make a meaningful contribution to the overall portfolio value;

- c. the size of the free float¹⁵⁴ – asset managers typically dislike it when the free float is less than 50% due to concerns around liquidity (i.e. that they may not easily be able to sell the shares of a given company if there is only a small free float);
- d. their share of the free float – some asset managers may choose (or have as a condition of their mandate) not to hold more than a certain percentage, often 10%, of the free floated shares in a company (again due to concerns around liquidity and so the ability to disinvest);
- e. the quality of the book – asset managers may also be interested in the other investors in the book, in particular they may be concerned if there are a number of hedge funds or ‘flippers’¹⁵⁵ in the book;¹⁵⁶
- f. their relationship with the book-builder – asset managers’ decision to participate in an IPO/placing or how they conduct themselves within the book-building process may take into account their on-going relationship with the book-builder. For example, they may be reluctant to push too much on price for fear of damaging their relationship;¹⁵⁷
- g. sufficient cash to invest – an asset manager’s decision on whether to participate in an IPO or placing also depends on whether their fund has either sufficient free cash to invest, or other existing holdings that could be sold within the timeframes involved; and
- h. the fund’s objectives and mandates – these set out the type of investments that the fund will make and therefore may constrain an asset manager’s discretion to invest in particular IPOs or placings if these are not consistent with the fund objective.¹⁵⁸ There may also be regulatory limits or restrictions.

5.63 Once an asset manager has decided to try to acquire shares in a particular IPO or placing, based on the criteria set out in paragraph 5.62, it can bid during the book-building process. In making a bid, the asset manager can choose:

- a. the price per share they are willing to pay;

¹⁵³ This partly explains why asset managers will often submit bids for a certain value of shares rather than a certain number of shares.

¹⁵⁴ The percentage of shares that are freely floated on the stock market and available to investors. The remaining shares may be held by owners or management, meaning they are not typically traded on the stock market. This may matter for investors, since greater trading of shares in the stock market makes the shares more readily available, increasing the liquidity of the shares (i.e. there is typically greater demand and supply for the shares). Hargreave Hale also said that there was a risk to a significant ‘overhang’ held by the issuer in an IPO since it could lead to depressing of the shares in the open market if the issuer decided to sell the remaining stake in the open market. See UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 3.4(h).

¹⁵⁵ A ‘flipper’ refers to a short-term investor who seeks to buy shares in an IPO and then sell for a profit shortly after they begin trading.

¹⁵⁶ In part because this may increase the volatility of the share price once floated.

¹⁵⁷ For example, [name] said ‘...that’s the sort of thing that can sour your relationship with a company. If they think that you’ve tried to game the process to get a better deal for yourself rather than showing your true demand that paints him in a pretty bad light’; see UUID 16260001, transcript of an FCA interview with [name] (Numis), 2 November 2016 (‘[name] FCA Interview Transcript’), page 65, lines 2389-2392.

¹⁵⁸ In terms of the types of companies an asset manager may be interested and able to invest in at IPO or placing, fund objectives or mandates often focus on the size and geographic listing of the company – for example UK smaller companies or European mid-size companies. It is less common, although not unknown, for funds to focus on a particular sector, for example technology companies. Some funds may also be constrained from investing in particular sectors, for example for ethical reasons, or have a maximum proportion of the fund that can be invested in any industrial sector, or have limits on the degree to which a particular industry could be over or under-weighted relative to the industry sector weighting in a relevant index (for example, the FTSE All-Share Index).

- b. the volume of shares they wish to buy;
- c. whether or not to submit stepped bids (i.e. different volumes at different prices); and
- d. whether or not to submit a 'strike' bid, so that they are willing to buy anywhere within the indicative range (so that such bids will produce either a variable amount invested or a variable number of shares acquired).

- 5.64 By refining their assessment of the value of the issuing company's shares and submitting bids which carry information (i.e., making limit or stepped bids), the asset manager furthers their chances of obtaining a favourable allocation. This is because, aside from the usefulness of the price information to the book-builder, they also indicate to the book-builder and issuing company that the asset manager sees value in the company (for example as a long-term investment).
- 5.65 An asset manager wishing to increase the likelihood of a desirable allocation (see paragraph 5.18 for factors favouring this), can actively engage with the syndicate banks and the issuer, for example by attending the roadshow and lobbying the book-builder. Other factors affecting allocation (such as how much business the asset manager provides to the book-builder's other business lines, and its general strategy regarding share retention) do not appear susceptible to variation within the typically short period of a book-building process.
- 5.66 The asset manager would likely have formed a view of their valuation of the shares, for example formed by undertaking their own research, attending meetings with the book-builder and issuer, their sense of the level of interest from discussions with other market participants (for example their views of the company prospects), from their own experience of previous IPOs and placings, and their expertise gained investing in the specific sector and the wider market. These factors also go towards the asset manager's decision on the size of their investment (i.e., the number of shares they wish to acquire at specific price points).
- 5.67 Accordingly, a key element of the asset manager's competitive strength is their ability to form an accurate assessment of the value of the company and to decide how much to invest in it. If they can do this well, they have increased chances of their investment, their portfolio - and their individual bonuses - all growing. If they do this poorly, then they risk overbidding or underbidding. Overbidding the price may lead to an underperforming asset, although the risk is mitigated by the fact that the issue price is uniform to all bidders who are allocated shares.¹⁵⁹ Further, the issue price is typically set below the market-clearing price in order to achieve some oversubscription (see paragraph 5.44). The risk of bidding too low is also reduced (but not removed) by asset managers potentially receiving general information on the level of demand at different price points, and so the opportunity to increase the bid (see paragraphs 5.30 to 5.33). The risks, however, are not mitigated in terms of over- or under-bidding in terms of volume.
- 5.68 From the perspective of the issuer, the book-building process allows it to reach a wide investor base and raise the required equity capital at the lowest cost possible (alongside other considerations such as allocating shares to long term investors). As noted in paragraph 5.7, a lower cost of capital is achieved by exchanging shares at the highest

¹⁵⁹ Instead of asset managers paying the share price that they bid, as in the case of auctions or bilateral contract negotiations. This means that discussions between asset managers and the book-builders are in the context of the current price range given the level of demand at different price point. Repeated rounds of discussions seek to refine the price range, until the issue price is set at a level to allocate the shares and achieve some excess demand. Thus, the impact of an individual bid on pricing will be through achieving sufficient coverage of the book at a certain price point. The extent of this impact depends on the specifics of the IPO and importantly on the level of demand for shares at various price points within the indicative price range.

price possible. Therefore, the book-building process sets the interests of asset managers seeking to achieve value by paying a lower price, against those of the issuer seeking to raise equity capital at the lowest cost possible by achieving a high share price. However, the period over which the process runs, and the information flows provided by the process (see paragraphs 5.21 to 5.37), enable both the issuing company and potential investors to adjust their offers to see if supply can match demand and for the transaction to proceed.

- 5.69 Asset managers bidding in IPOs and placings are in direct competition with each other. Each wants to receive the allocation of shares closest to their desired allocation at a price at or below their best estimate of the 'true' value of the shares (the market price emerges over time once trading commences and fluctuates depending on market conditions).¹⁶⁰ If demand for shares exceeds the number of shares available, then some asset managers will be allocated less than they applied for or may miss out altogether. Several factors determine the allocation of shares in IPOs (see paragraph 5.18), but two important factors are the volume of shares bid for (or the equivalent value in monetary terms) and whether a limit or stepped bid is submitted.¹⁶¹ Therefore, competition between investors during the book-building process could lead to better coverage of the book by providing certainty to the issuer that the IPO will be successful and may help attract other investors by signalling the quality of the IPO. This effect is likely to be particularly important from the book-builder's and issuer's perspective in cold IPOs, where individual bidders hold greater sway over whether the IPO succeeds (i.e. the book coverage is, by definition, lower).
- 5.70 Therefore, within applicable regulation, the book-builder has a strong incentive to reveal information about the coverage of the book to asset managers, because the primary role of the book-building process is to achieve coverage for the allocation of shares and some excess demand. This means that there is downward pressure on the offer price for IPOs and placings which generate limited demand. That is, investors can demand more favourable pricing in return for a greater allocation of shares required to cover the book.¹⁶²
- 5.71 As noted, price-sensitive bids help price formation (paragraph 5.40). Competition between investors likely leads to greater certainty in price-setting, since the book-building process favours such price-sensitive bids, by providing a higher allocation to bidders making them. Price-sensitive bids are costly from the perspective of the asset manager because they have to undertake research to value the shares, and they are more likely to submit such bids if there is a credible risk of being allocated fewer or no shares if they do not.
- 5.72 Competition between asset managers in the book-building process must also be seen in the context of a longer and dynamic process, whereby allocations also incorporate other considerations important to the issuer and the book-builder. For example, the issuer may have preferences for a certain type of investor to be over-represented in the allocation of shares. Book-builders may also reward certain types of investors with allocations in IPOs and placings where there is flexibility to do so (for example in over-subscribed IPOs), such as those that participate in 'cold IPOs'. However, these considerations are supplementary to the primary consideration of raising the required equity capital and minimising the cost of such equity capital.

¹⁶⁰ Since book-building seeks to generate over-subscription, once the issue price is set, the book-builder and issuer decide on how the available shares are rationed between the different bidders.

¹⁶¹ See FCA Occasional Paper 15, page 32.

¹⁶² See UUID 66450014, RAMAM Equity Issuance Note, paragraph 3.39.

The potential adverse effects of bid disclosure on competition between asset managers

- 5.73 In a competitive book-building process, asset managers independently and confidentially decide the volume and value of their bids, based on their own assessment of the attractiveness of the investment opportunity. This information is private to each asset manager. But they must also consider the likely demand from rivals for the shares, and so consider the bid they need to make to secure the allocation they want in the face of such competition. In bidding for shares and supplying equity capital to the issuing company, each asset manager weighs its incentive to bid less (in the hope of obtaining shares at a lower price), against the risk of being allocated fewer shares or missing out completely if rivals bid for sufficient volume at sufficiently high prices.¹⁶³
- 5.74 Any one bid can affect the strike price, since that bid may determine if the book is covered within the indicative price range, or alternatively affect the price at which the book is covered.¹⁶⁴ If a bidder knows the importance of its bid to book coverage or the price at which the book will be covered (for example because of the volume of their bid), it may try to exert downward pressure on the strike price (through its bid), which would be contrary to the interests of the issuing company. The book-builder and the issuing company may have fewer options than in other market settings, such as in bilateral negotiations, to threaten to and in fact move its entire demand to another supplier. For book-building, the issuing company requires multiple asset managers to bid for shares and cover the book. This means that the marginal bid necessarily affects the success of the book-build where the book is just covered and can affect the strike price where it affects the price at which the book is just covered.
- 5.75 Accordingly, any one bid has the potential in and of itself to affect the outcome of the book-building, by for example lowering the strike price. Whether any one bid has such an effect cannot be known with certainty by asset managers in advance or even after the book closes.¹⁶⁵ The importance of any one bid only becomes fully apparent to the book-builder once the book closes and it can determine the coverage at different price points. The consequence is that since any one bid can affect the strike price, it is essential to the ability of the book-building process to raise equity capital at the minimum available cost that each bid is made without knowledge of a rival's bid.
- 5.76 If asset managers disclose their actual bids or bidding intentions to other asset managers, they undermine the book-building process and hinder its ability to produce a competitive outcome. Such disclosure removes a key source of uncertainty for competing asset managers, namely how rivals intend to bid. This uncertainty about rival bids compels asset managers to reveal to the book-builder (via their bids) how much they think the issuing

¹⁶³ These incentives also play out across different book-building processes, since interactions between book-builders (representing issuers) and investors are repetitive and reputational effects are important. See for example FCA Occasional Paper 15, page 48.

¹⁶⁴ The impact that any one investor can have on the ultimate strike price depends, amongst other factors, on the level of demand for the shares. If there is strong demand, with many investors submitting bids within the indicative price range, the impact of any one bid would be more limited than if demand is weaker. This is also an indication of the weaker bargaining position for the investor in cases where there is strong demand for shares, meaning there are many investors willing to supply equity capital to the firm within the price range. While book-building is a bidding process, it is an iterative process where the issuing company may reveal information on the development of the book and the speed of the coverage of the book is indicative of the strength of demand that investors typically learn as the process develops. Conversely, in cases where there is weak demand for the shares, the bids of individual investors can have a significant effect on the strike price. For example, the final bid in a book that is just covered, is very important to the issuing company and could shift the strike price if significantly different to others. This is a specific example of the general observation that the valuations of marginal consumers are determinative of the pricing and output of the firm in a market with uniform prices.

¹⁶⁵ The book-builder collects individual bids from asset managers and develops an understanding of demand at different price points. This is likely to include an understanding of the importance of different bids (for example large bids or from valued investors). The book-builder may share some of this understanding with asset managers, as a way of encouraging bids.

company is worth. For the asset manager, any allocation priced below this private valuation is a valuable investment, and so in a competitive process it should bid up to that level. Removing uncertainty about rival bids can therefore remove the incentive for an asset manager to reveal their private valuations and to bid up to their maximum private valuation. If rival asset managers disclose their own bids to each other, they can bid lower, based on the knowledge of what the supposed rival is in fact bidding. This means that asset managers may have incentives to disclose their bids if they think it will enable them to acquire shares at a lower price.

- 5.77 The potential effects of such information disclosure include a lower strike price and so a higher cost of capital for the issuing company, since the strike price is typically set close to the weighted average of limit bids.¹⁶⁶ The effects of the information sharing are likely to be even greater when the asset managers' bids are lowered significantly and/or the volumes they bid for are significant. The effect of bid volumes also depends on the level of demand for shares – if the investors sharing information account for a large share of total volumes, the effect of the reduction in their bids is more significant.
- 5.78 Accordingly, the more widespread the disclosure and the lower the targeted price, the greater the potential adverse effect in terms of depressing the strike price and raising the cost of capital. Ultimately, if bidding intentions or conduct were widely circulated among supposedly competing asset managers, they could tacitly or even expressly coordinate onto a low price, eliminating any competition among themselves and in effect forcing the issuer to confront a single potential investor. However, even disclosure between two otherwise competing asset managers has the potential to depress the strike price.
- 5.79 Bid disclosure by supposedly competing asset managers may be particularly harmful in book-building processes, since the book-builder relies on the bids made to gauge overall interest in the company. If asset managers disclose information on their bids during the book-building with the aim of depressing the final strike price, which leads to bids being depressed overall, the book-builder may take a more negative view of the prospects for the shares, than would be the case with competitive bids. It then loses the opportunity to make general positive reports about demand in its dialogue with other asset managers to generate further bids or to improve existing bids. The book-builder and the issuing company could also adjust their expectations about the strike price and ultimately accept a lower share price than would have been the case if asset managers were bidding relying solely on their private valuations of the shares. This effect could extend to other asset managers, who could view the development of the book more negatively than would have been the case (for example if it takes longer to cover the book at the bottom of the indicative range other asset managers may take a more cautious view of the shares).
- 5.80 Information sharing between asset managers could also lead to a failed book-building process. If investors share information which leads to lower bids and significantly reduces the expected strike price, the issuing company may decide to reduce significantly the size of the issuance or call off the issuance altogether. This could arise if the bids are important to covering the book (for example the book is not fully covered or there is no margin for flexing allocations by the issuing company). This in turn would mean that the issuer raises a significantly smaller amount of capital or does not raise any capital at all.
- 5.81 By disclosing bidding conduct or intentions, an investor can affect the incentives of competing asset managers to invest in researching the company and deprive the book-builder and issuing company of a further source of information as to the competitive valuation of the company's shares (and so its cost of equity capital). By seeking out or

¹⁶⁶ *Bookbuilding: How Informative Is the Order Book?*, page 1423.

taking account of the valuation of a rival, an asset manager free-rides on that other's expertise or research, and potentially fails to undertake research or analysis that it otherwise would have done. This means that any bid it subsequently makes is less informative to the book-builder than it appears to be, and deprives the book-builder of a further source of information. If an investor is keen but uncertain as to the proper valuation of the company, it can submit a 'strike' bid. If, by using a rival's valuation, instead it submits a limit bid, then it seeks to increase its own allocation despite not undertaking the research or analysis to justify the value of the bid submitted. These are further ways in which information sharing between supposedly rival investors could render a book-building process uncompetitive and undermine its ability to reveal the competitive costs of equity capital for the issuing company.

- 5.82 Finally, the disclosure of bid information by rival asset managers, which raises the cost of equity capital, could affect the investment decisions of firms, for example affecting the scale of investment or making the planned investment unviable because of the higher cost of financing. This in turn could affect the attractiveness of IPOs and placings as a way for companies to raise capital and the incentives of entrepreneurs to undertake investments, if returns from those investments are lower as a result of reduced share price than would otherwise be the case.
- 5.83 In summary, the disclosure and acceptance of strategic information between otherwise rival asset managers during a book-building process can lead to:
- a. asset managers placing lower bids than they might otherwise have placed;
 - b. the issuing company and book-builder achieving a lower strike price and by implication a higher cost of capital for the issuing company;
 - c. an asset manager free-riding on the discloser's expertise or research, with it failing to undertake the research or analysis that it otherwise would have done. This means that any bid it subsequently makes is less informative to the book-builder than it appears to be, and deprives the book-builder of a further source of information;
 - d. the free-riding asset manager receiving an unjustified allocation of shares, if it puts in a limit bid when its own knowledge and expertise would only have justified a strike bid;
 - e. a failed book-building process. If investors share information which leads to lower bids and significantly reduces the expected strike price, the issuing company may decide to reduce significantly the size of the issuance or call off the issuance altogether. This in turn would mean that the issuer raises a significantly smaller amount of capital or does not raise any capital at all, undermining the efficient allocation of capital;
 - f. where the cost of equity capital rises, because bids are lower as a result of anti-competitive conduct, the cost of related investments rises or those investments become unviable. This could reduce the attractiveness of coming to market as a way of raising capital, affect the allocation of capital and reduce entrepreneurs' incentives to build companies with a view to listing them. It can also undermine the credibility of the book-building process as a way to raise capital for companies.

Party submissions and the FCA's view of them

Artemis

- 5.84 Artemis said that the FCA's analysis of the IPO and placing process lacked evidence and was largely inconclusive, for example not addressing the substantive submissions made by Oxera Consulting LLP on behalf of RAMAM in the RAMAM Equity Issuance Note.¹⁶⁷ It said that the FCA's consideration of the IPO and placing process supported Artemis's view that information exchange within the IPO market was pro-competitive. This was due to the information asymmetries which favour the issuing company and the analysis showed that the benefits of information exchanges are recognised by issuers.¹⁶⁸ It highlighted the potential market failure identified by the FCA due to the information gap between the issuer and the asset manager, which makes the information flows between the two groups critical to the functioning of the market.¹⁶⁹ Given the potential for information flows to be pro-competitive, the FCA's assessment should consider whether the information exchanges had anti-competitive effects, rather than assessing through the 'by object' lens.¹⁷⁰ The collective market power of the parties to an information exchange was a relevant consideration in determining whether the exchange was capable of having anti-competitive effects.¹⁷¹
- 5.85 Artemis said that in the assessment of the effects of the information exchanges on competition, the FCA would have to consider whether the negative effects were outweighed by the positive effects.¹⁷² The FCA's case had not considered the role of book-builders in disseminating information, nor how information exchanges between asset-managers could complement these exchanges or could correct inaccuracies in the information provided by issuers. Given the complexity of the IPO process and the numerous information flows, limited bilateral exchanges could not be considered harmful to competition *per se*. The information flows can address the significant uncertainties that exist in IPOs, as indicated by the dispersion of bid values.¹⁷³ The FCA's analysis had shown that no negative conclusion could be derived from the fact that an IPO settles at the bottom of the range, since this could be a normal outcome of the IPO process. If an IPO was affected by an agreement to lower prices, the expectation would be for prices to recover once trading in the open market started, which was not the case for the Card Factory IPO.¹⁷⁴
- 5.86 Artemis said that the FCA's analysis showed that, contrary to the FCA's approach in the Statement of Objections, issuers have significant control over the IPO process, including over price, allocations and ultimately over whether the IPO proceeds.¹⁷⁵ This meant that while asset managers played an important role in the price-discovery process in IPOs, it is certainly not a decisive role and as such this was not a market where asset managers could fix prices. Artemis also said that the relationship between asset managers and underwriters was valuable to the asset managers, since asset managers were rewarded with IPO allocations if they had a business relationship with the underwriters. It would

¹⁶⁷ UUID 85300011, Artemis Submission on First Letter of Facts, paragraph 3.2(B).

¹⁶⁸ UUID 85300011, Artemis Submission on First Letter of Facts, paragraphs 6-7.

¹⁶⁹ UUID 85300011, Artemis Submission on First Letter of Facts, paragraphs 3.15-3.16.

¹⁷⁰ UUID 85300011, Artemis Submission on First Letter of Facts, paragraphs 3.15-3.16 and 3.23.

¹⁷¹ UUID 85300011, Artemis Submission on First Letter of Facts, paragraph 3.17.

¹⁷² UUID 85300011, Artemis Submission on First Letter of Facts, paragraphs 3.24-3.25.

¹⁷³ UUID 85300011, Artemis Submission on First Letter of Facts, paragraphs 3.15-3.16.

¹⁷⁴ UUID 85300011, Artemis Submission on First Letter of Facts, paragraph 3.21.

¹⁷⁵ UUID 85300011, Artemis Submission on First Letter of Facts, paragraphs 3.6-3.7 and 3.21.

therefore be counterintuitive for asset managers to risk the wider relationships with the underwriters by seeking to skew certain IPOs.¹⁷⁶

- 5.87 Artemis said that the FCA's assessment correctly recognised the importance of the timing and the content of information exchanges. In particular, information exchanged early in the book-building process was unlikely to have an appreciable effect on the uncertainty in the market given that the process is iterative, investors can amend their bids at any time and more information is gradually revealed during the process. The FCA's assessment confirmed that volume information (and not value alone) is crucial in the price revelation process. Bid information was in its view meaningless without the number or value of shares as the core information provided by prospective investors to the book-builder.¹⁷⁷ In this context, knowledge of value does not reduce strategic uncertainty and pricing information should not be characterised as strategic. It highlighted the FCA's conclusion that the volume and type of bids are two important factors in determining the allocation of shares as strategic information.¹⁷⁸

Hargreave Hale

- 5.88 Hargreave Hale said that the FCA's analysis of the IPO and placing process supported its view that the disclosure of information by and between market participants is an accepted and essential aspect of the price formation process in IPOs and placings.¹⁷⁹ Hargreave Hale pointed to the reference to the LSE guidance which, in its view, envisages investors who are thought-leaders educating other investors about the investment case.¹⁸⁰ It also noted that an important source of information for the valuation of shares in IPOs was the perceived level of interest from other investors. This was obtained from conversations with other asset managers and as such these conversations could not be assumed to be anti-competitive by object.¹⁸¹ The absence of such information exchanges would likely exert downward pressure on prices, since the disclosure of information reduces uncertainty, increases demand and therefore bids in IPOs and placings. The disclosure of interest in a cold IPO, by indicating willingness to make a substantial investment, is likely to make the shares more attractive and raise their value.¹⁸²
- 5.89 Hargreave Hale noted that the FCA's analysis recognised the tendency for issuers to 'talk up' the book, whereas investors have a natural tendency to 'talk it down'. The FCA had also recognised that under asymmetric information, investors lack information which is internal to the company and this reduces the value they place on the shares'. This meant investors needed to obtain information to establish where the true value of shares lies.¹⁸³ It also noted that the issuer had an incentive to limit the under-pricing that occurs from asymmetric information, and that this is achieved through due diligence and disclosure to potential investors.¹⁸⁴ Therefore, it considered that 'the disclosure of information about the company in the context of the book-building process, for the purposes of reducing uncertainty, can enhance confidence in the issuing company and increase the price of the shares'.¹⁸⁵ Hargreave Hale also stated that the FCA analysis identifies the varying incentives of different asset managers and in particular that sharing of views between

¹⁷⁶ UUID 85300011, Artemis Submission on First Letter of Facts, paragraph 3.22.

¹⁷⁷ UUID 85300011, Artemis Submission on First Letter of Facts, paragraph 3.12.

¹⁷⁸ See paragraph 5.69.

¹⁷⁹ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraphs 1.1(a) and 3.4(b).

¹⁸⁰ See paragraph 5.34.

¹⁸¹ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 3.4(i).

¹⁸² UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 1.1(a)-(c).

¹⁸³ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 2.6.

¹⁸⁴ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 3.4(a).

¹⁸⁵ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 2.6.

asset managers means that the asset manager receiving information free-rides on the other's expertise, analysis and experience.¹⁸⁶

- 5.90 Hargreave Hale said that the FCA's analysis suggests that it accepts as benign the practice of information sharing by asset managers, where the information paints the issuing company in a good light (and therefore boosts the value of the shares) and condemns the practice when there are discussions where they cast doubt on the company's prospects (and may create downward pressure on prices). This approach was plainly inconsistent and contradictory and could not assist in identifying disclosures which could infringe competition law by object.¹⁸⁷
- 5.91 Hargreave Hale also noted that the FCA had found that IPOs are typically heavily subscribed. This meant that in the context of an IPO book-building process, the disclosure by one bidder of its pricing intentions could not reduce uncertainty as to the operation of the market. Under-bidding runs the risk that the asset manager misses out on being allocated shares in the IPO. In relation to strike bids, Hargreave Hale said that the FCA had found that strike bids did not add to the price-discovery process in book-building and as the revelation of strike bids could not lead to reduced uncertainty.¹⁸⁸ Further, the complexity of the price-setting process in book-building means that the revelation of pricing intentions could not be presumed to reduce uncertainty in the market.¹⁸⁹

RAMAM

- 5.92 RAMAM raised concerns with the FCA's assessment of the IPO and placing process, and in particular the reference to sequential cascades (see footnote 117). Individual investors bid sequentially and this may result in higher prices for the issuers in IPOs with these features. However, such cascades could not develop in book-building, as noted in the relevant academic paper because the book-builder could maintain secrecy over the development of the book.¹⁹⁰ ¹⁹¹ Therefore the settings of book-building as employed in the IPOs and placing under investigation were very different from those envisaged in the academic literature and as such were not relevant in the present case.
- 5.93 Additionally, the general auction literature makes clear that auctions are often designed to ensure that information is revealed to the market place.¹⁹² It also submitted that there were several situations, such as in case where the issuer has an informational advantage over the individual bidders, where information sharing between bidders could be desirable. In auctions with a common value component such as IPOs, RAMAM said that the economic literature notes that greater competition between the bidders can worsen the 'winner's curse', and as such lead to lower overall bids and lead to worse outcomes for the issuers.¹⁹³ This meant that even if a one-off bilateral exchange of information did have the effects of reducing competition, an effects analysis would be necessary to assess whether this harmed the interests of the issuer.¹⁹⁴

¹⁸⁶ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 3.4(c).

¹⁸⁷ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 1.2.

¹⁸⁸ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 3.4(e).

¹⁸⁹ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 3.4(g).

¹⁹⁰ See UUID 84280027, RAMAM Submission on First Letter of Facts, e.g. paragraph 3.7.1.

¹⁹¹ Handbook of Corporate Finance, Volume 1, edited by B. Espen Eckbo, page 413. See also Welch, I. (1992), 'Sequential Sales, Learning, and Cascades', The Journal of Finance, 47:2, pages 695-732.

¹⁹² RAMAM referenced the setup of 'English' ascending auctions which have as a desirable outcome the revelation of formerly private valuations of the auction participants.

¹⁹³ See paragraph 5.25.

¹⁹⁴ See UUID 84280027, RAMAM Submission on First Letter of Facts, e.g. paragraphs 3.7.2-3.7.3; UUID 77130003, RAMAM Oral Hearing Transcript e.g. lines 948-964.

The FCA's view of party submissions

- 5.94 With regard to Artemis' submissions (see paragraphs 5.84 and 5.85) the FCA has set out its views on the effects that the disclosure of bidding information by supposedly competing asset managers can have on book-building processes and outcomes, including a lower strike price, higher cost of equity capital, failed book-building processes, reduced incentives for asset managers to research issuing companies and the investment decisions of companies that rely on equity capital as a way of funding these investments (see paragraphs 5.73 to 5.83).
- 5.95 As set out in paragraphs 5.23 to 5.26, the FCA considers that information asymmetries of the type described by the parties exist, particularly in the case of IPOs. In IPOs, the company's shares are not traded in the stock market at the time of the IPO, meaning that pricing information is not available to the bidders and there is greater uncertainty around the true valuation of the shares. This can lead to under-pricing of shares, by reducing the value that investors place on the shares, since investors take a cautious approach to bidding for fear of over-bidding for shares. In line with the parties' submissions, the FCA also considers that it is in the interest of the issuing company to reduce the information asymmetries in IPOs and placings, by disclosing helpful information about the company to the potential investors (see paragraph 5.23). The book-building process and the information flows between the issuing company on the one side and potential investors on the other, are a way of reducing the information asymmetries that exist in IPOs and placings.
- 5.96 However, the FCA also considers that the incentives for asset managers are to compete for an allocation of shares which is closest to their desired level, since these can deliver returns to their clients in the asset-management side of the business and ultimately grow their assets under management (see paragraphs 5.57 to 5.62). Within applicable regulation, book-builders in the IPO and placing processes tend to reward the important role of asset managers in this price-discovery process, by allocating more under-priced shares to particularly helpful bids (for example price-sensitive bids). Two important factors which affect the allocation of shares to individual asset managers are the volume of shares demanded and the willingness to submit limit or stepped bids. Competition between asset managers in the IPO and placing process is important to the issuing company, since it ensures that there is coverage of the book leading to a successful issuance of shares.
- 5.97 Normal book-building processes allow some information flows between the book-builder and investors (without sharing strategic information between potential investors – see paragraph 5.98). For example, investors may receive information on the development of the book from the book-builder, including the coverage of the book at the bottom of the indicative price range. This is likely to be an important indicator of the overall demand for shares and may encourage more aggressive bidding for the shares, since it is indicative of strong demand once the shares begin trading publicly (see paragraph 5.43). Therefore, book-building is an iterative process whereby the issuing firm and investors gradually refine their price expectations, with both parties having access to more information as the book develops. As consensus emerges between the issuing firm and investors regarding the value of the issuing company (and so the initial share price) and the book-builder develops an understanding of the likely demand at different price points, bidding intentions are likely to become firmer. While bids can be withdrawn or changed by an investor until the book closes, the FCA understands that this becomes less attractive as the deadline approaches, as it could affect an investor's credibility and reputation with the book-

builder.¹⁹⁵ Further, within applicable regulation, issuers have an incentive to reduce the information asymmetries, since this reduces the amount of under-pricing necessary to achieve coverage of the book (see paragraph 5.44).¹⁹⁶ The book-building process is an important price-discovery process, with important investors being rewarded for their role in determining the price for the shares and by implication the cost of equity capital to the issuing firm.

- 5.98 The FCA has not seen (theoretical or practical) evidence which supports the parties' assertions on the need for horizontal sharing of strategic information between potential investors as a mechanism for solving the information asymmetries in IPOs and placings. The FCA notes that the infringements relate to the disclosure and acceptance of confidential and strategic information between otherwise rival asset managers within the context of a book-building process (broadly, their bidding conduct or intentions but see paragraphs 8.9 to 8.21 regarding information that the FCA finds to be 'strategic'). It has not in this decision found that other information sharing between asset managers amounts to a competition law infringement. The parties did not explain why disclosure of strategic information (as opposed to other information) among competing asset managers was necessary.
- 5.99 However, as described above, under applicable regulation the issuing company has a strong incentive to ensure that there is sufficient demand for its shares by disclosing information on the investment case and the development of the book, providing greater certainty to investors and encouraging keener bids by them. Alongside their own assessment of the investment case, investors therefore obtain significant amounts of information on the company which addresses the uncertainty around the true valuation of the shares. The risk of over-bidding is also reduced by the under-pricing that is commonplace in IPOs and placings.
- 5.100 The FCA agrees with RAMAM (see paragraph 5.92) that informational cascades are unlikely in book-building, since book-building does not rely on sequential bidding arrangements. The FCA relied on the relevant literature to demonstrate the value of the information that can be generated under certain arrangements in IPOs and that free communication between bidders could lead to informational disadvantages for the issuing company and lead to IPO failure.¹⁹⁷ In book-building, informational cascades do not occur because the issuer can maintain secrecy over the development of the book. This means that it is against the interests of the issuer for free communication between bidders to exist (see

¹⁹⁵ UUID 20320001, transcript of an FCA interview with *NFM1* (Newton), 7 November 2016 ('*NFM1* First FCA Interview Transcript'), page 75, lines 2733–2743:

'...Without it being poor etiquette, I would know that it would potentially cause them – if everybody was changing their orders all the time, it would cause some element of chaos in the whole process. I'm very aware that people – other Fund Managers do it the whole time from my conversations with brokers, that I know they give last-minute orders and I know they give last-minute tweaks. But I've always felt that if the circumstances don't change, there's, there's – if your order doesn't grow or if the market doesn't collapse, it would, it would be a little bit cute to keep moving your orders or keep withdrawing and keep putting them back in. Albeit I knew that, broadly, everyone in the market was doing it apart from me.'

See also UUID 1600001, transcript of an FCA interview with *RM FM*, 31 October 2016 ('*RM FM* FCA Interview Transcript'), page 44 lines 1566 – 1575: *'...sometimes a fellow fund manager might unilaterally change an order in an IPO because they've changed their mind or the market has moved. And I prefer to avoid that if I possibly can because I like to, this is just personal preference, that when I move to a firm order I like to commit to that unless there is exceptional circumstance in which case, obviously I'll put my clients interests first. Though, I like to maintain my reputation that, if I put a firm order in then that us a firm order as opposed to subject to, RM FM always moves his orders, he can double it or halve it at a moment's notice. I try to avoid doing that if at all possible because I don't think that's helpful'*.

See further UUID 16260001, [name] FCA Interview Transcript, page 67, lines 2431–2435: *'Yes, I think people get a reputation for acting properly or not acting properly and, you know, you would view someone in a slightly different light if you know that they muck around and don't, you know, stick to their word and, you know, the day before he [NFM1 was very happy to buy them [OTB shares] at the higher price'*.

¹⁹⁶ Greater under-pricing means a higher cost of capital for the issuing firm, since it has to effectively sell of a greater share of the company to raise the required equity capital.

¹⁹⁷ RAMAM relied on the same literature to highlight the existence of the information sharing in IPOs, meaning that certain features are common to book-building and sequential bidding arrangements. See UUID 66450014, RAMAM Equity Issuance Note, paragraph 3.19.

paragraph 5.35). Information sharing between asset managers, can be viewed as creating informational advantages for the participating asset managers and may undermine the book-building process.

- 5.101 The FCA however does not agree with RAMAM's reference to general auction theory, since the arguments are not transferable to the book-building framework. The book-building process is designed to address information asymmetries between issuing company and potential investors (for example being an information revelation process whereby bidding is gradually refined) and the issuing company has an incentive to reduce information asymmetries as a way of reducing under-pricing of shares. RAMAM noted that book-building has been established in many countries – including the UK- as '*an alternative way of conducting equity issues that can result in more predictable outcomes [...]*'.¹⁹⁸ Therefore, RAMAM's submissions on the benefits of information sharing and reduced competitive tension in reducing the impact of the winner's curse on bidding, are not applicable to the IPOs and placing under consideration, which were all carried out using a book-building approach.
- 5.102 In relation to Hargreave Hale's submissions (paragraph 5.88), the FCA notes that the LSE guide¹⁹⁹ advocates a strong investor base and that one desirable quality of shareholders was a strong understanding of the company's equity story and positioning.²⁰⁰ The guide sets out that another main objective of IPOs is to maximise the selling price of shares.²⁰¹ However, the guide does not advocate sharing strategic information between investors. Sharing strategic information, which could lower share prices, would clearly be contrary to the main aim of the IPO process which is to raise the required equity capital at the lowest cost possible.
- 5.103 The FCA does not accept that asset managers need to share strategic information among themselves in order to address information asymmetries or to counter book-builders' incentives to talk up the book (see paragraph 5.89). There are other sources of information available to asset managers, and they may share non-strategic information.
- 5.104 The FCA considers that Hargreave Hale has misunderstood the FCA's analysis (paragraph 5.90): the FCA has only found an infringement where (among other things) competing asset managers disclosed confidential and strategic information to and accepted it from each other and so removed strategic uncertainty between themselves.
- 5.105 Regarding Hargreave Hale's paragraph 5.91 submissions, the FCA considers the issue of uncertainty in the market as opposed to uncertainty between competing undertakings in paragraph 9.25(b).

¹⁹⁸ UUID 66450014, RAMAM Equity Issuance Note, paragraph 2.5.

¹⁹⁹ Guide to Listing on the London Stock Exchange, page 59 (accessed 19 February 2019).

²⁰⁰ The other qualities are (i) the ability to maintain a shareholding over the long term (ii) the ability to invest further in the aftermarket and (iii) the ability to act quickly and participate in future equity raisings and/or sell-downs.

²⁰¹ Guide to Listing on the London Stock Exchange, page 59 (accessed 19 February 2019).

6 Market definition

Introduction

- 6.1 Section 5 described the process of raising equity capital in primary capital markets through IPOs and placings, and the roles of the different participants in them. This Section sets out the FCA's view on the relevant product and geographic market, by considering the competitive constraints that apply in IPOs and placings. It sets out:
- a. the role of market definition in Chapter I/Article 101 TFEU 'object' cases (paragraphs 6.2 to 6.5);
 - b. the starting point for the FCA's analysis (paragraphs 6.6 to 6.14);
 - c. the analytical framework for the analysis of the relevant market (paragraphs 6.15 to 6.17);
 - d. the relevant product market (paragraphs 6.18 to 6.40);
 - e. the relevant geographic market (paragraphs 6.41 to 6.45);
 - f. party submissions and FCA view of those submissions (paragraphs 6.46 to 6.66); and
 - g. the FCA's conclusions on the relevant product and geographic market (paragraph 6.67).

Market definition in Chapter I/Article 101 TFEU 'object' cases

- 6.2 Competition authorities commonly use market definition as a starting point in competition investigations to understand the competitive constraints that apply to the undertakings and, in light of that context, if their conduct (or transactions) may adversely affect competition.
- 6.3 The FCA is not bound by market definitions adopted in previous cases, although earlier definitions can, on occasion, be informative when considering the appropriate market definition. Equally, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.
- 6.4 In Sections 11 to 14, the FCA finds the concerted practices to have the 'object' rather than 'effect' of preventing, restricting or distorting competition. To reach that conclusion, the FCA must understand the legal and economic context of the concerted practices under investigation. To do so, the FCA considered the relevant market context in Section 5, and assesses market definition in this Section 6.
- 6.5 The secondary purpose of determining the relevant product and geographic market in finding an infringement in competition investigations is to facilitate the calculation of penalties. In line with CMA guidance,²⁰² the FCA uses the turnover of the firms in the

²⁰² CMA's guidance as to the appropriate amount of a penalty, CMA73, 18 April 2018.

relevant market as a starting point for calculating the level of any penalties.²⁰³ The CAT and the Court of Appeal have noted that it is not necessary for an authority to set out the precise relevant market definition to assess the appropriate level of the penalty.²⁰⁴ Rather, the FCA must be 'satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market affected by the infringement'.²⁰⁵ The FCA considers that this principle also applies, to the extent necessary, when assessing the relevant geographic market. The FCA has therefore considered the relevant product and geographic market in the present investigation for the purposes of establishing the parties' turnover in the relevant product and geographic market.

The starting point for the FCA's analysis

Individual transactions

- 6.6 The FCA has considered the disclosure of information between asset managers in relation to two IPOs (OTB and Card Factory) and one placing (Market Tech). IPOs and placings are primary capital market transactions, where investors (including asset managers), provide equity capital to an issuing company in return for shares in that company. The processes are described in Section 5.
- 6.7 IPOs and placings are generally carried out through a book-building process (also described in Section 5). Book-building is somewhat different to typical commercial transactions in other markets where buyers and sellers meet to exchange products for a monetary consideration. In such transactions, sellers typically set prices for their products and then buyers decide whether to buy from that particular seller. Competition between sellers leads to constraints on any one seller's ability to increase prices profitably. The process of market definition in such markets would usually involve the consideration of demand-side responses by buyers to a small increase in the price of the product and the impact this would have on the profitability of a hypothetical monopolist of the product(s).²⁰⁶ Supply-side considerations, on the basis of the expected responses of other sellers to a SSNIP, may lead to a wider market than that derived through demand-side considerations alone.²⁰⁷
- 6.8 As described in Section 5, the book-building process determines the price for the shares, the allocations to individual investors and the cost of equity capital for the firm. In consultation with its advisors, the issuing company typically sets an indicative price range and indicates the amount of equity capital it seeks to raise.²⁰⁸ It invites bids from asset managers who can meet the issuing company's equity capital requirements. Asset managers in turn indicate their interest in acquiring shares in the issuing company and

²⁰³ More specifically, the relevant turnover of the undertaking(s) is one of the inputs into the penalty calculation. The relevant turnover is an undertaking's turnover in the relevant product market and geographic market affected by the infringement in the undertaking's last business year. CMA's guidance as to the appropriate amount of a penalty, CMA73, 18 April 2018, paragraph 2.3.

²⁰⁴ *Argos and Littlewoods v Office of Fair Trading, JJB Sports v Office of Fair Trading* [2006] EWCA Civ 1318 ('*Argos, Littlewoods and JJB*'), paragraphs 169-173 and 189; *Argos and Littlewoods v Office of Fair Trading* (judgment on penalty) [2005] CAT 13, paragraph 178.

²⁰⁵ *Argos, Littlewoods and JJB*, paragraph 170. To this end, the CAT has said 'lack of physical substitutability between different items does not in our view preclude the [competition authority] from grouping certain items together as a relevant product market...if such a grouping reflects commercial reality and it can reasonably be shown that the products so grouped were "affected" by the infringement' (see *Umbro and others v Office of Fair Trading* (judgment on penalty) [2005] CAT 22, paragraph 119).

²⁰⁶ See paragraph 6.15.

²⁰⁷ See paragraph 6.16.

²⁰⁸ A small number of IPOs and placings may not include an indicative price range. The economics literature suggests that there is a trade-off between investing in price-refinement prior to the book-building process and letting the book-building process derive the price. Both approaches involve costs and the issuer makes a decision based on their preferences and the relative costs.

providing it equity capital, for example by indicating their willingness to acquire shares at different price points within the indicative price range. Viewed this way, book-builds in IPOs and placings are similar to bidding markets where investors bid to supply equity capital in exchange for the company's shares.

- 6.9 Market definition in bidding markets typically considers each tender as the starting point for the analysis and then considers widening the market on the basis of demand and/or supply-side considerations.²⁰⁹ In the present case, the equivalent approach is to consider each transaction (i.e. the two IPOs and one placing) as the starting point for the exercise of market definition. Therefore, the FCA proceeds by considering each transaction (two IPOs and one placing) as the starting point for its assessment of the relevant market, and then considers whether demand-side and supply-side constraints indicate towards a wider relevant market.

Asset managers as suppliers of equity capital

- 6.10 IPOs and placings bring together investors and issuing companies with the principal aim of raising equity capital for the issuing company, while at the same time allocating shares to investors willing to risk their capital on the future performance of the company. Companies may decide to raise capital for several reasons, including to fund investments, restructure the current mix of capital within the company or to allow initial investors to realise their investment.²¹⁰ Capital also allows these companies to purchase more inputs or to invest in new equipment, all with the intention of enabling or expanding the primary activity of the issuing company. Therefore, capital can be seen as an input to the issuing company used alongside other inputs.
- 6.11 From the perspective of the issuing company, a key objective underlying the book-building process is raising the equity capital required at the lowest cost of capital possible (although, as noted in paragraph 5.18, other factors apply regarding who the company chooses to have as its future shareholders and whether some 'underpricing' of the initial share offer may be desirable to ensure, for example, a strong after-market in the company's shares). In theory, the firm seeks to raise the required capital, surrendering as little of itself as possible²¹¹, by transferring shares at as high a price as possible.²¹² This is because a higher share price effectively lowers the cost of equity capital (see paragraph 5.7) and the process of book-building determines the cost of equity capital to the issuing company.
- 6.12 From the perspective of asset managers, IPOs and placings allow them to fulfil their core economic activity - that is to make investments on behalf of their clients, using their expertise to determine the price of this capital. 'Business as usual' for an asset manager is to manage investments for its clients (including buying and selling shares), earning revenue by charging fees, typically based on the value of the capital supplied by those clients. In bidding for shares in IPOs and placings, asset managers seek to invest in assets that contribute to returns on the funds they manage, while having regard to broader considerations (such as their fund mandates, see paragraph 5.62).

²⁰⁹ In particular supply-side substitution, since competitive constraints depend to a significant degree on the ability of alternative suppliers to actively compete in tenders. See the CMA's Merger Assessment Guidelines, paragraph 5.2.18.

²¹⁰ This effectively replaces one source of capital for another and still supports the core economic activities of the company.

²¹¹ The total number of shares being allocated as a proportion of the total number of shares. The issuing company's owners effectively give up a share in the company (sometimes all of their holding), in return for equity capital. By doing so, they are also giving up potential future earnings in the form of dividends and appreciation of the shares, meaning they have an interest in selling as little of the company as possible (subject to their equity capital requirements).

²¹² Subject to the demand for the shares and other considerations, such as the issuing company's desired investor mix.

- 6.13 Accordingly, the FCA considers that it is appropriate to view asset managers as the suppliers of equity capital, rather than as the buyers of shares. Equally issuing companies are in the market as customers demanding capital, rather than as suppliers offering shares. In this respect, the FCA notes the following.
- a. Issuing companies employ capital alongside other inputs. In the markets for those other inputs, the issuing company is a customer to the suppliers of those inputs. It would therefore be inconsistent to characterise issuing firms as on the demand-side of some input markets (for example labour, raw materials, equipment and premises), while being on the supply-side in the capital markets.
 - b. When deciding whether and how much capital to raise, the issuing company may have options such as raising equity capital or debt capital. In debt capital markets, the lenders supply capital to the companies and their price for lending capital is at the interest rate. It would be inconsistent to characterise the issuing company as being on the demand-side in debt capital markets, while being on the supply-side in equity capital markets.
 - c. The distinction between buyers and sellers in principle arises from sellers offering products, setting a price and buyers deciding whether to buy from that seller. Book-building is a form of bidding market where there is repeated interaction between issuer and bidders, the final price is uniform to all bidders and investors compete to be allocated shares. The role played by investors in book-building resembles that of a seller, in that they set a price at which they are willing to supply (their bids), which they may adjust during the book-building process. The issuing company makes allocation decisions, i.e. acquires capital, from different investors on the basis of these bids.
 - d. The primary purpose of IPOs and placings is to raise equity capital, and book-building is a way for the issuing company to raise the required capital and derive its price. In this context, it is appropriate to describe the issuing company as being on the demand-side and investors on the supply-side.
- 6.14 Therefore, the FCA considers the issuing companies to be on the demand-side of the equity capital raising process, while asset managers are on the supply-side. The FCA does not consider this characterisation of asset managers as suppliers of equity capital as critical to its economic²¹³ and legal assessment in this case, and, in particular, whether the infringements it found are 'by object' (see paragraph 9.29). The following subsections set out the framework for the assessment of the relevant product and geographic market.

Analytical framework for the analysis of the relevant market

- 6.15 Market definition begins with the product(s) which are part of the investigation (i.e. the 'focal products') and considers their closest substitute products along two dimensions: – product and geographic.^{214, 215} In identifying the closest substitutes, competition authorities typically employ the Hypothetical Monopolist Test (HMT) as an analytical

²¹³ The economic analysis of bidding markets does not depend on whether the bidders are suppliers competing to sell or purchasers competing to buy. The outcome is the same in both cases, with competitive bids being a desirable outcome. See for example Paul Klemperer, [Bidding Markets](#), June 2005, in particular paragraph 2.1(1) and footnote 10.

²¹⁴ More specifically, the product market is the set of products which are part of the relevant market and the geographic market are the geographic areas which form the relevant market. In both cases, the question for the authority is whether the alternatives (products or areas), impose a significant competitive constraint on the focal product(s).

²¹⁵ Market Definition, Guidance issued by the Office of Fair Trading and Adopted by the Board of the CMA ('CMA Market Definition Guidance'), published in December 2004, paragraph 2.4.

framework. HMT typically begins with the narrowest potential market,²¹⁶ for example each focal product – then asks if a hypothetical monopolist could profitably increase the prices of those products.²¹⁷ If close substitutes are available that impose a competitive constraint, the price increase may be unprofitable and the test is run sequentially on a broader set of products.²¹⁸ The set of products for which the price increase becomes profitable, is defined as the relevant market.

- 6.16 Demand-side substitution in practice is usually considered before supply-side substitution, since substitution by customers is typically more effective and timely as a constraint on the firm’s ability to increase prices (as usually it is easier for a customer to buy elsewhere than for a firm to start supplying a new product).^{219, 220} However, supply-side substitution may lead to a widening of the relevant market, if firms not currently offering (demand-side) substitutes could easily and rapidly start supplying rival products, so that the threat of them doing so would prevent the incumbent from raising its prices.^{221, 222} Formally, supply-side substitution is not secondary to demand-side substitution.²²³
- 6.17 The narrowest plausible relevant product market is each of the transactions separately (the two IPOs and one placing). The FCA has considered whether, on the basis of demand or supply-side considerations, the relevant product market is wider than the supply of equity capital in the individual transactions. The hypothetical question assessed in making these considerations is whether a hypothetical monopolist of the product(s) could profitably raise the cost of equity capital by a small amount, in line with the HMT and SSNIP frameworks described above.

Relevant product market

Equity versus debt capital

- 6.18 The FCA considered whether alternative forms of finance are sufficiently close demand-side substitutes from the issuing companies’ perspective to the supply of equity capital in the primary capital market to form part of the same relevant market. That is, it has considered whether a small hypothetical increase in the price of equity capital would lead sufficient firms requiring capital to switch from equity capital to other forms of capital, such as debt, to make such a price rise unprofitable. If this were the case, then alternative sources of capital form part of the same market as equity capital transactions in the primary market.

²¹⁶ However, it may be broadened on practical considerations (for example common sense or previous experience of the competition authority).

²¹⁷ A small but significant non-transitory increase in price (SSNIP), which is typically assumed to be a 5% to 10% increase above competitive levels.

²¹⁸ That is, additional products are added and the test is applied sequentially, until a SSNIP becomes profitable for a hypothetical monopolist of the wider set of products.

²¹⁹ Commission, *Notice on the definition of the relevant market for the purposes of Community competition law* (OJC372, 9.12.97, page 5), paragraph 13.

²²⁰ Evidence on demand-side substitution may include the views of market participants (for example the views of competitors or customers), historical evidence of price responses, evidence on barriers to switching, degree of product differentiation (including whether these differences matter to consumers) and quantitative evidence (for example estimates of demand responsiveness). CMA Market Definition Guidance, paragraph 3.7 and subsequent bullets.

²²¹ CMA Market Definition Guidance, paragraph 3.13.

²²² The inclusion of alternative suppliers relies on the expected response of these to an increase in the prices of the product(s) under investigation. Where switching is timely and effective in constraining the firm’s ability to increase prices, these suppliers of related products could be included in the relevant market. Evidence on supply-side substitution could include the views of customers, evidence on switching costs and capacity constraints. CMA Market Definition Guidance, paragraph 3.16 and subsequent bullets.

²²³ Commission, *Notice on the definition of the relevant market for the purposes of Community competition law* (OJC372, 9.12.97, page 5), paragraphs 13, 14, 20.

- 6.19 The cost of the different sources of capital is likely to play a role in determining the company's choice (paragraph 5.6). For example, when considering whether to raise debt capital or equity capital, the company may assess the relative costs of the two sources of funding – the interest costs of debt capital against the foregone future earnings from issuing equity capital (in the form of future dividend payments and appreciation from the issued shares).²²⁴ An investment bank will often provide advice on which form of finance is most suitable for the company. In practice, the company may face limits on its ability to switch between forms of capital and its decision may be driven by other (non-price) factors. For example, the company may not be able to raise further debt capital because it holds significant debt or the type of investment necessitates equity capital (for example riskier investments).²²⁵
- 6.20 Raising equity capital also entails surrendering property rights in the company, in part or even in whole, and incurring obligations to the new shareholders. However, there is no obligation to return the capital, and while the company may pay dividends, it has no legal obligation to do so. Debt capital usually entails incurring obligations to pay back the capital over a term (regardless of the company's performance – even up to insolvency). These considerations may affect the choices of an issuing company so that the small price changes considered in a SNIPP test are unlikely to be sufficient to affect the company's choice of method to raise capital.
- 6.21 The CMA's predecessor has previously concluded that other forms of capital raising are unlikely to impose a significant constraint²²⁶ on equity capital raising, for example finding that the majority (32 out of 48) of respondents to its survey indicated that they could not have met their needs through alternative forms of finance than equity capital.²²⁷
- 6.22 In the FCA's view, equity capital and other forms of capital are unlikely to be close substitutes from an issuer's perspective and as such unlikely to restrict small price increases in the cost of equity capital. This is because the choice of capital by the firm depends on several factors (aside from relative cost considerations), such as the suitability to the firm's needs, the level of capital required and the situation of the firm (see paragraphs 5.5 and 5.6).²²⁸

Individual equity transactions

- 6.23 The FCA has considered whether supply-side considerations lead to a wider product market than individual equity capital transactions. Asset managers seek to increase or retain assets under management and therefore look to invest in assets that will positively contribute to the performance of their fund. To achieve this, asset managers seek to maximise their return for a given level of risk. They can and do choose between supplying equity capital to a wide range of firms. In considering whether (and at what price and volume) to participate in a given IPO or placing, an asset manager will typically consider whether it represents better value and long-term potential than their fund's existing holdings.
- 6.24 The asset manager's interest in particular IPOs or placings also depends on the fund's objectives or mandates, which may set out the types of investments that the fund will make and as such constrain the ability of the asset manager to participate in certain IPOs

²²⁴ See paragraphs 5.6-5.7.

²²⁵ OFT Equity Underwriting Market Study, paragraph 3.6.

²²⁶ For example, because a significant number of firms raising capital would switch to other forms of capital than equity capital.

²²⁷ OFT Equity Underwriting Market Study, paragraph 3.6.

²²⁸ For example, equity financing has the advantage of not requiring collateral and does not increase the company's leverage, but it is a more complicated and time-consuming process than debt financing and does dilute the existing owners' ownership.

or placings. Fund objectives or mandates may set targets on the characteristics of the assets, such as the size of the company, the geographic location of the company or (less frequently) the sector of the company (for example funds focusing on high growth sectors or funds limiting investments in certain sectors following ethical considerations).

6.25 The two IPOs (OTB and Card Factory) and one placing (Market Tech), relate to companies operating in different sectors, have significantly different market capitalisations (see paragraph 6.34) and involve two primary issues (the IPOs) and one secondary issue (the placing). However, the FCA notes that all the parties subject to the investigation participated in the three transactions. As Table 1 shows, there were six asset managers who received allocations in all three transactions and 12 which participated in at least two transactions. This suggests that at least some managers supply equity capital to different equity capital transactions (both IPOs and placings), in different sectors and with differing capitalisations.²²⁹

Table 1: Asset manager participation

IPO/Placing	Asset managers receiving allocation	Also received allocation in other two	Also received allocation in at least one other
Card Factory IPO	76	6	12
Market Tech Placing	29		12
OTB IPO	63		9

Primary versus secondary issues, other forms of secondary issues and industry sector

6.26 The FCA also considered whether the relevant market should be segmented according to other characteristics of the issuer or type of issue. In particular, the FCA considered potential segmentation between primary and secondary issues (including placings, rights issues and open offers), other forms of equity capital (for example private equity) and by industry sector of the issuer.²³⁰

6.27 In both primary and secondary issues, asset managers supply equity capital to an issuing company directly in return for shares in that company. Artemis stated they '*do not consider there to be any material differences in the skills, knowledge or expertise required to invest in secondary issues by comparison to primary issues*'.²³¹ Given the similarity in what is being supplied and to whom, as well as the ease with which asset managers can and do substitute between the two, the FCA considers that primary and secondary issues form part of the same product market.

²²⁹ Table 1 does not show asset managers which could have bid but chose not to participate. These potential bidders may exert a competitive constraint and as such could be part of the market.

²³⁰ When an issuing company issues shares to be traded on a stock market for the first time this is called a primary issue, and is typically undertaken via an IPO process. An issuing company may subsequently return to the primary capital market to seek further equity capital in return for new shares in the company. This is known as a secondary issue.

²³¹ See UUID 15180002, Artemis response to FCA Request for Information, 3 April 2017, Question 11.

- 6.28 Similarly, asset managers can and do supply equity capital to firms across industrial sectors. The fund objectives and mandates of the parties' funds that were active in the supply of equity capital to small and mid-cap companies in the financial year preceding the infringements set out in this decision did not typically constrain the asset manager's discretion to invest in a given industrial sector, although some did place limits on the degree to which a particular industry could be over or under-weighted relative to the industry sector weighting in a relevant index (for example, the FTSE All-Share Index) or the maximum proportion of the fund that could be invested in any industrial sector.²³² While the FCA recognises that the potential attractiveness of a given IPO or placing to an asset manager may vary by the industrial sector of the issuing company, it does not consider that there are separate product markets based on the industrial sector of the issuing company.
- 6.29 With respect to other forms of equity capital, the FCA notes that (in line with its considerations of debt capital), the options available to issuing firms depend on several factors, not least on the reason for raising capital, the amount to be raised and the company's financial position. In principle, the issuing companies may choose between different sources of funding, considering the relative costs and benefits of each options. In practice, the choice available to the firms may be limited for the aforementioned reasons. As such, the FCA does not consider other forms of equity exert a sufficient competitive constraint on IPO's and placings, and as such has decided to exclude them from the relevant product market in this case.

Market capitalisation

- 6.30 In assessing the scope of the relevant product market, the FCA has considered whether, for the purposes of this case, the supply of equity capital to small-cap companies should be treated as belonging to a separate product market to the supply of equity capital to mid-cap companies.
- 6.31 In relation to the size of the company issuing equity capital, the FCA notes that companies on the stock market are commonly grouped by value, on the basis of their market capitalisation, into three categories – small-cap, mid-cap and large-cap. There are no definitive thresholds for classifying companies into these categories. However, the FCA's Investment and Corporate Banking Market Study²³³ took the approach to defining them in the context of UK equities by reference to the following FTSE indices:²³⁴
- a. Large-cap: companies that are approximately the same size as FTSE 100 companies (or more formally, companies that have a market cap greater than the largest company in the FTSE 250 index);
 - b. Mid-cap: companies that are approximately the same size as FTSE 250 companies (or more formally, companies that have a market cap greater than the largest company in the FTSE Small-cap index and less than or equal to the largest company in the FTSE 250 index); and

²³² See parties' responses to FCA's 17 March 2017 Request for Information: UUIDs 15930002 and 18970001, Artemis' responses, 3 and 7 April 2017; UUID 13950155, Hargreave Hale's response, 31 March 2017; UUIDs 14950003, 14950014 and 14950024, Newton's responses, 31 March 2017 and 2 May 2017; UUIDs 11340006, 13900005, RAMAM's responses, 31 March 2017 and 7 April 2017.

²³³ FCA MS15/1.2: *Investment and corporate banking market study interim report: Annex 2 – Data collection and analysis*, April 2016.

²³⁴ For clarity, whether a company is classified as small, mid or large-cap based on this approach is determined by considering their market cap in relation to these indices, not whether the company is included in that index. For example, companies listed on AIM would not form part of these indices.

- c. Small-cap: companies that are approximately the same size as FTSE Small-cap companies (or more formally, companies that have a market cap less than or equal to the largest company in the FTSE Small-cap index).
- 6.32 The other commonly used approach is to define small-cap as those companies which fall within the lowest decile (bottom 10%) of UK-listed companies based on market capitalisation.²³⁵ This is the methodology adopted by the Numis Smaller Companies Index.²³⁶
- 6.33 In response to the FCA's March 2017 Request for Information, each of the parties defined large-cap in relation to the FTSE 100 index. The division between small and mid-cap varied between the parties with three basing their approach on the FTSE indices and the other basing their approach on the Numis Smaller Companies Index.²³⁷
- 6.34 The issuing companies whose IPOs or placings are the subject of this investigation had the following market capitalisations at the conclusion of the relevant IPO or placing:
- a. OTB: £240 million²³⁸
 - b. Market Tech: £927 million²³⁹
 - c. Card Factory: £766.6 million²⁴⁰
- 6.35 This would mean that, using the FTSE indices, OTB would be categorised as small-cap²⁴¹, with Market Tech and Card Factory categorised as mid-cap.²⁴²²⁴³
- 6.36 The FCA notes that investments in small-cap equities tend to share many characteristics with investments in mid-cap equities. These include, for example, their risk and reward profile, their liquidity and therefore the type of investor who invests in them. In addition, there is no material difference between the skills, expertise and knowledge required to invest in small and mid-cap IPOs.²⁴⁴
- 6.37 Given these considerations, the FCA considers that the supply of equity to small and mid-cap companies should be treated as belonging to the same market.
- 6.38 The FCA also considered whether the supply of equity capital to large-cap companies should be treated for the purposes of this case as belonging to a separate product market to the supply of equity capital to small and mid-cap companies. Investment in large-cap equities tends to be associated with lower returns but also a lower degree of risk than small and mid-cap equities. This reflects the fact that:²⁴⁵

²³⁵ By comparison, the FTSE Small Cap Index accounts for approximately 3% of market capitalisation.

²³⁶ Numis, Quick Guide to the Numis Smaller Companies Index, 16 January 2017.

²³⁷ Artemis, Newton and RAMAM base their approach on the FTSE indices, while Hargreave Hale base their approach on the Numis Smaller Companies Index. See parties' responses to FCA's March 2017 Request for Information Question 1; see UUID 15180002, Artemis' response received on 3 April 2017; UUID 13950155, Hargreave Hale's response received 31 March 2017; UUID 14950003 Newton's response received 31 March 2017, UUID 13900004, RAMAM's response received 31 March 2017.

²³⁸ RNS Number 9095Z, [On the Beach IPO](#), 23 September 2015.

²³⁹ Bloomberg market data.

²⁴⁰ See UUID 876-67217-1-9, [Prospectus of Card Factory IPO](#), 15 May 2014, page 41.

²⁴¹ OTB's market cap of £240 million was less than the largest company in the FTSE Small Cap Index on 22 September 2015 (the day the books closed on the IPO) which had a market cap of £699 million. Figure from Bloomberg market data.

²⁴² Market Tech's market cap of £927 million was less than the largest company in the FTSE 250 Index on 9 July 2015 (the day the books closed on the placing) which had a market cap of £5.3 billion, but greater than the largest company in the FTSE Small Cap Index which had a market cap of £835 million. Figures from Bloomberg market data.

²⁴³ Card Factory's market cap of £766.6 million was less than the largest company in the FTSE 250 Index on 14 May 2014 (the day the books closed on the placing) which had a market cap of £4.8 billion, but greater than the largest company in the FTSE Small Cap Index which had a market cap of £730 million. Figures from Bloomberg market data.

²⁴⁴ See for example UUID 13950155, Hargreave Hale's response to FCA's March 2017 Request for Information received 31 March 2017, page 8, paragraph 12.

²⁴⁵ See parties' responses to FCA's March 2017 Request for Information: UUID 15180002, Artemis' response, 3 April 2017; UUID 13950155, Hargreave Hale's response; 31 March 2017; UUID 14950003 Newton's response, 31 March 2017; UUID 13900006 RAMAM response, 31 March 2017.

- a. large-cap companies tend to be more diversified than small and mid-cap companies which are often reliant on a small number of products and/or countries;
- b. shares in large-cap companies are more liquid than small and mid-cap companies where it can be harder for investors to sell in the secondary market without affecting the value;
- c. small and mid-cap companies have greater opportunity for significant growth in earnings being typically smaller and more nimble than large-cap companies; and
- d. large-cap companies tend to be well researched by investment bank analysts and other asset managers while there tends to be less available information to help determine the value of small and mid-cap companies making relevant expertise more important in enabling successful participation in an IPO or secondary issue.

6.39 In light of this, the FCA considers that the supply of equity capital to large-cap companies should be treated for the purposes of this case as belonging to a separate market.

FCA findings on relevant product market

6.40 Therefore, for the purposes of this case, the FCA considers, based on a broad view of the trade affected by the alleged infringements, the relevant product market consists of the supply of equity capital in the primary capital market to small and mid-cap companies. This includes the supply of equity capital at IPO and placings to small and mid-cap companies. For the purposes of this case, the FCA considers that small and mid-cap companies consist of those with a market capitalisation less than or equal to the largest company in the FTSE 250 index at the time of the primary capital market transaction (that is, the relevant IPO or secondary issue).

Relevant geographic market

6.41 In line with its analysis of the relevant product market, the FCA has assessed the relevant geographic market for the supply of equity capital in the primary capital market to small and mid-cap companies. The FCA considers each transaction (the two IPOs and one placing) as the starting point for the exercise of market definition and this applies to the assessment of the relevant geographic market.²⁴⁶ The two IPOs (On the Beach²⁴⁷ and Card Factory²⁴⁸) and placing (Market Tech²⁴⁹) all took place in London.²⁵⁰ Within the UK, the LSE continues to be the principal exchange for companies looking to be listed. Therefore, the FCA has considered whether based on demand or supply-side considerations, the relevant geographic market is wider than the UK.

6.42 On the demand-side, the FCA notes that transactions are typically arranged, managed and executed in a major financial centre such as London or New York. Therefore, issuing companies can be located elsewhere in the world, and in this sense, primary capital markets have a supranational dimension.²⁵¹ In the UK, companies looking to list on the

²⁴⁶ See also paragraph 6.9.

²⁴⁷ RNS Number 9095Z, 23 September 2015.

²⁴⁸ See UUID 876-67217-1-9, Prospectus of Card Factory IPO, 15 May 2014.

²⁴⁹ RNS Number 6418S, [Placing of shares in Market Tech](#), 9 July 2015.

²⁵⁰ The two IPOs were for listings on the main market of the LSE, while the placing was for listing on the AIM section of the LSE.

²⁵¹ The LSE noted that 'London's IPOs have become even more international in 2017, with nine of the top ten IPOs by size coming from outside of the UK. 20 North American companies chose London for their listing, with the UK markets remaining attractive to US fund managers. This underlines London's status as the world's most international financial centre and a market open to the world.' (LSE, 29 December 2017).

LSE are able to choose between the Main Market²⁵² and the Alternative Investment Market ('AIM')²⁵³. The Main Market will generally be chosen by companies that are larger in size and relatively mature in their business model, while AIM is targeted at companies that are generally smaller, and usually at an earlier or growing phase of their life cycle.²⁵⁴

- 6.43 The IPOs and placings that are subject to this investigation all concern UK-listed companies. The FCA further notes that between August 2008 and July 2018, 82% of IPOs and placings for firms with a market capitalisation below £930m²⁵⁵, were for companies registered in the UK.^{256, 257} The FCA considers it unlikely that a significant number of companies listing in the UK would switch to alternative countries in the event of a small rise in the cost of equity capital, given the legal, regulatory, logistical and cultural differences such a switch would entail.²⁵⁸
- 6.44 Similarly, on the supply-side, the FCA notes that the relevant asset managers were all located in the UK and almost all of them were in London. The funds on whose behalf they invested were primarily focussed on UK assets.²⁵⁹ Further, the investors that took part in the three transactions, were largely based in the UK. For example, over 90% of the shares issued in the Market Tech placing, were to investors who have a presence in the UK.²⁶⁰ Therefore, the FCA does not consider that supply-side considerations warrant widening the relevant geographic market.
- 6.45 Given these considerations, the FCA considers that the relevant geographic market for the supply of equity capital in the primary capital market to small and mid-cap companies is UK-wide.

Party submissions and FCA view of those submissions

Artemis

- 6.46 Artemis said that the FCA was wrong to consider secondary issues and IPOs as part of the same market. On the demand-side, IPOs are unique, one-off events and not substitutable with secondary issues. On the supply-side, there were substantial differences between the two, notably the greater information asymmetries (including price and company history) in IPOs. Artemis stated that the FCA could not group IPOs and secondary issues together by reference to the CAT's judgment in *Argos*, since infringements relate to either an IPO or placing, and no single infringement relates to both. Regarding its statement²⁶¹ on the differences between the two, factors other than the required skills-set are likely to affect the conclusion on whether they should be part of the same market.^{262, 263}
- 6.47 Artemis also said that the FCA had not carried out analysis to reach a conclusion that placings are in the same market as other types of secondary issues. If it had, it would

²⁵² www.londonstockexchange.com/mainmarket

²⁵³ www.londonstockexchange.com/aim

²⁵⁴ For more information see FCA DP16/3 *Availability of information in the UK Equity IPO process*, April 2016, chapter 2.

²⁵⁵ The (rounded) market capitalisation value of Market Tech at the time of the placing as the largest of the three transactions which are part of the FCA's investigation. See footnote 242.

²⁵⁶ FCA analysis of LSE listing data. See '[New Issues and IPO Summary Data](#)'.

²⁵⁷ A further 8% were from companies registered in British Overseas Territories.

²⁵⁸ See paragraph 6.17.

²⁵⁹ For example, the relevant Artemis funds aimed to invest around 60% of assets in equity.

²⁶⁰ Proportion of shares that were allocated to investors with a UK presence.

²⁶¹ Artemis stated that they '*do not consider there to be any material differences in the skills, knowledge or expertise required to invest in secondary issues by comparison to primary issues*' (UUID 15180002, Artemis' response to FCA Request for Information March 2017 Question 11, paragraph 6.27).

²⁶² UUID 65230003, Artemis Submission on Statement of Objections, paragraph 5.10.

²⁶³ UUID 85300011, Artemis Submission on First Letter of Facts, paragraph 3.4.

have found that placings are generally only offered to a small group of investors, including existing shareholders and rights issues are only available to existing shareholders.²⁶⁴ Artemis also stated that the FCA was wrong to find that small and mid-cap IPOs and placings were in the same market, because there was no demand-side (issuing company) substitution and that the size of funds raised is markedly different.²⁶⁵

- 6.48 Artemis said that the characterisation of asset managers as suppliers of equity in the Statement of Objections and its assessment of the IPO and placing process, was counter-intuitive and highlighted by the FCA's adoption of 'investor-as-buyer' terminology.²⁶⁶ Artemis said that the FCA should be consistent in its characterisation of the relevant activities.

Hargreave Hale

- 6.49 Hargreave Hale said that the FCA could not assess whether the conduct under investigation reduced uncertainty in the operation of the market or whether competition between undertakings was reduced, without determining the relevant market.²⁶⁷ Hargreave Hale considered that there are alternative sources of capital for issuing companies, including debt capital and private equity but that the FCA had dismissed these without providing substantive reasoning. It said debt finance is a realistic alternative to equity capital, noting that '*effectively all companies consider [it] at some point*' and it was a '*close and ready*' substitute for equity capital.²⁶⁸ It also said that issuing companies can also consider rights issues as an alternative to placings.²⁶⁹
- 6.50 Hargreave Hale said that the market for the supply of equity capital in the primary capital market to UK listed small and mid-cap companies is highly fragmented. It said that there is a very large number of potential investors that can supply equity capital to small and mid-cap IPOs and placings, including a large number of funds, at least 17 Investment Trusts and several notable Private Client Fund Managers.²⁷⁰ It also questioned the FCA's conclusion on the geographic market, noting this did not reflect the ease with which equity capital flows take place globally. It said, by way of example, that it understood that the broker in the OTB IPO marketed the offer to overseas investors. Accordingly, the number of potential investors is very large and the relevant market is highly fragmented in contrast to the cartel and information exchange cases that the FCA had cited where there were a small number of participants that accounted for a substantial proportion of the market.²⁷¹

RAMAM

- 6.51 RAMAM agreed the focus of the market definition analysis should be on the interaction between asset managers and equity-issuing companies. However, it viewed the FCA's definition of the relevant market and its characterisation of asset managers as suppliers of equity capital as fundamentally flawed,²⁷² which it said was confirmed by the information

²⁶⁴ UUID 65230003, Artemis Submission on Statement of Objections, paragraph 5.11.

²⁶⁵ UUID 65230003, Artemis Submission on Statement of Objections, paragraph 5.12.

²⁶⁶ UUID 85300011, Artemis Submission on First Letter of Facts, paragraph 3.3.

²⁶⁷ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 2.11. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 645-658.

²⁶⁸ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 2.15.

²⁶⁹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 2.16.

²⁷⁰ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraphs 2.17-2.19. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 681-688.

²⁷¹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraphs 2.21-2.22. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 676-678.

²⁷² UUID 66450010, RAMAM Submission on Statement of Objections, paragraph 37.

disclosed to it from the FSMA investigation²⁷³ (being the FSMA Notices and *NFM1*'s submission, together the 'FSMA Documents') which make repeated references to 'demand' from investors who are treated as purchasers of shares.²⁷⁴ It relied on two additional submissions: an economic submission by Dr Peter Davis of Cornerstone Research²⁷⁵ (the 'RAMAM Cornerstone Submission') and a note from Oxera: the RAMAM Equity Issuance Note.²⁷⁶

- 6.52 Summarising the RAMAM Cornerstone Submission and the RAMAM Equity Issuance Note, RAMAM said 'buy-side' and 'sell-side' were established terms in the industry and accurately described the relevant players in the book-building process: namely the (i) investors and (ii) the existing shareholders, the issuer, the book runner and underwriter syndicate respectively. It said on the buy-side, asset managers are the intermediate purchasers of shares and on the sell-side, brokers are appointed by the issuer to sell those shares. Asset managers manage assets on behalf of investors in return for a commission or charges. It said there was no necessary link between the acquisition of shares in the primary capital market and the supply of equity capital to issuing companies: there is no need for money received from market purchasers to be used for additional capital to the issuing firm.²⁷⁷
- 6.53 In particular, RAMAM said that the conventional approach to market definition would initially focus on the extent of demand substitution. This may then be supplemented by considering whether a supply-side substitution would justify a widening of the putative market definition. It said that the FCA had reversed this approach by first considering supply-side substitution, then demand-side.²⁷⁸
- 6.54 It said that the FCA had not presented supporting evidence for its analysis of supply-side or demand-side substitution. On the demand-side, RAMAM questioned the FCA's decision to exclude alternative sources of capital from the relevant market and noted that shareholders in equity-issuing companies will sometime develop an alternative strategy if an IPO fails. On the supply-side, RAMAM questioned the decision to expand the relevant market to include the supply of equity to small as well as mid-cap companies. It noted that there is '*significant variation in the risk-reward profile of small and mid-cap firms*' and that it was '*difficult to conclude that all assets within those asset classes are sufficiently good substitutes investment opportunities*'.²⁷⁹
- 6.55 It said asset managers were demanders of equity for their investors and the '*correct*' exercise of market definition should therefore consider whether asset managers, when faced with higher equity prices in IPOs or placements, would substitute to alternative investment opportunities such as secondary markets, corporate debt markets and gilt markets.²⁸⁰ RAMAM recognised that the extent to which such an investment strategy is attractive to the asset manager would depend on a number of factors, such as the fund mandate, switching costs and the relative cost of the switch.²⁸¹
- 6.56 RAMAM said that the FCA had not justified why the supply of equity capital was the correct focal product and that the description of asset managers' primary economic activity as supplying equity capital was incorrect.²⁸² Asset managers' primary economic activity is the

²⁷³ See Section 2, The FCA's investigations.

²⁷⁴ UUIID 127350001, RAMAM First Submission on FSMA Documents, 21 December 2018.

²⁷⁵ UUIID 66450013, RAMAM Cornerstone Submission, paragraphs 33-36.

²⁷⁶ UUIID 66450014, RAMAM Equity Issuance Note, paragraph 3.19.

²⁷⁷ UUIID 65220012, Hargreave Hale Submission on Statement of Objections, paragraphs 37-39.

²⁷⁸ UUIID 66450013, RAMAM Cornerstone Submission, paragraphs 7-10; UUIID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 764-755.

²⁷⁹ UUIID 66450013, RAMAM Cornerstone Submission, paragraphs 11-17.

²⁸⁰ UUIID 66450013, RAMAM Cornerstone Submission, paragraphs 18-19.

²⁸¹ UUIID 66450013, RAMAM Cornerstone Submission, paragraph 19.

²⁸² UUIID 66450013, RAMAM Cornerstone Submission, paragraphs 20-25.

sale of investment products and services to its customers and asset managers compete for retail and institutional investors by seeking to generate superior returns.²⁸³ The flow of money, which runs from asset managers to issuing firms, as well as the terminology (referring to asset managers as being on the 'buy-side' for example), made it clear that asset managers were on the demand-side of the market.²⁸⁴

- 6.57 RAMAM asked whether equity was '*simply money in another form*' which it said, according to the FCA, would justify the approach of considering the primary economic activity of the parties. It said this seemed inappropriate because equity was not a means of exchange and reflects defined tradable ownership rights in a firm. These entitle the owner to potential future payments but only if the issuing firm was successful. It also noted that the characterisation of the asset manager as a seller of money (in exchange for equity) depended on the assertion that equity is money.²⁸⁵
- 6.58 RAMAM submitted that the FCA's characterisation of asset managers as suppliers of equity capital was incorrect.²⁸⁶ It for example cited the terminology in the market, which refers to asset managers as being on the "buy-side" and noted that the flow of money was from asset managers to the issuing companies.
- 6.59 More generally, RAMAM said that the failure to analyse the market correctly undermined the FCA's assessment of whether there was an infringement. It said coordinated conduct between purchasers raised distinct legal and economic issues from coordination between suppliers. It also said that the '*fundamentally wrong characterization of the market*' made it impossible to make a careful analysis of the wider legal and economic context of a pure information exchange, where that was not supported by any other evidence of collusion or agreement to coordinate market conduct.²⁸⁷
- 6.60 RAMAM also noted that there was common ground between its view of the way the market for equity capital operates and the FCA's assessment of the IPO and placing process. In particular, it highlighted the FCA's description of the exchange that occurs between issuer and asset manager which shows that the reality of the transactions is that shares are sold by the issuer and the asset manager takes ownership as a tradeable asset and in the same way as any other asset.²⁸⁸ Further, the FCA's analysis of competition between asset managers (see paragraphs 5.57 to 5.72) was a standard description of the incentives of an intermediate purchaser of tradeable assets, i.e. acquiring those assets at a competitive price and then growing the value of the assets they manage on behalf of their customers. By contrast it was artificial to describe the incentives or the business of asset managers as the supply of equity capital to issuing firms. It was incorrect for the FCA to use the cost that the issuing company incurs as the price that issuers pay as demanders of equity. This approach leads the FCA to exclude the core business of asset managers from its competition analysis.²⁸⁹

²⁸³ UUID 66450013, RAMAM Cornerstone Submission, paragraphs 26 and 30. See also UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 710-712.

²⁸⁴ UUID 66450013, RAMAM Cornerstone Submission, paragraphs 33-36.

²⁸⁵ UUID 66450013, RAMAM Cornerstone Submission, paragraphs 36-37. See also UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 644-673.

²⁸⁶ UUID 66450013, RAMAM Cornerstone Submission, paragraphs 33-36.

²⁸⁷ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraphs 41-49. See also UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1062-1063.

²⁸⁸ See UUID 84280027, RAMAM Submission on First Letter of Facts, e.g. paragraph 3.10.1.

²⁸⁹ See UUID 84280027, RAMAM Submission on First Letter of Facts, e.g. paragraph 3.10.2.

FCA view of party submissions

- 6.61 The FCA has set out its view on the relevant product market (paragraphs 6.18 to 6.40) and the geographic market (paragraphs 6.41 to 6.45).²⁹⁰ The FCA considers that the assessment of the relevant market is necessarily case-specific and based on the activities to which the investigation relates. In the present investigation, the infringements took place during the process of raising equity capital through a process of book-building, whereby asset managers submit bids for the shares of the relevant companies. The price at which the shares are sold affects the amount of equity capital raised and the cost of equity capital to the firm.
- 6.62 For this reason and for the reasons set out in paragraph 6.13 (a to d), the FCA considers that the issuing companies are on the demand-side and asset managers on the supply-side of the market. The FCA further notes that the distinction is not material to its assessment of competition in this investigation (see paragraph 9.29). Further, the primary activities of the participants are not critical to the market definition exercise: the FCA has defined markets for the purposes of assessing the activities to which the infringement relates. In this regard, the FCA notes that the issuing companies' primary activities are also not related to the equity capital markets: they are primarily active in publishing, property and travel services.
- 6.63 Similarly, the FCA does not assess the relevant market in a mechanistic way, employing it instead as a way of identifying the most important competitive constraints on the focal products. The sequencing of the process of market definition typically starts with demand-side considerations, since these are typically the most effective competitive constraint on the behaviour of suppliers. However, the distinction is less clear in bidding markets, since market definition starts with each tender and then considers the ability of suppliers to participate in tenders. The FCA considers that this applies in book-building for IPOs and placings (see also paragraph 6.8). For presentational ease, the FCA has presented the demand-side constraints first and then considered the supply-side constraints in defining the relevant product market (see paragraphs 6.18 to 6.40).
- 6.64 In relation to the parties' arguments on the boundaries of the relevant market, the FCA has set out its view on the following:
- a. equity capital and other forms of capital: paragraphs 6.18 to 6.22;
 - b. IPOs and secondary issues: paragraphs 6.26 to 6.29;
 - c. value of the issuing company: paragraphs 6.30 to 6.39; and
 - d. geographic market: paragraphs 6.41 to 6.45.
- 6.65 The FCA has noted that it needs to understand the legal and economic context of the infringements, and to establish the parties' turnover in relevant markets as the starting point for penalty calculation (see paragraph 6.5). For these purposes, the FCA must be satisfied on a reasonable basis of the relevant product and geographic market (also see paragraph 6.5).
- 6.66 Given the FCA's position on the relevant product and geographic market, the FCA does not consider that it has failed to support its findings in the way RAMAM alleges. The FCA considers RAMAM's arguments further in Section 9.

²⁹⁰ See also paragraph 13.74 where the FCA addresses Hargreave Hale's submissions on the fragmentation of the market.

Conclusions on the relevant product and geographic market

- 6.67 For the purposes of this case, and in particular for the purpose of assessing the level of any penalties, the FCA considers that the relevant product market is the supply of equity capital in the primary capital market to small and mid-cap companies, and that the relevant geographic market is the UK. In other words, the relevant market is the supply of equity capital in the primary capital market to UK-listed small and mid-cap companies.

7 The facts

Introduction

- 7.1 This Section sets out the key evidence on which the FCA bases its decision that Newton, Hargreave Hale and RAMAM infringed competition law in respect of Market Tech (see paragraphs 7.2 to 7.23 and OTB (see paragraphs 7.24 to 7.47) and that there are no grounds for action against Artemis and Newton in respect of Card Factory (see paragraphs 7.48 to 7.67). A more detailed chronology of Market Tech can be found in Annex 1; of On the Beach in Annex 2; and of Card Factory in Annex 3.

Market Tech placing

Background

- 7.2 Market Tech is a Guernsey-based holding company which holds real estate assets in Camden Town in London and runs an e-commerce business based around an online platform called market.com. It is listed on LSE's AIM.
- 7.3 Market Tech held a placing on 9 July 2015 and appointed Shore Capital and Canaccord as joint global coordinators and joint bookrunners and Berenberg as joint bookrunner. The announcement of the placing was published on the LSE's website on 9 July 2015 and stated that the placing would be by way of an accelerated book-build of up to 90,000,000 shares.²⁹¹ Market Tech sought to place up to 90,000,000 ordinary shares (which represented approximately 23.8% of the existing shares). The books closed on 9 July 2015 at 17:00 with Market Tech placing 90,000,000 shares. Market Tech raised approximately £200.7 million of gross proceeds (before expenses).
- 7.4 The following subsections set out the relevant actions of Newton, Hargreave Hale and RAMAM.

Newton

9 July 2015

- 7.5 As noted, the books closed on 9 July 2015. That morning, Newton (*NFM1*) called Hargreave Hale and RAMAM separately and discussed the valuation of Market Tech.
- 7.6 At 09:57, Newton (*NFM1*) called RAMAM (*RM FM*, a fund manager). The FCA does not have a recording of this conversation.²⁹² *NFM1* said (FCA interview) that the call with RAMAM

²⁹¹ RNS Number 6418S, Placing of shares in Market Tech, 9 July 2015.

²⁹² The FCA was not able to retrieve the recording of this call from Newton because *NFM1* made the call from his mobile device. With regard to RAMAM, *NFM1* called the switchboard at RAMAM at 09:57 who then forwarded *NFM1*'s call to *RM FM*'s number, UUID 19110002, transcript of a call between *NFM1* (Newton) and a receptionist (RAMAM), 9 July 2015 at 09:57. *RM FM*'s number was diverted to his mobile phone as he was not in the office that day. This means that the call was not recorded by either firm.

(*RM FM*) was similar to the later conversation he had with Hargreave Hale (*HH FM1*, a fund manager) (see paragraph 7.8), but shorter.²⁹³ He said:

'During my call with RM FM, I told him that I valued the new Market Tech shares at 220p each. I also gave him my views on why I came to that valuation... I said to him that I did not think we should pay more than the net asset value for shares in Market Tech. The net asset value is a commonly used benchmark for value and it is the value of the assets less any debt. This would have been available in the company's investor presentation and Shore Capital's and Canaccord's analysts' reports which RM FM could access. It is my recollection that this figure was 216-218 pence per share and it is highly likely that I would have told him that in the same way I told HH FM1. RM FM told me that he did not agree with me and we left it at that.'

7.7 RAMAM (*RM FM*) said in his FCA interview that he did not recall the call with *NFM1*²⁹⁴ but in its representations to the FCA's Statement of Objections, RAMAM did not dispute that a conversation between RAMAM (*RM FM*) and Newton (*NFM1*) took place. It said that *RM FM* continued to have no recollection that *NFM1* mentioned his intended bidding strategy for Market Tech.²⁹⁵

7.8 At 10:13, Newton (*NFM1*) returned a call from Hargreave Hale (*HH FM1*):²⁹⁶

a. *HH FM1* explained to Newton (*NFM1*) that *HH FM2* (a fund manager at Hargreave Hale) had asked him to call Newton (*NFM1*). Hargreave Hale (*HH FM1*) said to Newton (*NFM1*):

*'HH FM2 rates you. We rate you. I just sort of just curious to hear your sort of, your views [on Market Tech] really if you don't mind divulging...'*²⁹⁷

b. Newton (*NFM1*) said to Hargreave Hale (*HH FM1*): *'So basically what I'm saying, I'm calling a few people and just saying, "Look, market's softened"'*.²⁹⁸ He said that he would try to push for the price of 220p per share rather than accepting the current price:

*'Basically the upshot is I think push them for it to kind of 220 price rather than the 230 plus they're talking about.'*²⁹⁹

c. Hargreave Hale (*HH FM1*) said to Newton (*NFM1*) that Hargreave Hale already had a very large shareholding in Market Tech since the IPO (i.e. £6 million of shares) and that a low price for the placing could adversely affect that existing shareholding:

²⁹³ UUID 11250002, transcript of an FCA interview with *NFM1* (Newton), 8 November 2016 (*'NFM1* Second FCA Interview Transcript'), page 65, line 2391. The FCA notes that this is not consistent with UUID 876-67349-0-6, *NFM1*'s mobile telephone bill, 23 July 2015 (*'NFM1* Mobile Bill'), which shows that his call with *RM FM* lasted 13 minutes 52 seconds (by contrast his call with *HH FM1* lasted only 7 minutes 2 seconds).

²⁹⁴ UUID 1600001, *RM FM* FCA Interview Transcript, page 21, lines 754-756.

²⁹⁵ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 24 and 26(g); UUID 66450011, *RM FM*'s witness statement, 1 February 2018 (*'RM FM* Witness Statement'), paragraphs 25-34. See also UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1458 -1470. The *RM FM* Witness Statement was dated 1 February 2017 but the FCA considers that the correct date is 1 February 2018: it was provided to the FCA on 12 February 2018 together with UUID 66450010, RAMAM Submission on Statement of Objections.

²⁹⁶ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015 at 10:13.

²⁹⁷ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 2, lines 43-45.

²⁹⁸ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 2, lines 51-53.

²⁹⁹ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 3, lines 101-103.

'...from my angle, given that we're probably not going to do like another the size that we did at the IPO, I'm not going to be, I'm just not going to bullshit you. I'm just not going to be able to, you know, push them...'.³⁰⁰

d. Hargreave Hale (*HH FM1*) said: *'Look, I'll have a word with my Shore Capital people and I'll sort of, I'll play around with it a little bit. Okay?'.³⁰¹*

e. Newton (*NFM1*) said he would be *'...submitting a chunky order at that 220 level'³⁰²*. He also added: *'I've spoken to one other person so far who intends to join me in that... strategy. So yes, you have a think about it'.³⁰³*

7.9 At 11:08, Newton's dealing desk placed an order with Canaccord (the book-builder) for 7,978,511 shares at the price limit of 220p per share.³⁰⁴

7.10 Later that afternoon, at 16:04, Market Tech (*[senior officer]*) called Newton (*NFM1*) to discuss his order.³⁰⁵ Market Tech (*[senior officer]*) told Newton (*NFM1*) that he really wanted to have him on the book but he was concerned that his order was *'one of the lowest'.³⁰⁶* Market Tech (*[senior officer]*) strongly encouraged Newton (*NFM1*) to move his bid to 223p per share. Newton (*NFM1*) agreed to move his bid to 223p.³⁰⁷

7.11 Just before the books closed, at 16:24, Newton amended the limit price of its final order with Canaccord from 220p to 223p per share³⁰⁸ and at 16:53, increased the quantity of the shares from 7,978,511 to 9,087,641.³⁰⁹

10 July 2015

7.12 At 11:01, Newton (*NFM1*) sent a Bloomberg message to Hargreave Hale (*HH FM1*): *'i got them down a bit anyway and placing looks to have gone well'.³¹⁰* Hargreave Hale (*HH FM1*) responded: *'...nice work. hopefully it does well for all of us in the medium term'.*

13 July 2015

7.13 Newton (*NFM1*) discussed the Market Tech placing with BMO Global Asset Management ('BMO') (*[name]*, a fund manager) on Bloomberg.³¹¹ Newton (*NFM1*) commented on his telephone conversations with Hargreave Hale (*HH FM1*) and RAMAM (*RM FM*) of 9 July 2015. He wrote to BMO (*[name]*): *'i rang HH FM3 and RM FM to get them to push price down...they didnt help me out...they wanted really to do it at 230'.* BMO (*[name]*) said *'So*

³⁰⁰ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 6, lines 191-194.

³⁰¹ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 7, lines 221-223.

³⁰² UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 8, lines 286-287.

³⁰³ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015 page 9, lines 291-296. *NFM1* said that the person he was referring to in his conversation with *HH FM1* (*'one other person... who intends to join me in that... strategy'*) was his colleague at Newton, *[name]* (see UUID 29350001, *NFM1*'s first witness statement, 23 June 2017 (*NFM1* First Witness Statement'), paragraph 11).

³⁰⁴ UUID 6550007, transcript of a call between *[name]* (Newton) and *[name]* (Canaccord), 9 July 2015 at 11:08.

³⁰⁵ UUID 876-72625-2, transcript of a call between *NFM1* (Newton) and *[senior officer]* (Market Tech), 9 July 2015 at 16:04.

³⁰⁶ UUID 876-72625-2, transcript of a call between *NFM1* (Newton) and *[senior officer]* (Market Tech), 9 July 2015, pages 1-2, lines 40-43 and 49-51. *[senior officer]* said: *'I mentioned a couple of key accounts that I would really like in my share register, one being you and one being Schroders... I'm just struggling a little bit on the fact that, you know, that you are one of the lowest'.*

³⁰⁷ UUID 876-72625-2, transcript of a call between *NFM1* (Newton) and *[senior officer]* (Market Tech), 9 July 2015, page 17, line 549.

³⁰⁸ UUID 6550004, transcript of a call between *[name]* (Newton) and *[name]* (Canaccord), 9 July 2015 at 16:24.

³⁰⁹ UUID 876-66219-0-41, Bloomberg messages between Newton and Canaccord employees, 8 July 2015 beginning at 11:24. The message is stated as 15:53 UTC. BST is quoted as that was the applicable time in the UK at the time.

³¹⁰ UUID 876-66219-0-48, Bloomberg message between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 10 July 2015 beginning at 10:01. The message is stated as 10:01 UTC. BST is quoted as that was the applicable time in the UK at the time.

³¹¹ UUID 876-66219-0-50, Bloomberg message between *NFM1* (Newton) and *[name]* (BMO), 13 July 2015 beginning at 00:25. The message is stated as 00:25 UTC.

*HH FM3 and RM FM basically said no?’ Newton (NFM1) replied ‘...they said they would think about it...’ and ‘seemed positive’.*³¹² He also added: ‘it was HH FM1 who called me’.

RAMAM

9 July 2015

- 7.14 As noted, at 09:57, Newton (*NFM1*) called RAMAM (*RM FM*): see paragraphs 7.6 and 7.7.
- 7.15 Between 14:37 and 14:39, RAMAM submitted an order for 2,125,000 shares in Market Tech at the price of 220p per share to the three book-builders.³¹³ Following a call between RAMAM (*RM FM*) and Shore Capital (*[name]*, *[title]*) in which RAMAM (*RM FM*) was informed that 220p was going to miss as the price was around 223p³¹⁴, *RM FM* (RAMAM) asked his dealer (*[name]* at RAMAM) to amend his order and wrote on Bloomberg: ‘yep, go ahead 223p’.³¹⁵
- 7.16 At 16:36, RAMAM amended its order in Market Tech to 223p per share.³¹⁶

Hargreave Hale

7 July 2015

- 7.17 At 10:47, Hargreave Hale put in an order with Shore Capital for 500,000 shares in Market Tech at strike.³¹⁷ At 13:50, Hargreave Hale sent a further application for 30,000 shares at the strike price which increased the total number of shares Hargreave Hale applied for that day to 530,000 shares.³¹⁸

9 July 2015

- 7.18 At 10:13, Hargreave Hale (*HH FM1*) discussed the Market Tech placing with Newton (*NFM1*) (see paragraph 7.8).
- 7.19 During the day, Hargreave Hale (*HH FM3*, *[title]* and a fund manager) and Shore Capital (*[name]*, *[role]*) discussed Hargreave Hale’s bid, but Hargreave Hale did not amend it.

Final allocations

- 7.20 The books closed on 9 July 2015 at 17:00 with Market Tech placing 90,000,000 shares. Market Tech raised approximately £200.7 million of gross proceeds (before expenses). The final price was 223p per share.

³¹² UUID 876-66219-0-50, Bloomberg message between *NFM1* (Newton) and *[name]* (BMO), 13 July 2015.

³¹³ UUID 6450001, transcript of a call between *[name]* (RAMAM) and Unknown, 9 July 2015 at 14:37; UUID 876-72626-0, transcript of a call between *[name]* (RAMAM) and *[name]* (Cannacord), 9 July 2015 at 14:38; UUID 19030001, transcript of a call between *[name]* (RAMAM) and *[name]* (Berenberg), 9 July 2015 at 14:39.

³¹⁴ UUID 876-72626-9, transcript of a call between *RM FM* (RAMAM) and *[name]* (Shore Capital), 9 July at 16:32.

³¹⁵ UUID 876-68667-13, Bloomberg messages between RAMAM employees, 6 July 2015 beginning at 06:15. The message is stated as 06:15 UTC.

³¹⁶ UUID 876-72626-8, transcript of a call between *[name]* (RAMAM) and Unknown, 9 July 2015 at 16:36.

³¹⁷ UUID 876-66131-28-2041, email from *HH FM1* (Hargreave Hale) to *[name]* (Shore Capital), 7 July 2015 at 10:47, page 2.

³¹⁸ UUID 876-66131-28-2528, email from *[name]* (Hargreave Hale) to *[name]* (Shore Capital), 7 July 2015 at 13:50, page 1.

- 7.21 Newton's final order was for 9,087,641 shares at the price of 223p per share.³¹⁹ Newton was allocated 9 million shares,³²⁰ which represented 10% of the total value of the placing.
- 7.22 Hargreave Hale's final order was for 530,000 shares at strike price.³²¹ Hargreave Hale was allocated 500,000 shares which represented approximately 0.6% of the total value of the placing.³²²
- 7.23 RAMAM's final order was for 2,125,000 shares at the price of 223p per share.³²³ RAMAM was allocated 2 million shares,³²⁴ which represented approximately 2.2% of the total value of the placing.

On the Beach IPO

Background

- 7.24 OTB is a UK online retailer of short-haul beach holidays.³²⁵ As part of the IPO on LSE's main market, as well as the sale of shares in OTB by Inflexion (a private equity firm) and OTB management, OTB sought to raise £10 million which is referred to as 'new money'. References to market capitalisation (or 'market cap') of OTB includes this new money. Market capitalisation is also described as the company's valuation 'post money' or 'post new money'.³²⁶
- 7.25 OTB decided to commence the IPO process on 3 September 2015, with the management roadshow to UK investors commencing on 9 September 2015.³²⁷ By 18 September 2015, Numis (the book-builder) considered that a valuation of £270 million market cap (a price of 208p per share), with a deal size of £168.4 million, was likely to be achieved. By 2pm on 21 September 2015, when the books were originally meant to close, there were insufficient orders from investors at a £270 million market cap (or indeed a £260 million market cap).
- 7.26 Numis therefore sought to re-broke the deal, at a market cap of £260 million, but on a smaller deal size of £130 million such that Inflexion and OTB management would retain a larger share of the total equity. However, following the amendment, some orders were revised lower and others were withdrawn, resulting in insufficient orders from investors to cover the £130 million deal size.
- 7.27 The following day, conversations with investors led to a further revised deal structure based on a deal size of £96 million and a reduced market cap of £240 million equating to a price 184p per share. This was approved by the private equity house, Inflexion and OTB management, with conditional dealing beginning the following day.
- 7.28 The following subsections set out the relevant actions of Newton, RAMAM and Hargreave Hale.

³¹⁹ UUID 876-66219-0-41, Bloomberg message between Newton and Canaccord employees, 8 July 2015 beginning at 11:24. The message is stated as 15:53 UTC. BST is quoted as that was the applicable time in the UK at the time.

³²⁰ UUID 6550003, transcript of a call between [name] (Newton) and Unknown, 10 July 2015 at 07:40, page 2, line 46.

³²¹ UUID 876-66131-28-2528, email from [name] (Hargreave Hale) to [name] (Shore Capital), 7 July 2015 at 13:50, page 1.

³²² UUID 2630071, Bookbuild data from Shore Capital for the Market Tech placing, 9 July 2015. UUID 2630010, email from [name] (Shore Capital) to [name] (Hargreave Hale), 9 July 2015 at 19:13.

³²³ UUID 876-68667-13, Bloomberg messages between RAMAM employees, 6 July 2015 beginning at 06:15. The message is stated as 06:15 UTC.

³²⁴ UUID 876-66079-157, email from [name] (Shore Capital) to RM FM (RAMAM), 9 July at 19:09.

³²⁵ See <http://www.onthebeach.co.uk>

³²⁶ By way of example, a reference to 'OTB's market capitalisation of 270 million' refers to a valuation of £260 million plus £10 million of new money. Conversely, references to 'pre-money' are references to OTB's valuation before the capital raise of £10 million.

³²⁷ UUID 876-69373-2-3, OTB Timeline of Events provided to the FCA by Numis.

Newton

21 September 2015

- 7.29 At 08:10 on 21 September 2015, the day the books were due to close in the OTB IPO, Newton (*NFM1*) blind copy emailed fund managers at 12 firms³²⁸ including Hargreave Hale and RAMAM (the '08:10, 21 September Email'). This email disclosed his valuation of OTB (i.e. £260 million pre new money) and urged them to move to this level. He disclosed that he had placed an order that morning at that limit and set out the amount of that order (£17 million). He asked recipients to 'have a think' and to mention to any colleagues:

'Sorry for the out of the blue email but I wanted to urge those considering or in for the OTB IPO to think about moving to a 260m pre money valuation limit. I have done that first thing this morning with my GBP17m order [...]

*I haven't received any indication that the books are well covered or even covered so suspect this one is still very much open to price movement. Please have a think and mention to any colleagues or have put orders in.'*³²⁹

- 7.30 At 09:03, Newton (*NFM1*) sent a further blind copy email to the same recipients as his 08:10, 21 September Email (including Hargreave Hale and RAMAM) informing them that the book-builder for the IPO had two orders at a particular valuation (260) and an amount (£20 million) ('09:03, 21 September Email' and together with the 08:10, 21 September Email, 'the Emails').³³⁰

RAMAM

18 September 2015

- 7.31 On 18 September 2015, RAMAM submitted an indicative order in the OTB IPO at the £270 million level, contingent on the private equity firm fully exiting and contingent on the £270m total market cap valuation.³³¹

21 September 2015

- 7.32 RAMAM (*RM FM*) replied to the 08:10, 21 September Email at 08:57, providing his own valuation of OTB:

*'I think £270m post money contingent on full exit by PE is suitable. Less if not a full exit.'*³³²

- 7.33 At 09:05, Newton (*NFM1*) emailed back:

*'Hey RM FM. I think full exit v unlikely given book coverage sounds thin at best but I may be wrong We have the power on this one...'*³³³

³²⁸ *NFM1* emailed 11 firms on 21 September 2015 and forwarded his email to a twelfth firm on 22 September 2015.

³²⁹ UUID 876-66219-1-65, the 08:10, 21 September Email.

³³⁰ UUID 876-66219-1-78, the 09:03, 21 September Email.

³³¹ UUID 876-66079-229, email from [*name*] (*RAMAM*) to *RM FM* (*RAMAM*) and *RAMAM* Dealing, copied to *RAMAM* UK Fund Managers, 18 September 2015 at 15:05.

³³² UUID 876-66119-12, email from *RM FM* (*RAMAM*) to *NFM1* (*Newton*), 21 September 2015 at 08:57. The message is stated as 07:57 UTC. BST is quoted as that was the applicable time in the UK at that time.

³³³ UUID 876-66219-1-81, email from *NFM1* (*Newton*) to *RM FM* (*RAMAM*), 21 September 2015 at 09:05.

- 7.34 After hearing from Numis that the private equity firm was not fully exiting and that the deal size was less,³³⁴ RAMAM (*RM FM*) revised its bid from £270 million to £17,000,000 worth of shares at a price of 200p per share (£260 million market cap) with no contingency.³³⁵

Hargreave Hale

21 September 2015

- 7.35 *HH FM2* of Hargreave Hale received the 08:10, 21 September Email and forwarded it to *HH FM1* and *HH FM3*.³³⁶ At 08:15, *HH FM1* also received it from *HH FM4* (a fund manager at Hargreave Hale). *HH FM1* replied: 'Thanks *HH FM4* – seen it & discussing now'.³³⁷
- 7.36 Following receipt of the Emails, Hargreave Hale (both *HH FM1* and *HH FM3*) each attempted to contact Newton (*NFM1*). Newton (*NFM1*) in turn attempted to contact Hargreave Hale:
- At 08:41, Hargreave Hale (*HH FM1*) emailed Newton (*NFM1*) asking him to give Hargreave Hale (*HH FM1*) a call.³³⁸
 - At 11.31, Hargreave Hale (*HH FM1*) called Newton (*NFM1*'s work land line) and received a recorded answerphone message. He did not leave a message.³³⁹
 - Hargreave Hale (*HH FM3*) then called and left a voicemail message for Newton (*NFM1*'s personal mobile) at 11:42:

*'Hi, NFM1, it's HH FM3. Could you call either myself or HH FM1 re On the Beach reasonably soon, I think, as time is running out. Our number is [X] would get me. Thanks, bye.*³⁴⁰
 - At 12:27 Newton (*NFM1*) called the Hargreave Hale switchboard and asked to speak to *HH FM3* or *HH FM1*.³⁴¹ The receptionist said there was no answer and asked to take a message. *NFM1* (of Newton) said to say he called and that he had a message from *HH FM3* already to call him. The receptionist said she would ask them to call him back.³⁴²
- 7.37 In respect of these attempted and actual contacts, Newton (*NFM1*) told the FCA that he had a brief call with Hargreave Hale (*HH FM1*) around lunchtime and that on the call he ran Hargreave Hale (*HH FM1*) through the points in the 08:10, 21 September Email. He said:

'It was a very brief call and I basically ran through the points in my email or something like it in the 8.10 email. And HH FM1 kind of took in the

³³⁴ UUID 876-66079-253, transcript of a call between [name] (Numis) and *RM FM* (RAMAM), 21 September 2015 at 13:48, page 1.

³³⁵ UUID 876-66079-254, transcript of a call between [name] (Numis) and *RM FM* (RAMAM), 21 September 2015 at 14:02.

³³⁶ UUID 876-66131-176-103, email from *HH FM2* (Hargreave Hale) to *HH FM3* and *HH FM1* (both Hargreave Hale), 21 September 2015 at 08:09.

³³⁷ UUID 876-66131-176-124, email from *HH FM1* (Hargreave Hale) to *HH FM4* (Hargreave Hale), 21 September 2015 at 08:15. At UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 5.20(d), it said that the FCA had misquoted *HH FM1*'s reply in the Statement of Objections. This quotation has been corrected.

³³⁸ UUID 876-66219-1-72, email from *HH FM1* (Hargreave Hale) to *NFM1* (Newton), 21 September 2015 at 08:41.

³³⁹ UUID 13180001, transcript of a call of *HH FM1* (Hargreave Hale) leaving a voicemail message on *NFM1*'s (Newton) answerphone, 21 September 2015 at 11:31.

³⁴⁰ UUID 876-72624-19, transcript of a call of *NFM1* (Newton) leaving a voicemail message on *HH FM3*'s (Hargreave Hale) answerphone, 21 September 2015 at 11:42.

³⁴¹ UUID 19090003, transcript of a call between Hargreave Hale reception and *NFM1* (Newton), 21 September 2015 at 12:27.

³⁴² UUID 19090004, transcript of a call between Hargreave Hale reception and *NFM1* (Newton), 21 September 2015 at 12:28.

information and gave the impression that basically agreed with what I was saying.³⁴³

7.38 Hargreave Hale denied this call ever took place. See discussion at paragraphs 13.30 to 13.34.

7.39 At 12:37, Newton (*NFM1*) emailed Hargreave Hale (*HH FM1* and *HH FM3*) to '*emphasise his earlier discussions with them*'.³⁴⁴ Newton (*NFM1*) said:³⁴⁵

'Hi guys

Just returned HH FM3's call – have been at Hostelworld visit! Just spoken to HH FM1 now.

I will soon be on a train with intermittent reception but please do try my mob again if you wish to chat again – [✕].

If you are a material part of this book, I really think it's worth pushing back on this.

Is PE really going to walk away for 3% when they have made so much already?

I've had feedback from RM FM (only him) that he reckons 270 is fair if PE out completely and 260 if not. On Friday anyway the books weren't even covered at the lowest possible free float.'

7.40 Hargreave Hale did not respond to this email. At 12:44, Hargreave Hale (*HH FM3*) discussed his OTB order with Numis (*[name]*) and explained that Hargreave Hale '*should probably do it at 260*' because the PE (private equity) seller (Inflexion) was only selling 75% of its holding.³⁴⁶

7.41 Hargreave Hale confirmed its order with Numis at 14:14. This was for £14,003,000 worth of shares at £260 million market cap.³⁴⁷

Other firms

7.42 Old Mutual Global Investors (UK) Limited ('Old Mutual') (*[name]*) told Numis that it had received emails from Newton (*NFM1*) that it was concerned about and explained that it had tried to block *NFM1*'s (of Newton) email address so it would be unable to receive further emails from him.³⁴⁸

7.43 BlackRock Investment Management (UK) Ltd ('BlackRock') (*[name]*) emailed Newton (*NFM1*) to explain that his emails were not in line with BlackRock protocols.³⁴⁹

7.44 Henderson Volantis, a grouping within Henderson Global Investors Limited ('Henderson') withdrew from participating in the OTB IPO and told Numis that one of the reasons for its non-participation was that '*There is correspondence flying around at the moment, which,*

³⁴³ UUID 29350001, *NFM1* First Witness Statement, paragraph 32.

³⁴⁴ UUID 29350001, *NFM1* First Witness Statement, paragraph 33.

³⁴⁵ UUID 876-66219-1-90, email from *NFM1* (Newton) to *HH FM1* (Hargreave Hale) and *HH FM3* (Hargreave Hale), 21 September 2015 at 12:37.

³⁴⁶ UUID 876-72624-20, lines 23-24, transcript of a call between *[name]* (Numis) and *HH FM3* (Hargreave Hale), 21 September 2015 at 12:47.

³⁴⁷ UUID 876-66131-176-224, email from *[name]* (Hargreave Hale) to *[name]* (Numis), 21 September 2015 at 14:14.

³⁴⁸ UUID 16290001, transcript of an FCA interview with *[name]* (Old Mutual), 5 October 2016, page 34, lines 1102-1121.

³⁴⁹ UUID 876-66219-1-125, email from *[name]* (*[✕]* BlackRock) to *NFM1* (Newton), 23 September 2015 at 16:46.

from a compliance perspective, looks quite tricky'³⁵⁰ and that 'I think it feels like there's quite an organised attempt to get the price down'.³⁵¹

Final allocations

- 7.45 Newton's order at 14:00 on 21 September was for £16,794,970 worth of shares at a price of 208p per share (this is equivalent to a £270 million market cap). On the revised deal structure based on a deal size of £96 million and a reduced market cap of £240 million (a price of 184p per share), Newton's final order was for 5,846,160 shares (£10,756,934 worth of shares). Newton received an allocation of £8,740,000 worth of shares (9.1% of the total).
- 7.46 Numis told RAMAM (*RM FM*) it was looking more like £240m and a big order contingent on 20% oversubscription, following which RAMAM (*RM FM*) revised its order to £13,200,000 worth of shares at £240 million, including an amount equivalent to a 20% oversubscription.³⁵² RAMAM received an allocation of £11,040,000 worth of shares (11.5% of the total).
- 7.47 Based on a deal size of £96m and a reduced market cap of £240 million (a price of 184p per share) Hargreave Hale's final order was for £14,201,000 worth of shares.³⁵³ Hargreave Hale received an allocation of £11,040,000 worth of shares (11.5% of the total).

Card Factory IPO

Background

- 7.48 Card Factory is a UK retailer of greeting cards. Morgan Stanley and UBS Limited were appointed as Joint Global Co-ordinators, Joint Sponsors and Joint Book-runners, Nomura as Joint Book-runner and Investec as Joint Lead Manager.
- 7.49 On 22 April 2014, Card Factory announced its intention to float on the main market of the LSE. The pathfinder prospectus was published and the book-building process and management roadshow officially started on 1 May 2014. The IPO concluded with Card Factory selling 131,834,049 shares at 225p per share. This price was at the bottom of the price range which had initially been 225-300p per share.

25 April 2014

- 7.50 On 25 April, a few days after Card Factory announced its intention to float, Artemis (*Artemis Analyst*, at that time an analyst) and Newton (*NFM1*) discussed the IPO by email.
- 7.51 At 09:26, Artemis (*Artemis Analyst*) sent an email to Newton (*NFM1*) asking: 'You going for Card?'.³⁵⁴ Newton (*NFM1*) replied that he was not sure.³⁵⁵ Artemis (*Artemis Analyst*) told Newton (*NFM1*) that he was 'strongly talking the range down to £700-800m'³⁵⁶ and

³⁵⁰ UUID 2500003, transcript of a call between [*name*] (Henderson) and [*name*] (Numis), 21 September 2015 at 09:39, page 4, lines 122-126.

³⁵¹ UUID 2500003, transcript of a call between [*name*] (Henderson) and [*name*] (Numis), 21 September 2015 at 09:39, page 4, line 131 and lines 141-142.

³⁵² UUID 876-66079-77, email from *RM FM* (RAMAM) to RAMAM Dealing and RAMAM Ops (copying [*fund manager*] and [*fund manager*]), 22 September 2015 at 17:13.

³⁵³ UUID 876-66077-2, Numis' Dealogic report of the On the Beach Bookbuild ('Numis Dealogic On the Beach Report'), page 2.

³⁵⁴ UUID 876-69001-2, email from *NFM1* (Newton) to *Artemis Analyst* (Artemis), 25 April 2014 at 09:53, page 2.

³⁵⁵ UUID 876-69001-2, email from *NFM1* (Newton) to *Artemis Analyst* (Artemis), 25 April 2014 at 09:53, page 2.

³⁵⁶ UUID 876-69001-2, email from *Artemis Analyst* (Artemis) to *NFM1* (Newton), 25 April 2014 at 10:47, page 2.

Newton (*NFM1*) replied: "Good plan [...]".³⁵⁷

29 April 2014

- 7.52 Artemis (*Artemis Analyst*) wrote to Newton (*NFM1*) again to ask for his view on Card Factory and disclosed to Newton (*NFM1*) that he was 'trying to talk it down to 12-14x'.³⁵⁸ Newton (*NFM1*) replied: 'Cardies at 12x 14 wd be good yes [...]'.³⁵⁹

1 May 2014

- 7.53 Card Factory announced the price range for its IPO (i.e. 225p-300p which corresponded to a market value of £767 million - £954 million)³⁶⁰ and the book-building process officially started.
- 7.54 At 09:37, *Artemis Analyst* (of Artemis) sent an email to his colleagues at Artemis asking if anyone was likely to go for Card Factory,³⁶¹ together with a table with proposed valuation multiples for Card Factory using a price earnings ratio measure ('P/E') for the years 2014-2017. It included P/Es in relation to bottom of the range to top of the range i.e. 'bottom £767m' to 'top £954m'.³⁶²
- 7.55 At 10:06, Newton (*NFM1*) forwarded an email he had received from UBS that morning with a price range for Card Factory to Artemis (*Artemis Analyst*) and wrote:

*'I wont be participating in this range
£700m more realistic
Use the phrase 'we don't have to do anything'
Thoughts?'*³⁶³

- 7.56 At 10:09 Artemis (*Artemis Analyst*) responded to Newton (*NFM1*):
- 'If he [AFM1, fund manager for whom Artemis Analyst worked] isn't that keen, I'll really try to screw the price down towards £650-700m. But he may be happy at £750m. You could always put your order in now at £700m - that will send a v strong signal'.*³⁶⁴
- 7.57 At 10:16 Newton (*NFM1*) replied to Artemis (*Artemis Analyst*):

*'Don't believe the brokers...
Was only 5 people on the buy side trip to B&M yesterday-which has an absolutely sensational story to be fair
I don't think this is a hot market at all*

³⁵⁷ UUID 876-69001-2, email from *Artemis Analyst* (Artemis) to *NFM1* (Newton), 25 April 2014 at 11:08.

³⁵⁸ UUID 876-69001-3, Bloomberg message between *NFM1* (Newton) and *Artemis Analyst* (Artemis), 29 April 2014 beginning at 13:17. The message is stated as 13:31 UTC. BST is quoted as that was the applicable time in the UK at the time.

³⁵⁹ UUID 876-69001-3, Bloomberg message between *NFM1* (Newton) and *Artemis Analyst* (Artemis), 29 April 2014 beginning at 13:17. The message is stated as 13:31 UTC. BST is quoted as that was the applicable time in the UK at the time.

³⁶⁰ UUID 876-66220-0-53, email from [name] (Nomura) to multiple recipients, 1 May 2014 at 07:01; UUID 876-66071-25, email between *Artemis Analyst* (Artemis) and [name] (UBS), 1 May 2014 at 07:25; UUID 876-66071-33, email from [name] (Morgan Stanley) to undisclosed recipients, 28 April 2014 at 16:18.

³⁶¹ UUID 876-66071-37, email from *Artemis Analyst* to [names] and *AFM2* (All Artemis), 1 May 2014 at 09:36.

³⁶² UUID 876-66071-37-1, Card Factory Valuation table attached to UUID 876-66071-37, email from *Artemis Analyst* to [name], [name], *AFM2* and [name] (All Artemis), 1 May 2014 at 09:36.

³⁶³ UUID 876-66220-0-35, email from *NFM1* (Newton) to *Artemis Analyst* (Artemis), 1 May 2014 at 10:06, page 2.

³⁶⁴ UUID 876-66220-0-35, email from *Artemis Analyst* (Artemis) to *NFM1* (Newton), 1 May 2014 at 10:09, page 2.

*Friend of a friend at Bluecrest hedgie said she is done with IPOs having got burned on Pets...*³⁶⁵

- 7.58 At 11:12, Artemis (*Artemis Analyst*) sent another email to his colleagues to tell them that he had added a new line to his previously circulated valuation table. This new line read 'P/E – [X] £700m'. This email included some of the information he had received from Newton (*NFM1*):

I've added a new valuation line to the table. I'm [X]. The froth seems to have gone out of the IPO market. There were only 5 investors on the second B&M site visit yesterday (cf full coachload on 8th April). Pets at Home will have burned some funds, probably.

I'm tempted to put in an order below the bottom of the range'.³⁶⁶

- 7.59 This email from *Artemis Analyst* was sent to and seen by two Artemis fund managers who each placed an order in the Card Factory IPO: *AFM1* and *AFM2*.

2 May 2014

- 7.60 The next day around noon, Artemis submitted an order for £22.74 million of shares at the price of 225p per share.³⁶⁷ £14.74 million of this order was on behalf of Artemis' [*fund name*] run by *AFM2*. £8 million was on behalf of Artemis' [*fund name*] by *AFM1*. Artemis did not amend its order before the books closed on 14 May 2014.

6 May 2014

- 7.61 Newton (*NFM1*) told one of the book-runners, Morgan Stanley ([*name*], [*role*]), that he was only willing to pay 'around 700 market cap'.³⁶⁸ *NFM1* did not ultimately submit an order in the IPO, but another fund manager at Newton did (paragraph 7.62).

12 May 2014

- 7.62 Newton (*NFM2*, fund manager) did participate in the IPO on behalf of the fund he managed. Newton (*NFM2*) sent an internal email two days before the books closed, on 12 May 2014, requesting a weighting of 1.5% in Card Factory at £2.50 or cheaper. Newton (*NFM2*) explained his reasons for this and referenced, among other things, that '*NFM1 is not going for it as he believes the stock is 10% over priced at the bottom of the range*'.³⁶⁹
- 7.63 When Newton (*NFM2*) sent this email, he forwarded an internal note from a meeting Newton had with Card Factory on 2 May 2014, prepared by his analyst ([*name*]), which included a recommendation on the price ('*That being said, we do feel that the Card Factory IPO is worth taking a look at the low end of the pricing range*').³⁷⁰

³⁶⁵ UUID 876-66220-0-35, email from *NFM1* (Newton) to *Artemis Analyst* (Artemis), 1 May 2014 at 10:16.

³⁶⁶ UUID 876-66071-45, email from *Artemis Analyst* to [*names*] and *AFM2* (copying *AFM1* and [*name*]) (All Artemis), 1 May 2014 at 11:12, page 2.

³⁶⁷ UUID 876-69252-196, email from *Artemis Analyst* (Artemis) to [*name*] (Morgan Stanley), 2 May 2014 at 12:00. *Artemis Analyst* submitted Artemis' order with Morgan Stanley for £15 million for the Artemis [*fund name*] (run by *AFM2* at Artemis) and £8 million for [*fund name*] (run by *AFM1*) and specified that the total order was £23 million. UUID 876-69252-197, email from *AFM2* to Dealers Ldn (All Artemis), 2 May 2014 at 12:00. *AFM2* asked the Artemis dealers to bid for 14.74m shares for his fund and [*name*] replied at 12:15 that Artemis' order as reflected to the bookrunners was '£22m ltd @ 225p'.

³⁶⁸ UUID 25930001, transcript of a call between [*name*] (Morgan Stanley) and *NFM1* (Newton), 6 May 2014 at 15:03, page 2, lines 65-66.

³⁶⁹ UUID 876-67217-0-9, email from *NFM2* to [*name*] (copying [*names*] (All Newton), 12 May 2014 at 16:28.

³⁷⁰ UUID 876-67217-0-9, email from *NFM2* to [*name*] (copying [*names*] (All Newton), 12 May 2014 at 16:28; UUID 876-67217-0-10, Internal Artemis Note of Card Factory Pre-IPO meeting, 2 May 2014.

13 to 14 May 2014

- 7.64 At 14:14, Newton (*NFM2*) submitted its bid in Card Factory for 125,000 shares at 250p per share or cheaper.³⁷¹ Two minutes later, Newton was informed that the price range was narrowed down to 225p-240p per share and Newton confirmed it had just put in its bid at strike.³⁷²
- 7.65 The next morning, Newton asked the book-builder whether the price was still 225p-240p and on hearing that it was, confirmed that its bid was at strike.³⁷³ The price range was reduced once again to 225-230p per share. Newton retained its bid at strike.³⁷⁴ The books closed around 14:30 that day and the final price settled at 225p per share.

Final allocations

- 7.66 The IPO concluded with Card Factory selling 131,834,049 shares at 225p per share. This price was at the bottom of the price range which had initially been 225-300p per share.
- 7.67 Allocations for Card Factory were released on 15 May 2014. Newton was allocated 125,000 shares at a price of 225p per share which represented 0.1% of the total allocation. Artemis was allocated 10,100,000 shares which made them the second largest investor in the IPO with approximately 7.7% of the total allocation.

³⁷¹ UUID 18980005, transcript of a call between [*dealer*] (Newton) and Unknown, 13 May 2014 at 14:14. See UUID 43520001, transcript of an FCA interview with *NFM2* (Newton), 26 September 2017. *NFM2* confirmed that this bid was in effect "at strike" assuming that price was £2.50 per share or less, pages 16-17, lines 591-601.

³⁷² UUID 18980006, transcript of a call between [*dealer*] (Newton) and Unknown, 13 May 2014 at 14:16.

³⁷³ UUID 18980007, transcript of a call between [*dealer*] (Newton) and Unknown, 14 May 2014 at 09:58.

³⁷⁴ UUID 18980008, transcript of a call between [*dealer*] (Newton) and Unknown, 14 May 2014 at 14:14.

8 The law applicable to 'concerted practices'

- 8.1 The FCA has decided that Hargreave Hale, Newton and RAMAM have each infringed the Chapter I prohibition and Article 101 TFEU due to their conduct during the Market Tech placing and OTB IPO. It has found there are no grounds for action with respect to Artemis's and Newton's conduct in relation to the Card Factory IPO.
- 8.2 Having set out the key facts in Section 7 and Annexes 1, 2 and 3, this Section outlines the law applicable to concerted practices.

Concerted practice

- 8.3 As noted (paragraphs 3.1 and 3.3) the Chapter I prohibition and Article 101 TFEU apply to agreements between undertakings, decisions by associations of undertakings or concerted practices between undertakings. A concerted practice is '*a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition*'.³⁷⁵
- 8.4 Nothing turns on the precise form taken by each of the elements comprising the overall agreement and/or concerted practice.³⁷⁶ This is because it is not necessary for the purpose of finding an infringement to distinguish between agreements and concerted practices, or even to characterise conduct as exclusively an agreement or a concerted practice. The FCA has, however, considered if the parties' conduct amounted to concerted practices.
- 8.5 A concerted practice must be understood in light of the concept that applicable competition law requires that each undertaking must determine independently the policy which it intends to adopt on the market.³⁷⁷ Although the requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does preclude:

'any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or

³⁷⁵ Judgment in *ICI Limited v Commission*, C-48/69, EU:C:1972:70, paragraph 64. See also judgment in *T-Mobile Netherlands BV and others v NMA*, C-8/08, EU:C:2009:343 ('*T-Mobile*'), paragraph 26; *JJB Sports and Allsports v Office of Fair Trading* [2004] CAT 17 ('*JJB Sports*'), paragraphs 151-153.

³⁷⁶ Judgment in *MasterCard and others v Commission*, C-382/12 P, EU:C:2014:2201, paragraph 63 and the case law cited.

³⁷⁷ *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission*, C-40/73 etc., EU:C:1975:174, paragraph 173, followed in judgment in *Commission v Anic Participazioni SpA*, C-49/92 P, EU:C:1999:356 ('*Anic*'), paragraph 116; judgment in *Hüls v Commission*, C-199/92 P, EU:C:1999:358 ('*Hüls*'), paragraph 159. See also, judgment in *Icap and others v Commission*, T-180/15, EU:T:2017:795 ('*Icap*'), paragraph 49.

services offered, the size and number of the undertakings and the volume of that market'.³⁷⁸

- 8.6 The FCA considers that a concerted practice in the context of information sharing, in line with the applicable law, requires:
- a. 'discussions' (also known as 'reciprocal contacts') involving one-way or two-way disclosure of strategic information, which is information that eliminates or substantially reduces strategic uncertainty as to a competitor's conduct on the market (see paragraphs 8.8 to 8.40);
 - b. between two or more actual or potential competitors (see paragraph 8.41);
 - c. subsequent conduct on the market (see paragraphs 8.42 to 8.49); and
 - d. a relationship of cause and effect between the discussions and that conduct (see paragraphs 8.50 to 8.67).
- 8.7 The FCA has considered these legal principles with the benefit of submissions from Artemis, Hargreave Hale, Newton and RAMAM. The FCA summarises below the main issues that they raised, grouping these according to the principles set out above in paragraph 8.6 (a to d) and sets out its findings in light of those submissions.³⁷⁹

'Discussions'

- 8.8 This subsection considers, in light of the requirement for knowing substitution of practical cooperation for the risks of competition:
- a. the type of information that can reduce uncertainty between competitors (paragraphs 8.9 to 8.22);
 - b. what amounts to a request for, or acceptance of, information (paragraphs 8.23 to 8.38); and
 - c. whether disclosure on a single occasion may found an infringement (paragraphs 8.39 to 8.40).

The type of information that can reduce uncertainty between competitors

- 8.9 As noted at paragraph 8.5, the Chapter I prohibition and Article 101 TFEU may prohibit contact between competitors where its object or effect is to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market. The Commission explains in its Horizontal Co-operation Guidelines that:

'Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty [...] in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it

³⁷⁸ *Icap*, paragraph 50 and the case law cited; see also *Suiker Unie and others v Commission*, C-40/73 etc., EU:C:1975:174, paragraph 174.

³⁷⁹ The FCA notes that some of the arguments raised by the parties raise the same issues under more than one of the principles set out in paragraph 8.6. To avoid repetition in this decision, the FCA sets these arguments out under the principle with which they are most readily addressed.

reduces the independence of competitors' conduct on the market and diminishes their incentives to compete'.³⁸⁰

- 8.10 Therefore, the information shared between competitors must be 'strategic', i.e. it must reduce uncertainty of conduct on the market for there to be an infringement of the Chapter I prohibition and Article 101 TFEU.

Party submissions

- 8.11 Artemis said the general level of competitive uncertainty in the market should be factored into any analysis of whether information is strategic. It said there is a distinction between the discussion of price between asset managers and an exchange of opinions about the high-level valuation of a business. Absence of volume information significantly limits the potential usefulness of information (with specific reference to the facts of the Card Factory transaction). Timing is an important part of any strategic exchange, since as the book-build moves into its final stages, the level of uncertainty is reduced as positions become more certain as likely ranges narrow and crystallise. Thus, an exchange between competing fund managers who are bidding in an IPO, where that exchange includes information about the bid they are likely to put in, taking place shortly before the books close would form an exchange of strategic information and could allow the parties to modify their behaviour to account for that of their peers.³⁸¹
- 8.12 Hargreave Hale questioned whether the information disclosed by Newton (*NFM1*) was the type of information which classic cartel cases were concerned about, noting that in Market Tech and OTB, those disclosures were *NFM1's 'intentions and thoughts'* as to valuation.³⁸²
- 8.13 RAMAM said that the information disclosed to it could not influence competition because it was just one piece of information available to an asset manager in a context in which there is a constant flow of information between asset managers and brokers. It noted ongoing uncertainty throughout the book-building process as to the reliability of such information with a range of sources of information influencing the price right up until the end of the process.³⁸³ It also said that the information disclosed by RAMAM (in OTB) was too uncertain and incomplete to have influenced competition because it was only a summary of *RM FM's* own valuation and did not contain a firm commitment to participate in the IPO or any information on the volume of RAMAM's (*RM FM's*) bid in the IPO.³⁸⁴

FCA findings

- 8.14 The courts have emphasised that a key aspect of the concept of a concerted practice is that in a properly functioning competitive market, competitors should not know how their competitors are likely to behave. A reduction of uncertainty is a key part of that concept.³⁸⁵ In defining 'uncertainty', the General Court in *Cimenteries* said:

'It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part'.³⁸⁶

³⁸⁰ Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (OJ C11, 14.1.2011), ('Horizontal Cooperation Guidelines'), paragraph 61.

³⁸¹ UUID 74290001, Artemis Further Submission e.g. paragraphs 3.5, 3.23 and 3.24. See also UUID 85300011, Artemis Submission on First Letter of Facts, e.g. paragraph 3.9(B).

³⁸² UUID 77120003, Hargreave Hale Oral Hearing Transcript e.g. lines 588-593 and 599-601.

³⁸³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 77(c).

³⁸⁴ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 77(e).

³⁸⁵ See for example, *Balmoral Tanks Limited v CMA* [2017] CAT 23 ('*Balmoral Tanks*'), paragraph 39. See paragraph 8.14.

³⁸⁶ Judgment in *Cimenteries CBR and others v Commission*, T-25/95-T-104/95, EU:T:2000:77 ('*Cimenteries*'), paragraph 1852.

In this decision, the FCA describes the contents of such a statement of intention as “strategic information”.

- 8.15 The FCA agrees with Artemis that in the context of an IPO or a placing, what constitutes strategic information depends on several factors. These include the content of the disclosure, in particular if share price and/or volume of an intended bid are disclosed. The FCA notes that share price may be expressed by way of the valuation of an issuing company (i.e. its market capitalisation) since the valuation of an issuing company can be calculated by multiplying the share price by the number of shares available. Valuation is a proxy for share price.
- 8.16 As noted in paragraph 5.63, the parameters on which asset managers compete within an IPO or placing process include deciding whether they will bid at all, but in addition, the value and volume of any such bid. Asset managers in an IPO or placing process compete most acutely by determining and submitting those two numbers to the book-builder.³⁸⁷ Accordingly, the more granular the information provided to a competitor about an intended or actual bid, the more likely it is to be strategic information. For this reason, the FCA does not accept RAMAM’s submission that the information disclosed to it could not influence competition because it was just one piece of information available to an asset manager (see 8.13 above). Since determining the value and/or volume of a bid are the key parameters on which asset managers compete in a book-building process, disclosure of that information between competitors can substantially reduce competitive uncertainty, even where there are other information flows between those asset managers and brokers.³⁸⁸
- 8.17 Timing of the disclosure is also important in an IPO and/or placing. The shorter the period between the disclosure about a bid and the time the book closes, the more likely that information disclosed is strategic (as Artemis said, see paragraph 8.11). That is because it becomes less likely that the discloser will depart from its stated intention or change a submitted bid, so the greater reliance the recipient can place on the information. As set out in paragraph 5.97, while bids can be withdrawn or changed by an investor until the book closes, this becomes less attractive as the deadline approaches, as it could affect an investor’s credibility and reputation with the book-builder. In those circumstances, uncertainty between those competitors as to expected conduct on the market (i.e. the bid) is likely to be eliminated or at the very least substantially reduced.
- 8.18 The valuation of the company and the volume of the bid they submit are the two variables that an asset manager can determine in expressing its demand for shares. As noted (paragraph 5.67), the ability to assess an accurate valuation of the issuing company and decide how much to invest in that company is one way how good asset managers distinguish themselves from the bad – and so how they compete.³⁸⁹
- 8.19 The FCA considers, however, it is not necessary in every case for information to relate to both valuation and volume for it to be strategic: one or the other can be sufficient depending on the circumstances in which it is disclosed. Disclosing intended price allows a rival to understand what the discloser thinks the company is worth, and disclosing

³⁸⁷ As described in Section 5, The IPO and placing process, the allocation of shares by the issuing company and their book-builders is based on a number of considerations, but a primary consideration for the issuer is to raise the required equity capital at the lowest price, which means achieving a higher share price during the book-building. This means that asset managers have an incentive to bid keenly in order to be allocated their desired number of shares. Other considerations for the book-builder are to achieve excess demand for the shares in order to allocate favourably to preferred asset managers, such as long-term investors or those that were particularly helpful during the book-building.

³⁸⁸ In this regard, in the course of its investigation, the FCA received no evidence of the brokers involved in the transactions it investigated disclosing the names of asset managers and their bids to other asset managers (see also paragraph 11.16).

³⁸⁹ Valuation of the issuing company is another way of articulating the price at which an asset manager is willing to supply equity capital to the issuing company since the value of the company is the share price multiplied by the number of shares.

intended volume allows the rival to understand how much a rival is willing to invest in (and so risk on) the issuing company. Accordingly, either may give a recipient rival sufficient detail to remove sufficient uncertainty about the discloser's competitive conduct to form a concerted practice (assuming the other relevant conditions are fulfilled).

- 8.20 Either valuation or volume information disclosed on the day the books are due to close is very likely to be sufficient to reduce or substantially eliminate strategic uncertainty between competitors. This is because there are limited parameters on which asset managers compete during a book-building process (see paragraph 5.63) and at that late stage, as set out at paragraph 5.97, it is less likely that bids will be withdrawn or changed as the deadline approaches. In those circumstances, more reliance can be placed by a recipient on the information disclosed.
- 8.21 The FCA agrees with Artemis' submission (paragraph 8.11) that the context of the disclosure is a relevant factor in any examination of whether information is strategic. Applying that consideration here: the competitive functioning of a book-building process requires rival asset managers to determine and submit bids according to their own knowledge, expertise and requirements.³⁹⁰ A book-building process entails a short window within which asset managers can compete for shares by submitting bids. In those circumstances, one competitor disclosing the value and/or volume of its bid to another competitor on a one-off basis can substantially reduce or eliminate uncertainty between them.³⁹¹ This is possible irrespective of the size of a transaction, the position of the concerting parties in that transaction or how many bidders there are. Moreover, while the book-building process involves information flows between investors and book-builders,³⁹² disclosure of value and/or volume bid information between competitors gives them a more precise understanding of what the other intends to do than the book-building process otherwise allows.³⁹³ For this reason, such disclosures can substantially reduce or eliminate uncertainty between them.
- 8.22 Sections 11 to 15 assess whether the information disclosed in each transaction was 'strategic'.

Request for, or acceptance of, strategic information

- 8.23 The existence of a concerted practice (as defined in paragraphs 8.3 to 8.5) implies contact between actual and/or potential competitors. This contact is sometimes known as 'reciprocity'.³⁹⁴ Such contact may be in the form of an exchange of strategic information. The Horizontal Cooperation Guidelines state that exchanging information on companies' individualised intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome.³⁹⁵
- 8.24 However, exchange (i.e. the two-way flow of information) is not necessary. The Horizontal Cooperation Guidelines note that:

³⁹⁰ See Section 5, The IPO and placing process.

³⁹¹ See *T-Mobile*, paragraph 60, which discusses about market conditions when considering whether an infringement of competition law is 'by object'. See also paragraphs 6.51-6.55 below where the FCA finds that the reduction or removal of uncertainty that supports the existence of a concerted practice in this particular case should be assessed between the actual or potential competitors participating in the practice, and this does not require wider assessment of uncertainty as to the operation of the market as a whole.

³⁹² See Section 5, The IPO and placing process.

³⁹³ See judgment in *Tate & Lyle and others v Commission*, T-202/98, EU:T:2001:185 ('*Tate & Lyle*'), paragraph 60, where the General Court found that the sharing of information between competitors which had also been shared with certain customers was anticompetitive and that it allowed the participating organisations to '*become aware of that information more simply, rapidly and directly than they would via the market*'.

³⁹⁴ The FCA refers to reciprocity as 'discussions' in Section 8.

³⁹⁵ Horizontal Cooperation Guidelines, paragraph 73.

'A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can... constitute a concerted practice. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour... When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour'.³⁹⁶

8.25 The General Court has also said that:

'...the concept of concerted practice does in fact imply the existence of reciprocal contacts (Opinion of Advocate General Darmon in Woodpulp II, cited at paragraph 697 above, points 170 to 175). That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it'.³⁹⁷

8.26 The CAT, in a 2004 judgment, confirmed that a concerted practice may exist where there is one way disclosure, saying: *'The fact that only one participant reveals his future intentions or other competitive information does not exclude the possibility of a concerted practice [...]'.³⁹⁸*

Party submissions

8.27 Artemis submitted that the FCA had failed to consider 'knowledge or awareness' when seeking to establish a concerted practice. In particular, in the case of Card Factory, the individuals from Artemis and Newton (see paragraphs 7.48 to 7.67 and Annex 3) that shared information did not participate in the IPO themselves and the conduct on the market in question (in terms of placing bids for shares) was carried out by individuals that were unaware of the discussions or contacts with rival firms.³⁹⁹

8.28 Hargreave Hale said that there is no fundamental distinction between the concepts of agreement and concerted practice: *'they are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and forms in which they are manifest'.⁴⁰⁰* The notion of a concerted practice requires *'proof of a sufficiently clear and precise manifestation of a concurrence of wills between the undertakings involved'*, and there is no concerted practice (no 'knowing substitution' of practical cooperation for the risks of competition) because there is no proof of a 'concurrence of wills'.⁴⁰¹ It said mere receipt of information is insufficient for establishing reciprocity; there must be an element of a mental consensus between the parties.⁴⁰² Mere

³⁹⁶ Horizontal Cooperation Guidelines, paragraph 62.

³⁹⁷ *Cimenteries*, paragraph 1849.

³⁹⁸ *JJB Sports*, paragraph 641, confirmed by the Court of Appeal in *Argos, Littlewoods and JJB*, paragraph 21.

³⁹⁹ UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraphs 1.4-1.5, 3.3(I), 3.7-3.12; UUID 77090001, Artemis Oral Hearing Transcript e.g. lines 319-324.

⁴⁰⁰ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 3.6 quoting *Anic*, paragraph 131.

⁴⁰¹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 3.9; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.3-2.4; UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraph 2.1; quoting the judgment in *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 12 and the Court of Appeal in *Argos, Littlewoods and JJB*, paragraph 22; UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, e.g. paragraph 5.

⁴⁰² UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 1.19 and 3.24-3.36; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 243-247; UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 1.17(a).

contact between undertakings alone will be insufficient to find a concerted practice.⁴⁰³ A party who merely receives information lacks the necessary element of a 'mental consensus' or 'practical cooperation'.⁴⁰⁴ In terms of what amounts to 'acceptance' by a recipient, Hargreave Hale said that it must be a positive act⁴⁰⁵ and that there is an important distinction between the concepts of acceptance and of receipt. It said 'receive' means to get by having something given, told, or imposed and may or may not imply the consent of the recipient, whereas 'accept' means to receive willingly or favourably.⁴⁰⁶ Hargreave Hale also noted that the Court of Appeal had approached the concept of a concerted practice in terms of whether an 'invitation' to 'achieve an anti-competitive aim' was accepted.⁴⁰⁷

- 8.29 RAMAM said that the Statement of Objections failed to identify the core requirement of the Chapter I prohibition and Article 101 TFEU that two or more undertakings have mutually agreed to adopt a particular form of conduct or measure. It said a precise characterisation of the nature of the cooperation is not liable to alter the legal analysis to be carried out under Article 101. As such, the basic requirement of 'concurrence of wills' or 'consensus' applies as much to a case based on a concerted practice as to a formal or informal agreement.⁴⁰⁸

FCA findings on 'request' or 'acceptance'

- 8.30 **Mental element: to request and/or accept.** The FCA agrees that a mental element is necessary to establish a concerted practice.⁴⁰⁹ there must be 'knowing' substitution of practical cooperation between the relevant parties for the risks of competition. In the context of the concerted practices examined by the FCA in this case, the mental element is linked to the transfer of strategic information:

- a. with regard to the discloser, the FCA considers this mental element is that the disclosures were deliberate rather than inadvertent, and the disclosing undertaking had the knowledge and awareness that such disclosure might affect the competitive conduct of the recipient.
- b. with regard to the recipient, the FCA considers this mental element can be found in the request for, or acceptance of, the information disclosed (see paragraph 8.25). In both cases, the recipient had knowledge and awareness of the information disclosed, so leading to the 'knowing substitution' that is a necessary element of a concerted practice.⁴¹⁰

⁴⁰³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 1.7.

⁴⁰⁴ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 1.9.

⁴⁰⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 1.19 and 3.24-3.36.

⁴⁰⁶ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 3.17.

⁴⁰⁷ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.7, quoting the Court of Appeal in *Argos, Littlewoods and JJB*, paragraph 101.

⁴⁰⁸ UUID 66450010, RAMAM Submission on Statement of Objections, paragraphs 51-52.

⁴⁰⁹ See CAT in *Tesco v Office of Fair Trading* [2012] CAT 31 ('Tesco'), paragraphs 55-56 'It seems to us that the following observation of Lloyd LJ (with whom Chadwick and Wall LJ agreed) in *Toys and Kits* is apposite: "22. Counsel for all the Appellants submitted that many of the observations in the cases from which these propositions are drawn need to be understood in the light of the particular facts. They pointed out that it is just as essential to a concerted practice as it is to an agreement that there be a consensus between the two or more undertakings said to be parties to the agreement or concerted practice. That is true, but concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for this purpose." The above passage, in our judgement, rightly emphasises the fact-specific nature of any assessment as to whether a concerted practice exists. It also highlights the way in which the courts have refrained from seeking to define the concept of a concerted practice with a degree of precision that would artificially restrict the breadth of the concept of a 'concerted practice'. A concerted practice is a versatile concept. The task of this Tribunal is to consider whether the facts we find to be proved demonstrate that Tesco entered into a concerted practice within the meaning of the Chapter I prohibition.'

⁴¹⁰ Knowledge and awareness does not require that an agreement has been reached; lack of an agreement does not preclude a finding of a concerted practice (see *Pre-Insulated Pipe Cartel* OJ [1999] L24/1, paragraphs 133-134), nor does acceptance require acceptance of a proposed course of action. See further paragraph 13.36.

- 8.31 The FCA considers that 'request' should be given its normal meaning. The request must be for strategic information (defined in paragraphs 8.9 to 8.10), but if an undertaking requests (general or unspecified) information and receives strategic information in response, whether this amounts to a concerted practice will turn on (among other things) whether the requesting undertaking then 'accepts' that information.
- 8.32 The FCA considers 'acceptance' should also be given its normal meaning. In this case, 'acceptance' entails receipt of, and knowledge and awareness of, the disclosed information by the recipient undertaking. Acceptance may take several forms but in each case, there must be a sufficient degree of engagement by the recipient. For example, it can be shown by the recipient thanking the discloser, continuing discussion with the discloser after receipt (therefore endorsing or encouraging the disclosure), agreeing to consider the information, or providing information in return. This is consistent with the Court of Appeal's judgment in *JJB v OFT* on whether an 'invitation' to 'achieve an anti-competitive aim' was accepted.⁴¹¹ Where the parties have the respective mental element described in paragraph 8.30 then there is the 'knowing' substitution of practical cooperation for the risks of competition between them that is required to form a concerted practice. See Sections 11 to 14 regarding the conduct of Hargreave Hale, RAMAM and Newton in relation to the disclosures made to them in the context of the Market Tech and/or On the Beach book-building processes.
- 8.33 The mode of communication of acceptance does not matter. A concerted practice does not require face to face meeting, but it does require contact and this may be by any means, whether email, Bloomberg chat, or telephone conversation. While Hargreave Hale disputed that *Eturas* supports the finding of a concerted practice where there was a unilateral disclosure by email,⁴¹² the FCA considers that forms of contact other than a meeting may be sufficient to found a concerted practice.
- 8.34 The FCA notes that the facts of a case may show elements of both requesting and acceptance of strategic information and it is not necessary to go further than to show that the facts demonstrate sufficient engagement by the recipient.
- 8.35 Evidence that the recipient did not distance itself from the information, reject the information, or report its receipt to regulators or internal compliance officers can also support a finding of acceptance. In *Cimenteries* (see paragraph 8.25), the Court found a concerted practice occurred where one firm requested a single meeting and failed to express any objections when informed of a competitor's strategy in a particular market in that meeting. The *Cimenteries* view of what constitutes 'acceptance' is supported by the 'distancing' line of cases i.e. where it has been established that if an undertaking participates in a meeting of a manifestly anti-competitive nature, it is for that undertaking to adduce evidence to establish it indicated its opposition to the anti-competitive arrangement to its competitors.⁴¹³
- 8.36 **Whose knowledge and awareness?** With regard to Artemis's submissions as to who must have knowledge and awareness (see paragraph 8.27), the FCA notes that the subjects of competition law are undertakings not employees. Under competition law, an

⁴¹¹ The Court of Appeal responded to an argument raised by the parties that there was no invitation to fulfil an anti-competitive goal, borrowing the words of the Court of Justice on anticompetitive agreements in the judgment in *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, C-2/01 P and C-3/01 P, EU:C:2004:2.

⁴¹² UUIID 65220012, Hargreave Hale Submission on Statement of Objections, paragraphs 3.45-3.48.

⁴¹³ See for example, *Hüls*, paragraph 155; *Anic*, paragraph 96. In this context, Hargreave Hale said that the distancing cases deal with causation rather than acceptance, but the FCA considers that these cases do show that the Courts take into account the seriousness of competition law infringements and the need to discourage them and are willing to accept that passive behaviours are culpable (see also judgment in *Aalborg Portland A/S and others v Commission*, C-204/00 P and others, EU:C:2004:6, paragraph 84).

undertaking is liable for the conduct of its employees who are authorised to act on its behalf (see paragraphs 4.9 to 4.10).

- 8.37 For a concerted practice involving information disclosure, it is the undertaking itself that must accept the information disclosed. It may do so even where within the undertaking a particular individual receiving the information has no awareness of its source. To contend otherwise is to suggest (wrongly) that an individual recipient could distribute strategic information accepted from a competitor within his/her undertaking without revealing its source and so 'sanitise' that information for competition law purposes.⁴¹⁴ In this regard, any member of staff may accept strategic information where they are authorised to act on its behalf.
- 8.38 In Sections 11 to 14, the FCA assesses if the necessary mental element on the part of the disclosing and receiving undertaking was present in each instance.

Single occasion

Party submissions

- 8.39 Hargreave Hale said that the wider context of this legal precedent must be considered, i.e. whether a single meeting where a concerted practice was found may have taken place in the context of pre-existing cartel arrangements or the market itself was highly concentrated and oligopolistic.⁴¹⁵

FCA findings

- 8.40 The FCA does not consider that the precedent requires such circumstances (as set out at 8.39) to be present in every case. The Court of Justice has recognised that a meeting on a single occasion between competitors may, in principle, constitute a sufficient basis to find a concerted practice.⁴¹⁶ The key issue is whether there is '*knowing substitution*' of practical cooperation between the relevant parties for the risks of competition, and accordingly, if there is sufficient contact for that to occur. In the context of an IPO or placement book-building process, repeated contacts disclosing strategic information may not be necessary as a one-off disclosure of such information is sufficient to undermine the competitive uncertainty between rivals that the Chapter I prohibition and Article 101 seek to preserve.

Between two or more actual or potential competitors

- 8.41 The FCA finds (and no party disputed) that to establish a concerted practice in this case, the concerting parties must be actual or potential competitors.

⁴¹⁴ UUID 74290001, Artemis Further Submission, e.g. paragraph 3.15. Artemis said that if a firm structurally set itself up to achieve 'information cleansing' then the starting point of any defence should be stricter than if there was no such artificial structure. In the absence of such a structure, the FCA should consider whether the bids made could be influenced by the information shared where the people making bids had no idea of the information exchanged or that an exchange had taken place. The FCA disagrees: Artemis was aware of information disclosed to it even though that awareness may not have been passed to those individuals that actually bid.

⁴¹⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 3.38-3.44.

⁴¹⁶ *T-Mobile*, paragraph 59. See also the decision of the CMA in *Galvanised steel tanks for water storage information exchange infringement* ('*Galvanised Steel Tanks*'), Case CE/9691/12, paragraphs 4.7-4.8 and 4.33; *Balmoral Tanks*, paragraphs 101-106; and *Balmoral Tanks Ltd & Anor v CMA* [2019] EWCA Civ 162, paragraph 18.

Subsequent conduct on the market

8.42 The General Court has held:

*'In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market ... It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct [on the market to be expected on his part]...'*⁴¹⁷

Party submissions

8.43 Artemis said that the FCA must show that each party to the alleged infringements must have intended to contribute by their conduct to the common objectives pursued by all the participants and that each knew or was aware of the actual conduct of the other in pursuit of the same objectives, or that it reasonably could have foreseen it.⁴¹⁸

8.44 Hargreave Hale said there must be a mental consensus between the parties as to the concerted conduct.⁴¹⁹

8.45 RAMAM said there must be some form of mutuality (or meeting of minds) as to future conduct and that there was not.⁴²⁰ There was no concurrence in respect of the Market Tech or OTB transactions, in particular with regard to the disclosed bidding strategies or approaches.⁴²¹

FCA findings

8.46 The parties must remain active on the relevant market and not exit, for a concerted practice to be established in the context of an information sharing case.⁴²² The FCA considers that this requirement goes to whether or not the undertakings are competitors: should one exit the market, they would not be competitors.

8.47 In this case, as set out in Section 7 and Annexes 1 to 3, disclosures were made between asset managers before books closed in an IPO or placing process. At that time, they were directly competing for share allocations and could still make or amend bids. These disclosures afforded the relevant recipients the opportunity to take the information disclosed to them into account in determining their conduct on the market: the information reached individuals within the respective undertakings who determined and ordered bids. Such conduct might be making or revising bids, but equally it can be maintaining a pre-existing bid, in the knowledge of a competing undertaking's intentions.

⁴¹⁷ *Cimenteries*, paragraph 1852. See also *JJB Sports*, paragraph 158, in which the CAT agrees that the wording in square brackets is consistent with the French, Italian, Spanish and German versions of the judgment. The English version states: 'to expect of the other on the market' which appears to be an error. See also *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4 ('*Apex Asphalt*'), paragraph 206; *Makers UK Limited v Office of Fair Trading* [2007] CAT 11 ('*Makers*'), paragraph 103.

⁴¹⁸ UUID 65230003, Artemis Submission on Statement of Objections, paragraph 1.4.

⁴¹⁹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 3.20.

⁴²⁰ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 12, 27(a)-(g) and 55-56; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1313-1321.

⁴²¹ UUID 66450010, RAMAM Submission on Statement of Objections, paragraphs 55(b) and 56(b).

⁴²² See the CAT in *Tesco*, paragraph 277, which sets out that the presumption of a relationship of cause and effect between the discussions and the subsequent conduct can be rebutted, by among other things, the undertaking exiting the market immediately after a communication and is no longer active on the market.

- 8.48 Accordingly, there is no need to demonstrate change in behaviour following the disclosure and requesting or acceptance of strategic information (as long as the undertaking remains on the market). In particular, the FCA need not show that the recipient accepted the disclosed course of conduct (for instance to bid at a specific price), as opposed to accepting the strategic information. Maintaining unaltered a bid already submitted is sufficient to remain active on the market. Any additional behaviour, such as accepting a disclosed course of conduct, may transform one form of infringement such as a concerted practice (which reduces strategic uncertainty) into another (such as aligned conduct on the market, for instance price fixing).
- 8.49 In light of *Cimenteries*, the FCA considers that disclosure of competitive intentions can amount to a concerted practice even where the recipient undertaking does not commit to the disclosed strategy or where the disclosures do not set out a complete or precise strategy. For the mental element to be established, in the context of this case, that one undertaking accepted the information from another will be sufficient to establish a concerted practice (where its other constituent elements are present).

A relationship of cause and effect between the discussions and that conduct

The presumption of causation

- 8.50 The Court of Justice has held that:

'[T]he concept of a concerted practice [...] implies, besides undertakings' concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two.

However, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. That is all the more true where the undertakings concert together on a regular basis over a long period...'⁴²³

'...it was for Hüls to prove that [the concertation] did not have any influence whatsoever on its own conduct on the market.'⁴²⁴

- 8.51 In the UK, the CAT has explained this presumption as follows:

'Even where participation in a meeting is limited to the mere receipt of information about the future conduct of a competitor, the law presumes that the recipient of the information cannot fail to take that information into account when determining its own future policy on the market...'⁴²⁵

⁴²³ *Hüls*, paragraphs 161-162. See also *Anic*, paragraph 121; *Icap*, paragraphs 56-57 and the case law cited.

⁴²⁴ *Hüls*, paragraph 167.

⁴²⁵ *JJB Sports*, paragraph 873. Since *JJB Sports*, the CAT has consistently cited the wording from *Hüls* and *Anic*, see for example *Apex Asphalt*, paragraph 206; *Makers*, paragraph 103; *Tesco*, paragraph 49; *Balmoral Tanks*, paragraphs 40 and 46. Against this background, the FCA uses the formulation of the presumption as established in *Hüls/Anic*, albeit it considers that *JJB Sports* is equally applicable, particularly as it refers to receipt of information rather than exchange.

Party submissions

- 8.52 Artemis said that the presumption did not apply to the conduct in which it participated. The rationale for the presumption is that an undertaking cannot fail to take into account strategic information disclosed by a competitor once it is aware of it. However, this assumes that those persons in receipt of this information are in a position to take that information into account in determining the subsequent conduct of the undertaking. It said the presumption does not automatically apply where there is no pricing change and the FCA overstated the application of the presumption where there is no subsequent conduct on the market. The presumption cannot apply if there is evidence to the contrary and there was as seen from the FCA interviews.⁴²⁶
- 8.53 Hargreave Hale said the presumption only applied if there was a concerted practice to begin with,⁴²⁷ that it was not justified unless influence is highly probable (and that was not the case here)⁴²⁸ and unless there is an exchange of information.⁴²⁹ It was inappropriate to apply the presumption to a single disclosure: the presumption is more compelling where there is regular concertation over a long period.⁴³⁰ It also stated that a firm must be active on the market for the presumption to apply but a non-bid is not "activity".⁴³¹ The presumption only applies when a bid does not change where three particular criteria are present: (i) information was received at the time when the undertaking was determining its conduct on the market; (ii) it was actually considered by that undertaking in determining its conduct and (iii) the policy decided on by the undertaking was in line with the object of the concertation.⁴³²
- 8.54 RAMAM said that the presumption does not apply as there was no consensus to begin with between the relevant individuals.⁴³³

FCA findings

- 8.55 As set out at paragraphs 8.46 to 8.47, as long as undertakings remain active on the market, there is no need for a subsequent change in bidding behaviour, in addition to the disclosure and requesting or acceptance of the strategic information. In *Galvanised Steel Tanks* for example, the CMA applied the presumption where parties to the information exchange remained active in the market, even where one of the parties argued that it priced independently subsequent to that exchange.⁴³⁴ The FCA therefore disagrees with the parties that the application of the presumption is not appropriate in this case.
- 8.56 While the presumption might be '*all the more true*' (see paragraph 8.50) where undertakings concert on a regular basis over a long period,⁴³⁵ it has been applied unmodified where concerted action is a result of a single meeting.⁴³⁶ The FCA considers that the number of contacts between parties is not decisive nor is it a pre-requisite for there to be an exchange of information. Rather, the key issue is whether the contact was

⁴²⁶ UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraphs 3.13-3.16; UUID 77090001, Artemis Oral Hearing Transcript, e.g. lines 700-725.

⁴²⁷ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 3.59-3.63; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 450-451.

⁴²⁸ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 3.52-3.58.

⁴²⁹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 3.59.

⁴³⁰ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 1.48, 3.59-3.83, 4.59 and 5.65(a); UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 452-458.

⁴³¹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 3.79-3.83.

⁴³² UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 3.84-3.92.

⁴³³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 58.

⁴³⁴ *Galvanised Steel Tanks*, paragraphs 4.29 and 4.32-4.34. In the event, the CMA said that there was not sufficient evidence to show that the party concerned did not use or take the information provided into account when deciding its conduct on the market.

⁴³⁵ See *T-Mobile*, paragraph 58; see also in *Balmoral Tanks*, paragraphs 46 and 120.

⁴³⁶ *T-Mobile*, paragraphs 59-62.

sufficient for one party to receive another party's strategic information, in circumstances where the receiving party could take the information into account to determine its own conduct on the market. This can amount to the knowing substitution of practical cooperation between the parties for the risks of competition that characterises a concerted practice.⁴³⁷ In the context of a short price formation process, information sharing in relation to key parameters of competition (i.e., valuation and/or volume) can be enough to eliminate or substantially reduce strategic uncertainty between otherwise competing undertakings (see Sections 11 to 14).

- 8.57 The FCA therefore can presume that an undertaking takes account of information disclosed by its competitor(s) for the purposes of determining its conduct on the market, provided that the recipient undertaking remains active on the market. In 2017, the CAT confirmed that *'[t]he strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all'*.⁴³⁸ The FCA finds the same principles apply to this case, and cannot think of any legitimate reason why one asset manager should disclose strategic information to another and that other should accept such information during an IPO or placing book-build.
- 8.58 Finally, to address Artemis' point about applicability of the presumption where contrary evidence exists, the FCA accepts the point in principle (i.e. that a presumption can be rebutted) and considers for each concerted practice if there is sufficient evidence to rebut the presumption. (See paragraph 8.64 and Sections 11 to 14).

Rebutting the presumption

Party submissions

- 8.59 Artemis submitted that the presumption may be strong or weak depending on the facts and the same is true for the rebuttal – in this case the presumption is weak and so evidence needed to rebut should be weak as well.
- 8.60 In the context of rebutting the causal connection presumption, Artemis said contemporaneous evidence is not the only evidence capable of such rebuttal. Witness evidence can be considered in rebutting the presumption. It submitted that the evidence required to rebut the presumption is not restricted to that showing the undertaking 'closed its mind'. Rebuttal evidence must be considered on a balance of probabilities and ambiguity must be resolved in favour of the undertaking. It said that where the evidence suits the FCA's case, the FCA considers it compelling otherwise that evidence had been dismissed.⁴³⁹
- 8.61 Hargreave Hale said that the standard applied by the FCA of 'no influence whatsoever' (see paragraph 8.64) was only applicable in the context of anticompetitive cartel meetings, and that the test to rebut the presumption in this context is that the firm *'must have not subscribed to [the] initiatives'*.⁴⁴⁰ *Eturas* means that if a firm does not follow the plan of what was being discussed, then in those circumstances and particularly in cases such as

⁴³⁷ See *T-Mobile*, paragraph 61: *'In those circumstances, what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question'*.

⁴³⁸ *Balmoral Tanks*, paragraph 41.

⁴³⁹ UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraphs 3.17-3.25; UUID 77090001, Artemis Oral Hearing Transcript, lines 1132-1143, 1148-1152, 1194, 1237-38 and 1387-1388.

⁴⁴⁰ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.37.

this which do not involve a meeting, the presumption can be rebutted. Put another way, the presumption can be rebutted where an undertaking demonstrates that it has made an *'independent entrepreneurial decision'*.⁴⁴¹ A requirement to provide irrefutable evidence is contrary to the presumption of innocence⁴⁴² and the FCA was wrong when it assessed the quality of evidence required to rebut the presumption.⁴⁴³

8.62 RAMAM said the presumption, if it applies, can be rebutted on the facts.⁴⁴⁴

FCA findings

8.63 The FCA does not accept Hargreave Hale's submission that the presumption can be rebutted by a firm *'not subscribing to the initiatives'*. The Court made this reference in response to a claim by *Hüls* that it had not subscribed to the initiatives. The Court noted that evidence had not been provided – not that this was the test.⁴⁴⁵

8.64 In particular, *Hüls* is clear that a party must prove *'to the contrary'* that it did not take account of the information received and that the *'concertation did not have any influence whatsoever on its own conduct on the market'*.⁴⁴⁶ This test is equally applicable in cases which do not involve a cartel meeting; the law makes no distinction between meetings and other communications.⁴⁴⁷ The burden is on the parties concerned to adduce this evidence.

8.65 The presumption is therefore rebuttable, albeit that the case law has acknowledged the strictness of the law in this regard.⁴⁴⁸ If a party successfully demonstrates that an independent decision has been made (as suggested by Hargreave Hale), then there is no cause and effect and no concerted practice. Examples of how the presumption can be rebutted include: the recipient distancing itself⁴⁴⁹ and rejecting the receipt of information, and reporting the receipt of the information to regulators or internal compliance. Silence is not enough.⁴⁵⁰

8.66 The FCA also considers the presumption can also be rebutted by contemporaneous evidence that the undertaking made an independent decision disregarding entirely the disclosed information. To address Artemis' point about the evidence required, the FCA notes that the General Court has rejected arguments in relation to the presumption being rebutted, referring to the lack of *'concrete, objective evidence'*⁴⁵¹ and *'specific and objective evidence'*.⁴⁵² The FCA has considered each instance on its merits and weighed up all the evidence available to it, including witness statements. It believes that an individual's own description of the pricing process, created after the fact for the purpose

⁴⁴¹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 1.49, 3.93-3.98, 4.61-4.69 and 5.70-5.72; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 484-488, 1119-1125, 1301-1304, 1829-1836, 1957-1958 and 2498; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.38.

⁴⁴² UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 3.99-3.110, quoting from the Dutch Trade and Industry Appeals Tribunal decision of 12 August 2010 in *T-Mobile*; UUID 77120003, Hargreave Hale Oral Hearing Transcript, alluded to at lines 1826-1828.

⁴⁴³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 3.111-3.117.

⁴⁴⁴ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 58-61.

⁴⁴⁵ *Hüls*, paragraph 174.

⁴⁴⁶ *Hüls*, paragraph 167.

⁴⁴⁷ See for example judgment in *Dole v Commission*, C-286/13 P, EU:C:2015:184 (*'Court of Justice in Bananas'*), paragraph 127: the test is applied to communications that took place through bilateral phone calls.

⁴⁴⁸ Judgment in *Solvay v Commission*, C-455/11 P, EU:C:2013:796, paragraph 43; judgment in *Solvay v Commission*, C-449/11 P, EU:C:2013:802, paragraph 38: *'it is for the undertaking concerned to prove that the concerted action did not have any influence whatsoever on its own conduct on the market. [...] The proof to the contrary must therefore be such as to rule out any link between the concerted action and the determination, by that undertaking, of its conduct on the market'*.

⁴⁴⁹ Judgment in *YKK Corp v Commission*, T 448/07, EU:T:2012:322, (*'YKK'*), paragraphs 113-117. See also footnote 413.

⁴⁵⁰ *YKK*, paragraph 116.

⁴⁵¹ Judgment in *Fresh Del Monte Produce v Commission*, T-587/08, EU:T:2013:129, paragraph 577.

⁴⁵² Judgment in *Dole v Commission*, T-588/08, EU:T:2013:130 (*'Bananas'*), paragraph 457. The judgment was upheld in *Court of Justice in Bananas*, paragraphs 127-133.

of a later FCA investigation is unlikely to amount to the 'objective evidence' necessary to rebut the presumption (in the absence of other evidence).⁴⁵³

Summary of the elements comprising a concerted practice

- 8.67 To summarise, to establish a concerted practice in the context of the sharing of information, the FCA's approach applying the applicable law, requires:
- a. 'discussions' involving disclosure of strategic information, which is information that eliminates or substantially reduces strategic uncertainty as to a competitor's conduct on the market. Discussion includes where one competitor discloses strategic information to another and the latter has requested it or accepts it;
 - b. between two or more actual or potential competitors;
 - c. subsequent conduct on the market; and
 - d. a relationship of cause and effect between the discussions and that conduct.
- 8.68 The application of the legal principles above depends on the factual circumstances of any given case. The FCA has applied these to the present case in Sections 11 to 15. In this context, the FCA notes that in most cases, the existence of a concerted practice or an agreement must be inferred from a number of facts and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.⁴⁵⁴

⁴⁵³ See judgment in *CISAC v Commission*, T-442/08, EU:T:2013:188 ('*Cisac*'), paragraph 99 and the case law cited; *Makers*, paragraphs 53(b) and 85.

⁴⁵⁴ Judgment in *Eturas UAB and others*, C-74/14, EU:C:2016:42 ('*Eturas*'), paragraph 36.

9 Object of preventing, restricting or distorting competition

Introduction

- 9.1 The Chapter I prohibition and Article 101 TFEU prohibit concerted practices which have as their object or effect the prevention, restriction or distortion of competition.
- 9.2 'Object' infringements are those forms of coordination between undertakings that are regarded, by their very nature, as being harmful to the proper functioning of normal competition. The essential legal criterion for a finding of anti-competitive object is that the coordination between undertakings '*reveals in itself a sufficient degree of harm to competition*' such that there is no need to examine its effects.⁴⁵⁵ The term 'object' refers to the sense of 'aim', 'purpose' or 'objective' of the coordination between undertakings in question.⁴⁵⁶
- 9.3 To determine whether a concerted practice has the object of restricting competition, regard must be had to the content of its provisions, its objectives and the legal and economic context.⁴⁵⁷ When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁴⁵⁸
- 9.4 Anti-competitive subjective intentions on the part of the parties can provide good evidence that there is an anti-competitive object, but they are not necessary for such a finding.⁴⁵⁹ A concerted practice can restrict competition by object even if the parties to it can show that restricting competition was not their aim, or they had other laudable motives.⁴⁶⁰
- 9.5 The CAT considered the meaning of 'by object' in its *Paroxetine* judgment:

'Restriction by 'object' therefore focusses on determining the potential effect of the agreement, having regard to its nature and its context, rather than on establishing on the facts what are, or were, its likely effects. That is why a horizontal price-fixing agreement remains a restriction 'by object' even if the parties can show that it was never observed and had no actual effect in increasing prices. Of course, that potential must be realistic and not fanciful and it must be clear that the potential effects would materially harm

⁴⁵⁵ Judgment in *Groupement des Cartes Bancaires v Commission*, C-67/13 P, EU:C:2014:2204 ('*Cartes Bancaires*'), paragraphs 49 and 57.

⁴⁵⁶ See, for example, respectively: judgments in *Consten and Grundig v Commission*, C-56/64, EU:C:1966:41, page 343 ('*Since the agreement thus aims at isolating the French market [...] it is therefore such as to distort competition...*'); *IAZ and others v Commission*, C-96/82, EU:C:1983:310, paragraph 25; *Competition Authority v Beef Industry Development Society Ltd* C-209/07, EU:C:2008:643 ('*BIDS*'), paragraphs 32-33.

⁴⁵⁷ *Court of Justice in Bananas*, paragraph 117; *Cartes Bancaires*, paragraph 53; judgment in *Allianz Hungária Biztosító Zrt and others*, C-32/11, EU:C:2013:160 ('*Allianz*'), paragraph 36 and the case law cited. See also judgments in *Philips v Commission*, C-98/17 P, EU:C:2018:774 ('*Philips*'), paragraphs 34-35; *Infineon v Commission* C-99/17 P, EU:C:2018:773 ('*Infineon*'), paragraphs 155-156.

⁴⁵⁸ *Cartes Bancaires*, paragraph 53; *Allianz*, paragraph 36; followed in the judgment in *Lundbeck A/S v Commission*, T-472/13, EU:T:2016:449 ('*Lundbeck*'), paragraph 343.

⁴⁵⁹ *Allianz*, paragraph 37; *Cartes Bancaires*, paragraph 54.

⁴⁶⁰ *IAZ and others v Commission*, C-96/82, EU:C:1983:310.

*competition. The assessment may, therefore, involve some consideration of potential effect in the overall market context...*⁴⁶¹

- 9.6 The European Courts, the Commission and the CMA have held on numerous occasions that agreements or concerted practices that involve the sharing between competitors of pricing or other information of commercial or strategic significance, or both, can restrict competition by object.⁴⁶² For example, in *Tate & Lyle*, the General Court held that an exchange of information regarding future pricing allowed the parties to ‘*create a climate of mutual certainty as to their future pricing policies*’ and amounted to a restriction of Article 101 TFEU by object.⁴⁶³
- 9.7 This was also confirmed by the Court of Justice in *Bananas*. In that case, the parties had not exchanged actual prices, but information regarding price setting factors, price trends and/or indications of quotation prices. According to the Court of Justice, this ‘*...made it possible to reduce uncertainty for each of the participants as to the foreseeable conduct of competitors [...] and therefore gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article [101]*’.⁴⁶⁴
- 9.8 In *ICAP*, the General Court held:
- ‘In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object.’*⁴⁶⁵
- 9.9 According to the Horizontal Cooperation Guidelines, ‘*[s]haring of strategic data can give rise to restrictive effects on competition because it reduces the parties’ decision-making independence by decreasing their incentives to compete.*’⁴⁶⁶ The Horizontal Cooperation Guidelines also state that information related to prices (and quantities) is generally the most strategic of information.⁴⁶⁷ The Horizontal Cooperation Guidelines also note that information exchanges between competitors of individualised data regarding intended future prices should be considered a restriction of competition by object.⁴⁶⁸

Party submissions

Artemis

- 9.10 Artemis said that the Statement of Objections relied on legal precedent without considering this case on its specific facts and in its legal and economic context (including the real conditions of the functioning and structure of the market). The FCA should specifically

⁴⁶¹ *GlaxoSmithKline and others v CMA* [2018] CAT 4, paragraph 170.

⁴⁶² The FCA notes that Artemis said the FCA must consider each case in context and on the facts in determining whether it is by object rather than relying on previous findings (UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraph 3.37.3).

⁴⁶³ *Tate & Lyle*, paragraphs 58 and 60. See also judgment in *Rhône-Poulenc SA v Commission*, T-1/89, EU:T:1991:56, paragraphs 122-124.

⁴⁶⁴ *Court of Justice in Bananas*, paragraph 134.

⁴⁶⁵ *ICAP*, paragraph 52 and the case law cited. See also *Galvanised Steel Tanks* in which the CMA held that the exchange of information reduced uncertainty as regards the pricing to be adopted by the parties involved and thereby had the object of restricting competition. Similarly, in *T-Mobile*, the Court of Justice confirmed that ‘*what matters is [...] whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question. This will depend on the subject matter of the concerted action and the particular market conditions.*’

⁴⁶⁶ Horizontal Cooperation Guidelines, paragraph 86.

⁴⁶⁷ Horizontal Cooperation Guidelines, paragraph 86.

⁴⁶⁸ Horizontal Cooperation Guidelines, paragraph 74.

consider case law more recent than the Horizontal Cooperation Guidelines.⁴⁶⁹ The FCA should have considered if other circumstances justified the finding that an agreement is not liable to impair competition.⁴⁷⁰

Hargreave Hale

- 9.11 Hargreave Hale said that the test for a restriction of competition by object requires an exchange of information (rather than unilateral disclosure) between competitors which '*reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted*' (rather than the reduction or removal of uncertainty as to what one party may claim to be doing).⁴⁷¹
- 9.12 Hargreave Hale said that a concerted practice can have only one object, and it is the object of the concerted practice that is of central importance, and not the "objects" (or intentions) of the parties to the alleged concentration. In the absence of a single common object, there can be no concerted practice in the first place, as there will be no consensus between separate undertakings.⁴⁷²
- 9.13 Hargreave Hale said in light of a proper understanding of the applicable legal framework and the relevant facts, no agreement or concerted practice existed and so it was unnecessary to consider whether the disclosures had an anti-competitive object or effect. It said that even if the disclosures did somehow amount to concerted practices, any such concerted practices did not have an anti-competitive object.⁴⁷³
- 9.14 Hargreave Hale said a contextual analysis was required and market structure and context is particularly important in relation to information exchange.⁴⁷⁴ It said that the Horizontal Cooperation Guidelines recognise that exchanges of information in fragmented markets are unlikely to have restrictive effects on competition, and that the fact that the case law and relevant guidance recognise that the effects on competition of the exchange of information between competitors in fragmented markets may be neutral or even positive.⁴⁷⁵ It noted, for example, that the exceptional cases where unilateral disclosure had been assessed as object infringement, involved, among other things, isolated disclosure in meetings in highly oligopolistic markets. In the present circumstances, its involvement was too small and the market too large for the information disclosed to have reduced market uncertainty, restrict competition or make '*any difference*'.⁴⁷⁶
- 9.15 Hargreave Hale said that, following the judgment in *Cartes Bancaires*, there can be no object infringement in circumstances where the conduct in question might have had the opposite effect.⁴⁷⁷ It said that, in this market, the FCA should not carry out an object assessment because each transaction is different, for example some may be oversubscribed. The FCA should therefore assess whether there are anticompetitive effects in each case rather than presuming that all cases restrict competition by object.⁴⁷⁸

⁴⁶⁹ UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraphs 3.27.3 and 3.27.5.

⁴⁷⁰ UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraph 3.27.4.

⁴⁷¹ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraphs 2.4(a) and 2.11, quoting *T-Mobile*, paragraph 35; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.20.

⁴⁷² UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 3.1 and 3.6.

⁴⁷³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 3.118; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 3.7 and 3.18.

⁴⁷⁴ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraphs 3.121-3.122. See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 2.4(a)(ii).

⁴⁷⁵ UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 5.7-5.10.

⁴⁷⁶ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 4.74 (Market Tech) and 5.112 (OTB). See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 1.17(c).

⁴⁷⁷ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 1.11 and 3.16.

⁴⁷⁸ UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 2050-2090.

- 9.16 Hargreave Hale added that, in assessing whether the conduct was reasonably likely to harm competition, the FCA should examine the findings in *Streetmap v Google* (which concerned the possibility of anti-competitive foreclosure):⁴⁷⁹

*'In determining that question [whether the conduct was reasonably likely to harm competition], the court will take into account, as a very relevant consideration, evidence as to what the actual effect of the conduct has been.'*⁴⁸⁰

- 9.17 Finally, Hargreave Hale said that the FSMA Documents acknowledge that the conduct giving rise to the infringements was novel and the misconduct and harm were not obvious. It was reasonable for Newton and other market participants not to have realised that there was any misconduct. It was not reasonable or appropriate for the FCA to characterise Hargreave Hale's receipt of unsolicited information from Newton as an object restriction. Hargreave Hale said that this was particularly the case given the judgment in *Cartes Bancaires* which warned against interpreting the concept of a restriction of competition by object restrictively.⁴⁸¹

RAMAM

- 9.18 RAMAM said that the legal precedents on which the FCA relied did not support the application of the concept of a 'by object' restriction to the strikingly different facts of the present case.⁴⁸² It is only in exceptional circumstances and not in every case that a single supply of future purchase information could be sufficiently flagrant to reveal '*in itself a sufficient degree of harm to competition*' to constitute an infringement of competition law by object.⁴⁸³
- 9.19 RAMAM noted that the facts of this case did not lend themselves to an 'object' analysis. It said the information disclosed arose in the midst of a mass of other information received by both brokers and asset managers. It was disclosed to relatively small market participants without any evidence that they enjoyed market power as against brokers and existing market holders. The information was too uncertain and incomplete to have influenced market competition.⁴⁸⁴ RAMAM considered that the FCA should carry out an effects-based analysis: information sharing between asset managers may not influence the price in a 'hot' IPO and may give rise to benefits in a 'cold' IPO.⁴⁸⁵ RAMAM added that the facts of this case would not support any finding of adverse effects on any relevant market.⁴⁸⁶
- 9.20 RAMAM said that asset managers should be regarded as purchasers of assets, not suppliers of equity capital,⁴⁸⁷ and that coordinated conduct between purchasers raises distinct legal

⁴⁷⁹ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.13.

⁴⁸⁰ *Streetmap.EU Ltd v Google Inc* [2016] EWHC 253 (Ch), paragraph 90.

⁴⁸¹ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 3.27-3.29. See also UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraphs 3.1-3.2.

⁴⁸² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 14 and 66-80. More broadly, RAMAM said that regulatory action would be more appropriate than competition enforcement action in this novel case (UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 152-169, 594-607, 1926-1934 and 1989-2017; UUID 71940003, RAMAM Further Submission, e.g. Section 2; UUID 127350001, RAMAM First Submission on FSMA Documents.

⁴⁸³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 16 and 66-80.

⁴⁸⁴ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 77-78.

⁴⁸⁵ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 16, 70-71 and 78 (quoting the Opinion of AG Wahl in *Cartes Bancaires*, Case C-67/13 P, EU:C:2014:1958, paragraph 56); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 580-593 and 1219-1293; UUID 84280027, RAMAM Submission on First Letter of Facts.

⁴⁸⁶ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 80; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1920-1925 and 1935-1941; UUID 84280027, RAMAM Submission on First Letter of Facts, e.g. paragraph 2.3.1.2.

⁴⁸⁷ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 9-11. RAMAM said that this was supported by the FSMA Documents: see UUID 127350001, RAMAM First Submission on FSMA Documents.

and economic issues from coordination between suppliers.⁴⁸⁸ An assessment of whether a joint purchasing concerted practice has the object of restricting competition requires a careful market analysis to determine whether it is capable of distorting competition and the FCA did not carry out such an analysis:

- a. joint purchasing concerted practices only raise competition law concerns where the purchasers enjoy significant market power on the upstream and/or downstream market, neither of which is alleged and evidenced in this case.⁴⁸⁹ It is unrealistic to suppose that one-off information exchanges on a single transaction involving only two purchasers without any proven market power could be capable of distorting competition on any relevant market. The Horizontal Cooperation Guidelines confirm that a joint purchasing concerted practices are '*less likely to give rise to competition concerns when the parties do not have market power on the selling market or markets*' and that market shares of below 15% on the purchasing and selling markets (which is unlikely to be met by the relevant parties in this case) are unlikely to give rise to effects on competition;⁴⁹⁰
- b. a balance should to be drawn between immediate benefits to downstream consumers and possible longer-term effects on investment incentives. RAMAM noted in this context the risk that information provided to investors by the sell-side broker will be exaggerated and inaccurate;⁴⁹¹ and
- c. it is also necessary to consider the ability of the sell-side to switch away from the purchasers concerned, should it be offered an unattractive price.⁴⁹²

FCA findings

- 9.21 The FCA agrees that it must establish that the practices at issue were, on account of their object, capable of altering the proper functioning of competition, in view of the specific legal and economic context of which they were part.⁴⁹³ It assesses the principle below, and in relation to the particular facts of each disclosure in Sections 11 to 14.

Object of the practice

- 9.22 The FCA does not accept Hargreave Hale's submission in paragraph 9.12 that a concerted practice can have only one common object. The case law is clear that a concerted practice may be regarded as having a restrictive object even if it has other aims.⁴⁹⁴ The FCA also does not agree that the object of a concerted practice is determined only by reference to the consensus reached between the parties; the 'object' is determined objectively, although the anti-competitive subjective intentions on the part of the parties can provide good evidence of this object (as set out in paragraphs 9.3 to 9.4).

⁴⁸⁸ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 42 and 63; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1050-1063; UUID 71940003, RAMAM Further Submission, e.g. paragraph 1.1.1.

⁴⁸⁹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 42(c).

⁴⁹⁰ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 43-44 and 48-49; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 797-816 and 1382-1394; UUID 66450014, RAMAM Equity Issuance Note; UUID 66450013, RAMAM Cornerstone Submission, e.g. paragraphs 6 and 45-46.

⁴⁹¹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 42(d).

⁴⁹² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 42(a)-(b); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1106-1187.

⁴⁹³ Judgment in *Philips v Commission*, T-762/14, EU:T:2016:738, paragraph 68. See also *Balmoral Tanks*, e.g. paragraphs 85, 100, 101-103 and 105. See also *Balmoral Tanks Ltd & Anor v CMA* [2019] EWCA Civ 162, paragraphs 34-36.

⁴⁹⁴ Judgment in *General Motors BV v Commission*, C-551/03 P, EU:C:2006:229, paragraph 64.

The potential harm of the practice

- 9.23 The FCA finds that asset managers compete during a book-building process, by submitting rival bids to the book-builder. The competitive outcome of a book-building process depends on there being strategic uncertainty between rival asset managers (as set out in paragraphs 5.73 to 5.83). That strategic uncertainty is eliminated or substantially reduced where one asset manager discloses strategic information to another in the book-build (see paragraphs 8.9 to 8.22). If this uncertainty is eliminated or substantially reduced, that outcome can be altered.
- 9.24 As set out in Section 5, a concerted practice via disclosure and acceptance of strategic information between otherwise rival asset managers during a book-building process can lead to:
- a. asset managers placing lower bids than they might otherwise have placed;
 - b. the issuing company and book-builder achieving a lower strike price and by implication a higher cost of capital for the issuing company;
 - c. an asset manager free-riding on the discloser's expertise or research, with it failing to undertake the research or analysis that it otherwise would have done. This means that any bid it subsequently makes is less informative to the book-builder than it appears to be, and deprives the book-builder of a further source of information;
 - d. the free-riding asset manager receiving an unjustified allocation of shares, if it puts in a limit bid when its own knowledge and expertise would only have justified a strike bid;
 - e. a failed book-building process. If investors share information which leads to lower bids and significantly reduces the expected strike price, the issuing company may decide to reduce significantly the size of the issuance or call off the issuance altogether. This in turn would mean that the issuer raises a significantly smaller amount of capital or does not raise any capital at all, undermining the efficient allocation of capital; and
 - f. where the cost of equity capital rises because bids are lower as a result of anti-competitive conduct, the cost of related investments rises or those investments become unviable. This could reduce the attractiveness of coming to market as a way of raising capital, affect the allocation of capital and reduce entrepreneurs' incentives to build companies with a view to listing them. It can also undermine the credibility of the book-building process as a way to raise capital for companies.
- 9.25 The potential for these effects exists irrespective of:
- a. information flows that already exist in the book-building process between asset managers and book-builders. As set out in Section 5, the issuing company has an incentive (within the bounds of applicable regulation) to reduce the information asymmetries that exist particularly in IPOs, but also in placings, by revealing information to the asset managers through the book-builder. Therefore, normal book-building processes allow (and require) some information flows between the book-builder and the asset manager. However, for book-building processes to work effectively, the asset managers must not disclose and accept strategic information relating to their bidding intentions to and from each other. The disclosure of strategic information by one asset manager to another harms the effective operation of the

book-building process and is contrary to the interests of the issuing company (see also paragraphs 5.73 to 5.83);

- b. the size and concentration of the market. As a matter of law (contrary to Hargreave Hale's submissions, see paragraph 9.14), information sharing is not only an object infringement in highly concentrated oligopolistic markets.⁴⁹⁵ What matters in an IPO/placing process is that uncertainty between rival asset managers is eliminated or substantially reduced, rather than uncertainty across the market as whole.⁴⁹⁶ The FCA notes that in some cases a wider market context has been considered to determine whether uncertainty has been reduced for the purposes of establishing a concerted practice.⁴⁹⁷ However, as the CAT noted in *Balmoral Tanks*:

'The European Courts have emphasised that one key aspect of the concept of a concerted practice is that in a properly functioning competitive market, competitors should not know how their competitors are likely to behave. A reduction in that uncertainty is a key part of the concept of a concerted practice'.⁴⁹⁸

- c. Further, as set out at paragraphs 5.74 and 5.75, any one bid has the potential in and of itself to affect the outcome of the book-building, by for example lowering the strike price. Whether any particular bid has such an effect cannot be known with certainty in advance. The book-builder collects individual bids from asset managers, seeking to generate demand at favourable price-points. The importance of any one bid only becomes apparent once the book closes, and so what coverage there is at different price points. Accordingly, competition law requires that every bid is made independently of the strategic information of a rival.
- d. the fact that a disclosure is just one piece of information available to a purchaser. The nature of the book-building process means that for a specific transaction, a single disclosure of bid information by one asset manager to another at the right moment is sufficient to remove strategic uncertainty between them. Such otherwise rival firm could adjust its own bid, not adjust a bid it would otherwise have adjusted, or maintain its pre-existing bid with increased confidence regarding the conduct of a competitor, with a potential adverse impact on the final share price.
- e. the fact that there might be alternative sources of capital available to the company (see paragraph 9.20(c)). Companies should not be compelled to switch to less good substitutes in other markets by anticompetitive conduct during a book-build.

9.26 To summarise: book-building processes aim to ensure rival asset managers independently place competing bids, in order to reveal the competitive cost of capital for the issuing company. The process cannot do that if asset managers share strategic information (in particular their bidding conduct or intentions) during the book-build process – i.e. if they do not compete when submitting bids.

9.27 Accordingly, the FCA finds that a concerted practice via disclosure and acceptance of strategic information between otherwise rival asset managers during a book-building process is, by its very nature, harmful to the proper functioning of normal competition,

⁴⁹⁵ Judgment in *Thyssen Stahl AG v Commission*, C-194/99 P, EU:C:2003:527, paragraphs 86-87.

⁴⁹⁶ See *T-Mobile*, paragraph 43: 'An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings'.

⁴⁹⁷ For example, in *Galvanised Steel Tanks*, the CMA found that pre-existing cartel arrangements on the market meant that competition was already limited such that an exchange of information about the prices the parties were charging and pricing bands they would charge in the future was clearly capable of reducing uncertainty about their future pricing; see *Galvanised Steel Tanks*, paragraph 4.17.

⁴⁹⁸ *Balmoral Tanks*, paragraph 39. See also *Balmoral Tanks Ltd & Anor v CMA* [2019] EWCA Civ 162, paragraphs 37-39.

and *'reveals in itself a sufficient degree of harm to competition'* such that there is no need to examine its effects and consider whether the facts of this case would support any finding of adverse effects on any relevant market.⁴⁹⁹ It has had regard to the content of its provisions, its objectives and the legal and economic context,⁵⁰⁰ and taken into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. It finds that the potential for harm from such a concerted practice is realistic and not fanciful and it is clear that the potential effects would materially harm competition (paragraph 9.5).

Novelty

- 9.28 The FCA does not accept Hargreave Hale's submission (see paragraph 9.17) that the infringements are novel and that the misconduct and harm were therefore not obvious. Whereas the FSMA Notices state that the FCA *'has not previously taken Enforcement action in relation to this type of breach connected to an IPO or placing'*,⁵⁰¹ the FCA does not consider that the conduct is novel under the Act for the reasons set out in paragraph 17.21 (see also paragraph 10.19 which sets out the FCA's view on the probative value of FSMA Notices more generally).

Supplier or customer

- 9.29 The FCA has considered RAMAM's submissions that the market should not be regarded as the supply of equity capital to issuing companies (paragraph 9.20). While the FCA considers that asset managers should be seen as suppliers rather than customers (paragraphs 6.10 to 6.14), even were RAMAM correct, it considers the concerted practices would still have the object of preventing, restricting or distorting competition:
- a. The Chapter I prohibition and Article 101 TFEU do not differentiate between buyers and sellers and refer *'in particular'* to agreements and concerted practices which *'directly or indirectly fix purchase or selling prices or any other trading conditions'*.
 - b. Joint purchasing arrangements can, as a matter of law, give rise to a restriction of competition by object.⁵⁰² This is recognised by the Horizontal Cooperation Guidelines.⁵⁰³ This is also clear in the comments of Commissioner Vestager following the recycled car battery decision:⁵⁰⁴

'All cartels undermine competition, and make our markets work less well. That happens no matter whether they fix selling prices or purchase prices. Today's fines send out a clear message that we will not tolerate cartels or anticompetitive behaviour that could damage the circular economy...'
 - c. The Horizontal Cooperation Guidelines state that joint purchasing arrangements *'usually aim at the creation of buying power which can lead to lower prices or better quality products or services for consumers'*.⁵⁰⁵ The FCA's view is that the aim of the concerted practice was to restrict competition between asset managers and depress the strike price produced by the book-building process. While this may benefit the

⁴⁹⁹ *Cartes Bancaires*, paragraphs 49 and 57.

⁵⁰⁰ See paragraph 9.3.

⁵⁰¹ UUID 117520001, Annotated FSMA Warning Notice to *NFM1*, 3 October 2017 ('Annotated Warning Notice'), paragraph 6.9(2).

⁵⁰² Case AT.40018, Car battery recycling.

⁵⁰³ Horizontal Cooperation Guidelines, paragraph 205.

⁵⁰⁴ Statement by Commissioner Vestager on a Commission decision fining companies €68 million for car battery recycling cartel, 8 February 2017.

⁵⁰⁵ Horizontal Cooperation Guidelines, paragraph 194.

asset managers and their clients, it would be at the expense of the issuing companies. See points (e) and (f) below.

- d. To respond to RAMAM's comment that joint purchasing concerted practices only raise competition law concerns where the purchasers enjoy significant market power, the FCA notes that the object approach is independent of the presence of buyer market power (see paragraph 9.25). The FCA has found that a single disclosure of strategic information between any two asset managers during the book-build process has the potential to influence the ultimate strike price of an IPO or placing for all asset managers involved in the transaction, and thereby restrict competition by object (see paragraph 8.40).
- e. The concerted practices have the potential to produce all the adverse consequences described in paragraph 9.24, regardless of whether asset managers are characterised as suppliers of equity capital or demanders of shares.
- f. While the aim of competition law and policy has been described as promoting competition in the interests of consumers⁵⁰⁶, it is apparent that there are several possible sets of consumers whose interests might be affected by the outcome of a book-building process: those wishing to invest by buying the shares of the issuing company (the ultimate customers of asset managers), but also those of the current owners of the issuing company wishing to sell shares in it, and those consuming its products or services. To the extent those interests are at odds (see RAMAM's submission summarised in paragraph 9.20(b)), the FCA thinks they are all best protected by ensuring that the book-building process is not undermined by asset managers' anti-competitive conduct. In this investigation, that means that asset managers should compete when submitting bids, rather than concert by disclosing and accepting strategic information among themselves. That applies whether the asset managers are characterized as buyers or as sellers.

9.30 The FCA considers that even if benefits accrued from the conduct (which it has not observed), the sharing of strategic information between competing asset managers is not necessary to achieve any such benefits (see paragraphs 16.20 to 16.37). The FCA has not seen evidence which supports the parties' assertions on the need for horizontal information sharing between potential investors as a mechanism for solving information asymmetries in IPOs and placings. This is particularly the case with respect to strategic information such as the specific valuations and bidding conduct or intentions of the individual asset managers.

⁵⁰⁶ See, for a recent example, FCA Mission: Approach to Competition, October 2019. The CMA describes its goal as to 'work to promote competition for the benefit of consumers, both within and outside the UK. Our aim is to make markets work well for consumers, businesses and the economy': <https://www.gov.uk/government/organisations/competition-and-markets-authority/about>

10 Other legal aspects of an infringement of the Chapter I prohibition and/or Article 101 TFEU

Introduction

- 10.1 A concerted practice only infringes the Chapter I prohibition and/or Article 101 TFEU if it has an appreciable effect on competition, an effect of trade within the UK or between EU member states respectively, and does not qualify for an exemption, legal exception, or exclusion. This Section considers each requirement in turn. It also considers the applicable burden and standard of proof that the FCA must fulfil to make an infringement decision.

Appreciability

- 10.2 A concerted practice will not infringe the Chapter I prohibition or Article 101(1) TFEU if its impact on competition is not appreciable.⁵⁰⁷
- 10.3 However, a concerted practice which has the object of preventing, restricting or distorting competition constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction of competition.⁵⁰⁸ Pursuant to section 60(2) of the Act,⁵⁰⁹ this principle also applies when assessing appreciability under the Chapter I prohibition.
- 10.4 The FCA considers 'appreciability' in the context of the relevant conduct in Section 16.

Effect on trade

- 10.5 By virtue of section 2(1)(a) of the Act, the Chapter I prohibition applies to agreements which '...may affect trade within the United Kingdom'.
- 10.6 As regards the question whether the effect on trade within the UK should be appreciable, the CAT has held in one case that there is no need to import into the Act the rule of 'appreciability' under EU law, the essential purpose of which is to demarcate the fields of EU law and UK domestic law respectively.⁵¹⁰ In a subsequent case, the CAT held that it was not necessary to reach a conclusion on that question.⁵¹¹
- 10.7 Article 101 TFEU applies to concerted practices which may affect trade between EU Member States. Such an effect on trade must be appreciable.⁵¹² An effect on trade means

⁵⁰⁷ Judgment in *Völk v Vervaecke*, C-5/69, EU:C:1969:35, paragraph 7.

⁵⁰⁸ Judgment in *Expedia Inc v Autorité de la concurrence and others*, C-226/11, EU:C:2012:795 ('*Expedia*'), paragraph 37.

⁵⁰⁹ Section 60(2) of the Act provides that, when determining a question in relation to the application of Part I of the Act (which includes the Chapter I prohibition), the court (and the FCA) must act with a view to securing that there is no inconsistency with any relevant decision of the Court of Justice in respect of any corresponding question arising in EU law.

⁵¹⁰ *Aberdeen Journals v Office of Fair Trading* [2003] CAT 11, paragraphs 459-461.

⁵¹¹ *North Midland Construction plc v Office of Fair Trading* [2011] CAT 14, paragraphs 48-51 and 62. The CAT stated that it was not necessary to reach a conclusion on the question whether the appreciability requirement extends to the effect on UK trade test as, at least in that case, there was a close nexus between appreciable effect on competition and appreciable effect on trade within the UK, in that if one was satisfied, the other was likely to be so.

⁵¹² Judgment in *Béguélin Import Co. v S.A.G.L. Import Export*, C-22/71, EU:C:1971:113, paragraph 16.

that the agreement, decision or concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU Member States.⁵¹³

- 10.8 For the purposes of assessing whether a concerted practice may affect trade between EU Member States, the FCA follows the approach set out in the Commission's published guidance. According to this guidance, horizontal cartels covering a whole Member State are normally capable of affecting trade between EU Member States, provided the product covered by the agreement or concerted practice is susceptible to import.⁵¹⁴
- 10.9 The FCA considers 'effect on trade' in the context of the relevant conduct in Section 16.

Exemption, legal exception and exclusion

- 10.10 The Chapter I prohibition and Article 101 TFEU do not apply to concerted practices which are excluded or exempt. It is for the party or parties wishing to rely on an exemption or exclusion to adduce evidence that the criteria are satisfied.
- 10.11 Artemis claimed the benefit of an exclusion or exemption. Hargreave Hale and RAMAM did not, but did make some submissions about the benefits of horizontal information exchange between asset managers. This claim and submissions are addressed in Section 16.

Burden and standard of proof

Party submissions

- 10.12 Hargreave Hale said that the use of inferences and presumptions was inappropriate where copious evidence exists such that it is neither necessary or appropriate to rely on or infer from coincidences and indicia and where an undertaking had legitimate and credible alternative explanations for its subsequent behaviour on the market which are supported by the facts. It said any doubt as to whether the legal standard had been met had to be resolved in its favour. It also said that the standard of proof and associated evidential standard had to recognise the criminal nature of the allegations levelled at them.⁵¹⁵
- 10.13 Hargreave Hale said it is not appropriate for the FCA to seek to rely on legal presumptions derived from cartel case law which are justified on the grounds on concealment of evidence, or a deliberate decision not to generate evidence in the ordinary course, in circumstances where Newton acted in an open and transparent way and did not seek to conceal its behaviour.⁵¹⁶
- 10.14 Hargreave Hale said that the FCA had, in many instances, interpreted the same evidence and drawn factual conclusions in ways which differ materially from the FCA's case against *NFM1* as set out in the FSMA Notices, and that the FSMA Notices support the alternative and legitimate 'plausible explanation' for the events in question.⁵¹⁷

⁵¹³ Judgment in *Société Technique Minière v Maschinenbau Ulm GmbH*, C-56/65, EU:C:1966:38, page 249.

⁵¹⁴ Commission, *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* (2004/C 101/07), paragraphs 78-80.

⁵¹⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 3.130-3.149; UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 550-557; UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraph 4.7; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 1.12, 1.14-1.15 and 4.1-4.7.

⁵¹⁶ UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraphs 2.12-2.14.

⁵¹⁷ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 1.8 and 2.2; UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraph 1.2.

10.15 RAMAM submitted that the FCA's use of a piece of evidence took a selective approach and did not consider the totality of the evidence.⁵¹⁸ RAMAM also said that the FCA could not rely on cumulative possibilities to meet the burden and standard of proof, for example the 'possibility' that a fund manager may have bid differently in the absence of the information sharing and that a fund manager may have had a competitor's bidding intention in mind when formulating its own bid.⁵¹⁹

FCA findings

10.16 The burden of proving an infringement of the Chapter I prohibition and of Article 101 TFEU lies with the FCA.⁵²⁰ In satisfying this burden, the FCA may rely, where appropriate, on inferences and evidential presumptions,⁵²¹ even in circumstances where the undertaking concerned has not sought to conceal its behaviour. The Court of Justice considered in *Eturas* that '*the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent*'.⁵²²

10.17 Before relying on inferences from the facts to prove an infringement, the FCA will consider whether the evidence before it provides any other plausible explanation for the events in question.⁵²³ It will do so by taking all the evidence into account in the round. This may include the nature of the existing relationship between the parties.

10.18 The FCA is required to demonstrate that an infringement has occurred on the balance of probabilities.⁵²⁴ In meeting this standard, the FCA must consider, but is not required to set out a full assessment of, each piece of evidence. However, the weight of evidence required to satisfy this standard will depend on the seriousness of the alleged infringement in question.⁵²⁵

10.19 The FCA has considered carefully all of the evidence on its file. With regard to the FSMA Notices, it notes that these represent FCA views and findings under a different legal regime.⁵²⁶ The FCA disagrees with Hargreave Hale (paragraph 10.14) that the FCA has interpreted the same evidence and drawn factual conclusions in ways which differ materially from the case set out in the FSMA Notices. It also notes that findings that comprise an infringement of the Competition Act or TFEU or both may not comprise an infringement of FSMA – and *vice versa*.

10.20 The FCA disagrees with RAMAM that it relies on cumulative possibilities. The FCA is not required to establish any effects on the facts of this case as it has established a restriction of competition by object (see Sections 9 and 11 to 14). The FCA sets out in Sections 8 and 11 to 14 the reasons why it relies on the legal presumption of cause and effect in this case.

⁵¹⁸ UUID 84280027, RAMAM Submission on First Letter of Facts, e.g. paragraph 6.

⁵¹⁹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 28 and 88-89; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1788-1789.

⁵²⁰ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 ('*Napp*'), paragraphs 95 and 100. See also *JJB Sports*, paragraphs 164 and 928-931; *Tesco*, paragraph 88.

⁵²¹ *Napp*, paragraphs 110-111. See also *Claymore Dairies Ltd and Express Dairies plc v Office of Fair Trading* [2003] CAT 18 (observations of the CAT upon staying the appeal), paragraph 10.

⁵²² *Eturas*, paragraph 37.

⁵²³ *Makers*, paragraphs 48-93.

⁵²⁴ *Tesco*, paragraph 88.

⁵²⁵ See *Makers*, paragraph 46.

⁵²⁶ See Section 2, The FCA's investigations.

11 Market Tech: Newton/Hargreave Hale concerted practice 'by object'

Introduction

- 11.1 The FCA finds that the conduct of Newton and Hargreave Hale in relation to the book-building process leading to the placing of shares in Market Tech infringed the Chapter I prohibition and Article 101 TFEU. These findings are made in light of the requirements set out in Sections 8 and 9 for such a finding.
- 11.2 In this Section, the FCA sets out its findings that Newton and Hargreave Hale engaged in a concerted practice (paragraphs 11.3 to 11.47) that had the object of preventing, restricting or distorting competition in relation to the placing of shares in Market Tech (paragraphs 11.48 to 11.86). Section 16 assesses the other conditions necessary for an infringement decision.

Concerted practice

- 11.3 As set out at paragraph 8.67, the key elements of a concerted practice in the context of the sharing of information are:
- a. 'discussions';
 - b. between two or more actual or potential competitors;
 - c. subsequent conduct on the market; and
 - d. a relationship of cause and effect between the discussions and that conduct.
- 11.4 These principles are applied below to the conduct between Newton and Hargreave Hale in relation to the placing of shares in Market Tech, taking into account the submissions made by Hargreave Hale.⁵²⁷

Discussions

- 11.5 As set out in paragraphs 8.8 to 8.40, the existence of a concerted practice implies contact between actual and/or potential competitors. Such contact may be in the form of an exchange of strategic information or where one competitor discloses strategic information to another and the latter has requested it or accepts it.

The information that Newton disclosed to Hargreave Hale

- 11.6 As set out at paragraph 7.8, Newton (*NFM1*) spoke to Hargreave Hale (*HH FM1*) before the deadline for the submission of the final orders in the placing of shares in Market Tech

⁵²⁷ The leniency applicant, Newton, admitted liability as set out in the Statement of Objections; see UUID 65240005, Newton Submission on Statement of Objections.

on 9 July 2015. On this call, Newton (*NFM1*) said to Hargreave Hale (*HH FM1*) he would be 'submitting a chunky order at that 220 level'.⁵²⁸

FCA findings

- 11.7 As set out in Section 8, the FCA considers that a statement of intention by one competitor to another that eliminates or substantially reduces uncertainty as to its expected conduct on the market is 'strategic information'. The FCA finds that Newton's statement to Hargreave Hale contained strategic information, for the following reasons.
- 11.8 First, the disclosure by Newton (*NFM1*) that he would be '...submitting a chunky order at that 220 level'⁵²⁹ was a clear statement as to his future conduct. Newton (*NFM1*) explained the call with Hargreave Hale (*HH FM1*): 'I was sharing my view with *HH FM1*. I thought he might have an interest in participating in the placing. I thought it would be useful to him, and I wanted him to consider my points when thinking about his order.'⁵³⁰ He also said 'The upshot is – I'm stating my intention. I am telling *HH FM1* what I intend to do'.⁵³¹
- 11.9 This statement consisted of share price and an indication of the size of Newton's intended bid. While this reference to volume was not precise (since it did not specify an actual figure), the FCA thinks it was sufficiently clear to indicate to Hargreave Hale what Newton's bidding intentions were. Hargreave Hale itself acknowledged the disclosure 'says it is what his intentions are, that he is proposing to submit a chunky order, that is a large order, at a particular price level'.⁵³²
- 11.10 Second, the statement was made during an accelerated book-build on the day the books were due to close. In those circumstances, it was less likely that Newton would depart from its stated intention (see paragraphs 5.97 and 8.17), so Hargreave Hale could place greater reliance on the information disclosed.
- 11.11 Therefore, in the context of Newton's (*NFM1*) bid for shares in Market Tech, the FCA finds that his description of the size of his bid (i.e. 'a chunky order') and his valuation of 220 pence per share disclosed on the day the books were due to close in an accelerated book-build constitutes strategic information. In those circumstances, uncertainty between those competitors as to expected conduct on the market (i.e. the bid) was eliminated or at the very least substantially reduced (see paragraphs 8.14 to 8.21).

Party submissions and the FCA's view of them

- 11.12 Hargreave Hale said that this disclosure by Newton (*NFM1*) on 9 July 2015 did not reduce strategic uncertainty. In summary, it said:
- a. *HH FM1* did not know whether what *NFM1* was telling him was true or whether *NFM1* had an ulterior motive in encouraging Hargreave Hale to submit a lower bid (so that Hargreave Hale would miss out on the share issue, increasing Newton's chances of being successful). In these circumstances, Hargreave Hale said there could be no reduction in strategic uncertainty.⁵³³

⁵²⁸ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 8, lines 286-287.

⁵²⁹ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 8, lines 286-287.

⁵³⁰ UUID 11250002, *NFM1* Second FCA Interview Transcript, page 67, lines 2459-2462.

⁵³¹ UUID 11250002, *NFM1* Second FCA Interview Transcript, page 68, lines 2490-2491.

⁵³² UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 800-801.

⁵³³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.42(a). See also UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraph 5.17(a).

- b. *HH FM1* did not know the information was strategic in nature;
- c. there was more than a realistic possibility that a low bid would miss out on an allocation altogether;⁵³⁴
- d. Newton's disclosed information differed from its final bid;⁵³⁵
- e. *NFM1* was forced to change his bid in any event due to market circumstances and so strategic uncertainty was not reduced⁵³⁶

11.13 The FCA assesses these submissions in turn.

- a. The FCA does not accept that the information disclosed by Newton was not strategic because *HH FM1* could not necessarily trust the accuracy of that information. The assessment of whether information is strategic is an objective assessment, and it is not necessary as part of this assessment to consider the subjective intention of any party. The FCA may however have regard to the parties' subjective intent as one factor in its overall assessment. The FCA has no evidence that that *HH FM1* doubted *NFM1*'s truthfulness: rather he sought *NFM1*'s views (9 July 2015 10:13 call) and said he would "*play around with it a little bit*" (which the FCA takes to mean that he would consider the information and bidding at different levels).
- b. Hargreave Hale has provided no relevant evidence to support its submission that *HH FM1* did not know the information was strategic in nature.⁵³⁷ The FCA finds that *HH FM1* did consider the information to be strategic. On the call, he explained to *NFM1* that he was calling him because his colleague *HH FM2* at Hargreave Hale had asked him due to the fact *HH FM2 rates you. We rate you...'*⁵³⁸ He also asked to hear *NFM1*'s views *'...if you don't mind divulging'*.⁵³⁹ In response to *NFM1* asking *HH FM1* to think about it, Hargreave Hale (*HH FM1*) said *'I will, I will. All right NFM1. Thanks a lot'*.⁵⁴⁰ This indicates that *HH FM1* did know that the information being disclosed was something that could reduce the strategic uncertainty between Newton and Hargreave Hale regarding their respective competitive strategies (in particular, the size and price of their bids).
- c. There is an inherent risk in missing out from a low bid in any book-building process, but this is mitigated by feedback provided by the book-builder. The FCA does not consider this shows that the information disclosed by Newton to Hargreave Hale was not strategic.
- d. That Newton's disclosed intention was different from its final bid does not mean the information disclosed was not strategic. Whether strategic uncertainty is reduced is not a question of hindsight, i.e. determined in light of subsequent events. *Cimenteries* makes it clear that it is uncertainty as to the conduct on the market *'to be expected'* that is important.⁵⁴¹ Newton disclosed the bid it intended to make. Given the proximity of the disclosure to the books closing, i.e. the same day in the

⁵³⁴ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.42(b).

⁵³⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.42(b).

⁵³⁶ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.42(b).

⁵³⁷ Hargreave Hale provided evidence from UUID 16270001, *HH FM1* FCA Interview Transcript, to support its submission, but the FCA notes that this related to the On the Beach disclosure (and in any event, was an explanation provided after the event and in the absence of contemporaneous evidence).

⁵³⁸ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 2, lines 43-45.

⁵³⁹ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 2, lines 43-45.

⁵⁴⁰ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 9, line 298.

⁵⁴¹ See Section 8, The law applicable to 'concerted practices'.

context of an accelerated book-build, Hargreave Hale could expect that Newton would place such a bid. That said, the FCA notes that Newton (*NFM1*) did indeed put in its bid at 220p (at 11:08 on 9 July 2015) and that it was a large order (at that time, a bid for 7,978,511 shares was almost 10% of the shares on offer).⁵⁴² *NFM1* only moved his bid to 223p following internal⁵⁴³ and external⁵⁴⁴ indications that a 220p bid might miss out, and a conversation with the CEO of Market Tech.⁵⁴⁵

- e. That external events may have caused Newton to revise its bid does not mean that the information Newton disclosed to Hargreave Hale at the time it was disclosed was not strategic. That information eliminated or substantially reduced Hargreave Hale's uncertainty as to Newton's competitive conduct. That intervening external events affected the outcome of the book-build process is not relevant for competition law purposes.

11.14 Newton (*NFM1*) said that the information Newton (*NFM1*) disclosed to Hargreave Hale (*HH FM1*) was not confidential because it was information that would have in any case been relayed to Hargreave Hale (*HH FM1*) by a broker (i.e., book-builder), '*...given the granularity of colour given by brokers on deals...*'⁵⁴⁶

11.15 However, the FCA received no evidence in the course of its investigation of the book-builders involved on Market Tech (or indeed the other transactions the subject of this decision) disclosing the names of other asset managers and their bids and even Newton (*NFM1*) accepted that the book-builder might not disclose '*...the Newton element*' of that. Finally, at the time Newton (*NFM1*) made the disclosure to Hargreave Hale (*HH FM1*) about his future pricing intention, the book-builder would not have known those intentions. Newton (*NFM1*) also accepted that.⁵⁴⁷

Request and/or acceptance

11.16 Having established that Newton disclosed strategic information to Hargreave Hale, the FCA must find that Hargreave Hale either requested that information or at the very least accepted it in order to establish a concerted practice.⁵⁴⁸

FCA findings

11.17 As set out at paragraph 8.34, the FCA notes that the facts of a case may show elements of both requesting and acceptance of strategic information and it is not necessary to go further than to show that the facts demonstrate sufficient engagement by the recipient.

11.18 In this case, the evidence demonstrates that Hargreave Hale was seeking an inappropriate disclosure from Newton in circumstances where that disclosure may have had a competitive value to Hargreave Hale. Accordingly, the FCA does not accept that *HH FM1* was making a legitimate enquiry about non-strategic information.⁵⁴⁹ Hargreave Hale (*HH FM1*) told *NFM1* on their 9 July 2015 call that he was calling Newton (*NFM1*) because his colleague *HH FM2* at Hargreave Hale had asked him to. This was due to the fact '*HH FM2*

⁵⁴² UUID 6550007, transcript of a call between [*name*] (Newton) and [*name*] (Canaccord), 9 July 2015. Newton increased its bid to 9,087,641 shares and was allocated 9,000,000 shares. See Section 7, The facts.

⁵⁴³ UUID 876-66219-0-73, Bloomberg messages between Newton employees, 8 July 2015, beginning at 00:27 UTC. The message is stated at 12:50 UTC but BST is quoted as that was the applicable time in the UK.

⁵⁴⁴ UUID 876-72625-9, transcript of a call between [*name*] (Canaccord) and *NFM1* (Newton), 9 July 2015 at 15:27, page 3, lines 88-89.

⁵⁴⁵ UUID 876-72625-2, transcript of a call between *NFM1* (Newton) and [*senior officer*] (Market Tech), 9 July 2015.

⁵⁴⁶ UUID 11250002, *NFM1* Second FCA Interview Transcript, page 83, lines 3027-3028.

⁵⁴⁷ UUID 11250002, *NFM1* Second FCA Interview Transcript, page 67, page 83, lines 3027-3039.

⁵⁴⁸ *Cimenteries*, paragraph 1849. See Section 8, The law applicable to 'concerted practices'.

⁵⁴⁹ See paragraph 11.25(a).

rates you. We rate you...'.⁵⁵⁰ He also asked to hear *NFM1*'s views *'...if you don't mind divulging'*.⁵⁵¹ This call took place on the day the books were due to close in an accelerated book-build. It is apparent to the FCA from the tone of *HH FM1*'s voice on the audio recording of the call that he was actively encouraging the conversation with *NFM1* and agreed to think about the disclosure *NFM1* in fact made.⁵⁵²

11.19 It became apparent during the course of the call that *NFM1* was disclosing strategic information, and *HH FM1* continued with, and actively participated in, the call. Accordingly, even if he did not call with the intention of obtaining strategic information, Hargreave Hale (*HH FM1*) did accept the strategic information that Newton (*NFM1*) then disclosed. As set out at paragraph 11.20 (a to g) below, Hargreave Hale engaged with the disclosure, thereby accepting the information and demonstrating the mental element that is a necessary component of a concerted practice.

11.20 That Hargreave Hale accepted strategic information from Newton on the call between *NFM1* and *HH FM1* at 10:13 on 9 July 2015 is shown by the following statements:

- a. when Newton (*NFM1*) started to talk about price (*'But I don't want to pay too close to the NAV already...'*), Hargreave Hale (*HH FM1*) said *'Yes'*, thus encouraging Newton (*NFM1*) to continue to give more specific price disclosures;⁵⁵³
- b. after Newton (*NFM1*) revealed his intended pricing,⁵⁵⁴ Hargreave Hale (*HH FM1*) said *'Yes'*.⁵⁵⁵ He continued to say *'Yes'* and *'Right'* as Newton (*NFM1*) elaborated the reasoning for this.⁵⁵⁶ It is apparent to the FCA from the tone of *HH FM1*'s voice on the recording of the call that he was actively encouraging the conversation, rather than just being polite to *NFM1*.
- c. Hargreave Hale (*HH FM1*) said to Newton (*NFM1*) *'...I understand how your audited 60 million uplift takes you to 220. Look, I'll have a word with my Shore Capital people and I'll sort of, I'll play around with it a little bit. Okay?'*⁵⁵⁷
- d. when Newton (*NFM1*) said: *'So just so we're clear that I will be submitting a chunky order at that 220 level'*, Hargreave Hale (*HH FM1*) responded: *'Right'*;⁵⁵⁸ and
- e. in response to Newton (*NFM1*) asking Hargreave Hale (*HH FM1*) to think about it, Hargreave Hale (*HH FM1*) said *'I will, I will. All right NFM1. Thanks a lot'*.⁵⁵⁹

11.21 Hargreave Hale's willingness to engage with Newton (*NFM1*) and the disclosed information is supported by *NFM1*'s report of the call with Hargreave Hale (and with RAMAM) to BMO ([name]) on 13 July 2015 where Newton (*NFM1*) stated that Hargreave Hale (and RAMAM)

⁵⁵⁰ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 2, lines 43-45.

⁵⁵¹ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 2, lines 43-45.

⁵⁵² UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 9, line 298.

⁵⁵³ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 2, lines 59-62.

⁵⁵⁴ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 3, line 102

⁵⁵⁵ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 3, line 105.

⁵⁵⁶ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, pages 3-4, lines 107-127.

⁵⁵⁷ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 7, lines 221-223.

⁵⁵⁸ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 8, lines 286-289.

⁵⁵⁹ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 9, line 298.

'...would think about it' and 'seemed positive'.⁵⁶⁰ This near contemporaneous evidence shows that Hargreave Hale engaged with the disclosure.

- 11.22 Hargreave Hale's (*HH FM1*'s) own explanation to the FCA for speaking to Newton (*NFM1*) (FCA interview) also demonstrates its willingness to engage: '*Maybe I'm trying to find out if he [NFM1] knows anything that I've missed in the investment thesis, that's maybe the point*'.⁵⁶¹ The FCA notes (as set out in Section 5) that competition is effective in the context of IPOs and placings where asset managers form their own valuation of shares, based among other things on their own research and expertise. In these circumstances, a disclosure of strategic information to an actual or potential competitor substantially reduces or eliminates the competitive uncertainty between them.
- 11.23 Therefore, the FCA finds that Hargreave Hale accepted the strategic information disclosed by Newton, so leading to the mental element and the 'knowing substitution' that is a necessary component of a concerted practice.

Party submissions and the FCA's view of them

- 11.24 '**Request**'. Hargreave Hale said that it (*HH FM1*) did not request any strategic information from Newton (*NFM1*):
- a. when *HH FM1* had said to Newton (*NFM1*) on the call '*just curious to hear your sort of, your views really, if you don't mind divulging*',⁵⁶² his choice of words '*simply reflected the recognition that some fund managers regarded their views or information on a company as proprietary knowledge*' rather than prompting Newton to reveal strategic information.⁵⁶³ Hargreave Hale told the FCA that '*HH FM1 recognised that, in asking NFM1 for his views on the company, he was seeking to free-ride on Newton's expertise or analysis, and potentially asking Newton to give up an informational advantage*'.⁵⁶⁴
 - b. *NFM1* himself told the FCA in interview and in his witness statement that *HH FM1* was looking for views on the company (as opposed to strategic information). Hargreave Hale added that *HH FM1* had said in his FCA interview he was trying to see if there was any big '*positives or negatives that [he] had missed about the investment thesis basically, under researched, under known story...*' and confirmed that in his witness statement. It was thus simply an enquiry by him concerning non-strategic information.⁵⁶⁵ Hargreave Hale said this was supported by the evidence, for example the FSMA Documents say that it is reasonable for fund managers to exchange their general views on companies, and *NFM1* told the FCA that attempts by asset managers to influence market perceptions relating to valuation are common practice. *NFM1* said that information, which is the result of detailed research on a company, is a commodity which a fund manager is entitled to share for others to consider. The only reasonable conclusion is therefore that Hargreave Hale's conversation with Newton took place in the spirit and context of this accepted and legitimate market

⁵⁶⁰ UUID 876-66219-0-50, Bloomberg message between *NFM1* (Newton) and [*name*] (BMO), 13 July 2015.

⁵⁶¹ UUID 16270001, transcript of an FCA interview with *HH FM1* (Hargreave Hale), 1 November 2016 ('*HH FM1* FCA Interview Transcript'), page 49, lines 1731-1732.

⁵⁶² UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 2, lines 44-45.

⁵⁶³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraph 4.23. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 857-868.

⁵⁶⁴ See UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 3.4(c).

⁵⁶⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 4.12(a), 4.25-4.31. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 871-895; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.13.

practice of investors discussing general views on a company or transaction, and there is no evidence to support any other motive on the part of Hargreave Hale.⁵⁶⁶

- c. it was *NFM1* that had initiated contact (with *HH FM2* of Hargreave Hale) with a view to pursuing his own agenda, namely being part of a wider strategy that he was implementing by contacting others i.e., *RAMAM (RM FM)*.⁵⁶⁷
- d. Hargreave Hale's questions about Market Tech to Newton were legitimate. Among other things, there was a limited amount of publicly available independent research on the company and Newton might have received different/additional information from its broker which might have provided additional colour on the company.⁵⁶⁸

11.25 The FCA does not accept these submissions on Hargreave Hale requesting the disclosure from Newton (*NFM1*). Considering them in turn:

- a. The evidence does not support that Hargreave Hale's enquiry was about non-strategic information: it was at the least ambiguous, and his use of language such as 'if you don't mind divulging' implies that he knew he was seeking an inappropriate disclosure.
- b. The disclosure by Newton (*NFM1*) concerned the price and volume of his bid, strategic information which goes beyond sharing information on general views on a company or the 'result of detailed research on a company'.
- c. Whether or not *NFM1* initiated the call is not relevant as there is no ambiguity in the content of the call (i.e. it is clear that Hargreave Hale requested and/or accepted the information disclosed).⁵⁶⁹
- d. As set out in paragraph 11.20, whether or not Hargreave Hale had explicitly sought strategic information is not relevant (and so whether its original request was 'legitimate'), since it received strategic information in response, and it accepted that information.

11.26 '**Accept**'. Hargreave Hale also said that it (*HH FM1*) did not accept any strategic information from Newton (*NFM1*), for the following reasons:

- a. *HH FM1* was the passive recipient of the disclosure which he had not requested or expected to receive.⁵⁷⁰
- b. *HH FM1* expressly rejected the information by stating that Newton's position was contrary to Hargreave Hale's interests. This was because Newton's proposal would be likely to depress the Market Tech share price and the value of Hargreave Hale's existing, much larger holding of shares and have a detrimental effect on the performance of its funds.⁵⁷¹
- c. If Hargreave Hale's incentive was to obtain a lower price, then it might have been expected to submit a lower bid rather than bid at strike and/or placed a larger order

⁵⁶⁶ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.13-2.15; UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraphs 1.3(c) and 2.3-2.5; UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, paragraphs 9-10.

⁵⁶⁷ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.12(b).

⁵⁶⁸ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.12(c).

⁵⁶⁹ See paragraph 11.24.

⁵⁷⁰ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.41(a).

⁵⁷¹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.12(d)(i). See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 959-979. Hargreave Hale said that this was submitted by the FSMA Documents: see UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.24; UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, e.g. paragraphs 7-8.

in the expectation that the price might be lower. Hargreave Hale's existing shareholding was much larger than its order for new shares and the detriment from a reduced shares price on its funds would significantly outweigh any benefit from a discount on new shares. *HH FM1*, *HH FM3* and *NFM1* were consistent in their FCA interviews that a low share issue price would depress the share price. *NFM1* also knew *HH FM1* had no interest in his proposed strategy. Also *NFM1* was planning to place a very substantial order, larger than his original holding, so that his incentives were different from *HH FM1*'s.⁵⁷²

- d. It had already placed its order two days before the conversation with Newton at strike, thus was prepared to accept whatever price the placing achieved⁵⁷³ and did not amend its bid.⁵⁷⁴
- e. *HH FM1* did not know if what *NFM1* was telling him was true.⁵⁷⁵
- f. *HH FM1* was being diplomatic rather than encouraging *NFM1* on the 9 July 2015 call. These were just 'empty platitudes' from *HH FM1*.⁵⁷⁶
- g. Newton himself recognised that Hargreave Hale had not accepted its disclosure evidenced in the Bloomberg chat *NFM1* had with [*name*] where he said, 'I rang *HH FM3* and *RM FM* to get them to push price down (...) they didnt help me out (...)'.⁵⁷⁷ This is supported by the FSMA Notices which say that Newton 'contacted fewer External Fund Managers than he did in relation to the OTB IPO and he did not believe that those that he did contact agreed with his views'.⁵⁷⁸

11.27 The FCA does not accept these submissions on acceptance of the disclosure from Newton (*NFM1*). In turn:

- a. the FCA does not accept that Hargreave Hale was a passive recipient given that it had the necessary mental element for a recipient to accept strategic information in order to establish a concerted practice. The FCA sets out above (paragraph 11.20) that Hargreave Hale had knowledge and awareness of the information disclosed, so leading to the 'knowing substitution' that is a necessary element of a concerted practice (if the other elements of a concerted practice are present).
- b. the FCA does not accept that Hargreave Hale (*HH FM1*) expressly rejected Newton's (*NFM1*) proposal as contrary to its interests.⁵⁷⁹ Whether the incentives of Hargreave Hale and Newton were aligned is not relevant to whether Hargreave Hale accepted the information (as opposed to accepting Newton's proposed course of action).
- c. See b. Hargreave Hale's incentives do not affect whether it requested or accepted the strategic information Newton disclosed.

⁵⁷² UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 4.12(e)(i)-(iv) and 4.13-4.14. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 959-979; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.16(a).

⁵⁷³ UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 824-828; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.16(c).

⁵⁷⁴ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 4.12(d)(ii) and 4.41(c); UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraph 5.17(c). Hargreave Hale noted that the FSMA Documents confirmed the same; see UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.16(b) and 2.18; UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, e.g. paragraph 7.

⁵⁷⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.42(a).

⁵⁷⁶ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.24.

⁵⁷⁷ UUID 876-66219-0-50, Bloomberg message between *NFM1* (Newton) and [*name*] (BMO Global), 13 July 2015. See UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 1221-1252.

⁵⁷⁸ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.20-2.21, quoting UUID 117520001, Annotated Warning Notice, paragraphs 6.9(2) and paragraph 5.5.

⁵⁷⁹ See paragraph 11.26.

- d. similarly, the FCA is not persuaded that Hargreave Hale did not accept the information disclosed because it had already placed a bid at strike which it did not amend.⁵⁸⁰ As noted above, 'acceptance' does not require acceptance of a course of action (and see paragraphs 11.30 to 11.46 regarding Hargreave Hale's subsequent conduct on the market).
- e. the FCA notes that Hargreave Hale has provided no specific and objective evidence to support its submission that *HH FM1* did not know if what *NFM1* was telling him was true⁵⁸¹ but in any event, such evidence would be unlikely to negate the very clear evidence of its acceptance of the information.
- f. the FCA also notes that Hargreave Hale (*HH FM1*) told Newton (*NFM1*) that: '*...I mean yes, I mean look, given what I've just said, I'll have a think...*'.⁵⁸² Hargreave Hale (*HH FM1*) said (FCA interview) that he was probably just being '*diplomatic and polite*'.⁵⁸³ However, given the other comments he makes to Newton (*NFM1*) set out above (paragraph 11.20), the FCA, having listened to the audio tape (see paragraph 11.18), is not persuaded by this.
- g. that *NFM1* subsequently told [*name*] that Hargreave Hale did not '*help [him] out*'⁵⁸⁴ (i.e. did not accept *NFM1*'s proposal) is not relevant to whether Hargreave Hale accepted the strategic information from Newton.

Between two or more actual or potential competitors

- 11.28 At the time of the infringement in relation to Market Tech, the FCA considers that Newton and Hargreave Hale were actual competitors on the relevant market and potential competitors in relation to the placing of shares in Market Tech. This is because they were both asset managers in the supply of equity capital in the primary capital market to UK-listed small and mid-cap companies (see Section 4 on the parties to the investigation and Section 6 on the relevant market). In this particular transaction, the FCA also notes that they also both bid in the Market Tech placing and so were direct rivals competing for share allocations in that company.
- 11.29 The FCA does not accept *NFM1*'s (Newton) comment that Hargreave Hale and Newton were not competitors regarding the Market Tech placing because Hargreave Hale operated in a different part of the market i.e. small-cap only.⁵⁸⁵

Subsequent conduct on the market

- 11.30 As set out in Section 7, Hargreave Hale participated in the placing of shares in Market Tech, placing a bid for 530,000 shares at strike and receiving an allocation of 500,000 shares at a price of 223p per share. Newton also participated in the placing and its final bid was for 9,087,641 shares at the price of 223p per share.⁵⁸⁶ Newton was allocated 9 million shares,⁵⁸⁷ which represented 10% of the total value of the placing.

⁵⁸⁰ See paragraph 11.26.

⁵⁸¹ See paragraph 11.12(a).

⁵⁸² UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 6, lines 189-190.

⁵⁸³ UUID 16270001, *HH FM1* FCA Interview Transcript, page 61, line 2180.

⁵⁸⁴ See Section 7, The facts.

⁵⁸⁵ UUID 11250002, *NFM1* Second FCA Interview Transcript, page 69, line 2526.

⁵⁸⁶ UUID 876-66219-0-41, Bloomberg message between Newton and Canaccord employees, 8 July 2015, beginning at 11:24. The message is stated as 15:53 UTC. BST is quoted as that was the applicable time in the UK at the time.

⁵⁸⁷ UUID 6550003, transcript of a call between [*name*] (Newton) and Unknown, 10 July 2015 at 07:40, page 2, line 46.

- 11.31 The FCA therefore finds that there was subsequent conduct on the market by both parties following their discussions on 9 July 2015.

A causal connection

- 11.32 As noted at paragraphs 8.50 to 8.58, in order to establish a concerted practice, there must be a relationship of cause and effect between the discussions and the subsequent conduct. To establish this relationship, and where the undertakings concerned remain active on the market, there exists a presumption that an undertaking takes account of information exchanged with or received from its competitor for the purposes of determining its own conduct on the market.

Application of the presumption

FCA findings

- 11.33 While Hargreave Hale had already submitted its bid at strike in the placing process before its conversation with Newton and did not alter that bid following the conversation, the FCA considers that maintaining an order on the book constitutes 'remaining active' on the market. Orders can be amended until the book closes (see paragraphs 5.17 and 5.30). Thus, the disclosure by Newton gave Hargreave Hale the opportunity to take the information disclosed about Newton's intended conduct into account for the purposes of determining its own conduct on the market.⁵⁸⁸
- 11.34 The strategic information was in the mind of someone at Hargreave Hale who could amend its bid, at a time when it could amend its bid. The FCA finds that the presumption of causation applies so that it can presume that Hargreave Hale took account of information received from Newton for the purposes of determining its conduct on that market.

Party submissions and the FCA's view of them

- 11.35 Hargreave Hale acknowledged that it participated in the placing of shares in Market Tech, placing a bid for 530,000 shares at strike and receiving an allocation of 500,000 shares at a price of 223p per share. It said, however, that it had placed its bid two days before the conversation between *HH FM1* and *NFM1*.⁵⁸⁹ It rejected the FCA's allegation that there was subsequent 'conduct' on the market because bids can be amended at any time. It said that allegation ignored the fact that *HH FM1* expressly rejected *NFM1*'s proposal and Hargreave Hale did not act in accordance with that proposal.⁵⁹⁰ Hargreave Hale added that there was no subsequent conduct on the market because Newton (*NFM1*) failed in its attempt to influence Hargreave Hale.⁵⁹¹
- 11.36 The FCA considers that maintenance of a pre-existing bid amounts to remaining active on the market. Contrary to Hargreave Hale's submission, as set out above at paragraph 11.20, Hargreave Hale did not 'expressly reject' strategic information from Newton.

⁵⁸⁸ See Section 8, The law applicable to 'concerted practices'.

⁵⁸⁹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 4.57-4.58; UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 1275-1276; UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 1.17(b)(i).

⁵⁹⁰ For Hargreave Hale's more general submissions on the application of the presumption in this case and the FCA's response, see Section 8.

⁵⁹¹ UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 4.3-4.4; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.23 and 2.24(a).

Rebutting the presumption

FCA findings

- 11.37 Hargreave Hale accepted strategic information from Newton during their phone call at 10:13 on 9 July (see paragraph 11.20), and maintained the bids it placed on 7 July 2015. The evidence an undertaking must provide to rebut the presumption is that a party must prove *'to the contrary'* that it did not take account of the information received and that the *'concertation did not have any influence whatsoever on its own conduct on the market'*.⁵⁹² See paragraphs 8.63 to 8.66.
- 11.38 Against this standard, Hargreave Hale has not provided sufficient evidence to rebut the presumption: see paragraphs 11.39 to 11.46.

Party submissions and the FCA's view of them

- 11.39 As set out in paragraph 8.61, Hargreave Hale said that the test to rebut the presumption is that the firm *'must have not subscribed to [the] initiatives'*. The presumption can be rebutted where an undertaking demonstrates that it has made an *'independent entrepreneurial decision'*.⁵⁹³ On this basis, it said that there was clear evidence⁵⁹⁴ that Hargreave Hale did not subscribe to Newton's initiative with respect to Market Tech, that it rejected the information and followed a *'completely different course from Newton'*:
- a. Newton was seeking a lower share price;
 - b. Hargreave Hale had already placed its bid and at strike which was inconsistent with Newton's proposed strategy to push for a lower price;
 - c. Hargreave Hale did not agree with or accept Newton's proposal, with *HH FM1* expressly rejecting it;
 - d. *NFM1* told the FCA that Hargreave Hale had disagreed with him;
 - e. Hargreave Hale had provided compelling evidence of why a reduced share price would not be in its interests;
 - f. Hargreave Hale did not modify its conduct following the conversation with Newton; and
 - g. the FCA had not provided any evidence as to how Hargreave Hale's subsequent behaviour showed that it had subscribed to the initiatives.⁵⁹⁵
- 11.40 In the FCA's view, first, and as set out in paragraph 11.37, the issue is whether Hargreave Hale can demonstrate that the *'concertation did not have any influence whatsoever on its own conduct on the market'* rather than a firm *'must not have subscribed to [the] initiatives'*.

⁵⁹² *Hüls* (see Section 8).

⁵⁹³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 1.49, 3.93-3.98, 4.61-4.69 and 5.70-5.72; UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 484-488, 1119-1125, 1301-1304, 1829-1836, 1957-1958 and 2498.

⁵⁹⁴ Hargreave Hale pointed to the FCA Enforcement Notices, which showed that Hargreave Hale did not act on the information (UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.22).

⁵⁹⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 4.59-4.69; UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 1295-1342; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.43-2.47.

- 11.41 Second, the FCA does not agree that the presumption is rebutted because Hargreave Hale had already placed its bid and did not amend that price as proposed by Newton. As noted at paragraph 11.33, orders can be altered until books close. Accordingly, Newton's information had the potential to affect Hargreave Hale's view, even where Hargreave Hale had already placed a bid, as it considered whether to amend that bid. *HH FM1* asked for Newton's views and said, *'Look, I'll have a word with my Shore Capital people and I'll sort of, I'll play around with it a little bit. Okay?'*⁵⁹⁶ and in response to Newton (*NFM1*) asking Hargreave Hale (*HH FM1*) to think about it, Hargreave Hale (*HH FM1*) said *'I will, I will. All right NFM1. Thanks a lot'*.⁵⁹⁷
- 11.42 Third, pricing differently from the proposed or agreed level is not sufficient to rebut the presumption, and the presumption can hold even where there has been no direct change to pricing. The FCA notes that in *JJB Sports* the CAT applied the presumption to a situation in which Allsports took the relevant information into account in not amending its pricing policy. Even though, as Hargreave Hale submits, the agreement/concerted practice in this case was not to change the price,⁵⁹⁸ in contrast to the current facts, the case still supports application of the presumption where pricing does not change.⁵⁹⁹
- 11.43 Fourth, the FCA does not accept, as argued by Hargreave Hale that it was not in Hargreave Hale's commercial interests to achieve a lower price and that this rebuts the presumption (i.e. that Hargreave Hale would not have taken Newton's disclosure into account). Differing commercial incentives are not relevant to whether or not strategic information was disclosed and accepted: the issue is whether strategic uncertainty between otherwise competing asset managers (Newton and Hargreave Hale) was reduced.
- 11.44 Fifth, the FCA finds that the contemporaneous evidence on Hargreave Hale's incentives is mixed.⁶⁰⁰ There is evidence that Hargreave Hale saw two sides to the issue: the risk of depressing the price of existing shares may have played a part in its thinking but that did not exclude the possibility of taking into account *NFM1*'s view.

a. *HH FM1* expressed both sides of the case on the 9 July call. He said:

*'...You know, if we go in for a couple of million versus the 6 million we have today, we're kind of just, you know, sort of f***ing ourselves a little bit. I mean who knows? Because you know, if it recovers and we get it cheaper, do you know what I mean?'*⁶⁰¹

The first sentence expresses the concern that a lower pricing on the placing could depress the price of the existing shares. However, the second sentence suggests the contrary, that obtaining a bargain in the placing could pay off. This was Newton's (*NFM1*'s) understanding given his comments that follow:

*'Yes, you're not f***ing yourself at all. You're only f***ing yourself on, you know, your Q3 evaluation, if you believe in it.'*⁶⁰²

⁵⁹⁶ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 7, lines 221-223.

⁵⁹⁷ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 9, line 298.

⁵⁹⁸ See UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.39.

⁵⁹⁹ [2004] CAT 2017, paragraph 877.

⁶⁰⁰ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.62(e). The FCA notes Hargreave Hale's submission that *'ambiguity'* is not enough to establish a concerted practice. The ambiguity here goes to whether Hargreave Hale has provided sufficient evidence to rebut the presumption, where the burden of proof is on Hargreave Hale and does not go to whether the FCA has met the required standard in establishing a concerted practice.

⁶⁰¹ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 6, lines 203-207.

⁶⁰² UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 6, lines 209-210.

*'You want to get them cheap now you know'*⁶⁰³

- b. *HH FM1* acknowledged that the second view played some part in his thinking. In particular, over the long and medium term, he said his incentives aligned with Newton's, stating *'but actually in the long term, in the medium term, in three years the share price can be hopefully a lot higher for our clients and actually it's been a good investment for all of us'*.⁶⁰⁴
- c. At 11:01 the next day 10 July 2015, Newton (*NFM1*) sent a Bloomberg message to Hargreave Hale (*HH FM1*): *'i got them down a bit anyway and placing looks to have gone well'*.⁶⁰⁵ Hargreave Hale (*HH FM1*) responded: *'...nice work. hopefully it does well for all of us in the medium term'*.

11.45 Accordingly, the evidence shows that the risk of depressing the price of existing shares may have played some part in Hargreave Hale's thinking, but that risk was not so great as to have excluded any influence of Newton's disclosure on Hargreave Hale's own conduct on the market.

11.46 To conclude, Hargreave Hale has not demonstrated that it made an independent decision and did not distance itself from or reject the strategic information (see further paragraphs 8.63 to 8.66). As the FCA found in paragraph 11.34, Newton's strategic information was in the mind of someone at Hargreave Hale who could amend its bid, at a time when it could amend its bid and so the FCA can presume that Hargreave Hale took account of information received from Newton for the purposes of determining its conduct on that market. The FCA applies the legal presumption that Hargreave Hale took account of information received from Newton for the purposes of determining its conduct on that market and so there was cause and effect between the discussions and the subsequent conduct on the market.

Conclusion

11.47 In light of the above, the FCA's finds that, as a result of the discussions between Newton and Hargreave Hale where Newton disclosed its valuation intentions in the placing of Market Tech IPO on 9 July 2015, they knowingly substituted practical cooperation between them for the risks of competition. As such, the FCA finds that the conduct in question amounted to a concerted practice.

'Object' of preventing, restricting or distorting competition

11.48 The Chapter I prohibition and Article 101 TFEU prohibit concerted practices which *'have as their object or effect the prevention, restriction or distortion of competition'*.

FCA findings

11.49 The FCA considered in Section 9 whether the disclosure and acceptance of strategic information during a book-building process could amount to a concerted practice with the object of preventing, restricting or distorting competition. As set out in paragraph 9.2, the

⁶⁰³ UUID 876-72624-21, transcript of a call between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 9 July 2015, page 6, line 214.

⁶⁰⁴ UUID 16270001, *HH FM1* FCA Interview Transcript, page 71 lines 2527-2529.

⁶⁰⁵ UUID 876-66219-0-48, Bloomberg message between *NFM1* (Newton) and *HH FM1* (Hargreave Hale), 10 July 2015 beginning at 10:01. The message is stated as 10:01 UTC. BST is quoted as that was the applicable time in the UK at the time.

essential legal criterion for a finding of anti-competitive object is that the coordination between undertakings 'reveals in itself a sufficient degree of harm to competition' such that there is no need to examine its effects.

- 11.50 As set out in paragraphs 9.3 to 9.5, to determine whether a concerted practice has the object of restricting competition, regard must be had to the content of its provisions, its objectives and the legal and economic context.⁶⁰⁶ When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁶⁰⁷ Anti-competitive subjective intentions on the part of the parties can provide good evidence that there is an anti-competitive object, but they are not necessary for such a finding.⁶⁰⁸

Content and objectives of the concerted practice and its legal and economic context

- 11.51 Section 5 sets out the legal and economic circumstances of a book-build process, and the real conditions of the function and structure of the market in question. Based on this, and as also set out in paragraph 9.23, the FCA finds that asset managers should have been competing during the Market Tech book-building process, by submitting rival bids to the book-builder. The competitive outcome of the book-building process depended on there being strategic uncertainty between rival asset managers. That strategic uncertainty was eliminated or substantially reduced where one asset manager disclosed strategic information to another in the book-build. Since this uncertainty was eliminated or substantially reduced, that outcome could have been adversely affected: paragraph 9.24 sets out possible adverse outcomes.
- 11.52 The FCA finds, as set out at paragraphs 11.7 to 11.15, that the uncertainty between Newton and Hargreave Hale as to Newton's expected conduct on the market was eliminated or at the very least substantially reduced in the context of the placing of shares in Market Tech. Newton's statement consisted of share price (220) and an indication of the size of Newton's intended bid ('chunky'). Importantly, it was made in the context of an accelerated book-build on the day the books were due to close. In those circumstances, it was less likely that Newton would depart from its stated intention, so Hargreave Hale could place greater reliance on the information disclosed.

NFM1's intent

- 11.53 The FCA considers that Newton's (NFM1) subjective intent was to reduce the Market Tech placing share price. While not necessary or determinative, this supports its finding that the concerted practice was a restriction of competition by object.
- 11.54 First, NFM1 himself has told the FCA that the general purpose of fund managers speaking to each other is to influence the other. In submissions made to the FCA in the context of regulatory proceedings against him, he said, inter alia:

'...the exchange of views, and occasionally order information, between fund managers is at the heart of the "price formation process" and is not a subversion of that process.

⁶⁰⁶ See paragraph 9.3.

⁶⁰⁷ *Cartes Bancaires*, paragraph 53; *Allianz*, paragraph 36; *Lundbeck*, paragraph 343.

⁶⁰⁸ *Allianz*, paragraph 37; *Cartes Bancaires*, paragraph 54.

'It is submitted that there is an implicit intention to influence other parties, and price, in the vast majority of information sharing that takes place'.⁶⁰⁹

'NFM1 submits that his communications, which he accepts potentially had the effect (and indeed at least partly had the purpose) of influencing the bids of other buy-side participants, were entirely proper.'⁶¹⁰

'The disclosure of the size and price limit of NFM1's orders was in the interest of Newton and NFM1's clients, because that disclosure supported NFM1's attempt to influence the views of other fund managers as to the correct valuation of shares offered in the OTB IPO and Market Tech placing.'⁶¹¹

'He [NFM1] was attempting to persuade other fund managers to change their genuinely held views, and for that reason, their bids.'⁶¹²

- 11.55 Hargreave Hale said these submissions showed that *NFM1's* intent was not to reduce the price and that it demonstrated instead that there was a problem of information asymmetry between issuers and investors. It said that they showed merely that the aim of sharing views is 'investor education'.
- 11.56 The FCA however considers these submissions show that *NFM1* considered fund managers spoke to the other with the purpose of influencing the other. *NFM1* himself said some months after the placing that he felt it was acceptable to provide one's own genuine view to other investors in the market with the intention of driving the price down.⁶¹³
- 11.57 Second, the contemporaneous evidence also shows that *NFM1's* subjective intent in disclosing his intended bid for Market Tech shares to Hargreave Hale in particular was to reduce the price of the shares:
- a. Newton (*NFM1*) said that the purpose of his call with Hargreave Hale (*HH FM1*) was to gain momentum and support for his 220p bid.⁶¹⁴
 - b. Newton (*NFM1*) said that he thought there was a good reason to get a good discount on the placing and had decided to put an idea in Hargreave Hale's (*HH FM1*) mind that 220p per share could be a good price.⁶¹⁵
 - c. A few days after the placing, on 13 July 2015, Newton (*NFM1*) commented on his telephone conversation with Hargreave Hale (*HH FM1*) of 9 July in a Bloomberg chat with BMO ([name]). Newton (*NFM1*) wrote to BMO ([name]): '*i rang HH FM3 and RM FM to get them to push price down (...) they didnt help me out (...) they wanted really to do it at 230'*⁶¹⁶
- 11.58 The FCA need not establish that Hargreave Hale (*HH FM1*) had the same subjective intent as Newton. The FCA has shown in Section 9 and at paragraphs 11.50 to 11.52 why it considers the disclosure was by its very nature harmful to competition.

⁶⁰⁹ UUID 62330007, *NFM1's* first written submission in the FSMA investigation, 17 January 2018, paragraphs 35 and 36.

⁶¹⁰ UUID 97490001, *NFM1's* second written submission in the FSMA investigation, 29 June 2018 ('*NFM1* Second FSMA Submission'), paragraph 8.3.

⁶¹¹ UUID 97490001, *NFM1* Second FSMA Submission, paragraph 34.

⁶¹² UUID 97490001, *NFM1* Second FSMA Submission, paragraph 75.

⁶¹³ UUID 876-71481-1, note of an interview with *NFM1* by Allen & Overy LLP on behalf of Newton, 19 January 2016 ('*NFM1* Second Newton Interview'), paragraph 2.30. In this context, the FCA notes that *NFM1* told the FCA in November 2016 that his intention (in the OTB IPO) was not to drive the price down but to '*get what I felt was the fair price for a security*' (see UUID 20320001, *NFM1* First FCA Interview Transcript, page 184, lines 6033-6035). The FCA thinks this amounts to the same thing.

⁶¹⁴ UUID 876-71481-1, *NFM1* Second Newton Interview, paragraph 2.23.

⁶¹⁵ UUID 876-71481-3, note of an interview with *NFM1* by Allen & Overy LLP on behalf of Newton, 3 December 2015 ('*NFM1* First Newton Interview'), paragraph 2.26.

⁶¹⁶ UUID 876-66219-0-50, Bloomberg message between *NFM1* (Newton) and [name] (BMO), 13 July 2015.

- 11.59 Subjective intent is not necessary for that finding, but the FCA considers that the evidence it has that *NFM1*'s subjective intent was to influence other asset managers to depress the issue prices of Market Tech supports its findings that the object of Newton's concerted practice with Hargreave Hale was to prevent, restrict or distort competition.

Hargreave Hale's submissions on 'object' and the FCA's view of them

Fragmented market

- 11.60 Hargreave Hale submitted that Newton's (*NFM1*) and Hargreave Hale's (*HH FM1*) involvement in the Market Tech placing was too small and the market was too large and fragmented for the disclosure to 'reveal in itself a sufficient degree of harm to competition',⁶¹⁷ in light of the nature of the information disclosed.⁶¹⁸
- 11.61 The FCA finds (as set out in Section 9) that as a matter of law, information sharing is not an object infringement only in highly concentrated, oligopolistic markets. What matters in an IPO or placing book-building process is that uncertainty between rival asset managers (here, Newton and Hargreave Hale) is eliminated or substantially reduced, rather than uncertainty across the market as whole (see also paragraph 9.25(b)). In a book-building process, a one-off disclosure of strategic information is sufficient to prevent, restrict or distort competition (see also paragraph 11.84).

Unilateral or one-off disclosures

- 11.62 Hargreave Hale said that the exceptional cases involving the unilateral disclosure of information which have been assessed as object infringements have established an element of collusion through the development of longer term practices and expectations as between the parties, or, in respect of isolated instances of disclosure, in the context of a meeting between all of the competitors in a highly concentrated oligopolistic market. Neither of those criteria is satisfied in the present case.⁶¹⁹ It said that there was no pattern of behaviour or shared understanding that had evolved as between Hargreave Hale (*HH FM1*) and Newton (*NFM1*).⁶²⁰
- 11.63 The FCA finds that in a book-building process, a one-off disclosure of strategic information can be (and in this case, was) sufficient to prevent, restrict or distort competition – there was no need for a longer-term practice or pattern to do so. See Section 5.

Innocent recipient/no Hargreave Hale intent

- 11.64 Hargreave Hale said that any consideration of the legal and economic context must lead to the conclusion that the conduct was not capable of reducing uncertainty because Hargreave Hale (*HH FM1*) was merely the innocent recipient of unsolicited information,⁶²¹ who did not solicit, encourage or expect the provision of confidential information or

⁶¹⁷ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 1.50 and 4.74; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 659-695 and 1356-1376. See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraphs 1.3 and 1.17(c); UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 5.12-5.13 and 5.17(a); UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.7.

⁶¹⁸ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.74; UUID 118990004, Hargreave Hale Further DPS Submission, paragraph 2.32(c).

⁶¹⁹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.70(b).

⁶²⁰ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.70(b) and (c)(iii).

⁶²¹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.76. See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraphs 2.20, 2.4(b)(i) and 2.5.

reciprocate in an exchange of confidential information.⁶²² It also said that the FCA only provides evidence of *NFM1*'s objectives, which is insufficient, and had failed to take Hargreave Hale's objectives as a passive recipient into account.⁶²³

- 11.65 The FCA has found that Hargreave Hale was not a passive recipient of the information disclosed, but requested and/or accepted that information.⁶²⁴ It has found the mental elements necessary for both Newton and Hargreave Hale to demonstrate the 'knowing' substitution necessary to form a concerted practice, since it has found that Hargreave Hale requested and/or accepted the strategic information Newton disclosed. It was not just a 'passive recipient' of Newton's strategic information.
- 11.66 The FCA need not show a party's subjective intent in order to establish an 'object' infringement, but evidence of such intent can provide good evidence that a concerted practice has an anti-competitive object: see paragraph 9.4. The FCA considers *NFM1*'s subjective intent is relevant to whether the objective of the concerted practice was anticompetitive: he sought to influence other asset managers to depress share prices and disclosed strategic information. As noted, it has found that Newton and Hargreave Hale each had the relevant mental element necessary to form a concerted practice.

NFM1's intent

- 11.67 Hargreave Hale said that *NFM1*'s unilateral objective was irrelevant in circumstances where there was no mental consensus between Newton and Hargreave Hale and therefore no concerted practice.⁶²⁵ In terms of the objectives of the conduct, Hargreave Hale said that *NFM1*'s submissions made to the FCA in the context of regulatory proceedings⁶²⁶ showed that his intent was not to reduce the share price of the placing but was to address information asymmetry between the book-builder and asset managers.⁶²⁷
- 11.68 The FCA considers that disclosing strategic information does not affect information asymmetries: it contains no substantive information about the issuing company but instead discloses the competitive strategy of the rival asset manager. It might be possible for asset managers to discuss an issuing company and, in particular, general or factual information about it without infringing competition law. However, Newton did more than that and disclosed strategic information which Hargreave Hale accepted.

Newton's disclosed strategy was against Hargreave Hale's commercial interests

- 11.69 Hargreave Hale said that the strategy disclosed by Newton was expressly stated by Hargreave Hale to be contrary to Hargreave Hale's commercial interests.⁶²⁸ Hargreave Hale said this is supported by the FSMA Notices, which note for example that *HH FM1* told *NFM1* that '*his interest was in the share price not being too low*'.⁶²⁹
- 11.70 The FCA has found that strategic uncertainty was knowingly and substantially reduced or eliminated between Newton and Hargreave Hale, irrespective of whether Hargreave Hale's

⁶²² UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 4.70(c) and 5.113.

⁶²³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 1.53 and 4.71; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 1927-1931. See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraphs 1.17(c), 2.16 and 2.17(b); UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraph 2.32(a); UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.8(b).

⁶²⁴ See paragraphs 11.16-11.26.

⁶²⁵ See UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 2.15; UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 1.6(a), 4.5 and 5.36.

⁶²⁶ UUID 97490001, *NFM1* Second FSMA Submission.

⁶²⁷ See UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 2.18.

⁶²⁸ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 4.70(c) and 5.113.

⁶²⁹ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.3.

commercial interests were aligned with those of Newton.⁶³⁰ This is the key question. Further, Hargreave Hale's commercial incentives were mixed (paragraph 11.44).

Disclosure is part of price formation

- 11.71 Hargreave Hale said that the discussions were not by their very nature harmful, given that book-builders disclose this type of information as a legitimate part of their price formation process⁶³¹ and as the disclosure of information by and between market participants is an accepted and essential aspect of the price formation process in IPOs and placings.⁶³²
- 11.72 It said that this was supported by the FSMA Documents, for example the FSMA Decision Notice recognised that fund managers form a view of their valuation of shares based on, among other things, '*their sense of the level of interest from discussions with other market participants (for example their views on the company's prospects)*'; the FSMA Decision Notice also distinguished between '*discussing valuations and disclosing certain information about bids*' and '*seeking to influence potential investors to bid at the same price limit*'. Hargreave Hale also said that made no suggestion that simply disclosing information about bids is contrary to APER. Therefore, the disclosure would not amount to an object restriction as it is not obvious as to whether, and if so where, a line should be drawn.⁶³³
- 11.73 The FCA commented on the relevance to this investigation of the FSMA Notices in paragraph 10.19. It has found no evidence to suggest that the disclosure by Newton (*NFM1*) was an accepted and essential aspect of the price formation process.⁶³⁴ In a book-building process, asset managers are rivals offering to supply capital, and must not concert by disclosing and accepting strategic information to and from each other as they do so.

220p bid would have missed

- 11.74 Hargreave Hale said that Newton's (*NFM1*) disclosure that he was '*submitting a chunky order at that 220 level*' did not, as a matter of fact, reduce or remove uncertainty as to the operation of the market because any bid made at that level would have missed out on receiving an allocation as it was below the guidance issued by the broker that bids below 223 pence were likely to miss out.⁶³⁵
- 11.75 The FCA finds that Newton's disclosure did remove the uncertainty that Hargreave Hale had at that point regarding Newton's competitive conduct: such uncertainty is a key source of competitive pressure during a book-build (paragraph 5.76). That other factors meant that the bidding information that Newton disclosed was not followed by Newton (so that Newton's final bid was above 220p, and that a 220p bid would have missed out) does not affect the FCA's view that Newton's disclosure eliminated or substantially reduced strategic uncertainty between Newton and Hargreave Hale at the time when they were in competition.

⁶³⁰ See paragraph 11.42.

⁶³¹ UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 5.14-5.16.

⁶³² UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraphs 1.1(a), 2.10 and 3.41, UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraph 3.23(b).

⁶³³ UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, e.g. paragraphs 9-10.

⁶³⁴ See paragraph 11.15.

⁶³⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.75.

Attempt to influence is not concerted practice

- 11.76 Hargreave Hale said that the evidence was of an attempt to influence, not to coordinate and that an attempt to influence does not satisfy the criteria of coordination and cooperation necessary for determining the existence of a concerted practice.⁶³⁶ Hargreave Hale said that this was supported by the FSMA investigation, which concluded that *NFM1* (of Newton) 'attempted to influence' other fund managers to cap their orders at the same price as his orders and that these attempts were unsuccessful.⁶³⁷
- 11.77 Hargreave Hale said that (i) the FSMA Decision Notice distinguishes between '*discussing valuations and disclosing certain information about bids*' and '*seeking to influence potential investors to bid at the same price limit*', (ii) there is no suggestion in the FSMA Decision Notice that simply disclosing information about bids is contrary to APER and (iii) likewise, simply receiving information about another participant's bid or views on valuation does not equate to a concerted practice as it does not involve a 'concurrence of wills'.⁶³⁸
- 11.78 Hargreave Hale noted that *NFM1*'s submission that the discussions '*potentially had the effect (and indeed at least partly had the purpose) of influencing the bids of other buy-side participants*', and said that a unilateral action which potentially had the effect of influencing bids falls a long way short of the relevant legal threshold for establishing an object restriction.⁶³⁹
- 11.79 The FCA finds that whether or not *NFM1*'s conduct could be categorised as an attempt to influence under the FSMA investigation is not relevant to an assessment as to whether or not Hargreave Hale infringed the Act. It notes that a finding under FSMA (that there was an 'attempt to influence') is not incompatible with the FCA's findings in this decision, namely that Hargreave Hale and Newton participated in a concerted practice that infringed competition law. The FCA finds that Newton disclosed strategic information which Hargreave Hale requested and/or accepted, and this (given the other factors present) amounts to an infringement.

Effect analysis

- 11.80 Hargreave Hale said that the FCA should have carried out an analysis of the effects on competition, and that any such analysis would show that there were no such effects.⁶⁴⁰ Hargreave Hale said this is supported by the FSMA Documents, which note that the conduct had no effect on the level of either Hargreave Hale's or Newton's order.⁶⁴¹
- 11.81 The FCA disagrees that it should carry out an effects analysis: see Section 9. For the reasons given in paragraphs 11.49 to 11.59, the FCA is satisfied that the concerted practice had the object of preventing, restricting or distorting competition and so no effects-based analysis is necessary.

⁶³⁶ See UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 1.6(b), 3.1-3.5 and 4.1-4.3; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.6; UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraph 2.6. In these submissions, Hargreave Hale said that its point was supported by *Cimenteries* which contrasted at paragraph 1849 a concerted practice with '*...the purely passive role of a recipient of the information, which [the discloser] unilaterally decided to pass on to it, without any request by [the recipient]*'.

⁶³⁷ UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, paragraphs 3-7.

⁶³⁸ See UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, e.g. paragraph 10.

⁶³⁹ UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 5.19-5.21, citing extracts from UUID 97490001, *NFM1*'s Second FSMA Submission; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraph 2.32(c); UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.8(c)(ii).

⁶⁴⁰ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.77; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraph 2.32(c).

⁶⁴¹ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.8(c)(iii).

11.82 Hargreave Hale also made several points on why it considers that that the conduct cannot constitute an 'object' restriction because it gave rise to market efficiencies. These points are summarised and addressed in Section 16.

Novelty

11.83 Hargreave Hale also referred to observations made by the FCA's regulatory decision-making panel that Newton's conduct can be distinguished from a typical price-fixing cartel, that notes the complexity of the competition law aspects of the case and the degree of confusion and uncertainty as to whether *NFM1*'s behaviour constituted an infringement and if so what was the nature of that infringement.⁶⁴²

11.84 The FCA addresses Hargreave Hale's comments on the novelty of the infringement in paragraph 17.70. See also paragraphs 9.17, 9.28 and 17.21 regarding 'novelty'.

Conclusion on 'Object'

11.85 In light of the outcomes that a substantial reduction or elimination of strategic uncertainty in a book-building process can lead to (as summarised at paragraph 11.51), the FCA finds that the disclosure by Newton (*NFM1*) to Hargreave Hale (*HH FM1*) in relation to the Market Tech placing revealed in itself a sufficient degree of harm to competition. There is no need to examine its effects, since it removed or at least substantially reduced the strategic uncertainty between otherwise rival asset managers on which the competitive outcome to a placing depends.

11.86 In light of the above assessment, taking into account the content, objectives and legal and economic context of the concerted practice, the FCA finds there is a concerted practice with the object of preventing, restricting or distorting competition between Newton and Hargreave Hale in relation to the book-building process for the Market Tech placing.

⁶⁴² See UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraphs 1.3(c)-(d) and 3-3-3.8.

12 Market Tech: Newton/RAMAM concerted practice 'by object'

Introduction

- 12.1 The FCA finds that the conduct of Newton and RAMAM in relation to the book-building process leading to the placing of shares in Market Tech amounts to an infringement of the Chapter I prohibition and Article 101 TFEU. These findings are made in light of the requirements set out at in Sections 8 and 9 for such a finding.
- 12.2 In this Section, the FCA sets out its findings that Newton and RAMAM engaged in a concerted practice (paragraphs 12.3 to 12.44) that had the object of preventing, restricting or distorting competition in relation to the placing of shares in Market Tech (paragraphs 12.45 to 12.74). Section 16 assesses the other conditions necessary for an infringement decision.

Concerted practice

- 12.3 As set out at paragraph 8.67, the key legal principles of a concerted practice in the context of the sharing of information are:
- a. 'discussions';
 - b. between two or more actual or potential competitors;
 - c. subsequent conduct on the market; and
 - d. a relationship of cause and effect between the discussions and that conduct.
- 12.4 These principles are applied below to the conduct between Newton and RAMAM in relation to the placing of shares in Market Tech, taking into account the submissions made by RAMAM.⁶⁴³

Discussions

- 12.5 The existence of a concerted practice implies contact between actual and/or potential competitors. Such contact may be in the form of an exchange of strategic information. It may also include a situation where one competitor discloses strategic information to another and the latter has requested it or accepts it.

⁶⁴³ The leniency applicant, Newton, admitted liability as set out in the Statement of Objections; see UUID 65240005, Newton Submission on Statement of Objections.

The information that Newton disclosed to RAMAM

12.6 As set out at paragraphs 7.6 and 7.7, at 09:57 on 9 July 2015 (just before speaking with Hargreave Hale), Newton (*NFM1*) called RAMAM (*RM FM*). The FCA does not have a recording of this conversation.⁶⁴⁴

FCA findings

12.7 The evidence shows that a call between Newton (*NFM1*) and RAMAM (*RM FM*) took place at 09:57 on 9 July 2015. This is accepted by Newton and RAMAM.

12.8 The FCA finds that on this call, in light of all the available evidence, Newton (*NFM1*) disclosed its proposed valuation of Market Tech at 220p per share to RAMAM (*RM FM*), for the following reasons:

- a. *NFM1* (of Newton) was consistent in his recollection of the existence of the call with RAMAM (*RM FM*). He confirmed that the discussion took place both during his interview with Allen & Overy LLP on behalf of Newton⁶⁴⁵ and in his FCA interview.⁶⁴⁶ *NFM1* said in his Allen & Overy interview that he could not remember the exact words he used when he mentioned the 220p price to *RM FM* but he thought he said: *'this is the price I am going at. I think it is a fair price, you might consider it'*. *NFM1*'s FCA interview is quoted in paragraph 7.6. In contrast, *RM FM*, in his FCA interview on 31 October 2016 (just over a year after the call took place), said he could not remember any call. Subsequently he noted in his witness statement of 1 February 2018 (almost two years after the call) that a call had in fact taken place.⁶⁴⁷
- b. At 14:38 on 9 July 2015, and after the call with Newton earlier that morning (see paragraph 12.7), RAMAM (*RM FM*) submitted an order for 2,125,000 shares in Market Tech at 220p per share. While the FCA notes that RAMAM said that the 220p bid by *RM FM* was not influenced by *RM FM*'s conversation with *NFM1* that morning and was independent,⁶⁴⁸ the FCA considers that the fact that RAMAM (*RM FM*) placed the same bid as Newton (*NFM1*) shortly after their call and that both bids were 'outliers' (at 220p) compared to other bids, suggests that the disclosure did take place. See paragraphs 7.5 to 7.16 for the sequence of events.
- c. On 13 July 2015, Newton (*NFM1*) sent a Bloomberg message to BMO (*[name]*) which said *'i rang HH FM3 and RM FM to get them to push price down ...they didnt help me out...they wanted really to do it at 230'*. BMO (*[name]*) said *'So HH FM3 and RM FM basically said no?'* Newton (*NFM1*) replied *'...they said they would think about it...'* and *'seemed positive'*. He added *'it was HH FM1 who called me'*.⁶⁴⁹ The FCA thinks that this contemporaneous evidence demonstrates that Newton (*NFM1*) did disclose a statement of intention to RAMAM (*RM FM*).

12.9 As set out in Section 8, the FCA considers that a statement of intention by one competitor to another that eliminates or substantially reduces uncertainty as to its expected conduct on the market is 'strategic information'. The FCA finds that Newton's statement to RAMAM contained such strategic information. This disclosure consisted of Newton's intended bid for Market Tech at 220p a share and so was a statement of future conduct. It was made

⁶⁴⁴ See paragraph 7.6.

⁶⁴⁵ UUID 876-71481-3, *NFM1* First Newton Interview, page 3, paragraph 2.18.

⁶⁴⁶ UUID 11250002, *NFM1* Second FCA Interview Transcript, page 66, lines 2395-2408.

⁶⁴⁷ See paragraph 7.7.

⁶⁴⁸ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 27(f).

⁶⁴⁹ UUID 876-66219-0-50, Bloomberg message between *NFM1* (Newton) and *[name]* (BMO), 13 July 2015.

in the context of an accelerated book-build on the day the books were due to close. In those circumstances, where it was unlikely that Newton would depart from its stated intention, RAMAM could place greater reliance on the information disclosed. Accordingly, the FCA considers that uncertainty between Newton and RAMAM as to Newton's expected conduct on the market was eliminated or at the very least substantially reduced (see paragraphs 8.14 to 8.21).

Party submissions and the FCA's view of them

12.10 *NFM1* (of Newton) told the FCA that he spoke to RAMAM (*RM FM*) about Market Tech.⁶⁵⁰

*'During my call with RM FM, I told him that I valued the new Market Tech shares at 220p each. I also gave him my views on why I came to that valuation.... RM FM told me that he did not agree with me and we left it like that'.*⁶⁵¹

12.11 As noted at paragraph 7.7, RAMAM (*RM FM*) did not recall the conversation with *NFM1*.⁶⁵² However, RAMAM did not dispute that a call between *NFM1* and *RM FM* took place. It noted that *RM FM* said in his witness statement that there was a tube strike on 9 July so he had set up a call diversion from his work phone to his personal mobile. RAMAM said that *RM FM* did not think that *NFM1*'s recollection of that call was plausible in so far as *NFM1* suggests that he provided information to *RM FM* regarding Market Tech. It said: '*RM FM continues to have no recollection that NFM1 actually mentioned his intended bidding strategy for Market Tech at all*'.⁶⁵³

12.12 RAMAM said that *RM FM*'s recollection was that of a telephone conversation he had with *NFM1* at the time involved two other companies, Play Tech and Plus 500 which are irrelevant to the FCA's case. It said that explained the discrepancy between *NFM1*'s recollection of the call being short when in fact the telephone bill showed it as being 13 minutes 52 seconds long.⁶⁵⁴

12.13 The FCA is not persuaded by RAMAM's representations. For the reasons set out at paragraphs 12.7 and 12.8, it considers that the evidence shows that Newton did disclose strategic information to RAMAM on the 09:57 call on 9 July 2015.

Request and/or acceptance

12.14 Having established that Newton disclosed strategic information to RAMAM, the FCA must show that RAMAM either requested that information or at the very least accepted it in order to find a concerted practice.⁶⁵⁵

FCA findings

12.15 As set out at paragraph 8.34, the FCA notes that the facts of a case may show elements of both requesting and acceptance of strategic information and it is not necessary to go further than to show that the facts demonstrate sufficient engagement by the recipient.

⁶⁵⁰ See UUID 29350001, *NFM1* First Witness Statement, paragraph 12; UUID 876-67349-0-6, *NFM1* Mobile Bill. Fact and time of call also evidenced by *NFM1*'s mobile phone records.

⁶⁵¹ UUID 29350001, *NFM1* First Witness Statement, paragraph 14.

⁶⁵² UUID 1600001, *RM FM* FCA Interview Transcript, page 21, lines 754-756.

⁶⁵³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 24 and 26(g); UUID 66450011, *RM FM* Witness Statement, paragraphs 12-13, 25-34.

⁶⁵⁴ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 27(d) and (e); UUID 66450011, *RM FM* Witness Statement, paragraphs 25-34. See also UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1458-1475.

⁶⁵⁵ *Cimenteries*, paragraph 1849. See Section 8, The law applicable to 'concerted practices'.

- 12.16 As set out above at paragraph 12.8, the FCA finds that, in light of all the available evidence, Newton (*NFM1*) disclosed on the call with RAMAM (*RM FM*) at 09:57 on 9 July 2015, its proposed valuation of Market Tech at 220p per share.
- 12.17 It also finds that RAMAM accepted that information. This is evident from *NFM1*'s report of the call to BMO ([*name*]) on 13 July 2015. *NFM1* said (at 14:17:05) that '*i rang HH FM3 and RM FM to get them to push price down*'. While he noted at 14:17:47 '*they didnt help me out*', he also said they '*...would think about it*' and '*seemed positive*'.⁶⁵⁶ This near contemporaneous evidence shows that RAMAM engaged with the strategic information, so leading to the mental element and the 'knowing substitution' that is a necessary component of a concerted practice. Further, RAMAM also placed a bid at 220p following its call with Newton and as set out at paragraph 12.8(b), these bids were 'outliers' compared to other bids. This also indicates that it accepted the information that Newton disclosed.
- 12.18 The FCA considers it is immaterial whether or not RAMAM agreed with Newton's proposed course of action.⁶⁵⁷ As noted in Section 8, the mental element of a recipient necessary for a concerted practice relates to acceptance of the strategic information. It does not require acceptance of the proposed course of conduct (such as an agreement to submit bids at particular prices or volumes). For that reason, the fact that *NFM1* told [*name*] that *RM FM* did not '*help him out*' or that *NFM1* said in his First Witness Statement that *RM FM* did not really agree with him is immaterial to whether RAMAM accepted the strategic information from Newton.
- 12.19 As noted in paragraph 8.35, evidence that the recipient failed to distance itself from the information or rejected the receipt of the information or reported such receipt to regulators or internal compliance can also support a finding of acceptance. The FCA does not consider that RAMAM's (*RM FM*) statement to Newton (*NFM1*) that he did not really agree with *NFM1* is sufficient to constitute 'distancing' because RAMAM has not adduced evidence to show that it opposed the anti-competitive practice in the way required by case law.

Party submissions and the FCA's view of them

- 12.20 RAMAM said *RM FM* had no recollection of speaking with *NFM1* with respect to Market Tech but in any event, there was no evidence of a consensus or concurrence of wills between it and Newton. It said that the contemporary record and the witness evidence of *NFM1* and *RM FM* confirm that there was no meeting of minds as to the future conduct of either party.⁶⁵⁸ It noted that *NFM1* himself had told the FCA that *RM FM* did not commit to anything and he did not really agree with *NFM1* – even stating that he was wrong, which is consistent with *RM FM*'s view that he did not endorse *NFM1*'s strategy. *NFM1*'s recollection of the call shows that its content was not important to *RM FM*; this supports RAMAM's position that there was no acceptance of strategic information.⁶⁵⁹ It added that there is no contradiction between two parties to a conversation having different recollections of that conversation.⁶⁶⁰ RAMAM said that *NFM1*'s recollection of the call was incorrect as *NFM1* would have known that *RM FM* was familiar with the transaction and did not need an explanation of its merits or demerits. *RM FM* thought the most *NFM1* might

⁶⁵⁶ UUID 876-66219-0-50, Bloomberg message between *NFM1* (Newton) and [*name*] (BMO), 13 July 2015 at 14:18.46 - 14:18:55.

⁶⁵⁷ In this regard, the FCA notes that there is some inconsistency between the near contemporaneous evidence where *NFM1* told [*name*] that RAMAM (and Hargreave Hale) seemed positive and *NFM1*'s First Witness Statement where he said that RAMAM did not accept what he said on their call. In any event, as noted in paragraph 13.36, acceptance does not require acceptance of a proposed course of action.

⁶⁵⁸ UUID 127350001, RAMAM First Submission on FSMA Documents.

⁶⁵⁹ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1651-1658; UUID 127350001, RAMAM First Submission on FSMA Documents.

⁶⁶⁰ UUID 127350001, RAMAM First Submission on FSMA Documents.

have said was that he was looking at a real estate investment and a price, in part because the discussions took place during the “dark period”, so the parties would not have been discussing the issuing company by name.⁶⁶¹ *NFM1*’s statement that he asked *RM FM* to ‘push the price down’ (paragraph 12.8(c)) was nothing more than boasting.⁶⁶²

- 12.21 RAMAM said there was no expectation of the part of *NFM1* as to *RM FM*’s future conduct and he did not know that *RM FM* had made his bid below the strike price.⁶⁶³ That RAMAM’s bid was lower than the strike price and the same as Newton’s cannot form the basis of a concurrency of wills in light of the fact that *NFM1* said *RM FM* rejected his approach.⁶⁶⁴ RAMAM said that this was supported by the FSMA Documents, which characterise Newton’s conduct throughout as an ‘attempt’ to subvert the price formation process or to galvanise competitors into changing their orders.⁶⁶⁵
- 12.22 RAMAM said *RM FM* developed a pricing strategy independently, taking account of his own knowledge of the business and additional information provided by Shore Capital as well as from the company’s management on a call he had with them before speaking to *NFM1*. The fact that the bids were made by *NFM1* and *RM FM* after their call cannot form any basis for saying there was a concurrence of wills given the rejection by *RM FM* (according to *NFM1*) of *NFM1*’s approach.⁶⁶⁶ It is not enough that *RM FM* may have made his own bid with knowledge of *NFM1*’s bidding intention.⁶⁶⁷
- 12.23 The FCA does not accept these submissions. It finds that the call took place and Newton disclosed strategic information to RAMAM. It considers that the ‘meeting of minds’ is not the applicable legal test (see Section 8), but that Newton had the mental element necessary in that disclosure was deliberate, with the knowledge and awareness that the information disclosed may affect the competitive conduct of the recipient, and that RAMAM accepted the information (see paragraph 8.30). RAMAM’s submission that such discussions were unlikely to take place during the dark period and given *RM FM*’s existing knowledge of the Market Tech transaction are not sufficient to demonstrate that the discussions did not take place, given the contemporaneous evidence that they did.
- 12.24 The FCA has not found an ‘attempt’ to influence bids amounts to an infringement of competition law (see RAMAM’s submission summarised in paragraph 12.21). Rather it finds that Newton disclosed strategic information which RAMAM accepted, and this does (given the other factors present) amount to such an infringement. The FCA’s characterisation of the conduct under FSMA and under the Act accord, although the legal conditions for an infringement finding under each differ. Finally, in response to RAMAM’s submission summarised in paragraph 12.22, RAMAM has not shown that Newton’s disclosure had no influence whatsoever on RAMAM’s bid: see paragraphs 12.36 to 12.43.

Between two or more actual or potential competitors

FCA findings

⁶⁶¹ UUID 66450011, *RM FM* Witness Statement, paragraph 31; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1491-1549.

⁶⁶² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. footnote 4, paragraphs 55(c) and 59(a); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1522-1523, 1645-1647 and 1756-1766.

⁶⁶³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 27 and 55.

⁶⁶⁴ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 55(f).

⁶⁶⁵ UUID 127350001, RAMAM First Submission on FSMA Documents.

⁶⁶⁶ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 27.

⁶⁶⁷ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 55(d).

- 12.25 At the time of the infringement in relation to Market Tech, the FCA finds that Newton and RAMAM were actual competitors on the relevant market and potential competitors in relation to the placing of shares in Market Tech. This is because they were both asset managers in the supply of equity capital in the primary capital market to UK-listed small and mid-cap companies (see Section 4 on the parties to the investigation and Section 6 on the relevant market). In this particular transaction, the FCA also notes that they also both bid in the Market Tech placing and so were direct rivals competing for share allocations in that company.
- 12.26 This is supported by *NFM1*'s (Newton) acceptance in his FCA interview that RAMAM and Newton were competitors.⁶⁶⁸

Party submissions and the FCA's view of them

- 12.27 RAMAM disputed that Newton and it were competitors. It said that in a 'hot' IPO there was an element of competition in the sense that there would not be enough shares to go around, but in a 'cold' IPO, investors were not competitors in a real sense because if they did not all participate, the deal might not happen.⁶⁶⁹ RAMAM said that this was consistent with its view of asset managers as purchasers rather than suppliers; asset managers compete for resources on the upstream asset market.⁶⁷⁰
- 12.28 The FCA does not draw a distinction between hot and cold IPOs for the purpose of assessing whether asset managers are competitors. As set out at paragraph 5.69, asset managers bidding in IPOs and placings are competing to supply capital and receive the allocation of shares which is closest to their desired allocation, whether or not the transaction is hot. Individual bidders may hold greater sway over whether the IPO succeeds in cold IPOs, but that does not mean that there is no process of competition between them in circumstances where they are still pricing keenly in order to get an allocation close to their desired level.

Subsequent conduct on the market

- 12.29 As set out in Section 7, Newton participated in the placing of shares in Market Tech. Newton's final order was for 9,087,641 shares at the price of 223p per share.⁶⁷¹ Newton was allocated 9 million shares,⁶⁷² which represented 10% of the total value of the placing. RAMAM also participated in the placing: its final order was for 2,125,000 shares at the price of 223p per share.⁶⁷³ RAMAM was allocated 2 million shares,⁶⁷⁴ which represented approximately 2.2% of the total value of the placing
- 12.30 The FCA therefore finds that there was subsequent conduct on the market by both parties following their discussions on 9 July 2015.

A causal connection

- 12.31 As noted in Section 8, in order to establish a concerted practice, there must be a relationship of cause and effect between the discussions and the subsequent conduct. To

⁶⁶⁸ UUID 11250002, *NFM1* Second FCA Interview Transcript, page 70, lines 2548-2552.

⁶⁶⁹ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1576-1589.

⁶⁷⁰ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1591-1601.

⁶⁷¹ UUID 876-66219-0-41, Bloomberg messages between Newton and Canaccord employees, 9 July 2015 beginning at 11:24. The message is stated as 15:53 UTC. BST is quoted as that was the applicable time in the UK at the time.

⁶⁷² UUID 6550003, transcript of a call between [name] (Newton) and Unknown, 10 July 2015 at 07:40, page 2, line 46.

⁶⁷³ UUID 876-68667-13, Bloomberg message between RAMAM employees, 6 July 2015 beginning at 06:15. The message is stated as 06:15 UTC.

⁶⁷⁴ UUID 876-66079-157, email from [name] (Shore Capital) to *RM FM* (RAMAM), 9 July at 19:09.

establish this relationship, and where the undertakings concerned remain active on the market, there exists a presumption that an undertaking takes account of information exchanged with or received from its competitor for the purposes of determining its own conduct on the market.

Application of the presumption

FCA findings

12.32 The FCA finds that Newton and RAMAM remained active on the market following their discussions on 9 July 2015, with neither exiting the market.

12.33 Accordingly, the FCA presumes that RAMAM took account of information received from Newton for the purposes of determining its own conduct on that market. The evidence supports this: the call between Newton (*NFM1*) and RAMAM (*RM FM*) was at 09:57 on 9 July 2015. As set out at paragraph 12.7, the FCA finds that Newton (*NFM1*) disclosed at least its proposed valuation of Market Tech at 220p per share. At 14:37 to 14:39, RAMAM placed a bid at 220p a share.⁶⁷⁵ This bid was somewhat away from what other investors were submitting: the book-builder told RAMAM that 220p was likely to miss.⁶⁷⁶

Party submissions and the FCA's view of them

12.34 RAMAM said that the presumption does not arise because there was no consensus between *NFM1* and *RM FM* and the evidence shows the parties acted on their own assessments in each case.⁶⁷⁷

12.35 The FCA considers that the acceptance by RAMAM of Newton's strategic information provides the mental element required for a concerted practice. Further, orders can be made and/or amended until the book closes. Thus, the disclosure by Newton, accepted by RAMAM, gave RAMAM the opportunity to take the information disclosed to it into account for the purposes of determining its conduct on the market.⁶⁷⁸

Rebutting the presumption

FCA findings

12.36 As set out in Section 8, a party must prove 'to the contrary' that it did not take account of the information received and that the 'concertation did not have any influence whatsoever on its own conduct on the market'.⁶⁷⁹

12.37 Against this background, RAMAM has not provided sufficient evidence to rebut the presumption. *RM FM's* account of how he formulated his price for Market Tech is not supported by any contemporaneous evidence (see paragraphs 12.38 to 12.43). As set out at paragraph 8.66, the FCA believes that an individual's own description of the pricing process, created after the fact and in the context of a later investigation is unlikely to

⁶⁷⁵ UUID 6450001, transcript of a call between [*dealer*] (RAMAM) and Unknown, 9 July 2015 at 14:37; UUID 876-72626-0, transcript of a call between [*dealer*] (RAMAM) and [*name*] (Canaccord), 9 July at 14:38; UUID 19030001, transcript of a call between [*dealer*] (RAMAM) and [*name*] (Berenberg), 9 July 2015 at 14:39.

⁶⁷⁶ UUID 876-72626-9, transcript of a call between *RM FM* (RAMAM) and [*name*] (Shore Capital), 9 July 2015 at 16:32.

⁶⁷⁷ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 58-59; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1347-1349; UUID 127350001, RAMAM First Submission on FSMA Documents.

⁶⁷⁸ See Section 8, The law applicable to 'concerted practices'.

⁶⁷⁹ *Hüls* (see Section 8).

amount to the 'objective evidence' necessary to rebut the presumption (in the absence of other contemporaneous evidence).⁶⁸⁰ The strategic information was in the mind of RAMAM (*RM FM*), who could and did make a bid at the time the disclosure was made, and so there was cause and effect between the discussions and RAMAM's subsequent conduct on the market.

Party submissions and the FCA's views of them

- 12.38 RAMAM said that *RM FM*'s bidding conduct was unaffected by the disclosure, with *RM FM* rejecting *NFM1*'s approach from the start.⁶⁸¹
- 12.39 *RM FM* said that his bidding strategy was based on his own assessment of the transaction in advance of any call with *NFM1* and would not have been influenced by *NFM1* even if he had communicated his bidding strategy to *RM FM*.⁶⁸²
- 12.40 *RM FM* said he wanted to be supportive of the company and restrict dilution. He decided to purchase only a small number of shares as a top up to his existing shareholding. He said he sought an analytical framework from Shore Capital which he received on 8 July 2015 and had determined that the price he was prepared to pay was up to approximately 224.5p per share. The next lower round number was, said *RM FM* 220p which was a 'sensible opening bid in [his] mind'. He said brokers would always push him above what he offered so it was good practice to start below his valuation. But he said he did was 'not interested in the opinions of others and do not follow them'.⁶⁸³
- 12.41 *RM FM* also said that as an existing shareholder, he would not have wanted to push the price down and that to tell someone that he would 'think about' something was a phrase he often used to get people off the phone.⁶⁸⁴
- 12.42 As noted (paragraph 12.37), the FCA finds that these submissions, without good contemporaneous evidence to support them, are insufficient to meet the requisite legal standard to rebut the presumption of causation.
- 12.43 To conclude, RAMAM has not demonstrated that it made an independent decision and did not distance itself or reject the receipt of information (see further paragraph 8.65). As the FCA found in paragraph 12.8, Newton's strategic information was in the mind of someone at RAMAM who could and did make a bid and so the FCA can presume that RAMAM took account of information received from Newton for the purposes of determining its conduct on that market. The FCA applies the legal presumption that RAMAM took account of information received from Newton for the purposes of determining its conduct on that market and so there was cause and effect between the discussions and the subsequent conduct on the market.

Conclusion

- 12.44 In light of the above, the FCA's finds that, as a result of the discussions between Newton and RAMAM where Newton disclosed its valuation intentions in the placing of Market Tech IPO on 9 July 2015, practical cooperation between them was knowingly substituted for the

⁶⁸⁰ See *Cisac*, paragraph 99.

⁶⁸¹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 59(a).

⁶⁸² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 59(b); UUID 66450011, *RM FM* Witness Statement, paragraphs 35 and 39.

⁶⁸³ UUID 66450011, *RM FM* Witness Statement, paragraphs 36-39.

⁶⁸⁴ UUID 66450011, *RM FM* Witness Statement, paragraph 41.

risks of competition. As such, the FCA finds that the conduct in question amounted to a concerted practice.

Object of preventing, restricting or distorting competition

12.45 The Chapter I prohibition and Article 101 TFEU prohibit concerted practices which '*have as their object or effect the prevention, restriction or distortion of competition*'.

FCA findings

12.46 The FCA considered in Section 9 whether the disclosure and acceptance of strategic information during a book-building process could amount to a concerted practice with the object of preventing, restricting or distorting competition. As also set out in Section 9, the essential legal criterion for a finding of anti-competitive object is that the coordination between undertakings '*reveals in itself a sufficient degree of harm to competition*' such that there is no need to examine its effects.

12.47 As set out in paragraphs 9.3 to 9.5, to determine whether a concerted practice has the object of restricting competition, regard must be had to the content of its provisions, its objectives and the legal and economic context.⁶⁸⁵ When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁶⁸⁶ Anti-competitive subjective intentions on the part of the parties can provide good evidence that there is an anti-competitive object, but they are not necessary for such a finding.⁶⁸⁷

12.48 The FCA considers these elements below, in light of RAMAM's representations which it assesses subsequently.

Content and objectives of the concerted practice and its legal and economic context

12.49 Section 5 sets out the legal and economic circumstances of a book-build process (as well as the real conditions of the function and structure of the market in question). In particular, as set out in paragraph 5.69, the FCA finds that asset managers should have been competing during the Market Tech book-building process, by submitting rival bids to the book-builder. The competitive outcome of the book-building process depended on there being strategic uncertainty between rival asset managers. That strategic uncertainty was eliminated or substantially reduced where one asset manager disclosed strategic information to another in the book-build. Since this uncertainty was eliminated or substantially reduced, that outcome could have been adversely affected: paragraph 9.24 summarises possible adverse outcomes.

12.50 The FCA finds, as set out at paragraphs 12.7 to 12.9, that the uncertainty between Newton and RAMAM as to Newton's expected conduct on the market was eliminated or at the very least substantially reduced in the context of the placing of shares in Market Tech. Newton's statement consisted of at the very least, the share price of Market Tech at 220p per share to RAMAM (*RM FM*). Importantly, it was made in the context of an accelerated book-build

⁶⁸⁵ See paragraph 9.3.

⁶⁸⁶ *Cartes Bancaires*, paragraph 53; *Allianz*, paragraph 36; *Lundbeck*, paragraph 343.

⁶⁸⁷ *Allianz*, paragraph 37; *Cartes Bancaires*, paragraph 54.

on the day the books were due to close, in which circumstances, it is unlikely that the discloser will depart from his stated intention, so RAMAM could place greater reliance on the information disclosed.

NFM1's intent

- 12.51 The FCA considers that Newton's (*NFM1*) subjective intent was to reduce the Market Tech placing share price. While not decisive, this supports its finding that concerted practice was a restriction of competition by object.
- 12.52 First, the FCA considers that *NFM1* thought that the general purpose of fund managers speaking to each other is to influence the other and to drive the price down, for the reasons listed in paragraph 11.54. The FCA does not accept RAMAM's position that the submissions made by *NFM1* cannot be read in this way (see further paragraphs 12.67 to 12.70).
- 12.53 Second, *NFM1's* subjective intent in disclosing his intended bid for Market Tech shares to RAMAM in particular is evident:
- a. he said that the purpose of its call with RAMAM (*RM FM*) was to gain momentum and support for his 220p bid.⁶⁸⁸
 - b. he said that he thought there was a good reason to get a good discount on the placing and had decided to put an idea in RAMAM's (*RM FM*) mind that 220p per share could be a good price.⁶⁸⁹
 - c. A few days after the placing, on 13 July 2015, *NFM1* commented on his telephone conversation with RAMAM (*RM FM*) of 9 July in a Bloomberg chat with BMO (*[name]*). *NFM1* wrote to *[name]*: 'i rang HH FM3 and RM FM to get them to push price down (...) they didnt help me out (...) they wanted really to do it at 230'.⁶⁹⁰
- 12.54 The FCA is not required to establish that RAMAM (*RM FM*) had the same subjective intent as Newton, or that Newton's (*NFM1*) intent demonstrated any mutuality between Newton (*NFM1*) and RAMAM (*RM FM*). As set out above at paragraphs 12.15 to 12.19, the FCA finds that RAMAM accepted the disclosure from Newton. RAMAM engaged with the strategic information disclosed so leading to the mental element and the 'knowing substitution' that is a necessary component of a concerted practice.
- 12.55 The FCA does not need to demonstrate, as part of its assessment of subjective intent (or as part of its overall assessment of whether or not there was an infringement) that RAMAM (*RM FM*) or any other party changed their order as a result of the discussions since the FCA's finds that there was a restriction of competition by object, that eliminated or substantially reduced strategic uncertainty between Newton and RAMAM.

RAMAM submissions on 'object' and the FCA's view of them

- 12.56 RAMAM submitted that the facts of this case, in the market context, are not sufficiently flagrant to reveal in themselves a sufficient degree of harm to competition to constitute an infringement of competition by object.⁶⁹¹ RAMAM distinguished the facts from other

⁶⁸⁸ UUID 876-71481-1, *NFM1* Second Newton Interview, paragraph 2.23.

⁶⁸⁹ UUID 876-71481-3, *NFM1* First Newton Interview, paragraph 2.26.

⁶⁹⁰ UUID 876-66219-0-50, Bloomberg message between *NFM1* (Newton) and *[name]* (BMO), 13 July 2015.

⁶⁹¹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 71-72.

cases in which a single exchange of information has been found, in exceptional circumstances, to constitute a restriction of competition by object.⁶⁹²

- a. In contrast to *T-Mobile*, where the information exchanged at a multilateral face to face meeting (between all the main suppliers on a retail market) related to a '*one-off alteration in market conduct with reference simply to one parameter of competition*', the information disclosed in this case arose in a rapidly evolving context in which both the 'sell side' and 'buy side' were in receipt of a mass of other such information relevant to the ultimate strike price, which was ultimately set by the broker rather than by individual purchasers.⁶⁹³
- b. In contrast to *Galvanised Steel Tanks*, there is no evidence of any wider or multilateral discussions taking place that could provide evidence of a collusive arrangement to which the exchange of information contributed or that it could reinforce.⁶⁹⁴

12.57 Against this background, RAMAM said it was only in '*wholly exceptional market circumstances*' that a single supply of future purchase information could constitute a 'by object' infringement. By contrast, the facts of the present case in the context of book-building processes were far from this. In particular: the book-runner was seeking to generate excess demand from a wider category of bidder; in many such cases, demand will outstrip supply so that bidders who fail to bid at or above the strike price will be eliminated from the transaction (whether or not they have been made aware of other bids); the vertical and horizontal information flows between actual or potential participants on which the book-building process is founded; and the information asymmetry between the sell-side and the buy-side.⁶⁹⁵

12.58 The FCA disagrees. Within the Market Tech book-building process, asset managers submitted competing bids to supply equity capital, specifying the price and volume at which they are willing to supply. Disclosure of such key strategic information therefore eliminated or substantially reduced the strategic uncertainty between competitors necessary for the process to function effectively. As such, the concerted practice revealed in itself sufficient harm to competition to amount to a restriction by object. To address RAMAM's case law point,⁶⁹⁶ the FCA has found in this case that in the context of the placing of shares in Market Tech, where information was disclosed on the day the books were due to close in an accelerated book-building process, strategic uncertainty between competitors was eliminated or at the very least substantially reduced. On those facts, the conduct had the object of restricting competition.

12.59 RAMAM said that the information disclosed was too uncertain and incomplete to influence competition: there was no evidence that RAMAM provided any information to Newton in relation to Market Tech and that the only evidence was that *RM FM* rejected *NFM1's* approach.⁶⁹⁷ The information disclosed was just one piece of information available in a context in which there is a constant flow of information, with general ongoing uncertainty throughout the dynamic book-building process as to the reliability of such information, during which a range of sources of information as to the changing pattern of demand influences the ultimate price up until the end of the process.⁶⁹⁸

⁶⁹² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 14 and 65-77.

⁶⁹³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 74-77; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1316-1322.

⁶⁹⁴ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 77(f).

⁶⁹⁵ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 72.

⁶⁹⁶ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 14 and 65-67.

⁶⁹⁷ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 77(e).

⁶⁹⁸ UUID 66450010, RAMAM Submission on Statement of Objections, paragraph 77(c).

- 12.60 The FCA accepts that other information was available to RAMAM. However, it finds the book-building process depends on strategic uncertainty between rival asset managers, so that Newton’s disclosure of the information and RAMAM’s acceptance of it eliminated or substantially reduced that strategic uncertainty between them. See paragraph 9.25.
- 12.61 RAMAM said the information was provided to two relatively small market participants, without any evidence that either of the parties to the exchange (or the two buyers collectively) enjoyed market power on any relevant economic market as against the brokers and existing equity holders.⁶⁹⁹
- 12.62 The FCA does not accept RAMAM’s submission that the assessment is undermined by the size of the parties on the market.⁷⁰⁰ The FCA’s case is concerned with competition between the relevant asset managers in the context of a placing. That competition is eliminated or substantially reduced where one asset manager knows the expected conduct of another on the market. That is true irrespective of the size of market, the position of the concerting parties on the market or the concentration of the market. Again, see paragraph 9.25.
- 12.63 RAMAM submitted that the FCA did not address the following issues in its assessment of the legal and economic context:⁷⁰¹
- a. The market power of book-builders, which is crucial given their pivotal role between the sell and the buy sides.
 - b. The significance of price revelation in the book-building process, and the fact therefore that a number of potential bidders are dependent on the book-builder for information on the transaction.
 - c. Incentives arising out of, and the importance of, the ongoing relationship between a book-builder and asset managers, and the reputational risk that would arise to have misled a book-builder as to their independent valuation or bidding strategies.
 - d. The role of private equity funds in IPOs and placings, their function as experienced participants in transactions, and the alternative options open to them if a transaction seems unlikely to meet their original commercial objectives.
- 12.64 The FCA recognises the information disclosure role of book-builders and the significance of price revelation in a book-building process (see Section 5). It finds that book-builders have incentives to reduce information asymmetries (paragraph 5.95), and while they may present an optimistic view of an issuing company and ‘talk up the book’ (within applicable regulation), that tendency is obvious to asset managers and taken into account by them in researching the company and making bids. It is no justification for asset managers to concert by disclosing strategic information to each other. The FCA set out the incentives of book-builders and asset managers in Section 5 and has taken these into account. While preserving reputation may give asset managers an incentive not to concert, it does not mean that disclosure of strategic information should not be an ‘object’ infringement. With regard to alternative options open to private equity funds, they should not be compelled to adopt substitutes by anticompetitive conduct among asset managers.
- 12.65 More generally, RAMAM said that the failure to analyse the market correctly undermined the FCA’s assessment of whether there was an object infringement (see Section 6, in

⁶⁹⁹ UUID 66450010, RAMAM Submission on Statement of Objections, paragraph 77(d); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 797-816, 1326-1328, 1364-1372 and 1386-1393.

⁷⁰⁰ UUID 66450010, RAMAM Submission on Statement of Objections, paragraph 77(d).

⁷⁰¹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 40.

particular paragraphs 6.51 to 6.60). The FCA should regard asset managers as purchasers of shares, not suppliers of equity capital, which raises distinct legal issues.⁷⁰²

- a. There is no sufficiently obvious adverse effect on competition for consumers for it to be treated as an object infringement. As the conduct could have ambivalent effects on the market, any analysis of the competitive effects of joint purchasing on the market would need to consider customers of both the asset managers and the issuing firm,⁷⁰³ balance the short-term benefits to downstream customers from lower prices on the upstream market with possible longer-term incentive effects both upstream and downstream.⁷⁰⁴
- b. RAMAM said that investor incentives are not always centred on lower prices in a placing; for example, existing shareholders are more equivocal where they're an existing shareholder.⁷⁰⁵
- c. RAMAM noted that there may be a longer-term common interest between all market players that information exchange between asset managers acts as a counterweight to information asymmetry on this market (which is particularly the case on 'cold' IPOs⁷⁰⁶) which in turn increases the willingness of asset managers to compete in a transaction;⁷⁰⁷ this reduces the risk of an artificially inflated share price, a weak aftermarket or a collapse of the deal either before the books close or on the aftermarket.⁷⁰⁸ RAMAM noted that this argument applied equally regardless of market definition.⁷⁰⁹

12.66 The FCA set out in Section 9 why it considered that a concerted practice by means of disclosure and acceptance of strategic information could amount to an 'object' infringement whether asset managers were seen as buyers or seller (see in particular paragraph 9.29). It notes that while RAMAM's submission might apply to sharing of some information among asset managers, it does not justify disclosure of strategic information between them. Regarding RAMAM's point on the ambivalent effects of the conduct on the market, the FCA does not think the effects are ambivalent: it considers that the disclosure and acceptance of strategic information between otherwise rival asset managers is a concerted practice with the object of preventing, restricting or distorting competition, and so need not consider the effects of such concerted practice. However, even if benefits accrued from such disclosure (the FCA does not think they do) the sharing of strategic information between competing asset managers is not necessary to achieve any such benefits (see also paragraphs 16.20 to 16.37). The FCA has not seen evidence which supports the parties' assertions on the need for horizontal information sharing between potential investors as a mechanism for solving information asymmetries in IPOs and placings. This is particularly the case with respect to the specific valuations and bidding conduct or intentions of the individual asset managers, i.e., the strategic information that is the subject of this infringement decision.

12.67 RAMAM said that there was no suggestion in *NFM1*'s submissions made to the FCA in the context of regulatory proceedings that his intent was to reduce the share price of the

⁷⁰² UUID 65220012, Hargreave Hale Submission on Statement of Objections, paragraphs 41-49; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1052-1063.

⁷⁰³ UUID 77130003, RAMAM Oral Hearing Transcript e.g. lines 1142-1179 and 1240-1244.

⁷⁰⁴ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 16, 70-71 and 78 (quoting the Opinion of AG Wahl in *Cartes Bancaires*, paragraph 56); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1161-1179, 1219-1293 and 1224-1247; UUID 84280027, RAMAM Submission on First Letter of Facts, e.g. paragraphs 2.3.1.1 and 2.3.1.3.

⁷⁰⁵ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1263-1229.

⁷⁰⁶ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 951-964.

⁷⁰⁷ UUID 71940003, RAMAM Further Submission, e.g. paragraphs 1.1.7-1.1.9.

⁷⁰⁸ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1248-1294.

⁷⁰⁹ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1174-1178.

placing. They said these submissions were general in nature and indicated that the exchange of views between asset managers was at the heart of the price formation process rather than a subversion of it and that communications between fund managers contribute significantly to market efficiency.⁷¹⁰

12.68 The FCA disagrees: it finds *NFM1*'s intention was to reduce the issue price of the shares (see paragraph 12.53).

12.69 RAMAM also said that *NFM1*'s intent was irrelevant to the question of whether RAMAM was party to an infringement of competition law, in particular because the evidence does not show any mutuality between Newton (*NFM1*) and RAMAM (*RM FM*), it does not address the lack of a causal link between the information exchanged and any effect on competition, and the evidence demonstrates that none of the recipients of *NFM1*'s email changed their order as a result of the discussions.⁷¹¹

12.70 The FCA finds that *NFM1*'s subjective intent is relevant to the question of the object of the concerted practice. It finds his intention to reduce the issue price was anticompetitive. It finds that RAMAM had the requisite mental element to found a concerted practice since it accepted Newton's strategic information (paragraphs 12.14 to 12.24).

12.71 RAMAM made several further points on why it considered that that the conduct cannot constitute an object restriction because it gave rise to market efficiencies. These points are further addressed in the context of exemptions in paragraphs 16.20 to 16.37.

12.72 Finally, RAMAM considered that the FCA should carry out an effects-based analysis as the structure of the market does not lend itself to an object analysis.⁷¹² RAMAM added that the facts of this case would not support any finding of adverse effects on any relevant market.⁷¹³

12.73 The FCA sets out in paragraph 6.13 the reasons why the FCA considers that it is more appropriate to view asset managers as the suppliers of equity capital than the buyers of shares. For these reasons, the FCA disagrees that it would need to consider the benefits to downstream customers from lower prices on the upstream market. In this case the FCA has found that the concerted practices have as their object the prevention, restriction or distortion of competition and the FCA is not therefore, as a matter of law, obliged to establish that a concerted practice has or would have had any anti-competitive effect (regardless of whether asset managers are buyers or suppliers, see paragraph 9.29).

Conclusion on Object

12.74 In light of the above assessment, taking into account the content, objectives and legal and economic context of the concerted practice, the FCA finds there is a concerted practice with the object of preventing, restricting or distorting competition between Newton and RAMAM in relation to the book-building process for the Market Tech placing.

⁷¹⁰ UUID 84280027, RAMAM Submission on First Letter of Facts, paragraphs 2.3.4 and 2.3.1.1.

⁷¹¹ UUID 107760003, RAMAM Submission on Second Letter of Facts, e.g. paragraphs 3-4.

⁷¹² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 16, 70-71 and 78 (quoting the Opinion of AG Wahl in *Cartes Bancaires*, paragraph 56); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1219-1293; UUID 84280027, RAMAM Submission on First Letter of Facts.

⁷¹³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 80; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1920-1925 and 1935-1941; UUID 84280027, RAMAM Submission on First Letter of Facts, e.g. paragraph 2.3.1.2.

13 On the Beach: Newton/Hargreave Hale concerted practice 'by object'

Introduction

- 13.1 The FCA finds that the conduct of Newton and Hargreave Hale in relation to the book-building process leading to the OTB IPO infringed the Chapter I prohibition and Article 101 TFEU. These findings are made in light of the requirements set out in Sections 8 and 9 for such a finding.
- 13.2 In this Section, the FCA sets out its findings that Newton and Hargreave Hale engaged in a concerted practice (paragraphs 13.3 to 13.62) which had the object of preventing, restricting or distorting competition in relation to the OTB IPO (paragraphs 13.63 to 13.89). Section 16 assesses the other conditions necessary for an infringement decision.

Concerted practice

- 13.3 As set out at paragraph 8.67, the key elements of a concerted practice in the context of the sharing of information are:
- a. 'discussions';
 - b. between two or more actual or potential competitors;
 - c. subsequent conduct on the market; and
 - d. a relationship of cause and effect between the discussions and that conduct.
- 13.4 These principles are applied below to the conduct between Newton and Hargreave Hale in relation to the IPO of OTB, taking into account the submissions made by Hargreave Hale.⁷¹⁴

Discussions

- 13.5 As set out in paragraphs 8.8 to 8.40, the existence of a concerted practice implies contact between actual and/or potential competitors. Such contact may be in the form of an exchange of strategic information or where one competitor discloses strategic information to another and the latter has requested it or accepts it.

The information that Newton disclosed to Hargreave Hale

- 13.6 As set out at paragraph 7.29, Newton (*NFM1*) sent the 08:10, 21 September Email on the day the books were due to close in the OTB IPO, to Hargreave Hale (among others). This email disclosed his valuation of OTB (£260 million pre new money) and urged them to move to this level. He also disclosed that he had placed an order that morning at that limit

⁷¹⁴ The leniency applicant, Newton, admitted liability as set out in the Statement of Objections; see UUID 65240005, Newton Submission on Statement of Objections.

and set out the amount of that order (£17 million). He asked recipients to 'have a think' and to mention to any colleagues.⁷¹⁵

FCA findings

- 13.7 As set out in Section 8, the FCA considers that a statement by one competitor to another that eliminates or substantially reduces uncertainty as to its expected conduct on the market is 'strategic information'. The FCA finds that Newton's email to Hargreave Hale contained such strategic information.
- 13.8 First, the disclosure by Newton (*NFM1*) that he had submitted his order for £17 million worth of shares at a valuation of £260 million pre new money was a statement of his conduct. This statement consisted of valuation, which is a proxy for share price (see paragraph 8.15), and of the size of Newton's bid.
- 13.9 Second, the statement was made in the context of a book-build on the day the book was due to close. In those circumstances, it was less likely that Newton would depart from its stated intention, particularly as Newton had informed recipients that it had already placed its bid.⁷¹⁶ While bids can be changed until the books close, Hargreave Hale could rely on the information Newton disclosed.
- 13.10 Therefore, in the context of Newton's (*NFM1*) bid for shares in OTB, the FCA finds that his disclosure of the size of his bid ('£17 million') and his valuation of £260 million pre new money disclosed on the day the books were due to close in an IPO book-build constitutes strategic information. Accordingly, uncertainty between Newton and Hargreave Hale as to Newton's expected conduct on the market (i.e. the bid) was eliminated or at the very least substantially reduced (see paragraphs 8.14 to 8.21).

Party submissions and the FCA's view of them

- 13.11 Hargreave Hale said that the valuation of OTB that *NFM1* shared in the 08:10, 21 September Email was in fact the same as the price guidance that had already been issued by the book-builder Numis to asset managers, including to Hargreave Hale that morning.⁷¹⁷ It said there was therefore 'nothing unexpected or confidential' in the valuation figure that *NFM1* provided.⁷¹⁸
- 13.12 The FCA does not accept that the information contained in the 08:10, 21 September Email would have not been 'unexpected' by asset managers, and that it was not confidential. While Numis provided an indication of where the book was pricing, it did not disclose specific information about the pricing intentions of an identified competitor and the volume of its bid. Asset managers compete by making confidential bids to the book-builder. That one asset manager may suspect that another would put in a low bid is very different from knowing that it has in fact done so. Strategic uncertainty remains in the first case and has been eliminated in the second.

⁷¹⁵ UUID 876-66219-1-65, the 08:10, 21 September Email.

⁷¹⁶ See paragraph 5.97 which sets out that asset managers generally regard it as 'bad form' to change their bids at the last minute.

⁷¹⁷ UUID 6510005, transcript of a call between *HH FM3* (Hargreave Hale) and [*name*] (Numis), 21 September 2015 at 07:56. See lines 47-48 where [*name*] tells *HH FM3* '...I think we are still looking at two seventy million...'; UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 1.17(b)(ii)' UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraph 5.17(d)(i).

⁷¹⁸ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 5.1-5.10. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 1572-1573. See also UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraphs 3.9-3.11.

- 13.13 To address Hargreave Hale’s submission that the information in the 08:10, 21 September Email might have been expected, the reactions of other firms show that Newton’s (*NFM1*) disclosure was not typical:
- a. Numis told the FCA that it was ‘*pretty shocked*’ by Newton’s disclosure;⁷¹⁹
 - b. BlackRock told the FCA that it ‘*was concerned that NFM1 was not behaving the correct way*’;⁷²⁰
 - c. Old Mutual noted internally that it was ‘*bizarre behaviour*’;⁷²¹ and
 - d. Henderson said that the 08:10, 21 September Email ‘*from a compliance perspective, looks quite tricky*’.⁷²²
 - e. Even Hargreave Hale (*HH FM1*, who received the 08:10, 21 September Email), said that its content was ‘*surprising*’⁷²³ and ‘*unusual*’.⁷²⁴
- 13.14 Hargreave Hale said the lack of demand was clear to potential investors as they had not received a ‘books covered’ message from Numis. Accordingly there would be no incentive for asset managers to increase the level of their bids from the bottom of the price range (£260 million) that the broker had previously communicated.⁷²⁵
- 13.15 The FCA does not consider that the incentives of rival asset managers to act on the information disclosed by Newton relevant to the question of whether or not strategic uncertainty had been eliminated or substantially reduced between them. Uncertainty can be eliminated or substantially reduced even if the disclosed plan is not followed.
- 13.16 Hargreave Hale said the granularity of the information provided by *NFM1* in the 08:10, 21 September Email could be contrasted with information disseminated to asset managers by brokers, in particular by Numis in the context of the OTB IPO. Numis provided information that was very granular and, unlike information provided by *NFM1*, was reliable.⁷²⁶
- 13.17 The FCA disagrees: it understands that a book-builder would not disclose such granular information as that provided by Newton. Numis told the FCA:

*‘[...] you would never obviously talk about particular institutions. You may talk about types of institutions or a nationality of institutions who are showing interest. You might give colour on, sort of, order sizes that are starting to come through in terms of percentage of company or millions of pounds. So, you know, in helping the prospective investor to get a sense of whether the price is forming and what the ultimate, sort of, shareholder list might look like. Those are the sorts of, that’s the sort of information you would share’.*⁷²⁷

⁷¹⁹ UUID 16260001, [name] FCA Interview Transcript, page 157, line 5761.

⁷²⁰ UUID 16280001, transcript of an FCA interview with [name] ([redacted] BlackRock), 6 October 2016 ([name] FCA Interview Transcript), page 20, line 652-653.

⁷²¹ UUID 876-65557-2-99, email between [name] (Old Mutual) and [name] (Old Mutual), 22 September 2015 at 14:04.

⁷²² UUID 2500003, transcript of a call between [name] (Henderson) and [name] (Numis) at 09:39, 21 September 2015, page 4, lines 125-126.

⁷²³ UUID 16270001, *HH FM1* FCA Interview Transcript, page 110, line 3933.

⁷²⁴ UUID 16270001, *HH FM1* FCA Interview Transcript, page 139, line 4964.

⁷²⁵ See UUID 13950151, email from [name] (Numis) to [name] (Hargreave Hale), 7 August 2015 where Numis informed Hargreave Hale that a valuation of £260 million was appropriate. See UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 5.11-5.12. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 1428-1434.

⁷²⁶ Hargreave Hale referred to two examples: UUID 876-72627-2, transcript of a call between [name] (Standard Life Investments Limited) and [name] (Numis), 18 September 2015 at 16:44, where [name] told Standard Life Investments Limited that ‘*you’re going to get it for 270...*’ and UUID 6510005, transcript of a call between *HH FM3* (Hargreave Hale) and [name] (Numis), 21 September 2015 at 07:56, where [name] provided to *HH FM3* a valuation figure of £270 million and indicated that an order at that level would be ‘*fine*’ and ‘*where it prices*’.

⁷²⁷ See UUID 16260001, [name] FCA Interview Transcript, page 14, lines 499-506.

- 13.18 During the OTB IPO book-build in particular, while Numis disclosed some information, it was not as granular as the information Newton (*NFM1*) disclosed to its competitors. Numis told:
- a. Newton that *'...there are orders as low as 260 million...And, you know, in fairness there are some big orders, a £20 million quid, a £25 million quid...'*⁷²⁸ and that he had taken an order of £15 million at the same level of £270 million pre new money;⁷²⁹
 - b. Hargreave Hale that *'we've kind of got the majority of the orders at £270 million, market cap £270 million...with two, kind of, big orders at 260';*⁷³⁰ and
 - c. RAMAM that *'There are orders in the book higher and lots of orders at strike and things like that but, you know, the bigger orders, yours and few others have said 270.'*⁷³¹
- 13.19 The FCA disagrees that this kind of information is 'very granular' or more 'reliable' in the context of a concerted practice. What matters is whether the information disclosed eliminated or substantially reduced uncertainty as to the discloser's expected conduct on the market. The FCA's thinks that these (paragraph 13.18) examples do not do so, in contrast to the disclosure of a particular (and named) competitor's price and volume information in the 08:10, 21 September Email.
- 13.20 Hargreave Hale said it was not potentially interested in the information disclosed by *NFM1*, which the FCA had said supported the 'strategic' nature of the information. Hargreave Hale noted that *HH FM4* and *HH FM2* (both Hargreave Hale) were the recipients of the 08:10, 21 September Email but said it was *'entirely natural'* for them to forward it to their colleagues who were working on the IPO. It did not follow that because *HH FM3* and *HH FM1* tried to contact *NFM1*, this meant they wanted to discuss strategic information with him.⁷³²
- 13.21 The FCA, however, considers that Hargreave Hale's interest in the information indicates that it thought the information provided by Newton (*NFM1*) could affect Hargreave Hale's own competitive strategy and was strategic because it removed uncertainty between them. Whatever *HH FM4* and *HH FM2*'s motivation in forwarding the 08:10, 21 September Email⁷³³ internally, *HH FM1* (of Hargreave Hale) acknowledged to *HH FM4* that he had seen the email and that he was *'discussing now'*.⁷³⁴ That demonstrates Hargreave Hale's interest in the information it contained. Further, following Hargreave Hale's receipt of the 08:10, 21 September Email, between 08:41 and 11:42, on 21 September, Hargreave Hale (*HH FM1* and *HH FM3* each) attempted to contact Newton (*NFM1*) (see paragraph 7.36).
- 13.22 Moreover, Newton (*NFM1*) said to the FCA that the information he was sharing was of value. He said that he sent the 08:10, 21 September Email because he *'had some pieces of information in my mind. I thought it might be helpful for other Fund Managers to also be privy to those, to that thinking.'*⁷³⁵

⁷²⁸ UUID 19010001, transcript of a call between *NFM1* (Newton) and [*name*] (Numis), 16 September 2015 at 11:19.

⁷²⁹ UUID 2500002, transcript of a call between *NFM1* (Newton) and [*name*] (Numis), 18 September 2015 at 10:17.

⁷³⁰ UUID 6460001, transcript of a call between [*name*] (Hargreave Hale) and [*name*] (Numis), 21 September 2015 at 10:35.

⁷³¹ UUID 876-66079-252, transcript of a call between [*name*] (Numis) and *RM FM* (RAMAM), 18 September 2015 at 10:10, page 2.

⁷³² UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.32(a)-(b).

⁷³³ UUID 876-66131-176-143, email from *HH FM4* (Hargreave Hale) to *NFM1* (Newton), 21 September 2015 at 09:00 (*'Am not involved but have forwarded it to HH FM1'*).

⁷³⁴ UUID 876-66131-176-124, email from *HH FM1* to *HH FM4* (Hargreave Hale employees), 21 September 2015 at 08:15. Hargreave Hale noted in its submissions that the FCA had mistakenly quoted this email in the Statement of Objections as *'seen it and discussing it now'* (see UUID 65220012, Hargreave Hale Submission on Statement of Objections Statement, paragraph 5.20(d)). The FCA remains of the view that the reference to having seen the email and the fact there was a discussion is relevant to the strategic nature of that information.

⁷³⁵ UUID 20320001, *NFM1* First FCA Interview Transcript, page 93, lines 3415-3417.

13.23 Hargreave Hale's submission and *HH FM1*'s witness statement said that the contacts between them were legitimate because contact was only made by Hargreave Hale to discuss the potential implications of litigation brought by Ryanair against OTB.⁷³⁶

13.24 The FCA considers this does not, however, fully reflect what both *HH FM1* and *HH FM3* told the FCA interview. *HH FM1* (Hargreave Hale) said *'...it could've been something, if I missed the Ryanair litigation, maybe there was another thing that I missed that was important in the thesis'*.⁷³⁷ *HH FM3* (Hargreave Hale) told the FCA that he tried to get in touch with Newton (*NFM1*) to *'find out whether there was anything that I hadn't thought of which was going to affect my decision as to what to do'*.⁷³⁸ Further, contemporaneous evidence does not indicate that Hargreave Hale wished to discuss the litigation only: *NFM1* referred twice more to the level of bids in two emails to Hargreave Hale, which suggests that specific bidding information was of interest to Hargreave Hale:

a. at 12:37 on 21 September, Newton (*NFM1*) referenced what RAMAM was thinking on valuation *'I've had feedback from RM FM (only him) that he reckons 270 is fair if PE out completely and 260 if not'* and;

b. on 25 September 2015, after the books closed, he wrote:

*'If you did indeed come in with a lowball bid for OTB, thanks very much. I think we should do more of this – not be bullied by the brokers who say "this is coming at X price" like it or lump it. The fact is, there are relatively few funds with reasonable firepower in small cap IPOs and they [sic] days of high teen PE multiple deals should be well over'*⁷³⁹

13.25 *HH FM3* (of Hargreave Hale) said that he did not recall receiving⁷⁴⁰ or reading⁷⁴¹ the 08:10, 21 September Email but he *'might well have read it'*.⁷⁴² The FCA finds, however that *HH FM1* (of Hargreave Hale) had read the 08:10, 21 September Email (see paragraph 13.27).

Request and/or acceptance

13.26 Having found that Newton disclosed strategic information to Hargreave Hale, the FCA must also find that Hargreave Hale had either requested that information or at the very least accepted it in order to establish a concerted practice.⁷⁴³

FCA findings

13.27 As set out at paragraph 8.34, the FCA notes that the facts of a case may show elements of both requesting and acceptance of strategic information and it is not necessary to go further than to show that the facts demonstrate sufficient engagement by the recipient. The FCA considers that the following evidence, taken in the round, demonstrates that Hargreave Hale received and had knowledge and awareness of the information in the 08:10, 21 September Email and so accepted the strategic information it contained.

⁷³⁶ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 5.32(b) and 5.33. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, line 1732-1753; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.29.

⁷³⁷ UUID 16270001, *HH FM1* FCA Interview Transcript, page 122, lines 4385-4388.

⁷³⁸ UUID 1560001, transcript of an FCA interview with *HH FM3* (Hargreave Hale), 3 November 2016 (*'HH FM3* FCA Interview Transcript'), page 44, lines 1596-1597.

⁷³⁹ UUID Nx-RXW-0125-01_USB-113321-000000039, email from *NFM1* (Newton) to *HH FM1* (Hargreave Hale), 25 September 2015, 12:55.

⁷⁴⁰ UUID 1560001, *HH FM3* FCA Interview Transcript, page 33, line 1193.

⁷⁴¹ UUID 1560001, *HH FM3* FCA Interview Transcript, page 35, line 1277.

⁷⁴² UUID 1560001, *HH FM3* FCA Interview Transcript, page 37, lines 1337-1338.

⁷⁴³ *Cimenteries*, paragraph 1849. See Section 8, The law applicable to 'concerted practices'.

- 13.28 First, *HH FM4* and *HH FM2* (the direct Hargreave Hale recipients) of the *NFM1*'s email forwarded it to *HH FM1* and *HH FM3* who were the asset managers who decided on possible Hargreave Hale bids for OTB. *HH FM1* considered it ('discussing now') (see paragraph 7.35).
- 13.29 Second, Hargreave Hale (*HH FM1* and *HH FM3*, separately) attempted to get in touch with Newton (*NFM1*) following their receipt of the 08:10, 21 September Email as set out in paragraph 7.36.
- 13.30 Third, the FCA considers that the evidence indicates that *NFM1* and *HH FM1* did speak between 12:27 and 12:37 on 21 September 2015. While the FCA has not obtained direct evidence that the call took place:⁷⁴⁴
- a. at 12:27, Newton (*NFM1*) called Hargreave Hale and left a message for *HH FM3* or *HH FM1* to call him back (paragraph 7.36).^{745, 746}
 - b. Newton (*NFM1*) said:

*'I managed to speak to HH FM1 before the books closed and this was around lunchtime. We had a brief call, probably around two or three minutes long. On the call I ran HH FM1 through the points in my 8:10 email. HH FM1 gave the impression that he agreed with what I was saying...'*⁷⁴⁷
 - c. an email from Newton (*NFM1*) to Hargreave Hale (*HH FM3* and *HH FM1*) at 12:37 said 'Just returned *HH FM3*'s call...Just spoken to *HH FM1* now' (see paragraph 7.39).
- 13.31 Hargreave Hale's own explanation to the FCA for speaking to Newton (*NFM1*) also demonstrates it had received and was aware of the disclosed information.
- a. In respect of the voicemail from Hargreave Hale (*HH FM3*) to Newton (*NFM1*) at 11:42, *HH FM3* said, when asked why he made the call:

'Well, as best as I can remember, remember I was thinking about... About what to do, as to what price it was going to come at and what price we should, we should go in at. What - you know, all the things that were influencing me. Like the size, as I said before, the size of the issue, in particular, the fact that Inflexion was, having tried to sell out, were not staying. All those things. So, I would have been curious to know whether there's something that I hadn't thought about...'
 - b. *HH FM1* said in his witness statement that the reason he tried to contact Newton (*NFM1*) on the morning of 21 September 2015 was because he was interested in the Ryanair litigation issue, whether he had any information about the deal structure and how much Inflexion was selling. He said he thought *NFM1* might have had a different

⁷⁴⁴ The FCA has not been provided with this call by either Hargreave Hale or Newton, suggesting that it was not made by either party from their respective work land lines (see UUID 876-69377-1, email from Hargreave Hale to the FCA, 4 January 2016 and UUID 16270001, *HH FM1* FCA Interview Transcript, page 137, line 4876). During *HH FM1*'s interview with the FCA, Hargreave Hale's advisers told the FCA there was no record of the call. Neither *NFM1*'s mobile phone records or *HH FM1*'s work mobile phone records contain any record of it. This leaves the possibility that the call was made from *HH FM1*'s personal mobile but he told the FCA in interview and subsequently in his witness statement provided by Hargreave Hale that he did not use his personal mobile for work (see UUID 65220010, Witness Statement of *HH FM1*, 5 February 2018 ('*HH FM1* Witness Statement'), paragraph 19). Hargreave Hale also said *HH FM1* no longer had the relevant personal mobile phone records (Hargreave Hale also said that it had contacted *HH FM1*'s personal mobile phone company, '3' to see if they could recover the relevant phone bill but that it had been informed that such data is only retained for 12 months after which it is deleted).

⁷⁴⁵ UUID 876-72624-19, transcript of a call between *HH FM3* (Hargreave Hale) and *NFM1* (Newton), 21 September 2015 at 11:42.

⁷⁴⁶ UUID 19090003, transcript of a call between *NFM1* (Newton) and receptionist (Hargreave Hale), 21 September 2015 at 12:27.

⁷⁴⁷ UUID 19090004, transcript of a call between *NFM1* (Newton) and receptionist (Hargreave Hale), 21 September 2015 at 12:28.

⁷⁴⁷ UUID 29350001, *NFM1* First Witness Statement, paragraph 32.

contact at Numis and so a different perspective on these issues.⁷⁴⁸ As noted at paragraph 13.24, this does not fully reflect what *HH FM1* told the FCA interview. He said that he had wanted to discuss the email with *NFM1* as he said *NFM1* may have known something more about the Ryanair litigation and that ‘...if I missed the Ryanair litigation, maybe there was another thing that I missed that was important in the thesis’.⁷⁴⁹

13.32 Therefore, the FCA finds that Hargreave Hale accepted the strategic information in the 08:10, 21 September Email, so leading to the mental element and the ‘knowing substitution’ that is a necessary component of a concerted practice.

Party submissions and the FCA’s view of them

13.33 Hargreave Hale said there was no evidence that *NFM1* spoke with *HH FM1*, apart from a cryptic reference in an email at 12:37pm on 21 September 2015 that he had. It said that *NFM1* was confused about his recollection (with that recollection in his FCA interview being vague, which was unsurprising given it was more than a year after the events in question and the alleged call was only two or three minutes long). The evidence did not support *NFM1*’s version of events:⁷⁵⁰

- a. there were no phone records of the any call between *NFM1* and *HH FM1* in the way that *NFM1* had described;
- b. *NFM1*’s phone records show only one relevant call which is when he spoke to the Hargreave Hale reception and was told that *HH FM1* and *HH FM3* were unavailable;
- c. *HH FM1* confirmed he did not use his mobile phone for work so if he had called *NFM1* it would have been recorded;
- d. there was a complete record of the contact between Newton and Hargreave Hale on 21 September 2015 but no evidence of a call that *HH FM1* spoke to *NFM1*, apart from *NFM1*’s vague assertion sometime after the event. In any event, *NFM1*’s recollection could not be relied upon;
- e. *NFM1* said that he called *HH FM1* when he returned from a site visit at 11:30-12pm but the evidence did not support that; and
- f. *NFM1* emailed *HH FM1* and *HH FM3* on 25 September thanking them if they had come in with a ‘lowball’ offer for OTB. Hargreave Hale said that is not consistent with him having spoken to *HH FM1*.

13.34 The FCA finds that the call did take place for the reasons given in paragraph 13.30. The FCA considers that *NFM1*’s email of 21 September at 12:37pm is not ‘cryptic’ – it states: ‘Just returned *HH FM3*’s call...Just spoken to *HH FM1* now’ (see paragraph 7.39). If the call to which he referred in that email had not taken place, it would expect this statement to have been challenged by *HH FM3* and/or *HH FM1* in reply. There is no evidence that they did. The FCA does not accept that the 25 September 2015 email which demonstrates that *NFM1* was unaware of *HH FM1*’s bid undermines the fact the call between them took place and that Hargreave Hale accepted strategic information from Newton. Whether Hargreave

⁷⁴⁸ UUID 65220010, *HH FM1* Witness Statement, paragraph 17. Provided by Hargreave Hale to FCA.

⁷⁴⁹ UUID 16270001, *HH FM1* FCA Interview Transcript, page 122, lines 4367-4388.

⁷⁵⁰ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 5.48-5.55. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 1583-1704.

Hale also informed *NFM1* (Newton) of its own intentions is not relevant to the FCA's decision.

13.35 Hargreave Hale said that it did not request or accept any strategic information from Newton (*NFM1*):

- a. it reached its bid independently: (i) the Newton information was consistent with Numis' price guidance; (ii) Hargreave Hale knew the books were not covered; and (iii) Numis also confirmed that the private equity seller, Inflexion, would not be selling its entire stake.⁷⁵¹
- b. its bid was lower than Newton's which demonstrates Hargreave Hale's non-acceptance.⁷⁵² It was a '*passive recipient*' of the 08:10, 21 September Email which was out of the blue, unsolicited, unexpected,⁷⁵³ isolated and unilateral.⁷⁵⁴
- c. it was not interested in the information disclosed by *NFM1* (see paragraph 13.20).
- d. it is not credible, given *HH FM3*'s greater experience than *NFM1*, that Hargreave Hale accepted Newton's recommendation to bid at a valuation of £270 million (*NFM1* told the FCA that *HH FM3* was '[X]').⁷⁵⁵
- e. the fact that other firms reacted differently to Hargreave Hale does not prove that Hargreave Hale accepted the disclosure from *NFM1*.⁷⁵⁶
- f. its conduct was entirely consistent with the FCA's findings set out in the FSMA Notices that it is reasonable for fund managers to exchange general views on companies and to discuss recent, current and/or future transactions.⁷⁵⁷
- g. the FSMA Notices are clear that Newton's 'attempted co-ordination' failed and that a unilateral 'attempt to influence' clearly does not constitute the necessary consensus for a concerted practice to be found.⁷⁵⁸ Hargreave Hale said the oral submissions made by *NFM1* in the FSMA investigation supported its point. For example, *NFM1* submitted that the FCA '*specifically accept[s] that NFM1 was not attempting to get any element of reciprocity*', that '*no reply was expected...there was no coordination*', '*the attempt to influence was carried out by a unilateral email*' and '*[NFM1] wasn't seeking to get people saying yes...or even get responses...It was seeking to influence*'. Hargreave Hale also referred to a statement made by the FCA's counsel in the oral hearing held with *NFM1* in the FSMA investigation that '*we say that it doesn't matter that [NFM1] wasn't seeking reciprocity*'.⁷⁵⁹ Hargreave Hale also referred to the FSMA Notices which said that '*He [NFM1] revealed that he had placed an order for £17 million at that level [£270 million], thereby indicating that others could be more*

⁷⁵¹ Hargreave Hale said that this was confirmed by the FSMA Documents; see UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, paragraphs 7-8.

⁷⁵² UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 5.15-5.18, 5.27 and 5.90-5.100. See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 1509-1576; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.35.

⁷⁵³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.18(a). See also UUID 77120003, Hargreave Hale Oral Hearing Transcript, line 1861.

⁷⁵⁴ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.47(a).

⁷⁵⁵ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.51, quoting UUID 113860008, *NFM1*'s third written submissions in the FSMA investigation, 12 October 2018 ('*NFM1* Third FSMA Submission') paragraph 31(a).

⁷⁵⁶ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.55.

⁷⁵⁷ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.51, quoting UUID 113860008, *NFM1* Third FSMA Submission, paragraphs 2.28 and 2.30.

⁷⁵⁸ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.51, quoting UUID 113860008, *NFM1* Third FSMA Submission, paragraphs 2.31-2.32; UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraph 2.2.

⁷⁵⁹ UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraphs 1.4 and 2.9-2.11.

confident that, if they bid the same, they would not be excluded from the allocation of shares because their bid was too low.⁷⁶⁰

- h. Hargreave Hale said that it did not bid the same as Newton so it had no reassurance on not being excluded from the share allocation.⁷⁶¹

- 13.36 The FCA does not accept these submissions. It notes that 'acceptance' relates to acceptance of the information itself rather accepting a proposed course of action. The level of Hargreave Hale's bid is not relevant as to whether it accepted Newton's strategic information. The FCA finds that Hargreave Hale was not a passive recipient, but accepted Newton's strategic information (paragraphs 13.27 to 13.32). That is the key question. Whether or not the email was 'out of the blue, unsolicited, unexpected, isolated and unilateral' does not affect this. It is also not relevant whether Hargreave Hale gained any reassurance on not being excluded from the share allocation; the question is whether its strategic uncertainty regarding Newton's conduct was eliminated or substantially reduced. The FCA has considered whether or not Hargreave Hale was interested in the information in paragraphs 13.7 to 13.25, where it found that the information was strategic and that the evidence shows Hargreave Hale's engagement. That *NFM1*'s conduct may be characterised as an 'attempt to influence' is not relevant to whether or not Newton's and Hargreave Hale's conduct fulfilled the criteria of an anticompetitive concerted practice.
- 13.37 Newton's disclosure concerned the price and volume of its bid, strategic information which goes beyond sharing information on general views on a company. The FCA therefore finds that Newton disclosed strategic information which Hargreave Hale accepted.
- 13.38 Finally, the FCA accepts that the fact that other firms reacted differently to Hargreave Hale does not by itself show that Hargreave Hale accepted that information. Nevertheless, the actions of other firms that had received the 08:10, 21 September Email indicate how well-advised firms might react: see paragraphs 7.42 to 7.44.

Between two or more actual or potential competitors

- 13.39 At the time of the infringement in relation to OTB, the FCA considers that Newton and Hargreave Hale were actual competitors on the relevant market and potential competitors in relation to the OTB IPO. This is because they were both asset managers in the supply of equity capital in the primary capital market to UK-listed small and mid-cap companies (see Section 4 on the parties to the investigation and Section 6 on the relevant market). In this particular transaction, the FCA also notes that they both bid in the OTB IPO and so were direct rivals competing for share allocations in that company.

Subsequent conduct on the market

- 13.40 As set out in Section 7, Hargreave Hale participated in the OTB IPO. Based on a deal size of £96m and a reduced market cap of £240 million (a price of 184p per share) Hargreave Hale's final order was for £14,201,000 worth of shares.⁷⁶² Hargreave Hale received an allocation of £11,040,000 worth of shares (11.5% of the total).

⁷⁶⁰ UUID 117520004, written response of FCA to *NFM1*'s written representations in the FSMA investigation, 21 September 2018, paragraph 25. See also UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, paragraphs 3-5.

⁷⁶¹ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 2.51, quoting UUID 113860008, *NFM1* Third FSMA Submission, paragraphs 2.33-2.34.

⁷⁶² UUID 876-66077-2, Numis Dealogic On the Beach Report, page 2.

- 13.41 Newton also participated in the OTB IPO. Newton's order at 2pm on 21 September was for £16,794,970 worth of shares at a price of 208p per share (this is equivalent to a £270 million market cap). On the revised deal structure based on a deal size of £96 million and a reduced market cap of £240 million (a price of 184p per share), Newton's final order was for 5,846,160 shares (£10,756,934 worth of shares). Newton received an allocation of £8,740,000 worth of shares (9.1% of the total).
- 13.42 The FCA therefore finds that there was subsequent conduct on the market by both parties following their discussions.

A causal connection

- 13.43 As noted at paragraphs 8.50 to 8.58, in order to establish a concerted practice, there must be a relationship of cause and effect between the discussions and the subsequent conduct. To establish this relationship, and where the undertakings concerned remain active on the market, there exists a presumption that an undertaking takes account of information exchanged with or received from its competitor for the purposes of determining its own conduct on the market.

Application of the presumption

FCA findings

- 13.44 The FCA finds that Newton and Hargreave Hale remained active on the market following the 'discussions', with neither exiting the market. The disclosure by Newton gave Hargreave Hale the opportunity to take the information disclosed about Newton's intended conduct into account for the purposes of determining its own conduct on the market. The FCA considers that the fact that the deal was subsequently restructured does not affect the application of the causal connection. What matters is whether strategic uncertainty between Newton and Hargreave Hale was eliminated or substantially reduced by Newton's disclosure at the time they were supposed to be competing, which the FCA finds happened in this case.
- 13.45 In light of this, the FCA presumes that Hargreave Hale took account of information received from Newton for the purposes of determining its own conduct on that market.

Party submissions and the FCA's view of them

- 13.46 Hargreave Hale said that the presumption did not apply (see paragraph 8.53). It said it participated in the OTB IPO, placing a bid for 14,003,000 shares based on a valuation of £260 million and receiving an allocation of 6 million shares at a price of 184p per share. Its bid contrasted with that of Newton (*NFM1*) which was based on a valuation of £270 million. The deal restructuring that took place due to the insufficient demand for the shares undermined any connection between the 08:10, 21 September Email and its further conduct on the market.⁷⁶³
- 13.47 The FCA considers that the level of the final bids is not relevant to whether the presumption applies: the question is whether Newton's disclosure of strategic information and Hargreave Hale's acceptance of it eliminated or substantially reduced strategic uncertainty at a point in time when they should have been competing.

⁷⁶³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 5.58-5.61.

Rebutting the presumption

FCA findings

13.48 In order to rebut the presumption of causation, a party must prove 'to the contrary' that it did not take account the information received and that the 'concertation did not have any influence whatsoever on its own conduct on the market' (see paragraphs 8.63 to 8.66).⁷⁶⁴ Against this standard, the FCA finds that Hargreave Hale has not provided sufficient evidence to rebut the presumption.

Party submissions and the FCA's view of them

13.49 Hargreave Hale said (paragraph 8.61), that the test to rebut the presumption is that the firm 'must have not subscribed to [the] initiatives'. Put another way, the presumption can be rebutted where an undertaking demonstrates that it has made an 'independent entrepreneurial decision'.⁷⁶⁵

13.50 The FCA (see paragraphs 8.63 to 8.66), does not accept that 'subscribing to the initiatives' is the applicable legal test. In the FCA's view, the issue is whether Hargreave Hale can demonstrate that the 'concertation did not have any influence whatsoever on its own conduct on the market' rather than a firm 'must not have subscribed to [the] initiatives'. The FCA notes Hargreave Hale's submission that its strategy was based on a number of factors (e.g. confirmation that Inflexion would have a significant overhang).⁷⁶⁶ Even if this is correct, this is not enough to demonstrate that Newton's disclosure 'did not have any influence whatsoever on its own conduct on the market'.

13.51 Hargreave Hale said that as regards OTB, the valuation that *NFM1* provided to Hargreave Hale was the same figure that Numis had already provided to it on a call at 07:54 on 21 September 2015 on a call between *HH FM3* and [name].⁷⁶⁷ On that call, [name] said:

'...the official guidance is still two seventy to two eighty but I have been saying to your guys I think two seventy is fine and will be where it prices and that hasn't changed for most of last week really'.

13.52 Hargreave Hale also said any indecision regarding the bid was removed following that call, not after receipt of the 08:10, 21 September Email. It also noted that at 10:33, Numis informed Hargreave Hale of two big orders at '260' which showed that a valuation of £270 million was optimistic and that it may have been coming down.⁷⁶⁸ The information in that email was therefore of no use to Hargreave Hale. It also noted that where a book is priced at the bottom of the range (as here) and it becomes clear that the book is not covered, it is natural to place a bid at that end of the range or lower.⁷⁶⁹

13.53 The FCA disagrees with Hargreave Hale's submission that the information in the 08:10, 21 September Email was of no use to Hargreave Hale because Numis had provided it that morning. While Numis provided an indication of where the book was pricing, it was not the provision of specific information about the pricing intentions of an identified competitor

⁷⁶⁴ Hüls.

⁷⁶⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 1.49, 3.93-3.98, 4.61-4.69, 5.70-5.72; UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 484-488, 1301-1304, 1119-1125, 1829-1836, 1957-1958 and 2498.

⁷⁶⁶ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.41-2.42 and 2.48-2.54.

⁷⁶⁷ UUID 6510005, transcript of a call between *HH FM3* (Hargreave Hale) and [name] (Numis), 21 September 2015 at 07:56, lines 52-55; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.52-2.53.

⁷⁶⁸ UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 1481-1482.

⁷⁶⁹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 5.77(a) and 5.79-5.89.

and the volume of its bid. Further, if the information provided by Newton was of no use to Hargreave Hale, it is unclear why Hargreave Hale would make such efforts to contact *NFM1* after that email was received (see paragraph 7.36). As set out at paragraphs 13.7 to 13.10, the information provided by Newton (*NFM1*) in the 08:10, 21 September Email eliminated or substantially reduced Hargreave Hale's uncertainty as to Newton's expected conduct on the market. Numis' guidance did not do that.

13.54 Further, the FCA finds that the information was useful to Hargreave Hale and this was shown by its actions: (i) the 08:10, 21 September mail was forwarded internally and *HH FM1* noted that he was 'discussing'; and (ii) Hargreave Hale made repeated attempts to contact *NFM1* that morning. Further, the interview evidence of *HH FM3* and *HH FM1* does not fully support Hargreave Hale's position that this was to do with the Ryanair litigation (see paragraphs 7.35 to 7.41).

13.55 Hargreave Hale said that it adopted an entirely different strategy from Newton. This was based on the price provided by Numis; Hargreave Hale's recognition that the books were not covered and that Numis needed its order to help fill the book; and confirmation that Inflexion would have a significant overhang. On the basis that Hargreave Hale formed a different course of action from the discloser, the presumption could be rebutted. Hargreave Hale said this was supported by the FSMA Notices which note that, notwithstanding Newton's intention, Hargreave Hale did not act in the way that *NFM1* intended and instead followed a different and independently determined strategy.⁷⁷⁰

13.56 The FCA finds that pricing differently from the proposed level is not sufficient to rebut the presumption (paragraph 8.63): the issue is whether strategic uncertainty was eliminated or substantially reduced between competitors.

13.57 Hargreave Hale also said it participated in the OTB IPO ultimately based on a restructured deal (at a valuation of £240 million) so that there was no cause and effect between the discussions and their subsequent conduct on the market.

13.58 The FCA finds that the presumption applies even where there has been no change in pricing. For this reason, the fact that the deal was subsequently restructured does not affect the causal connection, because what matters is whether strategic uncertainty between Newton and Hargreave Hale was eliminated or substantially reduced by Newton's disclosure at the time it was supposed to be competing with Hargreave Hale. The FCA considers that that happened in this case. There is no evidence which clearly rebuts the presumption that Hargreave Hale took into account the information from Newton when determining its own conduct on the market.

13.59 Hargreave Hale said '*[...] those are the reasons why HH FM3 went in at 260. He used his experience and he waited until he knew what the deal structure was and he went in at 260. And the FCA's suggestion...that he had no strategy in place until NFM1 sent an email out just really doesn't make any sense at all.*'⁷⁷¹

13.60 The FCA considers that Hargreave Hale's submission that any indecision regarding the bid was removed following its call with Numis, not after receipt of the 08:10, 21 September Email, is not sufficient to rebut the presumption that Hargreave Hale took Newton's information into account in deciding its own competitive strategy:

- a. The FCA considers that Hargreave Hale had been undecided on the level of its bid and valuation since early September 2015 and it was only after it received the 08:10, 21

⁷⁷⁰ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.41-2.42 and 2.48-2.54.

⁷⁷¹ UUID 77120003, Hargreave Hale Oral Hearing Transcript, lines 1851-1856.

September Email that it submitted its bid. On 11 September 2015, *HH FM1* emailed internally a note of a meeting he attended with OTB management, containing analysis of the company within a valuation range of £270m market cap to £300m market cap.⁷⁷² *HH FM1* (Hargreave Hale) confirmed that this reflected the range given to Hargreave Hale⁷⁷³ and if Inflexion were to exit fully, his view was that was 'ballpark right'.⁷⁷⁴ When asked if he had had a more precise number in mind however, *HH FM1* (Hargreave Hale) said 'No, to be honest we're not, I'm not that smart'.⁷⁷⁵

- b. Hargreave Hale discussed the 08:10, 21 September Email internally (Hargreave Hale said seen the email and was 'discussing now'⁷⁷⁶ shortly after having received the 08:10, 21 September Email) and Hargreave Hale (*HH FM1* and *HH FM3* each) attempted to contact Newton (*NFM1*) shortly after having received the 08:10, 21 September Email).

13.61 To conclude, Hargreave Hale has not demonstrated that it made an independent decision and did not distance itself or reject the strategic information it received from Newton. The FCA therefore presumes that Hargreave Hale took account of information received from Newton for the purposes of determining its own conduct on that market.

Conclusion

13.62 In light of the above, the FCA's finds that, as a result of the discussions between Newton and Hargreave Hale where Newton disclosed its intended valuation and volume of its bid in the OTB IPO and Hargreave Hale accepted that information, they knowingly substituted practical cooperation between them for the risks of competition. As such, the FCA finds that the conduct in question amounted to a concerted practice.

'Object' of preventing, restricting or distorting competition

13.63 The Chapter I prohibition and Article 101 TFEU prohibit concerted practices which 'have as their object or effect the prevention, restriction or distortion of competition'.

FCA findings

13.64 The FCA considered in Section 9 whether the disclosure and acceptance of strategic information during a book-building process could amount to a concerted practice with the object of preventing, restricting or distorting competition. As set out in paragraph 9.2, the essential legal criterion for a finding of anti-competitive object is that the coordination between undertakings 'reveals in itself a sufficient degree of harm to competition' such that there is no need to examine its effects.

13.65 As set out in paragraphs 9.3 to 9.5, to determine whether a concerted practice has the object of restricting competition, regard must be had to the content of its provisions, its objectives and the legal and economic context.⁷⁷⁷ When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁷⁷⁸ Anti-competitive subjective intentions on the part of the parties can provide

⁷⁷² UUID 13950047, Hargreave Hale On the Beach meeting note, 11 September 2015.

⁷⁷³ UUID 16270001, *HH FM1* FCA Interview Transcript, page 94, lines 3347-3352.

⁷⁷⁴ UUID 16270001, *HH FM1* FCA Interview Transcript, page 94, line 3361.

⁷⁷⁵ UUID 16270001, *HH FM1* FCA Interview Transcript, page 95, line 3375.

⁷⁷⁶ UUID 876-66131-176-124, email from *HH FM1* to *HH FM4* (Hargreave Hale employees), 21 September 2015 at 08:15.

⁷⁷⁷ See paragraph 9.3.

⁷⁷⁸ *Cartes Bancaires*, paragraph 53; *Allianz*, paragraph 36; *Lundbeck*, paragraph 343.

good evidence that there is an anti-competitive object, but they are not necessary for such a finding.⁷⁷⁹

Content and objectives of the concerted practice and its legal and economic context

13.66 Section 5 sets out the legal and economic circumstances of a book-build process (as well as the real conditions of the function and structure of the market in question). In particular, as set out in paragraph 5.69, the FCA finds that asset managers should have been competing during the OTB IPO book-building process, by submitting rival bids to the book-builder. The competitive outcome of the book-building process depended on there being strategic uncertainty between rival asset managers. That strategic uncertainty was eliminated or substantially reduced where one asset manager disclosed strategic information to another in the book-build. Since this uncertainty was eliminated or substantially reduced, that outcome could have been adversely affected: paragraph 9.24 sets out possible adverse outcomes

13.67 The FCA finds, as set out at paragraphs 13.7 to 13.25, that the uncertainty between Newton and Hargreave Hale as to Newton's expected conduct on the market was eliminated or at the very least substantially reduced in the context of the OTB IPO. Newton's statement consisted of its valuation and the size of Newton's bid. Importantly, it was made in the context of an IPO on the day the books were due to close. In those circumstances, it was less likely that Newton would depart from its stated intention, particularly as Newton had informed recipients that it had already placed its bid, so Hargreave Hale could place greater reliance on the information disclosed.

NFM1's intent

13.68 The FCA considers that Newton's (*NFM1*) subjective intent was to reduce the OTB IPO share price. While not necessary, this supports its finding that the concerted practice was a restriction of competition by object.

13.69 First, the FCA considers that *NFM1* thought that the general purpose of fund managers speaking to each other is to influence the other and to drive the price down, for the reasons set out in paragraph 11.54. The FCA does not accept Hargreave Hale's position that the submissions made by *NFM1* cannot be read in this way (see further paragraph 11.55 and 11.56).

13.70 Second, *NFM1's* subjective intent in disclosing his intended bid for OTB shares to Hargreave Hale in particular was to reduce the price. Although *NFM1* said to the FCA that his intention (in the OTB IPO) was not to drive the price down but to '*get what I felt was the fair price for a security*', the FCA thinks this amounts to the same thing.⁷⁸⁰

13.71 For these reasons, the FCA disagrees with Hargreave Hale that the evidence shows that *NFM1's* intent was to address information asymmetry.⁷⁸¹ The FCA need not establish that Hargreave Hale (*HH FM1*) had the same subjective intent as Newton or that Hargreave Hale (*HH FM1*) had any reason to believe that the discussions would have any detrimental impact on price formation.⁷⁸² The FCA has shown in Section 9 and paragraphs 13.66 and 13.67 why it considers the disclosure was by its very nature harmful to competition

⁷⁷⁹ *Allianz*, paragraph 37; *Cartes Bancaires*, paragraph 54.

⁷⁸⁰ UUIID 20320001, *NFM1* First FCA Interview Transcript, page 184, lines 6033-6035.

⁷⁸¹ See UUIID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 2.18.

⁷⁸² UUIID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraph 5.17(d)(ii).

13.72 Subjective intent is not necessary for that finding, but the FCA considers that the evidence it has that *NFM1*'s subjective intent was to concert with other asset managers to depress the issue price of OTB. This supports its findings that the object of Newton's concerted practice with Hargreave Hale was to prevent, restrict or distort competition.

Hargreave Hale submissions on 'object' and the FCA's view of them

Fragmented market

13.73 Hargreave Hale submitted that Newton's and Hargreave Hale's involvement in the OTB IPO was too small, and the market was too large and fragmented, for the disclosure to '*reveal in itself a sufficient degree of harm to competition*',⁷⁸³ and that this is particularly the case given that the FCA states that IPOs using book-building are '*oversubscribed by around 4.5 times on average*'.⁷⁸⁴

13.74 The FCA does not accept Hargreave Hale's submission that the reduction of uncertainty was undermined by the size of a market or its fragmentation,⁷⁸⁵ and the fact that this was a bilateral communication between only two parties on the market.⁷⁸⁶ As set out further in paragraph 9.25, as a matter of law, information sharing is not only an object infringement in highly concentrated, oligopolistic markets. What matters in an IPO or placing book-building process is whether uncertainty between rival asset managers is eliminated or substantially reduced, rather than uncertainty across the market as whole. In a book-building process, a one-off disclosure of strategic information is sufficient to prevent, restrict or distort competition (see also paragraph 11.84).

Unilateral or one-off disclosures

13.75 Hargreave Hale said the exceptional cases which have been assessed as object infringements involving a unilateral disclosure of information have established an element of collusion through the development of longer term practices and expectations as between the parties, or in respect of isolated instances of disclosure in the context of a meeting between all the competitors in a highly concentrated oligopolistic market.⁷⁸⁷ It said the FCA had not considered relevant factors when assessing the legal and economic context of the disclosure, i.e. Hargreave Hale did not solicit the information; reciprocate; did not share any understanding with Newton; did not act on the behaviour; and the information was of no use to it.⁷⁸⁸ The FCA had only considered Newton's (*NFM1*) objectives and failed to consider Hargreave Hale's (*HH FM1*) objectives.⁷⁸⁹

13.76 The FCA has addressed Hargreave Hale's case law point by showing in this case that in the context of the IPO of OTB, where Newton disclosed strategic information to Hargreave

⁷⁸³ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 1.50; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 659-695 and 1880-1881. See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraphs 1.3, 1.17(c) and 2.12; UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 5.12-5.13.

⁷⁸⁴ UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraph 5.17(b).

⁷⁸⁵ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 1.50; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 659-695 and 1880-1881.

⁷⁸⁶ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.112. See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 1.17(c).

⁷⁸⁷ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 4.70(b).

⁷⁸⁸ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.107; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 1880-1893. See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraphs 2.4(b)(i), 2.5 and 2.20; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.5(a).

⁷⁸⁹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.108. See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraphs 1.17(c), 2.16 and 2.17(b).

Hale, and Hargreave Hale accepted it, on the day the books were due to close in a book-building process, uncertainty between competitors was eliminated or at the very least substantially reduced. On those facts, the conduct '*reveal[ed] in itself a sufficient degree of harm to competition*' and so had the object of restricting competition.

- 13.77 The FCA addresses the elements listed by Hargreave Hale in paragraph 13.75 in its assessment of whether there is a concerted practice (see paragraphs 13.3 to 13.62) rather than its assessment of whether the legal and economic context supports the conduct being by 'object'.

Information disclosed must be considered in context

- 13.78 Hargreave Hale said that the disclosure of information must be considered and assessed in the context of a market in which the disclosure of information about the issuing company is an essential feature.⁷⁹⁰ Hargreave Hale said that the information disclosed to Hargreave Hale (*HH FM1* and *HH FM3*) by Newton (*NFM1*) did not, and was not capable of removing market uncertainty or restricting competition, particularly given that the broker Numis was encouraging Hargreave Hale to submit a bid at the same price as that subsequently suggested by Newton (*NFM1*),⁷⁹¹ and the fact that this was a bilateral communication between only two parties on the market.⁷⁹² Hargreave Hale said that the OTB issue price could not have been adversely affected and there would have been no harm to competition even if Newton had been successful in persuading Hargreave Hale and/or any other party to reduce their orders.⁷⁹³ Hargreave Hale added that the discussions are not by their very nature harmful, given that book-builders disclose this type of information as a legitimate part of their price formation process.⁷⁹⁴

- 13.79 The FCA does not accept Hargreave Hale's submission that book-builders disclose the same type of information as a legitimate part of their price formation process: see paragraph 11.15.⁷⁹⁵ It also does not accept that the information disclosed did not and was not capable of removing market uncertainty or restricting competition, particularly given that the broker Numis was encouraging Hargreave Hale to submit a bid at the same price as that subsequently suggested by Newton (*NFM1*),⁷⁹⁶ for the reasons set out in paragraphs 13.7 to 13.10. Newton's disclosure meant that uncertainty between Newton and Hargreave Hale as to Newton's expected conduct on the market (i.e. its bid) was eliminated or at the very least substantially reduced, and this had the potential to cause the adverse effects set out in Section 5.

Bids determined by market factors

- 13.80 Hargreave Hale said that the level of Newton's bid in the OTB IPO was determined by market factors, rather than as a result of any co-ordination, and referred to the FSMA Notices which recognised that '*The lack of demand in the market prompted NFM1 to reduce*

⁷⁹⁰ See UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 2.10.

⁷⁹¹ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.111; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 1881-1891 and 2153-2159.

⁷⁹² UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.112. See also UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 1.17(c).

⁷⁹³ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.12.

⁷⁹⁴ UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 5.14-5.16 (at paragraph 5.17(d)(iv) Hargreave Hale noted that no recipient of the 08:10, 21 September Email subsequently changed their order and the FCA has addressed this point in paragraph 14.62).

⁷⁹⁵ UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 5.14-5.16.

⁷⁹⁶ UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraph 5.111; UUID 77120003, Hargreave Hale Oral Hearing Transcript, e.g. lines 1881-1891, 2153-2159.

his previous order of £270 million pre-money to £260 million pre-money' and that a wide range of variables and different factors influence the price of a share.⁷⁹⁷

- 13.81 The FCA sets out its findings on Hargreave Hale's subsequent action on the market in paragraphs 13.48 to 13.61. The key question is whether Newton's disclosure eliminated or substantially reduced strategic uncertainty between Newton and Hargreave Hale.

NFM1's intent

- 13.82 Hargreave Hale said that, in terms of the subjective intent in relation to the conduct, and as noted at paragraph 11.55, *NFM1's* submissions made to the FCA in the context of regulatory proceedings showed that his intent was not to reduce the share price of the placing but was to address information asymmetry.⁷⁹⁸
- 13.83 The FCA finds that *NFM1's* subjective intent was to reduce the issue price and that this was anticompetitive. See paragraphs 13.68 to 13.72.

Hargreave Hale did not intend or wish to align its prices with Newton

- 13.84 Hargreave Hale said that there was clear and compelling evidence that Hargreave Hale did not intend or wish to align its prices with Newton's prices and, accordingly, there was no reasonable basis for concluding that the conduct had the object of restricting competition.⁷⁹⁹ Hargreave Hale had no reason to believe that the discussions would have any detrimental impact on the price formation process in this market and that there was in fact no harm.⁸⁰⁰ Hargreave Hale said that this is supported in the FSMA Documents, which note for example that the conduct '*did not secure the price-limited orders that he [NFM1] suggested*'⁸⁰¹; that '*had NFM1 successfully managed to persuade others to adopt his strategy and bid at his proposed price, then the strike price might have been lowered*'⁸⁰² and that '*None of the External Fund Managers who received NFM1's 8.10am Email changed their order to the suggested price limit of £260 million pre-money*'.⁸⁰³
- 13.85 The FCA considers the key issue is whether Hargreave Hale accepted strategic information from Newton and so eliminated or substantially reduced competitive uncertainty between them. That Hargreave Hale may have had a separate commercial strategy does not affect this. Section 5 sets out the harm that this practice had the potential to cause.

Market efficiencies

- 13.86 Hargreave Hale made several points on why it considers that that the conduct cannot constitute an 'object' restriction because it gave rise to market efficiencies.
- 13.87 The FCA summarises and addresses these points in paragraphs 16.20 to 16.37. Even if the disclosure by *NFM1* in the 08:10, 21 September Email may have helped to get the IPO 'away' by generating support for it at the level proposed by Numis, the FCA finds that the disclosure unnecessarily eliminated or substantially reduced strategic uncertainty. Even serious object infringements, such as price fixing, may have winners as well as losers and

⁷⁹⁷ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 3.23-3.24.

⁷⁹⁸ See UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 2.18.

⁷⁹⁹ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.5(b).

⁸⁰⁰ UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraph 5.17(d)(ii).

⁸⁰¹ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 3.3 and 3.10.

⁸⁰² UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.11.

⁸⁰³ UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 2.48 and 3.14; UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, e.g. paragraph 7.

the chance that an IPO may or may not get 'away' is known to all market participants and therefore constitutes a normal market risk which cannot justify entering into anticompetitive practices.

Conclusion on Object

- 13.88 In light of the outcomes that a substantial reduction or elimination of strategic uncertainty in a book-building process can lead to, the FCA finds that the disclosure by Newton to Hargreave Hale in relation to OTB IPO revealed in itself a sufficient degree of harm to competition. There is no need to examine its effects, since it removed or at least substantially reduced the strategic uncertainty between otherwise rival asset managers on which the competitive outcome to a book-building process for an IPO depends.
- 13.89 In light of the above assessment, taking into account the content, objectives and legal and economic context of the concerted practice, the FCA finds that there is a concerted practice with the object of preventing, restricting or distorting competition between Newton and Hargreave Hale in relation to the book-building process for the OTB IPO.

14 On the Beach: Newton/RAMAM concerted practice 'by object'

Introduction

- 14.1 The FCA finds that the conduct of Newton and RAMAM in relation to the book-building process leading to the OTB IPO amounts to an infringement of the Chapter I prohibition and Article 101 TFEU. These findings are made in light of the requirements set out in Sections 8 and 9 for such a finding.
- 14.2 In this Section, the FCA sets out its findings that Newton and RAMAM engaged in a concerted practice (paragraphs 14.3 to 14.51) which had the object of preventing, restricting or distorting competition in relation to the OTB IPO (paragraphs 14.52 to 14.64). Section 16 assesses the other conditions necessary for an infringement decision.

Concerted practice

- 14.3 As set out at 8.67, the key elements of a concerted practice in the context of the sharing of information are:
- a. 'discussions';
 - b. between two or more actual or potential competitors;
 - c. subsequent conduct on the market; and
 - d. a relationship of cause and effect between the discussions and that conduct.
- 14.4 These principles are applied below to the conduct between Newton and RAMAM in relation to the OTB IPO, taking into account the submissions made by RAMAM.⁸⁰⁴

Discussions

- 14.5 The existence of a concerted practice implies contact between actual and/or potential competitors. Such contact may be in the form of an exchange of strategic information or where one competitor discloses strategic information to another and the latter has requested it or accepts it.

The information that Newton disclosed to RAMAM

- 14.6 As set out at paragraph 7.29, Newton (*NFM1*) sent the 08:10, 21 September Email on the day the books were due to close in the OTB IPO to RAMAM (among others). The email disclosed his valuation of OTB (£260 million pre new money) and urged them to move to this level. He also disclosed that he had placed an order that morning at that limit and set

⁸⁰⁴ The leniency applicant, Newton, admitted liability as set out in the Statement of Objections; see UUID 65240005, Newton Submission on Statement of Objections.

out the amount of that order (£17 million). He asked recipients to 'have a think' and to mention to any colleagues.⁸⁰⁵

- 14.7 As set out in Section 8, the FCA considers that a statement by one competitor to another that eliminates or substantially reduces uncertainty as to its expected conduct on the market is 'strategic information'. For the reasons set out in paragraphs 13.7 to 13.10, the FCA finds that the 08:10, 21 September Email contained strategic information. This applies with regard to Newton's disclosure to RAMAM, just as it did with regard to Newton's disclosure to Hargreave Hale: they were blind copied into the same email. Accordingly, uncertainty between Newton and RAMAM as to Newton's expected conduct on the market (i.e. the bid) was eliminated or at the very least substantially reduced (see paragraphs 8.14 to 8.21).

The information that RAMAM disclosed to Newton

- 14.8 As set out in paragraph 7.32, RAMAM (*RM FM*) replied to the 08:10, 21 September Email providing its own valuation of OTB to Newton (*NFM1*) ('*I think £270m post money contingent on full exit by PE is suitable. Less if not a full exit*').⁸⁰⁶

FCA findings

- 14.9 As set out at Section 8, the FCA considers that a statement by one competitor to another that eliminates or substantially reduces uncertainty as to its expected conduct on the market is 'strategic information'. The FCA finds that RAMAM's response to Newton contained such strategic information, for the following reasons.

- 14.10 First, the disclosure by RAMAM (*RM FM*), made on the day that the books were due to close and in circumstances where RAMAM (*RM FM*) was participating in the OTB IPO, was a statement as to its intended conduct even in the absence of an explicit statement that RAMAM would be placing or had already placed such a bid in the OTB IPO. *Cimenteries* makes it clear that it is uncertainty as to the conduct on the market 'to be expected' that is important.⁸⁰⁷ In these circumstances, the information disclosed by RAMAM (*RM FM*) amounted to the bid to be expected from RAMAM. Indeed, *RM FM* explained to the FCA in interview that his response to *NFM1* was 'stating the position that I was taking with the *On The Beach* IPO that had been prevailing since the prior week'⁸⁰⁸ which demonstrates that his response contained RAMAM's bid.

- 14.11 Second, this statement consisted of valuation, which is a proxy for share price (see paragraph 8.15). As set out in paragraph 8.20, the disclosure of valuation information alone (i.e. without volume information) on the day that books are due to close can be sufficient to reduce or substantially eliminate strategic uncertainty. The FCA considers that this was the case here.

- 14.12 The statement was made in the context of a book-build on the day the books were due to close. In those circumstances, it was less likely that RAMAM would depart from its stated intention, so Newton could place greater reliance on the information disclosed.

⁸⁰⁵ UUID 876-66219-1-65, the 08:10, 21 September Email.

⁸⁰⁶ UUID 876-66119-12, email from *RM FM* (RAMAM) to *NFM1* (Newton), 21 September 2015 at 08:57. The message is stated as 07:57 UTC. BST is quoted as that was the applicable time in the UK at that time.

⁸⁰⁷ See Section 8, The law applicable to 'concerted practices'.

⁸⁰⁸ UUID 1600001, *RM FM* FCA Interview Transcript, page 50, lines 1792-1793.

14.13 Accordingly, the FCA finds that uncertainty between Newton and RAMAM as to RAMAM's expected conduct on the market (i.e. the bid) was eliminated or at the very least substantially reduced).

Party submissions and the FCA's view of them

14.14 RAMAM said that *RM FM* did not disclose any information as to its intended bid, noting in particular that *RM FM* did not provide any information on the volume of shares he intended to bid for, or whether or not he even intended to bid in OTB.⁸⁰⁹ RAMAM said that *RM FM* simply summarised his pre-existing opinion as to the valuation of OTB on the assumption that there was a full exit by the selling private equity investor, which was a contingency that Newton (*NFM1*) thought unlikely to be satisfied.⁸¹⁰

14.15 For the reasons given in paragraphs 14.10 and 14.11, the FCA disagrees that RAMAM (*RM FM*) did not disclose any information as to its intended bid. As stated in paragraphs 8.20, price alone or its proxy, valuation, can amount to strategic information, and the FCA finds that it did so in this case.

Request and/or acceptance by RAMAM

14.16 Having found that Newton disclosed strategic information to RAMAM (paragraphs 14.6 to 14.7), the FCA must find that RAMAM either requested that information or at the very least accepted it in order to establish a concerted practice.⁸¹¹

FCA findings

14.17 As set out at paragraph 8.34, the FCA notes that the facts of a case may show elements of both requesting and acceptance of strategic information and it is not necessary to go further than to show that the facts demonstrate sufficient engagement by the recipient.

14.18 RAMAM's email response to the 08:10, 21 September Email, in which *RM FM* agreed with *NFM1*'s valuation should the selling private equity firm make a full exit and gave its valuation for OTB (see paragraph 7.32) shows that RAMAM engaged with the disclosure, so leading to the mental element and the 'knowing substitution' that is a necessary component of a concerted practice.

14.19 The FCA need not show whether or not RAMAM communicated any intention to alter its market conduct to Newton or committed itself to any particular course of action. As noted in paragraphs 8.30 to 8.35, the necessary mental element for a concerted practice in this regard relates to acceptance of the strategic information and does not require anything further such as an understanding to submit bids at particular prices.

14.20 As noted in paragraph 8.35, evidence that the recipient failed to distance itself from the information or rejected the receipt of the information or reported such receipt to regulators or internal compliance can also support a finding of acceptance. The FCA considers that RAMAM's submission (paragraph 14.21) that it did not accept Newton's proposed course of action is not sufficient to constitute 'distancing' in line with the case law.

⁸⁰⁹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 56(a) and (f); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1852-1855 and 1901-1904.

⁸¹⁰ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 56(a).

⁸¹¹ *Cimenteries*, paragraph 1849. See Section 8.

Party submissions and the FCA's view of them

- 14.21 RAMAM submitted that there was no acceptance because of the absence of a 'meeting of minds' or 'concurrence of wills'.⁸¹² It did not request or accept any strategic information from Newton because there is no evidence that *RM FM* communicated any intention to vary his approach in response, or that *NFM1* understood RAMAM to be committed to any particular course of action.⁸¹³
- 14.22 The FCA's findings on this point are set out in paragraphs 8.30 to 8.35. In particular, the FCA finds that the necessary mental element for a concerted practice in the circumstances of this case is found in Newton's deliberate disclosure and RAMAM's acceptance of strategic information.

Request and/or acceptance by Newton

- 14.23 Having found that RAMAM disclosed strategic information to Newton (paragraphs 14.9 to 14.13), the FCA must find that Newton either requested that information or at the very least accepted it as a necessary condition for the formation of a concerted practice.⁸¹⁴
- 14.24 As set out in paragraph 7.33, Newton (*NFM1*) replied to RAMAM's (*RM FM*) disclosure ('*I think full exit v unlikely given book coverage sounds thin at best but I may be wrong We have the power on this one...*').

FCA findings

- 14.25 As set out at paragraph 8.34, the FCA notes that the facts of a case may show elements of both requesting and acceptance of strategic information and it is not necessary to go further than to show that the facts demonstrate sufficient engagement by the recipient.
- 14.26 The FCA finds that Newton received and was aware of RAMAM's disclosure and so accepted it. This is shown by Newton's email, in which *NFM1* commented on RAMAM's (*RM FM*) disclosure by providing its own views and, moreover, telling RAMAM that the balance of power on the IPO lay with the asset managers ('*We have the power on this one*').
- 14.27 The FCA considers that Newton's response ('*I think full exit v unlikely given book coverage sounds thin at best but I may be wrong We have the power on this one...*') is not sufficient to constitute distancing in line with the case law.
- 14.28 This shows that Newton received and was aware of its receipt of RAMAM's disclosure, so leading to the mental element and the 'knowing substitution' that is a necessary component of a concerted practice.

Between two or more actual or potential competitors

FCA findings

- 14.29 At the time of the infringement in relation to OTB, the FCA considers that Newton and RAMAM were actual competitors on the relevant market and potential competitors in relation to the OTB IPO. This is because they were both asset managers in the supply of

⁸¹² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 12, 53 and 56.

⁸¹³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 32 and 56(a)-(b).

⁸¹⁴ *Cimenteries*, paragraph 1849. See Section 8.

equity capital in the primary capital market to UK-listed small and mid-cap companies (see Section 4 and Section 6). In this particular transaction, the FCA also notes that they both bid in the OTB IPO and so were direct rivals competing for share allocations in that company. *NFM1*'s (Newton) comment that RAMAM and Newton were competitors supports the FCA's finding.⁸¹⁵

Party submissions and the FCA's view of them

- 14.30 RAMAM disputed that RAMAM and Newton were competitors. It said that in a 'hot' IPO there was an element of competition in the sense that there would not be enough shares to go around, but in a 'cold' IPO, investors were not competitors in a real sense because if they did not all participate, the deal might not happen.⁸¹⁶ RAMAM said that this was consistent with its view of asset managers as purchasers rather than suppliers; asset managers compete for resources on the upstream asset market.⁸¹⁷
- 14.31 The FCA does not accept this submission for the reasons set out in paragraph 12.28, which apply to the OTB book-build just as they do to the Market Tech book-build.

Subsequent conduct on the market

- 14.32 As set out in Section 7, RAMAM participated in the OTB IPO. RAMAM (*RM FM*) bid for £13,200,000 worth of shares, based on a deal size of £96m and a reduced market cap of £240 million (a price of 184p per share.⁸¹⁸ RAMAM received an allocation of £11,040,000 worth of shares (11.5% of the total).
- 14.33 Newton also participated in the OTB IPO. Newton's order at 2pm on 21 September was for £16,794,970 worth of shares at a price of 208p per share (this is equivalent to a £270 million market cap). On the revised deal structure based on a deal size of £96 million and a reduced market cap of £240 million (a price of 184p per share), Newton's final order was for 5,846,160 shares (£10,756,934 worth of shares). Newton received an allocation of £8,740,000 worth of shares (9.1% of the total).
- 14.34 The FCA therefore finds that there was subsequent conduct on the market by both parties following their discussions

A causal connection

- 14.35 As noted at Section 8, in order to establish a concerted practice, there must be a relationship of cause and effect between the discussions and the subsequent conduct. To establish this relationship, and where the undertakings concerned remain active on the market, there exists a presumption that an undertaking takes account of information exchanged with or received from its competitor for the purposes of determining its own conduct on the market.

⁸¹⁵ UUID 11250002, *NFM1* Second FCA Interview Transcript, page 70, lines 2548-2552.

⁸¹⁶ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 951-964 and 1576-1589.

⁸¹⁷ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1591-1601.

⁸¹⁸ UUID 876-66079-77, email from *RM FM* (RAMAM) to RAMAM Dealing and RAMAM Ops (copying [*fund manager*] and [*fund manager*]), 22 September 2015 at 17:13.

Application of the presumption – RAMAM and Newton

FCA findings

- 14.36 The FCA finds that Newton and RAMAM each remained active on the market following their exchange, with neither exiting the market:
- a. The disclosure by Newton gave RAMAM the opportunity to take the information disclosed about Newton's intended conduct into account for the purposes of determining RAMAM's conduct on the market.
 - b. The disclosure by RAMAM gave Newton the opportunity to take the information disclosed about RAMAM's intended conduct into account for the purposes of determining Newton's conduct on the market.

Party submissions and the FCA's view of them

- 14.37 RAMAM said that the presumption does not arise because there was no consensus between Newton (*NFM1*) and RAMAM (*RM FM*) and the evidence shows the parties acted on their own assessment in each case.⁸¹⁹
- 14.38 The FCA finds that the acceptance by RAMAM of Newton's disclosure, and the acceptance by Newton of RAMAM's disclosure, provides the mental element required for a concerted practice. The FCA does not need to go further and establish any consensus (see paragraphs 8.30 to 8.35). Added to this, orders are capable of being made and/or amended until the book closes. Thus, the mutual disclosures and acceptances allowed each of Newton and RAMAM to take the information received into account for the purposes of determining their own conduct on the market.⁸²⁰

Rebutting the presumption – RAMAM

FCA findings

- 14.39 As set out in Section 8, in order to rebut the presumption of causation, a party must prove 'to the contrary' that it did not take account the information received and that the 'concertation did not have any influence whatsoever on its own conduct on the market'.⁸²¹ Against this standard, the FCA does not consider that RAMAM has provided sufficient evidence to rebut the presumption. See paragraphs 14.40 to 14.43.

Party submissions and the FCA's view of them

- 14.40 RAMAM said that the discussions did not have any influence whatsoever on RAMAM's conduct on the market.⁸²² RAMAM said that the evidence demonstrated that RAMAM acted independently throughout the IPO process:⁸²³

⁸¹⁹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 54 and 58-59; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1347-1349.

⁸²⁰ See Section 8.

⁸²¹ *Hüls* (See Section 8.)

⁸²² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 13 and 57.

⁸²³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 8, 13, 58(b) and 57; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1345-1352.

- a. RAMAM had formulated its own strategy in the IPO before the discussions with Newton, by placing a provisional bid in OTB on 18 September 2015 for shares in the range of £17 million to £24 million at a valuation of £270 million, subject to the condition that the selling private equity firm made a full exit.⁸²⁴ That contingent bid was reflected in the valuation that RAMAM summarised in its email to Newton on 21 September 2015.⁸²⁵
- b. RAMAM subsequently reduced its bid because the broker informed RAMAM about the reduced market capitalisation of the IPO, not as a result of its discussions with Newton. Those subsequent bids were consistent with RAMAM's own original bidding strategy and there is no evidence that the subsequent bids were altered in any way by the emails from Newton.⁸²⁶ The book-builder even thanked *RM FM* for the consistent and supportive way in which he had behaved during the difficult bidding process.⁸²⁷ RAMAM submitted a witness statement from *RM FM* stating that '*the email exchanges with NFM1 did not lead me to change my position, nor did they influence my pricing strategy, which I had developed independently the previous week*'.⁸²⁸

14.41 The FCA does not consider that RAMAM has provided sufficient evidence to rebut the presumption. While several factors may have influenced RAMAM's competitive strategy, it has not demonstrated that the strategic information it accepted from Newton '*did not have any influence whatsoever on its own conduct on the market*'. The FCA notes that *RM FM*'s account of his bidding strategy was produced during the course of the investigation. As set out at paragraph 8.66, the FCA believes that an individual's own description of the pricing process, created after the fact and in the context of a later formal investigation is unlikely to amount to the 'objective evidence' necessary to rebut the presumption.⁸²⁹

14.42 RAMAM said there was no evidence that Newton had any expectation of RAMAM's conduct as a result of the discussions.⁸³⁰ The FCA considers it is not relevant whether Newton had any expectation as to RAMAM's conduct. It is sufficient for the finding of a concerted practice that Newton had the knowledge and awareness that its disclosure might affect the competitive conduct of the recipient (which the FCA considers is present here), and not any particular expectation as to the recipient's conduct.

14.43 RAMAM said that the evidence demonstrates that there was no causal connection between any information exchange involving RAMAM and the outcome of the OTB IPO,⁸³¹ noting that any bilateral contact between Newton and RAMAM was unrelated to the withdrawal of third parties from the IPO process or the re-structuring of the IPO (which was in part caused by the fact that *NFM1*'s bid was misunderstood by the book-builders).⁸³² It said that *NFM1*'s submissions in the FSMA investigation supports this view: *NFM1* told the FCA that the misunderstanding as to his bid '*upset the applegart*' prior to and quite independently of his emails to other fund managers, let alone the subsequent short response from RAMAM stating its own position.⁸³³

⁸²⁴ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 30(a), 31 and 60.

⁸²⁵ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 30(a); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1796-1821 and 1905-1912.

⁸²⁶ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 31(a)-(b) and 56(d)-(e), 57 and 60.

⁸²⁷ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 56(e); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1889-1897.

⁸²⁸ UUID 66450011, *RM FM* Witness Statement, paragraph 67.

⁸²⁹ See *Cisac*, paragraph 99.

⁸³⁰ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 31(b) and 34.

⁸³¹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 8, 13 and 56(b); UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1345-1352.

⁸³² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 31(c)-(g), 35-36, 61 and 64; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 1822-1836 and 1871-1925. RAMAM said that this point was supported by the FSMA Documents: see UUID 127350001, RAMAM First Submission on FSMA Documents.

⁸³³ UUID 127350001, RAMAM First Submission on FSMA Documents.

14.44 The FCA notes that it is not required to establish any causal connection between the discussions and the IPO outcome itself. What matters is whether strategic uncertainty between Newton and RAMAM was eliminated or substantially reduced by the disclosures they made to one another at the time they were supposed to be competing. The FCA considers that that happened in this case.

Rebutting the presumption – Newton

FCA findings

14.45 In order to rebut the presumption of causation, a party must prove ‘to the contrary’ that it did not take account the information received and that the ‘concertation did not have any influence whatsoever on its own conduct on the market’.⁸³⁴

14.46 Against this background, even if Newton did not amend its bid as a result of the discussions with RAMAM, this is not enough to demonstrate that those discussions ‘did not have any influence whatsoever on its own conduct on the market’. This is particularly the case in these circumstances, where Newton engaged with the very subject matter of RAMAM’s disclosure. In fact, Newton (*NFM1*) shared RAMAM’s (*RM FM*) valuation with both BMO⁸³⁵ and Hargreave Hale,⁸³⁶ suggesting Newton (*NFM1*) considered that information relevant and useful.

Party submissions and the FCA’s view of them

14.47 Newton as leniency applicant did not make detailed comments. However, RAMAM said that the discussions did not have any influence whatsoever on Newton’s conduct on the market.⁸³⁷

14.48 The FCA considers that the evidence must show that the discussions had no influence whatsoever on a party’s own subsequent conduct. RAMAM is not well-placed to provide evidence about whether Newton was so influenced – in any event, it is insufficient to rebut the presumption on the basis that there is no evidence that Newton altered its bid or was otherwise influenced in its bidding strategy as a result of RAMAM’s disclosure.

14.49 RAMAM said that Newton had already submitted its bid in OTB before the discussions.⁸³⁸

14.50 The FCA considers it is not relevant that Newton had already submitted a bid, given that bids could be amended any point until the books closed.

Conclusion

14.51 In light of the above the FCA finds that, as a result of the discussions between Newton and RAMAM on 21 September 2015 where Newton disclosed its intentions as regards value and volume in the OTB IPO and RAMAM disclosed its intention as regards value to Newton, they knowingly substituted practical cooperation between them for the risks of competition. As such, the FCA finds that the conduct in question amounted to a concerted practice.

⁸³⁴ *Hüls* (see Section 8).

⁸³⁵ UUID 876-66219-1-87, email from *NFM1* (Newton) to [name] (BMO), 21 September 2015 at 09:49.

⁸³⁶ UUID 876-66219-1-90, email from *NFM1* (Newton) to *HH FM1* (Hargreave Hale) and *HH FM3* (Hargreave Hale), 21 September 2015 at 12:37.

⁸³⁷ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 13 and 57.

⁸³⁸ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 33, 35, 56(f) and 60.

Object of preventing, restricting or distorting competition

- 14.52 The Chapter I prohibition and Article 101 TFEU prohibit concerted practices which *'have as their object or effect the prevention, restriction or distortion of competition'*.

FCA findings

- 14.53 The FCA considered in Section 9 whether the disclosure and acceptance of strategic information during a book-building process could amount to a concerted practice with the object of preventing, restricting or distorting competition. As also set out in Section 9, the essential legal criterion for a finding of anti-competitive object is that the coordination between undertakings *'reveals in itself a sufficient degree of harm to competition'* such that there is no need to examine its effects.
- 14.54 As set out in paragraphs 9.3 to 9.5, to determine whether a concerted practice has the object of restricting competition, regard must be had to the content of its provisions, its objectives and the legal and economic context.⁸³⁹ When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.⁸⁴⁰ Anti-competitive subjective intentions on the part of the parties can provide good evidence that there is an anti-competitive object, but they are not necessary for such a finding.⁸⁴¹
- 14.55 The FCA considers these elements below in light of RAMAM's representations, which it assesses subsequently.

Content and objectives of the concerted practice and its legal and economic context

- 14.56 Section 5 sets out the legal and economic circumstances of a book-build process (as well as the real conditions of the function and structure of the market in question). In particular, as set out in paragraph 9.23, the FCA finds that asset managers should have been competing during the OTB IPO book-building process, by submitting rival bids to the book-builder. The competitive outcome of the book-building process depended on there being strategic uncertainty between rival asset managers. That strategic uncertainty was eliminated or substantially reduced where one asset manager disclosed strategic information to another in the book-build. Since this uncertainty was eliminated or substantially reduced, that outcome could have been adversely affected: paragraph 9.24 sets out possible adverse outcomes.
- 14.57 The FCA finds, as set out at paragraphs 14.5 to 14.25, that the uncertainty between Newton and RAMAM as to each other's expected conduct on the market was eliminated or at the very least substantially reduced in the context of the OTB IPO. Newton's statement consisted of valuation and the size of Newton's bid, and RAMAM's statement of intention consisted of its valuation. These discussions took place in the context of an IPO on the day that the books were due to close. In those circumstances, it was less likely that either party would depart from its stated intention, particularly as Newton had informed

⁸³⁹ See paragraph 9.3.

⁸⁴⁰ *Cartes Bancaires*, paragraph 53; *Allianz*, paragraph 36; *Lundbeck*, paragraph 343.

⁸⁴¹ *Allianz*, paragraph 37; *Cartes Bancaires*, paragraph 54.

recipients that it had already placed its bid,⁸⁴² so the parties could place greater reliance on the information disclosed by the other.

NFM1's intent

14.58 The FCA considers that Newton's (*NFM1*) subjective intent was to reduce the OTB IPO share price. While not necessary, this provides support for the concerted practice being a restriction of competition by object.

14.59 First, the FCA considers that *NFM1* thought that the general purpose of fund managers speaking to each other is to influence the other and to drive the price down, for the reasons set out in paragraph 11.54.

14.60 Second, as set out above at paragraph 13.70, *NFM1's* subjective intent in disclosing his intended bid for OTB shares to RAMAM (as when disclosing it to Hargreave Hale) was to reduce the strike price.

14.61 The FCA need not establish that RAMAM (*RM FM*) had the same subjective intent as Newton or that there was any 'mutuality'. Anti-competitive subjective intentions on the part of the parties can be taken into account in the assessment, but they are not a necessary factor for a finding that there is an anti-competitive restrictive object (see paragraph 9.4).⁸⁴³ As set out above at paragraphs 14.9 to 14.22, the FCA finds that RAMAM accepted the disclosure from Newton and engaged with the disclosure by disclosing strategic information in return, so demonstrating the mental element and 'knowing substitution' that is a necessary component of a concerted practice.

14.62 The FCA does not need to demonstrate, as part of its assessment of subjective intent (or as part of its overall assessment of whether or not there was an infringement) that RAMAM (*RM FM*) or any other party changed their order as a result of the discussions (the FCA's case is that there was a restriction of competition by object such that there is no need to examine its effects, see Section 9).

RAMAM submissions on 'object' and the FCA's view of them

14.63 RAMAM's submissions and the FCA views of them regarding OTB as a 'by object' concerted practice are set out in paragraphs 12.56 to 12.73. They apply equally to the FCA's assessment of this concerted practice in the context of the OTB book-build just as they applied in the context of the Market Tech book-build.

Conclusion on 'Object'

14.64 In light of the above assessment, taking into account the content, objectives and legal and economic context of the concerted practice, the FCA finds there is a concerted practice with the object of preventing, restricting or distorting competition between Newton and RAMAM in relation to the book-building process for the OTB IPO.

⁸⁴² See paragraph 5.97, which sets out that asset managers generally regard it as 'bad form' to change their bids at the last minute.

⁸⁴³ The Court of Justice has held that a finding that the objective purpose of agreement is anticompetitive is 'not invalidated by the fact that it has not been established that it was the intention of all the parties to the agreement to restrict competition' (*IAZ and others v Commission*, C-96/82, EU:C:1983:310, paragraph 25).

15. Card Factory: Newton/Artemis 'concerted practice'

Introduction

- 15.1 In this Section, the FCA finds that it has no grounds for action regarding the conduct of Newton and Artemis in relation to the book-building process leading to the IPO of Card Factory.

Concerted practice

- 15.2 As set out at paragraph 8.67, the key elements of a concerted practice in the context of the sharing of information are:
- a. 'discussions';
 - b. between two or more actual or potential competitors;
 - c. subsequent conduct on the market; and
 - d. a relationship of cause and effect between the discussions and that conduct.
- 15.3 In light of these elements, the FCA has considered whether the conduct of Newton and Artemis in relation to the IPO of Card Factory gave rise to a concerted practice, taking account of the representations made by Artemis.⁸⁴⁴

Discussions

The information that Newton disclosed to Artemis and the information that Artemis disclosed to Newton

- 15.4 As set out at paragraphs 7.50 to 7.57, Artemis (*Artemis Analyst*) corresponded with Newton (*NFM1*) via email and Bloomberg before the books closed in the Card Factory IPO on 14 May 2014. During these communications, Artemis (*Artemis Analyst*) disclosed the following information to Newton (*NFM1*):
- 25 April 2014: *'I'm strongly talking the range down to £700-800m'*;⁸⁴⁵
 - 29 April 2014: *'I'm trying to talk it down to 12-14x'*;⁸⁴⁶ and
 - 1 May 2014: *'I'll really try to screw the price down towards £650-700m'*.⁸⁴⁷

⁸⁴⁴ The leniency applicant, Newton, admitted liability as set out in the Statement of Objections; see UUID 65240005, Newton Submission on Statement of Objections.

⁸⁴⁵ UUID 876-69001-2, email from *NFM1* (Newton) to *Artemis Analyst* (Artemis), 25 April 2014 at 10:47, page 2.

⁸⁴⁶ UUID 876-69001-3, Bloomberg message between *NFM1* (Newton) and *Artemis Analyst* (Artemis), 29 April 2014, beginning at 13:17. The message is stated as 13:31 UTC. BST is quoted as that was the applicable time in the UK at the time. is quoted as that was the applicable time in the UK.

⁸⁴⁷ UUID 876-66220-0-35, email from *NFM1* (Newton) to *Artemis Analyst* (Artemis), 1 May 2014 at 10:09, page 2.

15.5 Following the price range announcement for the IPO, Newton (*NFM1*) told Artemis (*Artemis Analyst*): 'I wont be participating in this range - £700m more realistic...'.⁸⁴⁸

FCA findings

15.6 As set out in Section 8, the FCA considers that a statement by one competitor to another that eliminates or substantially reduces uncertainty as to its expected conduct on the market is 'strategic information'. What constitutes strategic information in the context of an IPO or placing process depends on several factors, including its content and timing. Specifically, the less granular the information and the longer the period between the disclosure about a bid and the books closing, the less likely that information disclosed is strategic. That is because less granular information leaves more uncertainty regarding the discloser's conduct and with a longer period until closing, it becomes less certain that the discloser will follow its stated intention. In those circumstances, a recipient can place less reliance on that information. Accordingly, strategic uncertainty remains between rivals.

15.7 Applying the principles in paragraphs 8.9 to 8.21 to the facts of the Card Factory IPO book-build, the FCA finds that there was no disclosure of 'strategic information' between Artemis and Newton. Specifically, *Artemis Analyst's* disclosures on 25 April, 29 April 2014, and 1 May did not eliminate or substantially reduce uncertainty as to Artemis' expected conduct on the market. This is because they do not demonstrate a clear statement of intention since:

- a. they disclosed a range rather than a specific price;
- b. the ranges disclosed varied significantly, e.g. £700-800 million, and £650-700 million. These disclosures amounted to a changing picture that could not and did not give Newton a clear idea of where Artemis was proposing to bid; and
- c. these disclosures were made well before the books closed on 14 May. Accordingly, it was less likely that the parties could rely on the information disclosed to the other.

15.8 Equally, Newton's (*NFM1's*) disclosure 'I wont be participating in this range - £700m more realistic...'.⁸⁴⁹ was also made on 1 May 2014, well before the books closed. Accordingly, the FCA considers that sufficient uncertainty about Newton's bidding intentions remained.

15.9 Taking into account the way that the book-building process operates, the context of the market more generally (see Section 5), and the particular disclosures in this IPO, the FCA has concluded, on balance and after careful consideration, that the information that the parties exchanged were not statements of intention that 'eliminated' or 'substantially reduced' uncertainty between them as to their expected conduct on the market.

Party submissions and the FCA's view of them

15.10 Artemis said there was no discussion of a party's future bidding intention and so uncertainty in the market place was not reduced.⁸⁵⁰ *Artemis Analyst* had no decision-making power and *NFM1* knew that. *NFM1* stated that he was not bidding and *Artemis Analyst* understood that. It said rather than price, there was an 'exchange of opinions about the high level valuation' of the business.⁸⁵¹

⁸⁴⁸ UUID 876-66220-0-35, email from *NFM1* (Newton) to *Artemis Analyst* (Artemis), 1 May 2014 at 10:06, page 2.

⁸⁴⁹ UUID 876-66220-0-35, email from *NFM1* (Newton) to *Artemis Analyst* (Artemis), 1 May 2014 at 10:06, page 2.

⁸⁵⁰ UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraphs 1.8.1 and 4.13.

⁸⁵¹ UUID 74290001, Artemis Further Submission, e.g. paragraph 3.24(A).

- 15.11 The FCA accepts that uncertainty between Newton and Artemis was not sufficiently reduced for the information disclosed, at the time it was disclosed, to count as strategic and for them to have formed a concerted practice.
- 15.12 Artemis said price information on its own was not strategic in this market. Volume was key in determining share price and without it, price was meaningless.⁸⁵² It accepted that analysis should be carried out on a case by case basis but that in the context of the Card Factory IPO, the absence of volume information was critical.⁸⁵³ This was because the timing of the exchange took place a few days before the book-building process began and nearly two weeks before it ended. To reduce uncertainty at this point in time, the exchange would have needed at least a high level volume indication so that the recipient would have had an indication of the level of interest in and commitment to the IPO. It noted that towards the end of a book-building process there could be an infringement where price was discussed even in the absence of volume information.⁸⁵⁴
- 15.13 The FCA thinks that price information without volume information can be strategic, but was not in this case given its timing well before the books closed, and its lack of specificity.
- 15.14 Artemis said fund managers had little or no power in the IPO process which was determined by the issuing company and its advisers. The information disclosed was sell side and/or public information and readily accessible. There was 'anecdotal evidence' that brokers provided the same level of granularity as was discussed between *Artemis Analyst* and *NFM1*.⁸⁵⁵
- 15.15 The FCA considers that asset managers should formulate and submit their bids independently for the book-building process to function effectively. It found no evidence that brokers (i.e. book-builders) provide granular information to potential investors about another party's intended bid which identified that bidder.
- 15.16 Artemis said that the FCA was wrong to state that *NFM1* and *Artemis Analyst* considered they could influence the price and that the discussions between them were detailed enough to reduce uncertainty. In the context of Card Factory, price discussions could not influence the price where the sell side held all the 'power' in the book-building process. The witness evidence supported that neither party was influential nor considered itself to be so.⁸⁵⁶
- 15.17 The FCA finds that *NFM1* in the Market Tech and OTB transactions intended to influence the issue price. It does not consider that issuers hold all the power in a book-building process. As noted, for such processes to function effectively, asset managers should formulate and submit their bids independently.
- 15.18 Artemis said that within Artemis, *AFM1* and *AFM2*, and within Newton, *NFM2* (the fund respective managers who placed bids in the Card Factory IPO) were not aware of the discussions between Newton (*NFM1*) and Artemis (*Artemis Analyst*) and this made the information not strategic.⁸⁵⁷ However, Artemis did not consider that case law allows the absence of knowledge and awareness of decision-makers to provide a defence to an infringement of the Chapter I prohibition or Article 101 TFEU in every case. A company should not be able to avoid liability because it has deliberately structured itself to institutionalise some sort of 'information cleansing' process in order to provide a "get-out-of-jail-free" card on information exchange. In the absence of such a structure,

⁸⁵² UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraphs 4.18-4.19.

⁸⁵³ UUID 74290001, Artemis Further Submission, e.g. paragraph 3.15(B) and 3.22.

⁸⁵⁴ UUID 74290001, Artemis Further Submission, e.g. paragraph 3.24(B).

⁸⁵⁵ UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraphs 1.8.1 and 4.14.

⁸⁵⁶ UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraph 4.19.

⁸⁵⁷ UUID 65230003, Artemis Submission on Statement of Objections, e.g. paragraphs 1.8.1 and 4.20.

consideration needs to be given as to whether bids made in a book-building exercise could be influenced by information where the people actually making the bids had no idea of the information exchanged nor even that an information exchange had taken place at all (as is the case in the Card Factory IPO).⁸⁵⁸

- 15.19 The FCA agrees with Artemis's submission in paragraph 15.18 regarding 'cleansing'. It considers the key issue is whether strategic uncertainty between competitors is eliminated or substantially reduced by a disclosure and acceptance of strategic information.

Conclusion

- 15.20 The FCA finds that the information disclosed by each of Newton and Artemis in the context of the Card Factory IPO was not 'strategic'. Accordingly, the FCA cannot demonstrate that the parties substituted practical cooperation between them for the risks of competition and so find that Newton and Artemis participated in a concerted practice.

- 15.21 The FCA does not consider it necessary to assess or conclude on whether the other conditions of the Chapter I prohibition and/or Article 101 TFEU have been met. The FCA therefore has no grounds for action regarding the conduct of Newton and Artemis in relation to the book-building process for the IPO of Card Factory.

⁸⁵⁸ UUID 74290001, Artemis Further Submission, e.g. paragraph 3.15(A).

16. Assessment: Appreciability, Effect on Trade and Exclusion or Exemption

Introduction

- 16.1 In this Section, the FCA sets out its findings that each of the four concerted practices described in Sections 11 to 14 constitutes an appreciable restriction of competition, was capable of affecting trade within the UK and is not covered by an exclusion or exemption.

Appreciability

- 16.2 As set out at Section 9, a concerted practice that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition for the purposes of the Chapter I prohibition and Article 101 TFEU.
- 16.3 This principle is applied below to the conduct between Newton and Hargreave Hale and to the conduct between Newton and RAMAM in relation to the placing of shares in Market Tech and the OTB IPO, taking into account the submissions made by Hargreave Hale and RAMAM.⁸⁵⁹

FCA findings

- 16.4 Given that the concerted practices in Sections 11 to 14 between the parties each had as its object the prevention, restriction or distortion of competition as it involved the sharing of strategic information as to the parties' future conduct on the market, the FCA has concluded that each had, by its very nature and independently of any concrete effect that it may have, an appreciable restriction of competition. This principle has been confirmed by the Court of Justice: see paragraph 10.3.
- 16.5 Even if the FCA were required to demonstrate an appreciable effect on competition, which for the reason set out in paragraph 16.4 the FCA does not accept, the FCA does not regard the fact that the parties concerned did not necessarily alter their bidding strategies following the discussions, nor the fact that it was a discussion between only two bidders on a market in which there are many sources of information available, indicates that the appreciability threshold would not be met. As set out in paragraphs 5.73 to 5.83, the FCA finds there are a several potential adverse effects of bid disclosure on competition between asset managers, including that individual investors can affect the strike price for the issuing company's shares through the value and volume of their bid.

⁸⁵⁹ The leniency applicant, Newton, admitted liability as set out in the Statement of Objections; see UUID 65240005, Newton Submission on Statement of Objections.

Party submissions and the FCA's view of them

- 16.6 RAMAM considered that there is no basis to find that the parties' conduct in relation to the Market Tech placing or the OTB IPO had or could have resulted in any appreciable restriction of competition.⁸⁶⁰ *Expedia* is clear that the question of the concrete effect of an agreement is a separate question from whether the agreement itself represents an appreciable restriction of competition.⁸⁶¹ As the FCA had not established a restriction 'by object', the *Expedia* case did not assist the FCA.⁸⁶²
- 16.7 The FCA has found a restriction of competition 'by object' and so rejects RAMAM's submission.
- 16.8 RAMAM said that there is no evidence that either Newton or RAMAM altered their respective bidding strategies because of the discussions between them in relation to Market Tech or OTB.⁸⁶³ Even if there was evidence that either Newton or RAMAM altered their bidding strategy because of the discussions, that would still be insufficient to show any appreciable restriction of competition.⁸⁶⁴ One exchange between two bidders could not appreciably distort the IPO or placing process (or competition more generally) because of the mass of information to which a primary capital market transaction gives rise and the alternative sources of information available to all interested parties, particularly if there is no evidence that the discussions had any impact on the market conduct of either of those bidders.⁸⁶⁵
- 16.9 The FCA rejects this submission for the reasons given in Sections 12 and 14: for each concerted practice between Newton and RAMAM (as well as those between Newton and Hargreave Hale) it has found a restriction 'by object' and this appreciably restricts competition.
- 16.10 RAMAM considered that the Statement of Objections failed to address the realities of the market and the inherent implausibility of isolated and unilateral or bilateral exchanges between individual asset managers having any material restrictive effect on competition between bidders in the context of a book-building process.⁸⁶⁶
- 16.11 The FCA rejects this submission. It sets out in Section 5 how the book-building process works and how exchanges might adversely affect that process in paragraphs 5.73 to 5.83.

Effect on trade

- 16.12 Article 101 TFEU applies to those concerted practice which may affect trade between EU Member States; and such an effect on trade must be appreciable. An effect on trade means that the concerted practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU Member States.⁸⁶⁷ See paragraphs 10.7 to 10.8.
- 16.13 The Chapter I prohibition applies to concerted practice which may affect trade within the UK and there is no appreciability requirement (see paragraph 10.6).
- 16.14 This principle is applied below to the conduct between Newton and Hargreave Hale and to the conduct between Newton and RAMAM in relation to the placing of shares in Market

⁸⁶⁰ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 17, 81 and 86.

⁸⁶¹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 82.

⁸⁶² UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 83.

⁸⁶³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraphs 84, 86-87.

⁸⁶⁴ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 8.

⁸⁶⁵ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 85.

⁸⁶⁶ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 81.

⁸⁶⁷ See Section 10.

Tech and the OTB IPO, taking into account the submissions made by Hargreave Hale and RAMAM.⁸⁶⁸

FCA findings

Effect on trade within the UK

- 16.15 The FCA considers that the four concerted practices described in Sections 11 to 14 between Newton and Hargreave Hale and between Newton and RAMAM were each capable of affecting trade within the UK.⁸⁶⁹ In particular:
- a. they were capable of reducing competition in the supply of equity capital in the primary capital market for small and mid-cap companies in the UK and, thus, altering the pattern of trade within the UK;
 - b. they were implemented within the UK and the products which are the subject of the concerted practices were offered to investors throughout the UK (and more widely); and
 - c. by their very nature, concerted practices that restrict competition such as those described in Sections 11 to 14 are likely to affect trade.
- 16.16 Accordingly, the FCA finds that the concerted practices were each capable of altering the pattern of trade within the UK, so that they may have an effect on trade within the UK.

Effect on trade between Member States

- 16.17 The FCA has concluded that the concerted practices described in Sections 11 to 14 may affect trade between EU Member States to an appreciable extent as follows:
- a. investment funds outside of the UK (including from elsewhere in Europe) are active in the supply of equity capital to UK-listed small and mid-cap firms. In the case of Market Tech, there were bids placed by investment funds from outside the UK; and⁸⁷⁰
 - b. issuing companies and their book-builders are free to look in any country in the EU for investors to supply the capital through the IPO or placing process as there are no restrictions on investments made by parties located outside of the UK.
- 16.18 The FCA does not regard the fact that the parties concerned did not necessarily alter their bidding strategies because of the discussions, nor the fact that it was a discussion between only two bidders on a market in which there are many sources of information available, indicates that the effect on trade between EU Member States/within the UK threshold would not be met. As set out in paragraphs 5.73 to 5.83, the FCA finds there are several potential adverse effects of bid disclosure on competition between asset managers, including that individual investors can affect the strike price for the issuing company's shares through the value and volume of their bid.

⁸⁶⁸ The leniency applicant, Newton, admitted liability as set out in the Statement of Objections; see UUID 65240005, Newton Submission on Statement of Objections.

⁸⁶⁹ See Section 10.

⁸⁷⁰ UUID 2880010, Canaccord's Dealogic Report Table setting out Market Tech placing investor bids.

Party submissions and the FCA's views of them

- 16.19 RAMAM made the same arguments for 'effect on trade' as for 'appreciable restriction of competition'.⁸⁷¹ The FCA's view on RAMAM's submissions on this point is the same as for 'appreciable restriction of competition' (see paragraphs 16.6 to 16.11 for RAMAM submissions and FCA views).

Exclusion or exemption

- 16.20 Section 9 of the Act (and Article 101(3) TFEU) provide that agreements, decisions or concerted practices that have as their object or effect an appreciable prevention, restriction or distortion of competition are exempt from, and therefore do not infringe, the Chapter I prohibition (and Article 101 TFEU, respectively), where the following criteria are met:

- a. they contribute to improving production or distribution or to promoting technical or economic progress;
- b. while allowing consumers a fair share of the resulting benefit;
- c. they do not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives (in the first bullet); and
- d. they do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

Any undertaking or association of undertakings claiming the benefit of this exemption bears the burden of proving that the conditions of section 9 are satisfied.

- 16.21 Although it is for the undertakings concerned to produce evidence that the conditions for exemption are satisfied, the FCA notes that concerted practices which have as their object the prevention, restriction or distortion of competition, are unlikely to benefit from individual exemption as such restrictions generally fail (at least) the first two conditions for exemption: they are unlikely to create objective economic benefits or benefit consumers.

- 16.22 These principles are applied below to the conduct between Newton and Hargreave Hale and to the conduct between Newton and RAMAM in relation to the placing of shares in Market Tech and the OTB IPO, taking into account the submissions made by Artemis, Hargreave Hale, and RAMAM.⁸⁷²

FCA findings

- 16.23 The FCA finds that no block exemption applies that would exempt the conduct of the parties from the Chapter I prohibition.

- 16.24 The FCA finds that none of the exclusions from the Chapter I prohibition applies in this case.

⁸⁷¹ See also UUID 77130003, RAMAM Oral Hearing Transcript, lines 1790-1795 (Market Tech) and 1918-1919 (OTB).

⁸⁷² The leniency applicant, Newton, admitted liability as set out in the Statement of Objections; see UUID 65240005, Newton Submission on Statement of Objections. The FCA has considered Artemis' submissions in this regard in light of their general application to the parties' conduct, notwithstanding the FCA's conclusion in Section 15 that it has no grounds for action regarding the conduct of Newton and Artemis in relation to the Card Factory IPO.

16.25 The FCA finds that the parties have not substantiated their claims that the concerted practices created any section 9 or Article 101(3) efficiency gains: see paragraphs 16.26 to 16.37.

Party submissions and the FCA's view of them

16.26 Artemis submitted that the criteria for exemption under section 9 of the Act and Article 101(3) TFEU were satisfied:⁸⁷³

- a. the information sharing addresses informational asymmetry and facilitates the efficient allocation of capital in the IPO process, generating investor confidence and ensuring that issuers carry out successful IPOs;
- b. better informed fund managers act directly to the benefit of consumers, who benefit from effective investments;
- c. the disclosures in question do not reduce competition; any restriction in competition found by the FCA could only be minimal.

16.27 Hargreave Hale did not specifically argue that the practices it engaged in are exempted from the Chapter I prohibition by operation of section 9 of the Act or from Article 101 TFEU by the operation of Article 101(3) TFEU, but said that the following efficiency gains arose from the conduct:

- a. *NFM1's* disclosure may have indicated strong support for the OTB IPO at the bottom of the range proposed by Numis and so generated interest and momentum for the IPO;⁸⁷⁴
- b. the information sharing resulted in a higher share price, as: (i) this addressed the information asymmetry which exists as between the sellers and investors,⁸⁷⁵ (ii) this led to increased confidence in the issuing company,⁸⁷⁶ particularly in a cold IPO,⁸⁷⁷ and (iii) the exchange of expressions of interest in a transaction generated a competitive tension.⁸⁷⁸

16.28 RAMAM also did not specifically seek to argue that the concerted practices engaged in by them are exempted from the Chapter I prohibition by operation of section 9 of the Act or from Article 101 TFEU by the operation of Article 101(3) TFEU, but said that the following efficiency gain arose from the conduct: shares can be acquired more cheaply which benefits downstream customers (i.e. investors).⁸⁷⁹

16.29 The FCA does not accept these submissions for the reasons that follow.

⁸⁷³ UUID 85300011, Artemis Submission on First Letter of Facts, paragraph 3.25.

⁸⁷⁴ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, paragraph 2.8; UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraph 5.13 (in which Hargreave Hale cites extracts from UUID 66450014, RAMAM Equity Issuance Note) and paragraph 5.16. See also UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 3.21-3.22, which quotes an extract from the FSMA Documents: '*Enforcement accepts that NFM1's valuation of OTB was within a reasonable range of valuations as other fund managers already had orders in line with his suggested cap*' and '*This was not an unusual valuation of OTB when compared with other orders as a number of other fund managers had already submitted an order with the same price limit*'.

⁸⁷⁵ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 2.12.

⁸⁷⁶ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraphs 1.1(b) and 2.6.

⁸⁷⁷ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 1.1(c).

⁸⁷⁸ UUID 84270004, Hargreave Hale Submission on First Letter of Facts, e.g. paragraph 2.12; UUID 107720003, Hargreave Hale Submission on Second Letter of Facts, e.g. paragraphs 5.24-5.33. See also UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 1.10 and 3.15, which quotes an extract from the FSMA Documents that '*It is also theoretically possible that revealing information about bidding intentions could cause other investors to increase their bid, as the Oxera report notes at paragraph 3.22*'.

⁸⁷⁹ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 42(b)(i).

Contribution to improving production or distribution or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit

- 16.30 The parties have not substantiated the extent to which their practices contributed to improving production or distribution. The book-building process is designed to identify the willingness of potential investors to acquire shares and thereby supply equity capital to the firm, at different price points.⁸⁸⁰ This process of price discovery is particularly important for IPOs⁸⁸¹, but is also relevant in placings. Therefore, book-building in IPOs and placings is aimed at reducing the scale of information asymmetries and the potential under-pricing of shares, which are present due to the uncertainty around the true value of the shares. As set out in Section 5, within the bounds of applicable regulation, the issuing firm and the book-builder have a strong incentive to reduce the information asymmetries and the potential for under-pricing, by disclosing helpful information to potential investors. Such disclosure may also include information to achieve coverage of the book, such as the development of demand at various price points. The process of book-building is the most common method for issuing shares in IPOs and placings because it allows issuing companies to achieve their objective of raising capital and allocating shares to investors. (see further Section 5).⁸⁸²
- 16.31 The parties have not explained how the disclosure of strategic information between competing asset managers would add to or improve the existing information flows (through the book-builder) and deliver improved outcomes, over and above those achieved through the book-building process without horizontal flows of strategic information. In bidding for shares and providing equity capital to the issuing firm, the book-building process sets the interests of potential investors against those of the issuing firm. By disclosing and accepting strategic information on their bids, the asset managers formed concerted practices that had the object of preventing, restricting or distorting competition and could depress the strike price⁸⁸³ and as such increase the cost of equity capital to the issuing firms (among other potential anti-competitive effects). Information exchanges between asset managers could lead to a loss of confidence in the ability of the book-building process to achieve desirable outcomes, particularly for issuing companies. An important consideration for the issuing company is raising equity capital at the lowest cost possible and the aim of the information exchanges was directly contrary to this aim.
- 16.32 The book-building process also rewards investors who are particularly helpful to the price discovery process. For example, investors who submit price-sensitive bids are rewarded with allocations which are closer to their demand and more likely to benefit from the under-pricing that is common in IPOs and book-building (see paragraph 5.40). A key part of the asset manager's role in this aspect, is assessing the valuation of the firm to inform their bids, particularly in the case of informed bids such as price-sensitive bids. The sharing of strategic information on valuations and bids means that certain asset-managers are free-riding on the assessment of the asset managers that invested in coming up with the valuation. This could reduce the value of carrying out the due diligence in the first place and hamper the price-discovery process which is the centre of the book-building process. The FCA therefore considers that the relevant information disclosures between asset

⁸⁸⁰ The cost of equity capital is directly related to the company's share price. A lower share price means that the company's cost of equity capital is higher (and vice versa) since for a given level of capital the issuing company has to sell a larger share of itself (i.e. sell more shares).

⁸⁸¹ Since the company's shares are not already traded and there is no existing price information which can be used to frame negotiations on price between the issuing company and investors.

⁸⁸² While, as noted in paragraph 5.31, the issuing company and book-builder have incentives 'to talk up the book', a competitive book-building process depends on asset managers formulating and submitting bids based on their own knowledge, expertise and requirements – see paragraphs 5.66-5.67.

⁸⁸³ While a strike price depressed by concertation might benefit asset managers and their customers it would penalise issuing companies and their shareholders, with the potential adverse effects set out in paragraphs 5.73-5.83.

managers which are the subject of this decision did not contribute to improving production or distribution in the relevant market.

16.33 Further, the parties have not substantiated the extent to which any practice contributed to promoting technical or economic progress.

16.34 With regard to consumers' share of any resulting benefit, in this context, and to address RAMAM's point on benefits to downstream consumers, the FCA considers that issuing companies are in the market as customers to satisfy their demand for capital rather than offering shares as suppliers of shares (see paragraphs 6.10 to 6.14), although the FCA's conclusion does not turn on this (see paragraph 9.29).

Do not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives

16.35 The parties have not substantiated the extent to which any practice imposed restrictions which are not indispensable to the attainment of those objectives. The FCA has found that the disclosure and acceptance of a limited class of information infringes the Chapter I prohibition and Article 101 TFEU, namely strategic information, as defined in paragraphs 8.9 to 8.21. The FCA considers that any benefits put forward by the parties could be achieved without the disclosure of such strategic information.

Do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question

16.36 The parties have not substantiated the extent to which any benefit does not enable them to eliminate competition in respect of a substantial part of the products in question. The disclosure and acceptance of strategic information does eliminate or substantially reduce uncertainty between the relevant parties in respect of the relevant transactions. Asset managers compete for allocations of shares which are typically under-priced (with respect to subsequent open market prices) and have an incentive to participate actively in the book-building and price discovery process. The issuing company and book-builders rely on the asset managers to provide information on their private valuations of the company, through the iterative bidding process. By sharing strategic information on their bids, the relevant parties undermined the process of price discovery and reduced strategic uncertainty in the competitive process of book-building, by changing the incentives of some of the participants to reveal information on their valuation of the shares. Competition between asset managers affects the strike price and as a result the cost of equity capital of the firm undertaking an IPO or placing. Therefore, the elimination of incentives to compete, distorts an important part of competition in the supply of equity capital through IPOs and placings. In any event, the FCA has set out in paragraphs 16.30 to 16.35 how the parties have not substantiated their claims that the concerted practices created any other section 9 or Article 101(3) efficiency gains so they cannot be exempt.

16.37 Accordingly, the FCA finds that the concerted practices between the parties described in Sections 11 to 14 are not exempt under section 9 of the Act or Article 101(3) TFEU.

17 The FCA's action

Decisions regarding infringement of the Chapter I prohibition and Article 101 TFEU

Market Tech and OTB

- 17.1 For the reasons set out above and in particular in Sections 11, 12 and 16, the FCA has decided that the following undertakings entered concerted practices that had as their object the prevention, restriction or distortion of competition in relation to the placing of shares in Market Tech in July 2015 and thereby infringed the Chapter I prohibition and Article 101 TFEU:
- a. Newton (together with its parent BNYM Corp) and Hargreave Hale.
 - b. Newton (together with its parent BNYM Corp) and RAMAM (together with its parent RAM Group).
- 17.2 For the reasons set out above and in particular in Sections 13, 14 and 16, FCA has decided that the following undertakings entered concerted practices that had as their object the prevention, restriction or distortion of competition in relation to the IPO of OTB in September 2015 and thereby infringed the Chapter I prohibition and Article 101 TFEU:
- a. Newton (together with its parent BNYM Corp) and Hargreave Hale.
 - b. Newton (together with its parent BNYM Corp) and RAMAM (together with its parent RAM Group).
- 17.3 The FCA considers that it is appropriate to impose a financial penalty on Hargreave Hale, RAMAM and its parent RAM Group in respect of each of these infringements. Newton and BNYM Corp have admitted their involvement in, and liability for, these infringements. As set out in paragraph 1.7, Newton and BNYM Corp have been granted immunity from financial penalties under the FCA's leniency programme.

Card Factory

- 17.4 For the reasons set out above and in particular in Section 15, the FCA has decided that there are no grounds for action in respect of the conduct of Newton and Artemis in April 2014 in relation to the IPO of Card Factory in May 2014.

Directions

- 17.5 Section 32(1) of the Act provides that if the FCA has made a decision that an agreement infringes the Chapter I prohibition or Article 101 TFEU, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end.

- 17.6 The FCA has decided not to impose any directions on the parties as the infringements are not continuing.

Financial penalties: legal framework

Introduction

- 17.7 Section 36(1) of the Act provides that, on making a decision that a concerted practice⁸⁸⁴ has infringed the Chapter I prohibition or Article 101 TFEU, the FCA may require an undertaking which is party to the concerted practice to pay a penalty in respect of the infringement.
- 17.8 The FCA has decided to impose a financial penalty on each of Hargreave Hale and RAMAM as follows:
- a. Hargreave Hale must pay £306,300; and
 - b. RAMAM and its parent RAM Group must pay £108,600.
- 17.9 Newton and BNYM Corp have been granted full immunity from financial penalties under the FCA's leniency policy. No financial penalty has been imposed on BNYM Corp or Newton.⁸⁸⁵ Consequently, the FCA has not calculated the level of any financial penalty that would be applied to BNYM Corp/Newton if immunity had not been granted.

FCA's margin of appreciation in determining the appropriate penalty

- 17.10 When setting the amount of a penalty under the Act, the FCA must: (i) impose a penalty that is within the range of penalties permitted by section 36(8) of the Act⁸⁸⁶ and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000;⁸⁸⁷ and (ii) have regard to the CMA's published guidance in force at the time as to the appropriate amount of any penalty ('CMA Penalties Guidance')⁸⁸⁸ in accordance with section 38(8) of the Act.
- 17.11 The FCA makes its assessment on a case-by-case basis,⁸⁸⁹ having regard to all relevant circumstances and the objectives of its policy on financial penalties. The CMA Penalties Guidance provides the FCA with sufficient flexibility to apply and interpret its provisions in many different situations.⁸⁹⁰

⁸⁸⁴ Section 36(1) of the Act expressly refers to 'agreements' and should be read in conjunction with section 2(5) of the Act which provides that a provision of Part 1 of the Act which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice (but with necessary modifications).

⁸⁸⁵ BNYM Corp must continue to co-operate and comply with the relevant leniency conditions set out in the immunity agreement between the FCA and BNYM Corp. See the CMA's guidance Applications for leniency and no-action in cartel cases (OFT1495, adopted by the CMA Board), paragraphs 2.7 and 10.6-10.9.

⁸⁸⁶ Section 36(8) is addressed in Step 5 of the penalty calculation.

⁸⁸⁷ SI 2000/309, as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, SI 2004/1259.

⁸⁸⁸ The Act, section 38(8). The guidance currently in force is the CMA's *Guidance as to the appropriate amount of a penalty* (CMA73, 18 April 2018).

⁸⁸⁹ See, for example, *Kier Group and others v Office of Fair Trading* [2011] CAT 3, paragraph 116, where the CAT noted that 'other than in matters of legal principle there is limited precedent value in other decisions relating to penalties, where the maxim that each case stands on its own facts is particularly pertinent'. See also *Eden Brown and others v Office of Fair Trading* [2011] CAT 8 ('*Eden Brown*'), paragraph 97, where the CAT observed that '[d]ecisions by this Tribunal on penalty appeals are very closely related to the particular facts of the case'.

⁸⁹⁰ See *Kier Group and others v Office of Fair Trading* [2011] CAT 3, paragraph 76; *Balmoral Tanks*, paragraph 134.

Intention or negligence

17.12 The FCA may impose a penalty on an undertaking which has infringed the Chapter I prohibition and/or Article 101 TFEU only if it is satisfied that the infringement has been committed intentionally or negligently.⁸⁹¹ The FCA is not obliged to specify whether it considers the infringement to be intentional or negligent.⁸⁹²

17.13 The CAT has defined the terms 'intentionally' and 'negligently':

'...an infringement is committed intentionally for the purposes of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition'.⁸⁹³

17.14 This is consistent with the approach taken by the Court of Justice:

'the question whether the infringements were committed intentionally or negligently [...] is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty'.⁸⁹⁴

The EU Courts have however not defined negligence for this purpose.⁸⁹⁵

17.15 Hargreave Hale said that the judgment of the Court of Justice in paragraph 17.14 narrowed the test for intention and negligence by referring only to the 'cannot be unaware' standard.⁸⁹⁶ The FCA considers that the CAT's approach to the test of negligence in paragraph 17.13 is consistent with European Court case law in paragraph 17.14 and that both tests are relevant to its assessment.⁸⁹⁷ The FCA considers that 'cannot be unaware' does not mean that intentionality and negligence must be assessed on the basis of the same knowledge standard.

Calculation of penalties

17.16 As noted at paragraph 17.10, when setting the amount of the penalty, the FCA must have regard to the CMA Penalties Guidance. The CMA Penalties Guidance sets out a six step approach for calculating the penalty; which the FCA has followed in calculating a financial penalty for RAMAM and Hargreave Hale:

⁸⁹¹ The Act, section 36(3).

⁸⁹² *Napp*, paragraphs 453-457; see also *Argos and Littlewoods v Office of Fair Trading* (judgment on penalty) [2005] CAT 13, paragraph 221.

⁸⁹³ *Argos and Littlewoods v Office of Fair Trading* (judgment on penalty) [2005] CAT 13, paragraph 221.

⁸⁹⁴ Judgment in *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603 ('*Deutsche Telekom*'), paragraph 124.

⁸⁹⁵ See *Napp*, paragraph 457, where the CAT said that 'As to "negligently", there appears to be little discussion of this concept in the case law of the European Community'.

⁸⁹⁶ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 3.6-3.7; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 173-233; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraphs 2.1-2.3. Hargreave Hale referred to case law, such as the judgment in *Bundeswettbewerbshöhrde and Bundeskartellanwalt v Schenker and others*, C-681/11, EU:C:2013:404 in which the Court applied only the 'cannot be unaware' test.

⁸⁹⁷ The test in *Deutsche Telekom* was put to the Court of Justice in terms of 'cannot be unaware' (see paragraph 114 of the *Deutsche Telekom* judgment) and the Court of Justice recites the 'cannot be unaware' formulation without suggesting that it is the exclusive test. In its 2018 judgment in *Ping Europe Limited v CMA* [2018] CAT 13 ('*Ping*'), the CAT cites (at paragraph 219) and applies both tests (the 'ought to have known' test is considered at paragraphs 227-228 and 232 and the 'cannot be unaware' test is considered at paragraphs 225 and 229 of *Ping*).

- Step 1 Calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking.
- Step 2 Adjustment for duration.
- Step 3 Adjustment for aggravating or mitigating factors.
- Step 4 Adjustment for specific deterrence and proportionality.
- Step 5 Adjustment if the maximum penalty of 10% of the worldwide turnover of the undertaking is exceeded and to avoid double jeopardy.
- Step 6 Adjustment for leniency, settlement discounts and/or approval of a voluntary redress scheme.

Calculation of penalty for RAMAM

Summary

- 17.17 The FCA has decided that RAMAM was a party to two concerted practices that each had as its object the prevention, restriction or distortion of competition and thereby infringed the Chapter I prohibition and Article 101 TFEU. The FCA considers that it is appropriate to impose a financial penalty on RAMAM in respect of each of these infringements.
- 17.18 The FCA sets out its calculation for RAMAM first, since it used its preferred methodology for calculating RAMAM’s relevant turnover, and then for Hargreave Hale, where the FCA was obliged to use a proxy methodology.
- 17.19 Table 2 below sets out, in summary form, the key steps in the FCA’s penalty calculations underlying the penalty in respect of RAMAM’s involvement in Market Tech and OTB.

Table 2: FCA penalty calculation for RAMAM

Step	Adjustment	Penalty at end of step
Relevant turnover	£493,864	
Step 1 – starting point	22%	£108,650
Step 2 – adjustment for duration	1	£108,650
Step 3 – adjustment for aggravating and mitigating factors	(a) Aggravating factors	+N/A
	(b) Mitigating factors	-N/A
		Total reduction of 0%
Step 4 – adjustment for specific deterrence and proportionality	-0%	£108,650
Step 5 – adjustment to ensure statutory cap is not exceeded and to avoid double jeopardy	No adjustment	£108,650
Step 6 – adjustment for leniency and/or settlement	No adjustment	£108,650
Final proposed penalty (Rounded down to nearest £100)		£108,600

Imposition of any penalty on RAMAM

- 17.20 RAMAM said that no financial penalty should be imposed on it, given:
- a. the novelty of the application of competition law to 'pure' information exchange in respect of book-building exercises for the primary capital markets;
 - b. that the conduct took place on an intermediate purchasing market without any credible evidence of market power on any relevant market;
 - c. the absence of any evidence of harm resulting from the infringement; and
 - d. that RAMAM was the recipient of unsolicited market information from a third party over whom it had no control.⁸⁹⁸
- 17.21 The FCA rejects these submissions and has decided that it should impose a penalty on RAMAM for both infringements to which it was a party. The FCA considers that the infringements are not novel. Even though there do not appear to have been previous competition law interventions by the CMA (or its predecessors) or the Commission regarding IPO or placing processes specifically, at the time of the infringements it was well established that the disclosure and acceptance of strategic information between competitors on any market infringes competition law.⁸⁹⁹ Any case relating to infringement of the Chapter I prohibition or Article 101 TFEU will turn on its relevant factual circumstances and the precise nature of the conduct concerned, in each case, and therefore the detail of the infringement will differ on a case-by-case basis. This does not mean that the infringements are 'novel' in a way that should affect assessment of financial penalties.
- 17.22 The FCA also rejects RAMAM's arguments at paragraph 17.20 points (b) to (d) as they relate to the substantive question of whether RAMAM infringed the Chapter I prohibition and Article 101 TFEU and not the question of whether any penalty should be imposed. Points (b) to (d) may be relevant to the level of any penalty imposed, but the FCA sets out in Step 1 and in Step 4 of RAMAM's penalty calculation the reasons why it does not accept RAMAM's points.

Single penalty

- 17.23 In order to reflect the fact that both infringements (i) pursued the same objectives; (ii) took place in the same relevant market; (iii) involved the same counterparty (Newton); (iv) involved the disclosure and acceptance of strategic information; and (v) each had the object of preventing, restricting or distorting competition by eliminating or at the very least substantially reducing strategic uncertainty between competitors, the FCA considers it appropriate in this case to make use of its margin of discretion and impose a single penalty on RAMAM for both of the infringements to which it was a party. This is notwithstanding that each infringement in its own right amounts to a breach of the Chapter I prohibition and Article 101 TFEU and the FCA could otherwise have imposed a separate penalty for each.

⁸⁹⁸ UUIID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 91. The FCA has considered the points on penalties raised in UUIID 66450010, RAMAM Submission on Statement of Objections where no equivalent points are raised in UUIID 96510011, RAMAM Submission on DPS.

⁸⁹⁹ See Section 8.

Intention or negligence

- 17.24 The FCA finds that RAMAM knew or ought to have known that its conduct had the object or would have the effect of preventing, restricting or distorting competition. This is the case whether or not RAMAM was aware that it was infringing EU or UK competition rules; but in this regard, the FCA notes that it is well-established law that the disclosure and/or acceptance of strategic information by one competitor to or from another amounts to an infringement of competition law (see Section 8). The Commission and the European Courts consider that experienced undertakings know or ought to know the competition implications of their conduct.⁹⁰⁰ The FCA thinks this principle applies to RAMAM as an experienced and sophisticated organisation. Specifically:
- a. in relation to the Market Tech infringement, the FCA finds that a call took place between Newton and RAMAM in relation to Market Tech on 9 July 2015 on which Newton disclosed strategic information to RAMAM which RAMAM accepted (see Section 12); and
 - b. in relation to the OTB infringement, the FCA finds that Newton disclosed strategic information to RAMAM which RAMAM accepted and RAMAM disclosed its own strategic information to Newton regarding OTB which was accepted by Newton (see Section 14).
- 17.25 The FCA considers that RAMAM knew or ought to have known that the disclosures by Newton in relation to the Market Tech and OTB book-builds (consisting as they did of Newton's future bidding intentions) which RAMAM accepted, would substantially reduce or eliminate strategic uncertainty between them. Similarly, RAMAM knew or ought to have known that the disclosure it made to Newton which Newton accepted in relation to OTB, consisting of its own bidding intention, would substantially reduce or eliminate strategic uncertainty between them. Accordingly, RAMAM knew or ought to have known that its conduct in relation to Market Tech and OTB had the object or would have the effect of preventing, restricting or distorting competition. That is because (as set out in Section 5), strategic uncertainty between rivals is essential for the book-building process to function properly. If asset managers disclose their bidding conduct or intentions to other potential investors they adversely affect the competitive outcome of the book-building process, with the potential consequences summarised in paragraph 5.83.
- 17.26 From this the FCA concludes that RAMAM acted at least negligently in committing the infringements.

Step 1 – Starting point

Relevant turnover

- 17.27 Relevant turnover is the turnover of an undertaking in the relevant market in that undertaking's last business year.⁹⁰¹ The FCA has found that the 'relevant market' for these purposes is the supply of equity capital in the primary capital market to UK-listed small and mid-cap companies via an IPO or a secondary market placement (as explained in Section 6).

⁹⁰⁰ Judgment in *United Brands v Commission*, C-27/76, EU:C:1978:22, paragraphs 299-301.

⁹⁰¹ Generally, relevant turnover will be based on figures from an undertaking's audited accounts, but in exceptional circumstances it may be appropriate to use a different figure. CMA Penalties Guidance, paragraphs 2.11-2.15.

- 17.28 In the present case, the FCA has determined the turnover for RAMAM in the relevant market as:
- a. the proportion of RAMAM's total revenue which is equal to the proportion of the total 'assets' managed by RAMAM relative to all assets under management;
 - b. where 'assets' means UK-listed equity purchased by RAMAM in either an IPO or a secondary market placement in a firm that was a small-cap or medium-cap firm at the time of the purchase.

This is the FCA's 'Preferred Methodology'.

- 17.29 The 'last business year' is the undertaking's financial year preceding the date when the infringement ended,⁹⁰² which in this case is the financial year preceding 2015 given the FCA's decision that the infringements each took place during 2015 only. The last business year for RAMAM is the financial year ending 30 June 2015. In accordance with the preferred methodology, the relevant turnover for RAMAM is £493,864.⁹⁰³

Seriousness of the infringement and the need for general deterrence

FCA findings

- 17.30 In line with the CMA Penalties Guidance, the FCA must determine the overall starting point for the purpose of calculating the penalty for RAMAM. As also explained in the CMA Penalties Guidance, in reaching this starting point, the FCA had regard to both the seriousness of the infringements (and ultimately the extent and likelihood of actual or potential harm to competition and consumers)⁹⁰⁴ and the need for general deterrence.⁹⁰⁵
- 17.31 First, the FCA considered how likely it is for the type of infringements in which RAMAM was involved to, by their nature, cause harm to competition. To adequately reflect the seriousness of an infringement, the FCA may apply a percentage rate of up to 30% of the undertaking's relevant turnover.⁹⁰⁶ The CMA Penalties Guidance states that while there is no pre-set 'tariff' of starting points for different types of infringement, a starting point of between 21% and 30% of relevant turnover will generally be used for the most serious types of infringement, that is, those which the competition authority considers are most likely by their very nature to harm competition such as price fixing and market sharing, and a starting point of between 10% and 20% will generally be used for certain less serious object infringements involving conduct which is less likely to be inherently harmful.⁹⁰⁷ As noted, the FCA has a margin of discretion, and has considered the specific facts and circumstances of RAMAM's infringements in determining an appropriate starting point.
- 17.32 The starting point must reflect the seriousness of the RAMAM infringements, in particular:
- a. the conduct removed strategic uncertainty between otherwise rival asset managers on which the competitive outcome to an IPO or placing depends in relation to two separate transactions;

⁹⁰² CMA Penalties Guidance, paragraph 2.11.

⁹⁰³ UUID 85320003, RAMAM's turnover calculation, 6 June 2018 ('RAMAM Turnover').

⁹⁰⁴ The FCA will consider the relevant circumstances of the case, such as the nature of the product, the structure of the market including the market shares of the undertakings involved in the infringement, market concentration and barriers to entry, the market coverage of the infringement, the actual or potential effect of the infringement on competitors and third parties, and the actual or potential harm caused to consumers whether directly or indirectly. CMA Penalties Guidance, paragraph 2.8.

⁹⁰⁵ CMA Penalties Guidance, paragraphs 2.5-2.9.

⁹⁰⁶ CMA Penalties Guidance, paragraph 2.4.

⁹⁰⁷ CMA Penalties Guidance, paragraph 2.6.

- b. the FCA has found that the conduct had the object of preventing, restricting or distorting competition. Each concerted practice was, by its very nature, harmful to the proper functioning of normal competition; each had the potential not only to adversely affect the transaction issue price but to give rise to the other adverse effects summarised in paragraph 5.83. The FCA generally considers 'by object' restrictions of competition to be among the more serious competition law infringements; and
- c. conduct of this nature constitutes a serious object infringement, but not the most serious of object infringements. In reaching this view, the FCA has taken account of the fact that the conduct did not involve price-fixing, market sharing or bid-rigging; and the infringements are based on discussions in relation to two transactions only. It notes that the CMA considered, in a case involving one-off information sharing, that 18% of relevant turnover was appropriate at Step 1.⁹⁰⁸

17.33 Second, the FCA has considered the several factors provided by the CMA Penalties Guidance that may be relevant to the extent and likelihood of harm to competition and ultimately to consumers, and which may indicate it is appropriate to adjust the starting point upwards or downwards to take account of specific circumstances of the case. These include: the nature of the product or service, the structure of the affected market, including the market shares of the undertakings involved in the infringement, market concentration and entry conditions, the market coverage of the infringement, the actual or potential effect on competitors and third parties and the actual or potential harm caused to consumers (whether directly or indirectly).⁹⁰⁹

17.34 The FCA has found that the nature and structure of the book-building process means that for a specific transaction, a single disclosure at the right moment of strategic information by one asset manager to a rival asset manager who accepts that information, can remove strategic uncertainty between them, with a potential adverse impact on the final share price. For this reason, the infringement could affect the entire book-building process, with the potential to affect the final share price for all competitors and cause significant consumer harm (as explained in Section 5). Accordingly, competition during book-building processes is particularly vulnerable to unlawful information sharing, and the FCA finds that the infringements are serious in the specific circumstances of this case.

17.35 Third, the FCA is determined to ensure that the starting point is sufficient for general deterrence. The FCA considers that:

- a. even though it is well-established that the disclosure and acceptance of strategic information between competitors infringes competition law, competition law awareness can be low in more transparent markets which are characterised by frequent exchanges of non-strategic information.⁹¹⁰ During this investigation, the FCA found there was limited awareness of competition law among the participants it interviewed. The starting point for penalties in this case should therefore show that participants on such markets should be alert to the competition law risk whenever engaging with competitors;

⁹⁰⁸ See *Galvanised Steel Tanks* (upheld in *Balmoral Tanks*).

⁹⁰⁹ CMA Penalties Guidance, paragraph 2.8.

⁹¹⁰ For example, *NFM1* said that 'it was common and entirely proper in these markets at the relevant time for potential investors on the buy-side to compare their views of the (objective) valuation of the company during the book-building process – a comparison which might expressly or implicitly reveal the intended bids of the communicators' (see UUID 113860008, *NFM1* Third FSMA Submission, paragraph 8). The FCA also notes that no recipient of strategic information expressed competition law concerns (see paragraphs 7.42-7.44).

- b. book-building processes are a common way of raising equity capital, and the FCA is determined to ensure competition within them is not prevented, restricted or distorted; and
- c. the asset management sector is large, as are some of the individual participants within it. The relevant market may therefore only be a limited part of their asset management and overall activities, which means that a percentage that just followed precedent could act as an insufficient general deterrent. Equally, in considering deterrence, the FCA has considered not only percentage, but the amount of the penalty in absolute terms, and the need to ensure it is adequate to deter: see further paragraphs 17.57 to 17.61 which assess whether the overall penalty for RAMAM is appropriate in the round.

- 17.36 In these circumstances, the FCA is determined to ensure that the starting point is sufficient to provide general deterrence, in order to demonstrate how seriously it takes breaches of competition law in book-building processes, in order to prevent similar infringements in future.
- 17.37 Taking all of these considerations into account in the round, and in light of RAMAM'S representations, the FCA considers that overall a starting point of 22%, which amounts to £108,650, is appropriate in all the circumstances. While it notes that this is higher than the CMA has applied in a previous information disclosure case,⁹¹¹ it considers this figure is justified in the circumstances of RAMAM'S specific infringements.

RAMAM submissions and the FCA's view of them

- 17.38 RAMAM did not contest the FCA'S provisional conclusion to Step 1 in its Draft Penalty Statement⁹¹² but did submit in its response to the Statement of Objections that any penalty should be low, taking account of the novelty of the FCA'S case.
- 17.39 The FCA rejects RAMAM'S submission on novelty for the reasons in paragraph 17.21.
- 17.40 RAMAM also said in its response to the Statement of Objections that any penalty should be low considering (a) Market Tech was at most a unilateral supply of information; (b) the evidence that neither party'S bidding strategy was affected by the disclosures; (c) the absence of any consensus as to future conduct or any expectation by either party of the other'S conduct; (d) the lack of causal connection and any adverse impact on either transaction; and (e) the only positive evidence on which the FCA relies in respect of RAMAM is one very short email summarising a contingent valuation that had been communicated to the broker of the OTB transaction three days before and that was only changed after the broker informed *RM FM* of changed circumstances that were outside his control.⁹¹³
- 17.41 The FCA rejects these submissions which relate to the substantive and evidential question of whether RAMAM infringed the Chapter I prohibition and Article 101 TFEU, on the same basis and for the same reasons that it found that RAMAM has done so: see Sections 12 and 14.

⁹¹¹ See *Galvanised Steel Tanks* (upheld in *Balmoral Tanks*).

⁹¹² UUID 96510011, RAMAM Submission on DPS, e.g. paragraph 2.1.

⁹¹³ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 92.

Step 2 – adjustment for duration

- 17.42 The starting point under Step 1 may be increased or decreased to take into account the duration of an infringement. Where the total duration of an infringement is less than one year, the FCA will treat that duration as a full year for the purpose of calculating the number of years of the infringement.⁹¹⁴ In exceptional circumstances, the starting point may be decreased where the duration of the infringement is less than one year.⁹¹⁵

FCA findings

- 17.43 The FCA does not consider that the circumstances of the infringements, where a single disclosure of information was sufficient to restrict competition in relation to one transaction, require a departure from the standard approach such as to warrant a multiplier of less than one. The practice of rounding up for infringements lasting less than a year aims to ensure sufficient deterrence for shorter infringements, recognising that even infringements of a very short duration may have a long-lasting impact.⁹¹⁶
- 17.44 The nature of the book-building process for IPOs and placings means that once an issue price has been determined for shares in a particular company, any anti-competitive effect cannot easily be undone and so will persist long after the anticompetitive conduct itself. In these cases, single disclosures of information with discussions lasting a matter of hours was sufficient to restrict competition. In other types of anti-competitive conduct (say, price fixing), the duration of anticompetitive conduct increases the harm caused, and so it could be argued that a cartel lasting under a year should attract a multiplier of less than one. Accordingly, the FCA does not consider that the circumstances of the infringements require a departure from the standard approach such as to warrant a multiplier of less than one.

RAMAM submissions and the FCA's view of them

- 17.45 RAMAM noted the short duration of any infringement,⁹¹⁷ but recognised that the CAT has applied a very strict standard in respect of duration.⁹¹⁸
- 17.46 The FCA agrees with RAMAM.

Step 3 – adjustment for aggravating and mitigating factors

- 17.47 In the circumstances of this case, the FCA has considered the possibly mitigating factors set out below at Step 3.

⁹¹⁴ CMA Penalties Guidance, paragraph 2.16.

⁹¹⁵ CMA Penalties Guidance, paragraph 2.16.

⁹¹⁶ As recognised by the CAT in *Apex Asphalt*, paragraph 278: ‘...the effect of the infringement is not restricted to the short period referred to above but has a potential continuing impact on future tendering processes by the same tenderees. Moreover, in relation to tenders we bear in mind the specific nature of a tender process: once a contract has been awarded following an anti-competitive tender, the anti-competitive effect is irreversible in relation to that tender. The contract has been awarded; the contract works will in all likelihood have commenced. It is readily apparent that this is not a case where ongoing conduct may simply be rectified. We consider, therefore, that the OFT’s decision not to make any adjustment for duration in the circumstances of this case was appropriate and reasonable.’ See also *Galvanised Steel Tanks*, paragraph 5.34, which was confirmed by the CAT in *Balmoral Tanks*, paragraphs 147-149.

⁹¹⁷ UUIID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 93(b).

⁹¹⁸ UUIID 96510011, RAMAM Submission on DPS, e.g. paragraph 2.1.

Mitigating factor – cooperation

- 17.48 The FCA may decrease the penalty at Step 3 for cooperation which enables the enforcement process to be concluded more effectively and/or speedily. An example of such cooperation may be the provision of staff for voluntary interviews and/or arranging for staff to provide witness statements.⁹¹⁹
- 17.49 RAMAM submitted that a discount of 10 to 15% should be applied to RAMAM’s penalty for co-operation and compliance.⁹²⁰ In terms of cooperation, RAMAM noted that it had come forward voluntarily to seek to settle the case and that it had sought to ensure the full cooperation of its ([<]) employee *RM FM* to provide evidence in respect of the allegations set out the Statement of Objections.⁹²¹
- 17.50 The FCA has considered RAMAM’s submissions on cooperation, having regard to paragraph 2.19 and footnote 35 of the CMA Penalties Guidance. The FCA does not consider this sufficient to warrant a penalty reduction because RAMAM’s engagement and cooperation did not go beyond what the FCA expected and did not enable the enforcement process to be concluded more effectively and/or speedily. RAMAM provided a voluntary witness statement to support its defence to the Statement of Objections rather than to assist the FCA’s investigation. The FCA acknowledges that RAMAM voluntarily offered to settle with the FCA, however this represents only the initiation of the settlement process and did not in and of itself enable the enforcement process to be concluded more effectively and/or speedily. RAMAM was aware that the decision to settle was at the FCA’s discretion.

Mitigating factor – compliance

- 17.51 The FCA may also decrease the penalty at Step 3 if a party has taken adequate steps with a view to ensuring compliance with Article 101 and the Chapter I prohibition. The CMA Penalties Guidance states that the mere existence of compliance activities will not be treated as a mitigating factor. Compliance activities are likely to be treated as a mitigating factor where an undertaking demonstrates that adequate steps, appropriate to the size of the business concerned, have been taken to achieve a clear and unambiguous commitment to competition law compliance throughout the undertaking (from the top down).⁹²²
- 17.52 RAMAM said that it had taken very extensive steps to seek to comply with relevant regulation and competition laws since the FCA launched its investigation together with its legal advisers, including conducting a comprehensive review of its regulatory compliance activities and putting in place appropriate risk based policies and procedures to minimise the risk of any regulatory or competition law infringements including issuing a competition law policy and rolling out training extensively across the business.⁹²³ RAMAM said that it has appointed a new role, Group Head of Legal Compliance and Risk, and that it supports the implementation of these changes from the top of the business.⁹²⁴
- 17.53 The FCA has carefully considered whether the evidence presented by RAMAM merits a discount. While the identified compliance activities demonstrate that RAMAM has engaged in steps that mitigate the risk of non-compliance, having regard to paragraph 2.19 and

⁹¹⁹ The CMA Penalties Guidance provides that, for these purposes, what is expected is cooperation over and above respecting time limits specified or otherwise agreed (which will be a necessary but not sufficient criterion). CMA Penalties Guidance, paragraph 2.19 and footnote 35.

⁹²⁰ UUID 96510011, RAMAM Submission on DPS, paragraphs 2.5 and 2.2.

⁹²¹ UUID 96510011, RAMAM Submission on DPS, paragraph 2.3.

⁹²² CMA Penalties Guidance, paragraph 2.19 and footnote 33.

⁹²³ UUID 96510011, RAMAM Submission on DPS, e.g. paragraph 2.4; UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 207-275.

⁹²⁴ UUID 77130003, RAMAM Oral Hearing Transcript, e.g. lines 276-280.

footnote 33 of the CMA Penalties Guidance, the FCA does not consider it to be appropriate to apply a reduction in the level of the penalty. RAMAM has significant resources and the FCA would therefore expect it to focus on competition law compliance.

Mitigating factor – the role of undertaking

- 17.54 RAMAM also noted in its response to the Statement of Objections that any penalty should be set at a low level as RAMAM did not solicit or initiate the information exchange in either case.⁹²⁵
- 17.55 Whereas the FCA may increase a party's penalty if that party was the instigator or clear leader, the FCA does not in this case consider it appropriate to reduce a penalty where a party is not the instigator.

Step 3 summary

- 17.56 The FCA considers that there are no aggravating or mitigating factors sufficient to justify adjusting the penalty. At the end of Step 3, therefore, RAMAM's penalty in relation to the infringements remains £108,650.

Step 4 – adjustment for specific deterrence and proportionality

- 17.57 At Step 4, the FCA will assess whether, in its view, the overall penalty is appropriate in the round.⁹²⁶ Where necessary, the penalty may be decreased to ensure that the level of penalty is not disproportionate or excessive. In carrying out the assessment of whether a penalty is proportionate, the FCA will have regard to the undertaking's size and financial position, the nature of the infringement, the role of the undertaking in the infringement and the impact of the infringing activity on competition.⁹²⁷
- 17.58 In assessing the penalty for RAMAM at Step 4, the FCA has taken into account that the penalty of £108,650 at the end of Step 3 for RAMAM would represent:⁹²⁸
- a. 0.17% of RAMAM's average annual worldwide turnover in the latest three years for which accounts are available, and 0.15% of RAMAM's worldwide turnover in the last year for which accounts are available;
 - b. 0.95% of RAMAM's average annual profit after tax in the latest three years for which accounts are available, and 0.72% of RAMAM's profit after tax in the last year for which accounts are available;
 - c. 0.16% of the sum of (i) RAMAM's net assets in the last year for which accounts are available, and (ii) 0.30% of RAMAM's total annual dividends in the last three years for which accounts are available; and
 - d. 22% of RAMAM's relevant turnover.
- 17.59 In light of these proportions, the FCA considers that a penalty of £108,650 is appropriate and proportionate in the round, and sufficient to deter RAMAM from breaching competition law in the future. It notes that RAMAM both disclosed and accepted strategic information.

⁹²⁵ UUID 66450010, RAMAM Submission on Statement of Objections, e.g. paragraph 92.

⁹²⁶ CMA Penalties Guidance, paragraph 2.24.

⁹²⁷ CMA Penalties Guidance, paragraph 2.24.

⁹²⁸ The latest published accounts available to the FCA for RAM Group are for financial years ended 30 June 2018, 30 June 2017 and 30 June 2016.

However, assessing the penalty in the round in light of the circumstances of this case, the FCA will not apply an uplift to the penalty at the end of Step 3 for specific deterrence.

17.60 RAMAM did not contest the FCA's provisional conclusion to Step 4 in its Draft Penalty Statement.⁹²⁹

17.61 RAMAM's penalty at the end of Step 4 is therefore £108,650.

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

17.62 No adjustments have been made at Step 5 as:

- a. the penalty in each case does not exceed 10% of RAMAM's applicable turnover;⁹³⁰
- b. no other penalties or fines applicable to the infringements have been imposed by other bodies.

17.63 At the end of Step 5, therefore, RAMAM's penalty in relation to the infringements remains £108,650.

Step 6 – application of reductions for leniency and settlement

17.64 The FCA has therefore not made any adjustments at Step 6 because reductions for leniency or settlement are not applicable to RAMAM.

Financial hardship

17.65 The FCA considers that, in the circumstances of this case, there are no exceptional circumstances such as to warrant making any financial hardship adjustment to the penalty for RAMAM after Step 6.

Conclusion

17.66 The total penalty for RAMAM in relation to the infringements is £108,650. The FCA considers that a penalty rounded down to £108,600 is appropriate in the circumstances of this case. Payment must be made in accordance with paragraph 17.149.

Calculation of penalty for Hargreave Hale

Summary

17.67 The FCA has decided that Hargreave Hale was a party to two concerted practices that each had as its object the prevention, restriction or distortion of competition and thereby infringed the Chapter I prohibition and Article 101 TFEU. The FCA considers that it is

⁹²⁹ UUID 96510011, RAMAM Submission on DPS, e.g. paragraph 2.1. RAMAM also said they did not contest the FCA's findings under Steps 1, 2 and 5.

⁹³⁰ The latest published accounts available to the FCA for RAM Group are for the financial year ended 30 June 2018; in that year, RAM Group had turnover of £74.8m. 10% of that figure is £7.48m. The FCA has assessed the penalty figures reached in respect of RAM Group at the end of Step 4 (£98,773) against the statutory cap threshold. This assessment has not necessitated any reduction at Step 5.

appropriate to impose a financial penalty on Hargreave Hale in respect of each of these infringements.

17.68 Table 3 below sets out, in summary form, the key steps in the FCA’s penalty calculations underlying the penalty in respect of Hargreave Hale’s involvement in Market Tech and OTB.

Table 3: FCA penalty calculation for Hargreave Hale

Step	Adjustment	Penalty at end of step
Relevant turnover	£1,392,490	
Step 1 – starting point	22%	£306,348
Step 2 – adjustment for duration	1	£306,348
Step 3 – adjustment for aggravating and mitigating factors	(c) Aggravating factors	+N/A
	(d) Mitigating factors	-N/A
		Total reduction of 0%
Step 4 – adjustment for specific deterrence and proportionality	-0%	£306,348
Step 5 – adjustment to ensure statutory cap is not exceeded and to avoid double jeopardy	No adjustment	£306,348
Step 6 – adjustment for leniency and/or settlement	No adjustment	£306,348
Final proposed penalty (Rounded down to nearest £100)		£306,300

Imposition of any penalty on Hargreave Hale

Hargreave Hale submissions

17.69 Hargreave Hale submitted that the FCA should not impose a financial penalty on it in this case:

- a. The FCA has not met the relevant standard of proof and any doubt as to whether that standard of proof has been met operate in favour of Hargreave Hale.⁹³¹
- b. There is a clear absence of strong and compelling evidence.⁹³²
- c. The case law confirms that novelty needs to be taken account in establishing any penalty. The Hargreave Hale infringements are novel because it was not ‘manifestly clear’ and Hargreave Hale could ‘legitimately have been unaware’ that the receipt of information in the context of this industry would constitute an infringement.⁹³³ In particular: (i) the conduct took place against a backdrop of legal uncertainty in which the exchange of information and views between fund managers is a normal and

⁹³¹ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 2.1-2.6; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 145-160; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraphs 4.1-4.8.

⁹³² UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 2.1-2.6.

⁹³³ UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 489-509, 556-611 and 707-737; UUID 124970001, Hargreave Hale First Submission on FSMA Documents, e.g. paragraph 3.29.

indeed an essential feature of the market; (ii) the Horizontal Cooperation Guidelines say that information exchange may resolve information asymmetries and generate efficiencies; (ii) the Horizontal Cooperation Guidelines also say that information exchange is not likely to cause restrictive effects in very fragmented markets (such as in this case); (iv) there has also not previously been a competition intervention in relation to such a market; and (v) the responses of other recipients of the Emails show that it was not obvious to any party that there was an infringement of any law and what law that might be if there had been any infringement.⁹³⁴

- d. Any decision to impose a penalty would be in breach of the principle of legal certainty, as set out in Article 49 of the Charter and Article 7 ECHR, which requires that an infringement can only be found if the FCA's interpretation of Hargreave Hale's conduct was reasonably foreseeable.⁹³⁵

FCA findings

17.70 The FCA has decided that it should impose a penalty on Hargreave Hale for both infringements to which it was a party and rejects these submissions. Considering them in turn:

- a. The FCA sets out in Sections 11 and 16 in relation to Market Tech and Sections 13 and 16 in relation to OTB the reasons why it considers that it has met the standard of proof to find that Hargreave Hale has infringed the Chapter I prohibition and Article 101 TFEU.
- b. The FCA considers that the quality and weight of the evidence it relies on, which includes numerous examples of primary evidence such as clear written and oral communications between the parties' concerned, is sufficiently strong to find that Hargreave Hale has infringed the applicable competition law (see in particular Sections 7, 11 and 13. See paragraphs 10.12 to 10.20 regarding the applicable burden and standard of proof.
- c. The FCA rejects Hargreave Hale's argument that the infringements were novel and not reasonably foreseeable, because the FCA's findings are founded on well-established principles of competition law (see Section 9). The FCA sets out in Sections 11 and 13 the reasons why it considers that the conduct amounts to restrictions of competition by object.
- d. See c.

Single penalty

17.71 As with RAMAM and for the same reasons (set out in paragraph 17.23), the FCA considers it appropriate in this case to exercise its discretion in order to impose a single penalty on Hargreave Hale for both infringements to which it was party.

⁹³⁴ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 4.1-4.7; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 600-677; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraph 2.18. See also UUID 128920001, Hargreave Hale Second Submission on FSMA Documents, e.g. paragraphs 3.12-3.16.

⁹³⁵ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 1.5(a) and 2.7-2.10; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraph 2.21(a).

Intention or negligence

FCA findings

- 17.72 The FCA finds that Hargreave Hale knew or ought to have known that its conduct had the object or would have the effect of preventing, restricting or distorting competition. This is the case whether or not Hargreave Hale was aware that it was infringing EU or UK competition rules but in this regard, the FCA notes that it is well-established law that the disclosure and/or acceptance of strategic information by one competitor to or from another amounts to an infringement of competition law (see paragraph 17.21 and Section 8). The Commission and the European Courts consider that experienced undertakings know or ought to know the competition implications of their conduct.⁹³⁶ The FCA thinks this principle applies to Hargreave Hale as an experienced and sophisticated organisation. Specifically:
- a. in relation to the Market Tech infringement, a call took place between Newton and Hargreave Hale in relation to Market Tech on 9 July 2015 on which Newton disclosed strategic information to Hargreave Hale which Hargreave Hale accepted (see Sections 7 and 11); and
 - b. in relation to the OTB infringement, the FCA has found that Newton also disclosed strategic information to Hargreave Hale which Hargreave Hale accepted (see Sections 7 and 13).
- 17.73 The FCA considers that Hargreave Hale knew or ought to have known that the disclosures by Newton in relation to Market Tech and OTB (consisting as they did of Newton's future bidding intentions) which Hargreave Hale accepted would substantially reduce or eliminate strategic uncertainty between them. Therefore, Hargreave Hale knew or ought to have known that its conduct in relation to Market Tech and OTB had the object or would have the effect of preventing, restricting or distorting competition. That is because (as set out in Section 5), strategic uncertainty between rivals is essential for the book-building process to function properly. If asset managers disclose their bidding conduct or intentions to other potential investors they can adversely affect the competitive outcome of the book-building process.
- 17.74 From this the FCA concludes that Hargreave Hale acted at least negligently in committing the infringements.

Hargreave Hale submissions and the FCA's view of them

- 17.75 Hargreave Hale submitted that its conduct does not satisfy the test for intention or negligence and that the FCA did not consider all of the relevant facts and circumstances for the purposes of its assessment:
- a. Hargreave Hale did not accept the information from Newton and regardless, it cannot be presumed from a finding of acceptance alone that Hargreave Hale must have been aware, could not have been unaware or ought to have known that its conduct was anticompetitive.⁹³⁷

⁹³⁶ Judgment in *United Brands v Commission*, C-27/76, EU:C:1978:22, paragraphs 299-301.

⁹³⁷ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 1.5(b) and 3.16-3.20; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 279-302; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraphs 2.12-2.15 and 2.16(a)(ii).

- b. Reciprocity is crucial to the anticompetitive nature of the conduct, but there is no basis for concluding that Hargreave Hale, in receiving information, must have been aware that the conduct was not unilateral action but was reciprocal.⁹³⁸ In Market Tech, Hargreave Hale acted independently, had already submitted its bid two days before the discussions with Newton, did not subsequently amend its bid and was clear that it did not want to follow Newton's valuation. In OTB, Newton's disclosure was unsolicited and was ignored by Hargreave Hale which formulated its valuation independently following detailed discussions with the broker.⁹³⁹
- c. Causation is also crucial to the anticompetitive nature of the conduct. The FCA cannot rely on a legal presumption of causation to establish its finding on intent/negligence, but must establish it on the facts,⁹⁴⁰ and there is no basis for concluding on these facts that Hargreave Hale must have been aware that the conduct could cause an adverse impact on competition.⁹⁴¹
- d. The conduct took place on a highly fragmented market and in circumstances where information sharing between asset managers is generally accepted and beneficial.⁹⁴²
- e. The FCA's interpretation of the law is novel.⁹⁴³
- f. There was no restriction or distortion of competition in relation to (i) Market Tech because Hargreave Hale did nothing with the information that was disclosed and did not amend its previous order which was at strike and because the Market Tech shares were ultimately issued at a price that was higher than Newton's proposed price); or (ii) OTB because it reached its own independent valuation based on discussions with Numis and because its bid differed from Newton's. It also said the IPO was pulled and reoffered at a lower price due to lack of demand which was not related to the disclosure by Newton.⁹⁴⁴

17.76 The FCA rejects these submissions, which relate to the substantive question of whether Hargreave Hale infringed the Chapter I prohibition and Article 101 TFEU. The FCA has found that Hargreave Hale was a party to two concerted practices which each had the object of preventing, restricting or distorting competition (as set out in Sections 11, 13 and 16). It follows that it does not accept these same arguments (to the extent they duplicate those submissions on the substantive question of infringement) in relation to calculation of a financial penalty for Hargreave Hale, and for the same reasons. Regarding any presumption of intent (see paragraph 17.75(c), the FCA considers Hargreave Hale's intent or negligence separately from the presumption of causation (paragraphs 17.72 and 17.73).

17.77 Hargreave Hale said that, in considering the test for intention or negligence, there are three core elements which the FCA needs to address: (a) the nature of Hargreave Hale's conduct; (b) whether that conduct had the object or effect of restricting competition, or would result in a restriction of competition; and (c) Hargreave Hale's state of knowledge

⁹³⁸ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 3.22 and 3.24-3.26; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 329-347, 356-391 and 437-432; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraphs 2.28-2.31.

⁹³⁹ UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 449-484 and 506-540; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraphs 2.16 and 2.17.

⁹⁴⁰ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 3.22 and 3.24-3.26; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 489-424 and 510-552.

⁹⁴¹ UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 348-350 and 391-443.

⁹⁴² UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 221-233 and 449-509; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraph 2.16(b).

⁹⁴³ UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 221-233 and 449-509; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraph 2.16(c).

⁹⁴⁴ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 3.11-3.12.

or awareness, or what it ought to have known, in respect of the above.⁹⁴⁵ The FCA does not agree that these three elements are required and sets out its approach in paragraphs 17.12 to 17.15.

- 17.78 The FCA does not need to show that Hargreave Hale was aware that its conduct amounted to a 'concerted practice' (paragraph 17.14). This was made clear by the Court of Justice which said that the test is satisfied 'where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty'.⁹⁴⁶ The FCA does not need to prove any effects in order to establish the infringement in this case, since it has found the concerted practices had an anti-competitive object: therefore it is not relevant that effects have not been proven in this case. Further, the FCA notes that in assessing what Hargreave Hale ought to have known, the relevant question is what it should have known at the time of the infringement and not at the end of the book-building process.⁹⁴⁷ The FCA sets out in paragraphs 17.72 to 17.74 its finding that Hargreave Hale acted at least negligently in committing the infringements.
- 17.79 Hargreave Hale said that its conduct did not meet the test for negligence because there was no reason why Hargreave Hale should have realised that there was an 'obvious, significant risk' that its conduct would be found to infringe competition law by object. Hargreave Hale referred to the 2018 judgment in *Ping* in which Ping was found to have been negligent because the purpose of its policy (an internet sales ban) was to restrict competition, and there was an obvious, significant risk that this policy would be found to infringe competition law by object.⁹⁴⁸ Hargreave Hale also noted that no other market participant identified competition law as the reason for their concern with Newton's communications.⁹⁴⁹
- 17.80 The FCA considers that the judgment in *Ping* is consistent with, and does not change, the case law referred to in paragraphs 17.13 to 17.14 above,⁹⁵⁰ and sets out in paragraphs 17.72 to 17.74 the reasons why it considers that Hargreave Hale acted at least negligently in committing the infringements.

Step 1 – Starting point

Relevant turnover

- 17.81 Relevant turnover is the turnover of an undertaking in the relevant market in that undertaking's last business year.⁹⁵¹ The FCA has found that the 'relevant market' for these purposes is the supply of equity capital in the primary capital market to UK-listed small and mid-cap companies via an IPO or a secondary market placement (as explained in Section 6, Market Definition).
- 17.82 The FCA considers that the most accurate methodology for the calculation of turnover in this market is its Preferred Methodology set out in paragraph 17.28. Hargreave Hale was unable to provide data using the Preferred Methodology [§<]. The FCA therefore obtained a proxy turnover figure for Hargreave Hale, determined as follows:

⁹⁴⁵ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 3.6-3.8.

⁹⁴⁶ *Deutsche Telekom*, paragraph 124.

⁹⁴⁷ *Ping*, paragraph 225(1).

⁹⁴⁸ *Ping*, paragraph 228.

⁹⁴⁹ UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraphs 2.3-2.11.

⁹⁵⁰ See footnote 897.

⁹⁵¹ CMA Penalties Guidance, paragraphs 2.11-2.15.

- a. identify funds which held UK listed small-cap or medium-cap equity;
- b. calculate the total value of UK listed small-cap or medium-cap equity purchased via an IPO or a placing for the funds in step (a), during the relevant period and during the two years prior to the relevant period;
- c. calculate the total value of purchases made by the funds in step (a) during the relevant period and during the two years prior to the relevant period;
- d. calculate the ratio of the value in step (b) divided by the value in step (c);
- e. the relevant turnover is calculated as the total turnover in the financial year preceding the infringements, multiplied by the ratio calculated in step (d).

This is the 'Proxy Methodology'.

- 17.83 The 'last business year' is the undertaking's financial year preceding the date when the infringement ended,⁹⁵² which in this case is the financial year preceding 2015 given the FCA's decision that the infringements each took place during 2015 only. The last business year for Hargreave Hale is the financial year ending 31 March 2015. In accordance with the Proxy Methodology, the relevant turnover for Hargreave Hale is £1,392,490.
- 17.84 Hargreave Hale said that the FCA's different methodologies for determining relevant turnover for each of RAMAM and Hargreave Hale resulted in a proposed level of fine which is nearly three times higher for Hargreave Hale than for RAMAM.⁹⁵³ The FCA addresses this Hargreave Hale submission in paragraphs 17.133 to 17.144.

Seriousness of the infringement and the need for general deterrence

FCA findings

- 17.85 The FCA used a Step 1 figure of 22% of relevant turnover for the purpose of calculating the penalty for Hargreave Hale, for the same reasons that are set out in paragraphs 17.30 to 17.35 for RAMAM. Paragraphs 17.118 to 17.127 assess whether the overall penalty for Hargreave Hale is appropriate in the round.
- 17.86 The FCA notes that the Hargreave Hale infringing conduct consisted of the disclosure and acceptance of information in relation to each of the Market Tech and the OTB transactions; and that the RAMAM infringing conduct consisted of the disclosure and acceptance of information in relation to the Market Tech transaction and the exchange of information in relation to the OTB transaction. The FCA does not consider that the extent and nature of the RAMAM infringements are sufficiently different from the Hargreave Hale infringements to justify a different starting point, having regard to the seriousness of the infringements (and ultimately the extent and likelihood of actual or potential harm to competition and consumers) and the need for general deterrence.⁹⁵⁴ Specifically, the Hargreave Hale infringements give rise to the same harm as the RAMAM infringements, as set out in Section 5.
- 17.87 While Hargreave Hale did not itself disclose strategic information, 'acceptance' is a key constituent of the concerted practices the FCA has found, and a key element of the 'knowing substitution' of practical cooperation between the relevant parties for the risks

⁹⁵² CMA Penalties Guidance, paragraph 2.11.

⁹⁵³ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.2.

⁹⁵⁴ CMA Penalties Guidance, paragraphs 2.5-2.9.

of competition necessary to constitute a concerted practice.⁹⁵⁵ Hargreave Hale accepted strategic information on more than one occasion.

17.88 Applying this 22% percentage to the relevant turnover results in a starting penalty for Hargreave Hale of £306,348.

Hargreave Hale submissions and the FCA view of them

17.89 Hargreave Hale submitted that a finding that a unilateral disclosure by a single investor in a highly fragmented and uncertain market was capable of reducing uncertainty as to the disclosing party's intended conduct was not 'inherently likely to cause significant harm to competition' in circumstances where the parties' have a very small share of the market, the disclosures in each case caused no harm and Hargreave Hale's objectives were inconsistent with as Newton's.⁹⁵⁶

17.90 The FCA rejects this submission which relates to the substantive question of whether Hargreave Hale infringed the Chapter I prohibition and Article 101 TFEU, on the same basis and for the same reasons that it found that Hargreave Hale has done so (see Sections 11 and 13).

17.91 Hargreave Hale said that a starting point of 22% was excessive, disproportionate and not appropriate, as this case is not in the most serious category of competition law infringements.⁹⁵⁷ It said that the FCA had not undertaken the necessary analysis to assess the extent and likelihood of harm to competition to support a starting percentage of 22%.⁹⁵⁸ Hargreave Hale noted that the starting point should reflect that:

- a. the conduct involved two isolated instances and is not a price fixing or market sharing cartel, an established and long-running pattern of behaviour or an overall arrangement;
- b. the theory of harm is novel;
- c. Hargreave Hale did not instigate the information sharing, share any strategic information itself or use the information disclosed by Newton;
- d. the conduct did not in fact affect the outcome of the IPO or placing process (noting that the Court in *Streetmap v Google* took account of evidence as to what the actual effect of the conduct has been);
- e. the conduct did not result in a reduction in market uncertainty.⁹⁵⁹

17.92 It said that the penalty imposed by the FCA on *NFM1* in the FSMA investigation supported its view that the infringements were not the most serious. The FSMA Decision Notice found the seriousness of the breach to be at the second lowest level, taking into account (among other things) that the FCA '*has not previously taken enforcement action in relation to this type of breach connected to an IPO or placing*'.⁹⁶⁰

⁹⁵⁵ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 7.25 and 9.39.

⁹⁵⁶ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 5.11-5.12 and 5.15.

⁹⁵⁷ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 1.5(c), 1.6(a) and 5.9-5.10; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 769-801.

⁹⁵⁸ UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 802-819; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraph 2.25.

⁹⁵⁹ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 5.13 and 5.17-5.18; UUID 118990004, Hargreave Hale Further DPS Submission, e.g. paragraphs 2.19-2.24 and 2.32(a).

⁹⁶⁰ UUID 131090001, Hargreave Hale Third Submission on FSMA Documents, e.g. paragraphs 11-14.

- 17.93 The FCA has carefully considered the factors that Hargreave Hale referred to in paragraphs 17.91 to 17.92:
- a. The FCA finds the two 'by object' concerted practices that Hargreave Hale entered to are serious competition law infringements in light of the potential effects set out in Section 5. A restriction of competition on this market does not require a long-running pattern of behaviour or the involvement of parties representing a significant proportion of the overall market; it is enough that the concerted practice took place between two parties only and that the disclosure and acceptance of strategic information took place on one occasion only. In any event, Hargreave Hale accepted strategic information on more than one occasion. However, the FCA does not find that they are the most serious infringements possible; the parties did not fix prices but did at the very least substantially reduce uncertainty between them. The FCA's starting point for seriousness reflects this at Step 1 of the assessment (see paragraph 17.96).
 - b. The FCA does not think its theory of harm novel, since information sharing between rivals is a well-established category of infringement (see Section 9).
 - c. That Hargreave Hale did not instigate the sharing is not relevant, since the CMA Penalties Guidance is clear that the starting point is intended to reflect the seriousness of the infringement at issue, rather than the particular circumstances of each undertaking's unlawful conduct (which are taken into account at other steps).⁹⁶¹ Nevertheless, the FCA does not consider this to be relevant for the later stages of its assessment (see paragraph 17.126(c) with regard to Step 4).
 - d. The FCA has found that Hargreave Hale engaged in two concerted practices which had as their object the prevention, restriction or distortion of competition because the conduct had the potential to give rise to the serious effects described in Section 5. It is not relevant whether these concerted practices had any effect on competition and the FCA does not consider it appropriate in this case to reduce a penalty where no effect has been established on the facts.
 - e. The FCA does not accept Hargreave Hale's argument that the conduct did not result in a reduction in market uncertainty for the reasons set out in paragraph 9.25(b).
- 17.94 Hargreave Hale said that any penalty imposed on it should be set at the lower end of the range at 10%.⁹⁶²
- a. A starting point of 22% was inconsistent with previous cases. The CMA has set a significantly lower starting point for more serious infringements concerning, for example, long-running cartels between parties accounting for substantially all of the market, for example in *RBS/Barclays*; *Galvanised Steel Tanks* and *Cleanroom laundry services and products*.
 - b. The FCA must leave sufficient headroom to apply a higher starting point to the most serious infringements of competition law, such as horizontal price fixing and market sharing.⁹⁶³
- 17.95 The FCA notes there is no pre-set 'tariff' of starting points for different types of infringement given the range of conduct that will be encountered in different cases and to

⁹⁶¹ CMA Penalties Guidance, paragraph 2.10.

⁹⁶² UUIID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.32.

⁹⁶³ UUIID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.25; UUIID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 861-887.

which the FCA must have regard in setting an appropriate penalty for the case in question.⁹⁶⁴

- 17.96 As regards previous cases, the FCA is not bound by previous CMA decisions in relation to the calculation of financial penalties;⁹⁶⁵ the FCA has a margin of appreciation when determining the appropriate amount of penalty under the Act (see paragraphs 17.10 to 17.11). Nevertheless, the FCA considers that its starting point is consistent with previous CMA decisions. The FCA notes that the decisions quoted by Hargreave Hale in paragraph 17.94 were taken under a previous version of the CMA Penalties Guidance. The FCA must have regard to the CMA's published guidance in force at the time when determining the appropriate amount of any penalty (see paragraph 17.7), and it has done so.
- 17.97 As the FCA may apply a starting point of up to 30%, the FCA considers that it has left sufficient headroom for the most serious competition law infringements.⁹⁶⁶

Step 2 – adjustment for duration

FCA findings

- 17.98 The FCA considers for the same reasons as are set out in paragraphs 17.43 and 17.44 that the circumstances of the infringements do not require a departure from the standard approach such as to warrant a duration multiplier of less than one.
- 17.99 At the end of Step 2, therefore, Hargreave Hale's penalty in relation to the infringements is £306,348.

Party submissions and the FCA's view of them

- 17.100 Hargreave Hale said that, in the exceptional circumstances of this case which involved mere receipt of unsolicited information on two isolated occasions, which each occurred on a single day and less than three months apart, it is appropriate to apply a multiplier of less than one for duration.⁹⁶⁷ Hargreave Hale considered that an appropriate and proportionate duration multiplier would be 0.25, reflecting the fact that the period between the two instances was less than three months.⁹⁶⁸ Hargreave Hale considered that a penalty for its conduct on the same basis as if Hargreave Hale had participated in cartel meetings which continued for a year would be irrational and unfair.⁹⁶⁹
- 17.101 Hargreave Hale submitted that a multiplier of one has been imposed for infringements of a very short duration only in cases where the decision-maker identified the nature of the continuing impact on competition, whereas in the present case, there were no long-lasting or ongoing effects on competition as a result of Newton's disclosures to Hargreave Hale, nor has the FCA identified such effects.⁹⁷⁰
- 17.102 Finally, Hargreave Hale said that even if the FCA maintains that a multiplier of one is appropriate, the FCA should follow the CAT's reasoning in *Balmoral Tanks*, where it said:

⁹⁶⁴ CMA Penalties Guidance, paragraph 2.6.

⁹⁶⁵ See, for example, *Eden Brown*, paragraph 78.

⁹⁶⁶ CMA Penalties Guidance, paragraph 2.6.

⁹⁶⁷ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 1.6(b).

⁹⁶⁸ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.37.

⁹⁶⁹ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.35.

⁹⁷⁰ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.36; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 888-894.

*'The fact that the infringement is based on an exchange of information which took place at a single meeting is, however, taken into account at Steps 1 and 4.'*⁹⁷¹

- 17.103 The FCA rejects these submissions. As noted in paragraph 17.98, book-building processes run for a short time leading to issue of shares at a single price. No long-lasting concertation is necessary to prevent, restrict or distort that competitive process: a one-off disclosure and acceptance of strategic information at the critical time can cause long lasting damage to the issuing company, in the form of the process producing a higher cost of capital for the company than it otherwise would have to pay. The FCA has taken account of the nature of the infringement and Hargreave Hale's role in the infringement at Steps 1 and 4.

Step 3 – adjustment for aggravating and mitigating factors

- 17.104 In the circumstances of this case, the FCA has considered at Step 3 the factors set out below.

Mitigating factor – the role of the undertaking

- 17.105 The FCA may decrease the penalty due to the role of the undertaking, for example, where the undertaking is acting under severe duress or pressure.
- 17.106 Hargreave Hale said that the very limited role of Hargreave Hale, as the mere recipient of the information which it neither requested nor expected, merits a reduction in the basic amount of the proposed penalty.⁹⁷²
- 17.107 The FCA does not agree that Hargreave Hale's role is sufficient to merit a discount in circumstances where Hargreave Hale freely accepted strategic information from a competitor and was not acting under duress.

Mitigating factor – genuine uncertainty

- 17.108 Hargreave Hale said that it had no reason to suspect that the mere receipt of information, 'out [of] the blue', about Newton's alleged strategic intentions, which it neither wanted nor expected and which it disregarded, might make it a party to an anti-competitive concerted practice or that it would result in a restriction or distortion of competition.⁹⁷³ Hargreave Hale noted that this was a novel case, which took place in a market where the exchange of information between asset managers in relation to companies and transactions is a normal and legitimate market practice and part of the price revelation process, can encourage asset managers to submit bids and does not undermine the ability of asset managers to determine their own independent policies on the market. Hargreave Hale noted that there had been no previous competition law interventions in such a market.⁹⁷⁴
- 17.109 The FCA has not seen good evidence of genuine uncertainty on the part of Hargreave Hale as to whether the concerted practices constituted infringements of competition law. The FCA does not consider that it would be appropriate to reduce the penalty at Step 3 on the grounds of genuine uncertainty because the infringements are not unusual or novel.⁹⁷⁵

⁹⁷¹ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.38.

⁹⁷² UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 5.41-5.43; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 894-901.

⁹⁷³ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.45.

⁹⁷⁴ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 3.14; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 898-901.

⁹⁷⁵ See paragraph 17.70(c).

Mitigating factor – cooperation

- 17.110 See paragraph 17.48. Hargreave Hale said that a reduction in its penalty is warranted because Hargreave Hale engaged and co-operated fully with the CMA's investigation, and *HH FM3* and *HH FM1* both attended lengthy interviews at the FCA, and *HH FM1* provided a voluntary witness statement.⁹⁷⁶
- 17.111 The FCA has considered Hargreave Hale's submissions on cooperation, having regard to paragraph 2.19 and footnote 35 of the CMA Penalties Guidance. The FCA does not consider that a penalty reduction is warranted at this stage because Hargreave Hale's engagement and cooperation did not exceed the FCA expectation.

Mitigating factor – compliance

- 17.112 See paragraph 17.51. Hargreave Hale noted that it had, shortly after the FCA commenced its investigation, implemented a competition law compliance programme involving competition law compliance training for all relevant staff in November 2016 and adopted competition law compliance guidelines in October 2016 including the issue of information exchange and discussions in this market. This has been taken seriously and there are regular updates. Hargreave Hale's new owner, Canaccord, is also strongly committed to maintaining competition law compliance.⁹⁷⁷
- 17.113 The FCA has carefully considered whether the evidence presented by Hargreave Hale merits a discount. While the identified compliance activities demonstrate that Hargreave Hale has engaged in steps that mitigate the risk of non-compliance, having regard to paragraph 2.19 and footnote 33 of the CMA Penalties Guidance, the FCA does not consider it to be appropriate to apply a reduction in the level of the penalty. Hargreave Hale has significant resources and the FCA would therefore expect it to focus on competition law compliance.

Mitigating factor – termination of infringement

- 17.114 The FCA may decrease the penalty for termination of the infringement as soon as the FCA intervenes (by exercise of its powers under sections 26 to 28A of the Act).
- 17.115 Hargreave Hale noted that there have been no similar occurrences since the FCA intervened through service of a section 26 notice on Hargreave Hale on 1 June 2016 and noted that the conduct did not continue beyond the day on which disclosure was made.⁹⁷⁸
- 17.116 The FCA does not consider Hargreave Hale's submission to be relevant to its assessment at Step 3 in this case as the infringements were not ongoing at the time of the FCA's intervention.

Summary of Step 3

- 17.117 The FCA considers that there are no aggravating or mitigating factors sufficient to justify adjusting the penalty. At the end of Step 3, therefore, Hargreave Hale's penalty in relation to the infringements remains £306,348.

⁹⁷⁶ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 5.52-5.53; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 911-917.

⁹⁷⁷ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 5.47-5.48; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 902-909.

⁹⁷⁸ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 5.49-5.50; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 941-943.

Step 4 – adjustment for specific deterrence and proportionality

- 17.118 In assessing the penalty for Hargreave Hale at Step 4, the FCA has taken into account that the penalty of £306,348 at the end of Step 3 for Hargreave Hale would represent:⁹⁷⁹
- a. 0.64% of Hargreave Hale’s average annual worldwide turnover in the latest three years for which accounts are available and 0.55% of Hargreave Hale’s worldwide turnover in the last year for which accounts are available;
 - b. 10.27% of Hargreave Hale’s average annual profit after tax in the latest three years for which accounts are available, and 31.16% of Hargreave Hale’s profit after tax in the last year for which accounts are available;
 - c. 1.53% of the sum of (i) Hargreave Hale’s net assets in the last year for which accounts are available, and (ii) 3.41% of Hargreave Hale’s total annual dividends in the last three years for which accounts are available; and
 - d. 22% of Hargreave Hale’s relevant turnover.
- 17.119 Hargreave Hale was purchased by Canaccord in September 2017. Hargreave Hale’s penalty would constitute a smaller part of Canaccord’s global turnover (calculated on the basis of total revenue figures only) than of Hargreave Hale’s worldwide turnover in the last year for which accounts are available.⁹⁸⁰

FCA findings

- 17.120 The FCA has, in line with the CMA Penalties Guidance, considered appropriate indicators of Hargreave Hale’s size and financial position at the time the penalty is being imposed in considering whether any adjustments should be made at Step 4. This requires an assessment of Hargreave Hale under Canaccord’s ownership, as Canaccord owns Hargreave Hale at the time the penalty is being imposed.⁹⁸¹ The FCA notes that it also considered such indicators at the time of the infringement.⁹⁸²
- 17.121 On the basis of paragraphs 17.118 to 17.119, the FCA considers that the penalty imposed on Hargreave Hale is appropriate and proportionate in the round, and sufficient to deter Hargreave Hale from breaching competition law in the future.
- 17.122 Hargreave Hale’s penalty at the end of Step 4 is therefore £306,348.

Hargreave Hale submissions and the FCA’s view of them

- 17.123 Hargreave Hale considered that Canaccord’s acquisition is not relevant to Step 4 as the acquisition took place two years after the infringement.⁹⁸³ The FCA disagrees: see paragraph 17.120.

⁹⁷⁹ The latest published accounts available to the FCA for Hargreave Hale are for Hargreave Hale’s financial years ended 31 March 2018, 31 March 2017 and 31 March 2016.

⁹⁸⁰ Canaccord’s total turnover for the year ending 31 March 2018 amounted to \$CA 879,546,000 (£601,863,895). In *YKK*, paragraph 91, the Court of Justice said that the objective of pursuing a deterrent effect through the financial penalty is essentially to control, in the future, the conduct of the economic entity to which the Commission decision is addressed. Such an effect must necessarily be produced on the undertaking in the state which it exists at the time when that decision is adopted.

⁹⁸¹ CMA Penalties Guidance, paragraph 2.20. The FCA does not hold Canaccord liable for the infringements (see paragraph 4.19).

⁹⁸² The FCA may also consider indicators of size and financial position from the time of the infringement, see the CMA Penalties Guidance, paragraph 2.20.

⁹⁸³ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 5.63-5.66; UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 989-992.

- 17.124 Hargreave Hale submitted that its penalty is disproportionately high and should be reduced for the following reasons:⁹⁸⁴
- a. The penalty is nearly three times higher than RAMAM’s penalty, despite the fact that Hargreave Hale’s total turnover is smaller than RAMAM’s total turnover.
 - b. The penalty represents nearly four times the percentage of Hargreave Hale’s turnover compared with RAMAM’s penalty, more than eight times as much of its profits and fifteen times as much of its assets. The FCA must have regard to the Court of Appeal’s judgment in *Interclass*, which says that differences of between four and 10 times on various metrics was disproportionate and unjust.⁹⁸⁵
 - c. The FCA considers that RAMAM’s lower financial penalty is appropriate and proportionate, so a lower penalty should also be appropriate and proportionate for Hargreave Hale.
 - d. The penalty does not reflect Hargreave Hale’s role in the infringements, which was the unwitting recipient of unsolicited information on just two occasions, where Hargreave Hale did not disclose its own strategic intentions in return or use the information disclosed by Newton in reaching its own independent decision on pricing or strategy.
 - e. Hargreave Hale did not make any economic or financial benefit from the infringement.
 - f. There was no impact on competition as a result of Hargreave Hale’s conduct.

17.125 Finally, Hargreave Hale submitted that, as the FCA considered that a penalty of £108,650 would be appropriate to deter RAMAM from breaching competition law in the future and appropriate and proportionate in the round, a penalty of not more than £108,650 would also be sufficient to have a deterrent effect on Hargreave Hale.⁹⁸⁶

- 17.126 The FCA does not accept that the differing proportions compared to RAMAM mean that Hargreave Hale’s penalty is disproportionate and rejects Hargreave Hale’s submissions:
- a. The FCA has addressed Hargreave Hale’s points regarding comparability with RAMAM’s penalty in paragraphs 17.132 to 17.142. At this Step 4, the FCA does not consider whether Hargreave Hale’s penalty is appropriate having regard to RAMAM’s penalty, but whether it is appropriate having regard to Hargreave Hale’s own size and financial position. In light of the level of the penalty compared to Hargreave Hale’s financial position in paragraph 17.118, the FCA does not find any basis for Hargreave Hale to claim that the penalty is disproportionate or excessive.
 - b. See a.
 - c. See a.
 - d. The penalty does reflect Hargreave Hale’s role: not as unwitting recipient but as active participant in two concerted practices that had the object of preventing, restricting, or distorting competition by accepting the strategic information from a supposed rival undertaking. Whereas the FCA may increase a party’s penalty if that party was the instigator or clear leader, the FCA does not in this case consider it appropriate to reduce a penalty where a party did not initiate the conduct. The FCA

⁹⁸⁴ UUIID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.62.

⁹⁸⁵ UUIID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 928-946.

⁹⁸⁶ UUIID 98600006, Hargreave Hale Submission on DPS, e.g. paragraphs 5.67-5.68.

does not consider that, once conduct has been initiated by a competitor, the act of disclosing strategic information in return is sufficiently different from the act of accepting strategic information to justify different treatment at Step 4. Both acts are modes of participation in the infringement.

- e. That Hargreave Hale did not profit from the practice is not proven since the issue prices in the absence of the concertation cannot be known and, in any event, is not relevant. Whereas the FCA may increase a party's penalty for deterrence if that party has made or is likely to make an economic or financial benefit from the infringement that is above the level of penalty reached at the end of Step 3, the FCA does not in this case consider it appropriate to reduce a penalty where it is not proven that an undertaking has profited.⁹⁸⁷
- f. The FCA has found that Hargreave Hale engaged in two concerted practices which, as set out in Sections 11 and 13 had as their object the prevention, restriction or distortion of competition. The FCA does not consider it appropriate in this case to reduce the penalty where no effect has been established on the facts.

17.127 Finally, the FCA notes that each Hargreave Hale submission (naturally) aimed solely to persuade the FCA to reduce the penalty applied to it, or not to apply a penalty at all. However, the FCA's role is to decide an appropriate penalty for Hargreave Hale, applying the relevant law and taking numerous factors into account as set out in the CMA Penalties Guidance. The FCA notes that it employed its margin of appreciation in some instances in ways that benefited Hargreave Hale. For instance, it treated the two Hargreave Hale concerted practices as a single infringement and calculated a financial penalty for Hargreave Hale on that basis (paragraph 17.71). It considers that it could legitimately have treated the two infringements as separate. Similarly, it decided not to impose an uplift for specific deterrence. Accordingly, while the FCA is satisfied that the overall penalty it has applied is appropriate and proportionate, it thinks there is a range of such penalties, and that while Hargreave Hale has argued vigorously that a lower or no penalty should be applied to it, equally a higher, possibly much higher, penalty could properly have been applied to it.

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

17.128 No adjustments have been made at Step 5 as:

- a. the penalty does not exceed 10% of Hargreave Hale's applicable turnover;⁹⁸⁸
- b. no other penalties or fines applicable to the infringements have been imposed by other bodies.

17.129 At the end of Step 5, therefore, Hargreave Hale's penalty in relation to the infringements remains £306,348.

⁹⁸⁷ CMA Penalties Guidance, paragraph 2.21.

⁹⁸⁸ The latest published accounts available to the FCA for Hargreave Hale are for the financial year ended 31 March 2018. In the financial year ending 31 March 2018, Hargreave Hale had a total turnover of £55.7 million. 10% of that figure is £5.57 million. The FCA has assessed the penalty figures reached in respect of Hargreave Hale at the end of Step 4 (£306,348) against the statutory cap threshold. This assessment has not necessitated any reduction at Step 5.

Step 6 – application of reductions for leniency and settlement

- 17.130 The FCA has not made any adjustments at Step 6 because reductions for leniency or settlement are not applicable to Hargreave Hale.

Financial hardship

- 17.131 The FCA considers that, in the circumstances of this case, there are no exceptional circumstances such as to warrant making any financial hardship adjustment to the penalty for Hargreave Hale after Step 6.

Equal treatment

The use of different turnover calculation methodologies

- 17.132 Hargreave Hale said that the use of different methodologies for determining RAMAM's and Hargreave Hale's relevant turnover resulted in a penalty for Hargreave Hale that is nearly three times higher than for RAMAM, and that this resulted in unequal treatment.⁹⁸⁹ However, it did not explain why this was the case.
- 17.133 The FCA considered how best to determine relevant turnover in this market. Since asset managers' revenue is primarily earned through *ad valorem* fees, it follows that the proportion of parties' turnover that is relevant is the same as the proportion of total assets under management that meet the definition of 'equity capital' contained in the FCA's market definition (see Section 5)
- 17.134 Relevant turnover is therefore properly calculated as the proportion of the asset manager's total revenue equal to the proportion of total assets managed that are UK listed equity purchased via an IPO or secondary market placement from an undertaking that, at the time of the purchase, was classified as a small-cap or medium-cap firm.
- 17.135 The FCA's Preferred Methodology for turnover calculation, as set out in paragraph 17.28, is the proportion of a party's total revenue which is equal to the proportion of the total 'assets' managed by that party relative to all assets under management; where 'assets' means UK-listed equity purchased by that party in either an IPO or a secondary market placement in a firm that was a small-cap or medium-cap firm at the time of the purchase.
- 17.136 The FCA requested turnover from Hargreave Hale and RAMAM at the same time based on the Preferred Methodology. RAMAM could provide the full data according to the Preferred Methodology.
- 17.137 Hargreave Hale was unable to provide data using the Preferred Methodology [X]. The FCA therefore used a Proxy Methodology for Hargreave Hale, which estimates the proportion of total revenue by reference to the proportion of 'assets' purchased by the party over the last three years relative to its purchase of all securities over the same period; where 'assets' means UK-listed equity purchased by that party in either an IPO or a secondary market placement in a firm that was a small-cap or medium-cap firm at the time of the purchase.
- 17.138 RAMAM also provided the data necessary for the Proxy Methodology. The FCA calculated RAMAM's relevant turnover under the Preferred Methodology, which the FCA considers to

⁹⁸⁹ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 5.2.

be the most accurate, as the FCA saw no reason for asking RAMAM to apply the Proxy Methodology.

17.139 The FCA notes that the Proxy Methodology applied to Hargreave Hale was based on a shorter run of data than the Preferred Methodology applied to RAMAM. However, the data under the Proxy Methodology was available to Hargreave Hale and so this methodology was the most practicable. Hargreave Hale was aware that RAMAM was collecting its turnover data according to the Preferred Methodology, and did not object at that time.

17.140 The FCA considers that the different turnover calculation methods it used for RAMAM and for Hargreave Hale are in line with the legal principles of equal treatment and non-discrimination, which require that similar situations shall not be treated differently and different situations shall not be treated in the same way, unless such treatment is objectively justified.⁹⁹⁰ This is because both parties were originally asked to calculate turnover according to the same Preferred Methodology, which the FCA considered to be the most accurate, and the differentiation between the parties was a result of the difficulties faced by Hargreave Hale in providing the data necessary to apply that methodology.

17.141 The FCA thinks that the availability of data is an objectively justified ground for differentiating between the RAMAM and Hargreave Hale. It would be inappropriate to use the Proxy Methodology (which is inherently to a greater extent an estimate) rather than its Preferred Methodology in relation to RAMAM in circumstances where RAMAM could provide the data necessary to perform the calculation under the FCA's Preferred Methodology.

17.142 The FCA does not think that the Proxy Methodology is inherently biased in any direction, and absent the data that Hargreave Hale was unable to provide, it is impossible to tell if Hargreave Hale was prejudiced or benefitted as a result of the FCA's calculation of relevant turnover using the method set out in paragraph 17.82. The FCA notes that RAMAM's turnover calculated under the Preferred Methodology gave rise to a higher number than under the Proxy Methodology.⁹⁹¹ Similarly, Hargreave Hale is not in a position to know if it was indeed prejudiced; Hargreave Hale acknowledged this and said *'it's probably much of a muchness for us if we could have done it, but it was a question of getting access to the historic data'*.⁹⁹² Since the proxy methodology is based on a shorter run of data, whether or not Hargreave Hale benefitted or suffered from its application will depend on whether Hargreave Hale was more or less active in the relevant market over the past 3 years than it was on average over a longer period. Hargreave Hale made no submissions on this point.

The differences in the total turnover calculated

17.143 Hargreave Hale also noted that comparisons of the level of Hargreave Hale's penalty with RAMAM's penalty, on all of the measures of financial strength which the FCA provided in the Draft Penalty Statements, demonstrate that the level of penalty proposed for Hargreave Hale is entirely disproportionate and excessive.⁹⁹³

17.144 The FCA has used the same principles for both Hargreave Hale and RAMAM (in line with the CMA Penalties Guidance) and has applied these principles in the same way (for

⁹⁹⁰ Judgment in *Tokai Carbon Co. Ltd and Others v Commission*, T-236/01, EU:T:2004:118, paragraph 219.

⁹⁹¹ RAMAM's turnover under the Preferred Methodology was 20.3% higher than under the Proxy Methodology; see UUID 85320003, RAMAM Turnover.

⁹⁹² UUID 117550002, Hargreave Hale DPS Oral Hearing Transcript, e.g. lines 1341-1352.

⁹⁹³ UUID 98600006, Hargreave Hale Submission on DPS, e.g. paragraph 1.6.1.

example, on duration, Step 1 percentage, mitigating factors and adjustment for specific deterrence/proportionality). The differing penalty levels reflect Hargreave Hale's and RAMAM's relevant turnover, which has been calculated to reflect the parties' different sizes and activity levels in the relevant market over the last three financial years. The FCA notes that the starting point for penalties in the CMA Penalties Guidance is the turnover of the relevant undertaking in the relevant market, because the seriousness of the infringements is very closely related to its harmful effects on the specific market.⁹⁹⁴ This is generally intended to reflect the scale of a party's activities in the relevant market under investigation and, accordingly, to act as a proxy to reflect the potential scale and impact of the infringing activity on a given market.⁹⁹⁵ Since Hargreave Hale's turnover shows that it has been more active in the relevant market than RAMAM in the relevant period, and such activity formed a greater proportion of its overall business than RAMAM's activity did of its, it follows that Hargreave Hale's penalty is larger in absolute and relative terms than RAMAM. This does not mean that the penalty for Hargreave Hale is disproportionate. Case law is clear that the difference in the proportion represented by the penalty in relation to the total turnover of the undertakings concerned does not, as such, constitute a sufficient justification for adjusting the penalty calculation.⁹⁹⁶

- 17.145 Consistent with this case law, 'relevant turnover' is just the starting point for calculating a financial penalty and is only one of the relevant factors in determining an overall appropriate penalty. The other factors that the FCA must consider, as outlined in the CMA Penalties Guidance and discussed above, are just as important for ensuring that the overall amount of the penalty is appropriate to reflect the seriousness of the infringement and has adequate deterrent effect, as well as being proportionate and not excessive.

Conclusion

- 17.146 The total penalty for Hargreave Hale in relation to the infringements of which it was a party is £306,348. The FCA considers that a penalty rounded down to £306,300 is appropriate in the circumstances of this case. Payment must be made in accordance with paragraph 17.149.

Payment of penalties

- 17.147 The total penalty for RAMAM is £108,600.
- 17.148 The total penalty for Hargreave Hale is £306,300.
- 17.149 The penalties will both become due to the FCA on 24 April 2019⁹⁹⁷ and must be paid to the FCA by 17:00 on that date.

⁹⁹⁴ See paragraph 17.27.

⁹⁹⁵ See for example *Eden Brown*, paragraphs 43-44 and 55. This is consistent with the approach taken by the Commission (which has regard to the 'value of...sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA' in accordance with its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003) and recognised by the EU Courts, for example, judgments in *Pilkington Group Ltd and others v Commission*, C-101/15 P, EU:C:2016:631, paragraphs 17-19; *LG Display v Commission* C-227/14 P, EU:C:2015:258, paragraphs 50-53; *SA Musique Diffusion française and others v Commission*, C-100-103/80, EU:C:1983:158, paragraph 121.

⁹⁹⁶ *Pilkington Group Ltd and others v Commission*, C-101/15 P, EU:C:2016:631, paragraph 66; *G F Tomlinson Group Ltd and others v Office of Fair Trading* [2011] CAT 7, paragraphs 150, 152 and 157.

⁹⁹⁷ The next working day two calendar months from the expected date of receipt of the decision.

Made by:

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Stuart McIntosh, Panel Member, for and on behalf of the Financial Conduct Authority

Malcolm Nicholson, Panel Member, for and on behalf of the Financial Conduct Authority

All of whom are the members of, and who together constitute, the Competition Decisions Committee.

21 February 2019