Case ME/6712-17

Completed acquisition by Ausurus Group Ltd of CuFe Investments Ltd

Decision to impose a penalty on Ausurus Group Ltd and European Metal Recycling Ltd under section 94A of the Enterprise Act 2002

Decision

1. The Competition and Markets Authority (the **CMA**) hereby gives notice[1] to Ausurus Group Ltd (**Ausurus**) and its subsidiary European Metal Recycling Ltd (**EMR**) that the CMA has decided to impose a penalty on Ausurus and EMR under section 94A of the Enterprise Act 2002 (**the Act**) because it considers that they have, without reasonable excuse, failed to comply in certain respects with the requirements imposed on Ausurus and EMR by the initial enforcement order issued by the CMA under section 72 of the Act on 11 September 2017 (the **IEO**).The penalty is a fixed amount of £150,000 for each breach, giving a total of £300,000.

A. Summary

2. The CMA has investigated the completed acquisition by Ausurus[2], through EMR, of CuFe Investments Limited (**CuFe**), including its wholly-owned subsidiary Metal & Waste Recycling Limited (**MWR**) (the **Merger**).[3] In this decision the business of CuFe and its subsidiaries, including MWR, is referred to as the **CuFe Business**. The business of Ausurus and its subsidiaries, including EMR, is referred to as the **Ausurus Business**.

3. On 12 October 2018 the CMA informed Ausurus and EMR that it was actively considering imposing penalties under the IEO. This letter is attached at **Appendix 1**. On 19 October 2018 Ausurus and EMR provided their initial response (the **First Response Letter**, attached at **Appendix 2**). On 27

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[1] In accordance with paragraph 5.4 of Administrative penalties: Statement of Policy on the CMA's Approach (**CMA4**).
[2] Ausurus company number 09123549.
[3] MWR company number 01031503.

November 2018, following careful consideration of the First Response Letter, the CMA decided to issue a provisional decision (the **Provisional Decision**, attached at **Appendix 3**). On 29 November 2018 the legal representatives of Ausurus and EMR informed the CMA that they did not wish to make oral representations in response to the Provisional Decision.[4] On 4 December 2018 Ausurus and EMR responded in writing to the Provisional Decision (the **Second Response Letter**, attached at **Appendix 4**). On 14 December 2018 the CMA requested clarification of two points arising from the Second Response Letter. This clarification was provided on 18 December 2018, attached at **Appendix 5**). Following careful consideration of both response letters and the clarification, the CMA has decided to issue this decision for the reasons set out below.

4. The CMA finds that Ausurus and EMR have failed to comply in certain respects (as set out in more detail below) with the IEO made on 11 September 2017. The failures to comply comprised:

    - directing the customers of the CuFe Business to make payment into bank accounts of the Ausurus Business and making payments to suppliers of scrap to the CuFe Business from bank accounts of the Ausurus Business, in both cases without seeking the consent of the CMA. Such action constituted an unauthorised integration of, and a failure to maintain separation of, the Ausurus Business and the CuFe Business. In addition, it might have impaired the ability of the CuFe business to compete independently, in particular by undermining the separate sales and brand identity of the CuFe business and, thereby, potentially damaging its goodwill; and

    - failing to give the managing director (**MD**) of MWR a clear delegation of authority to take decisions without consulting, or obtaining the permission of, Ausurus or EMR. This constituted a failure by Ausurus and EMR to take adequate steps to procure that CuFe Business was carried on separately from the Ausurus Business and was maintained as a going concern.

5. The CMA finds that Ausurus and EMR have no reasonable excuse for their failure to comply with the IEO.

6. The CMA considers that it is appropriate to impose a penalty in the interests of specific and general deterrence and because of the seriousness of the breaches.

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[4] [redacted].

7. In determining the amount of the penalty the CMA has taken into account these factors, as well as certain aggravating and mitigating factors and the financial position of Ausurus and EMR.

8. The CMA considers that a penalty of £150,000 for each breach, giving a total penalty of £300,000 (which is below the statutory maximum of 5% of global turnover) is an appropriate and proportionate penalty.

B. Factual background

9. [Redacted] is Group CEO, a director and a shareholder in Ausurus; Group CEO, a director, and a shareholder of EMR; and, since 25 August 2017, a director of MWR. [Redacted] is the company secretary of Ausurus, the legal director and company secretary of EMR, and, since 25 August 2017, the company secretary of MWR.

10. On 25 August 2017 EMR completed the acquisition of the entire issued share capital of CuFe by a Share Purchase Agreement dated 25 August 2017 (**the SPA**). CuFe is, through its subsidiary, MWR, a leading competitor of EMR. The transaction was not notified to the CMA, but was subsequently detected by the CMA's mergers intelligence function after publication of an article in a trade journal, *Letsrecycle,* on 29 August 2017.[5]

11. On 7 September 2017 the CMA sent an enquiry letter to [the Legal Director and Company Secretary of EMR and Ausurus] requiring information about the transaction. A brief initial response confirming the transaction was received on 11 September 2017.

12. On 11 September 2017 the CMA made the IEO applying to Ausurus and EMR. The IEO requires, among other things, that Ausurus and EMR: maintain and operate the enterprises separately and refrain from taking any action which might impair their ability to compete independently (paragraph 4); take certain steps to procure their continued separate operation (paragraph 5); ensure compliance with the IEO (paragraph 6); and notify the CMA promptly of any breach or suspected breach of the IEO (paragraph 9). [The CEO of EMR and Ausurus] and [the Legal Director and Company Secretary of EMR and Ausurus] provided regular compliance statements confirming that Ausurus and EMR were complying with the IEO.

13. On 24 January 2018 the CMA concluded that the Merger gave rise to a realistic prospect of a substantial lessening of competition and on 7 February

[5] [redacted].

2018 the CMA made a reference to its chair for the constitution of a Group of CMA Panel Members to investigate and report on the Merger.[6]

14. On 23 February 2018 the CMA issued directions under the IEO for Ausurus to appoint a monitoring trustee (the **Monitoring Trustee**). The Monitoring Trustee was appointed on 27 February 2018.

15. The IEO ceased to be in force as of 5 November 2018, following acceptance by the CMA of final undertakings pursuant to section 82 of the Act.

C. Relevant statutory provisions and provisions of the IEO

Relevant statutory provisions

16. Section 72(2) of the Act provides that the CMA may, by order, for the purpose of preventing pre-emptive action, impose certain restrictions and obligations. Section 72(8) defines pre-emptive action as action which might prejudice the reference concerned or impede the taking of any action which may be justified by the CMA's decisions on the reference. Section 72 is the basis for the IEO.

17. Section 94A(1) of the Act provides that where the appropriate authority considers that a person has, without reasonable excuse, failed to comply with an interim measure, it may impose a penalty of such fixed amount as it considers appropriate. Section 94A(2) of the Act provides that a penalty imposed under subsection (1) shall not exceed 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned and controlled by the person on whom it is imposed.

18. Section 94A(8) of the Act provides that an interim measure includes an order made pursuant to section 72 of the Act and that, in the case of failure to comply with an IEO, the appropriate authority is the CMA.

19. Section 86(6) of the Act provides that an order made pursuant to section 72 is an enforcement order. Sections 94(1) and 94(2) of the Act provide that any person to whom such an order relates has a duty to comply with it. A company is a person within the meaning of section 94(2) of the Act and Schedule 1 of the Interpretation Act 1978.

Relevant provisions of the IEO

20. The IEO included, among others, the following provisions:

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[6] Reference under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 and section 22(1) of the Act.

4 . Except with the prior written consent of the CMA, Ausurus and EMR shall not, during the specified period, take any action which might prejudice a reference of the transaction under section 22 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might:

(a) lead to the integration of the Cufe business with the Ausurus business;

(b) …; or

(c) otherwise impair the ability of the Cufe business or the Ausurus business to compete independently in any of the markets affected by the transaction.

5. Further and without prejudice to the generality of paragraph 4 and subject to paragraph 3, Ausurus and EMR shall at all times during the specified period procure that, except with the prior written consent of the CMA:

(a) the Cufe business is carried on separately from the Ausurus business and the Cufe business's separate sales or brand identity is maintained;

(b) the Cufe business and the Ausurus business are maintained as a going concern and sufficient resources are made available for the development of the Cufe business and the Ausurus business, on the basis of their respective pre-merger business plans;

[…] and

(e) except in the ordinary course of business for the separate operation of the two businesses:

(i) all of the assets of the Cufe business and the Ausurus business are maintained and preserved, including facilities and goodwill;…

21. Ausurus and EMR gave fortnightly compliance statements both confirming in general terms that they and their subsidiaries had complied with the IEO and affirming specifically that they had complied with each of the provisions set out above. The compliance statements were signed by [the CEO of EMR and Ausurus] or, in his absence, by [the Legal Director and Company Secretary of EMR and Ausurus].

The purpose of an IEO

22. As the Supreme Court has stated, "[t]he purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets."[7] It is of central importance to the ability of the UK's voluntary, non-suspensory merger regime to regulate in advance the impact of a merger on the competitive structure of markets that interim measures should be effective, particularly where, as in this case, the merger is completed shortly before it is identified and examined by the CMA.

23. In other words, the overarching purpose of an IEO is to prevent action which might prejudice the reference concerned or impede the taking of any action which may be justified by the CMA's decision on the reference.[8] In order to achieve this, the IEO includes positive obligations on the parties to do certain things, as well as obligations to refrain from taking certain actions.

24. As the Competition Appeal Tribunal recognised in *ICE/Trayport*, the IEO is framed in broad language and "should be interpreted to give full effect to its legitimate precautionary purpose".[9]

25. In the case of a completed merger, it is critical that any business which has been acquired continues to compete independently with the purchaser's business and is maintained as a going concern. If the businesses were to be integrated more than is necessary, or the viability of any business that has been acquired were to be undermined pending the outcome of the reference, this would risk prejudicing the ability of the CMA to ensure a competitive outcome if, as in this case, it finds that the merger has an adverse effect on competition.

D. Failure to comply with an interim measure

Use of EMR bank accounts for customer-facing and supplier-facing payments in and out of the CuFe Business

Facts

26. On 20 September 2017, in their first reasoned derogation request, the parties' legal advisers requested permission for MWR to access the credit facilities of the Ausurus Business. The reason given was that the MWR credit facilities

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[7] *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75 at paragraph 4.
[8] Section 72(8) of the Act.
[9] *InterContinental Exchange, Inc. v CMA and NASDAQ Stockholm AB* [2017] CAT 6 (I*CE/Trayport*) at 220.

with [name of bank] were subject to a clause stipulating that, on change of control, [name of bank] ceased to be committed to fund further utilisations of the credit facility, but the security on the loan remained in place. They stated:

> "The derogation would make financing available to MWR to address the situation that has arisen due to a change of control. No changes would occur to the operational bank accounts of MWR which are held with [name of bank]…." (emphasis added).[10]

27. On 21 September 2017 the CMA granted the following derogation:

> "The CMA consents to Cufe repaying and terminating its existing facility agreement (and associated guarantees) with [name of bank] and, to the extent necessary to avoid putting MWR in a detrimental position compared to its pre-merger position, gaining access to EMR's group banking facility agreement as a borrower and guarantor, [emphasis added] provided that any Cufe data that transfers to EMR for these purposes is ring-fenced and only accessible by Cufe personnel and designated EMR commercial business teams who will sign non-disclosure agreements in a form approved by the CMA."

28. On 15 March 2018 in its first report the Monitoring Trustee reported:[11]

> "All Metal & Waste payments and receipts are made from/to EMR's [redacted] bank account and allocated to Metal & Waste by EMR's finance team. All scrap payments are made from EMR's [redacted] bank accounts. Overheads are paid from [redacted] EMR's [redacted] and [redacted] bank accounts…"

29. EMR and Ausurus pointed out in their clarificatory e-mail of 18 December 2018:

> "[T]he Monitoring Trustee stated in its First Report (dated 15 March 2018) …(at page 18) that it had not identified any specific actions that it considered gave concerns that EMR was not acting in a manner consistent with the requirement to preserve the MWR business."

30. However, this general comment must be qualified by the fact that the Monitoring Trustee marked the status of the bank accounts issue as amber, meaning "Area being consider [sic] further and is subject to CMA views."[12]

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[10] Derogation request, [redacted].
[11] First Monitoring Trustee Report, page 25. A redacted version of this report was disclosed to the legal advisors of Ausurus and EMR [redacted] on 21 March 2018 at 14:45.
[12] First Monitoring Trustee Report, page 25.

31. Later, the same report continues:[13]

> "It appears from discussions with Metal & Waste and EMR that the change in banking arrangements may have gone further than intended by the derogation and that now most Metal & Waste banking, with a few exceptions, goes through the EMR bank accounts, although the monies are correctly allocated to Metal & Waste in the accounting records."

32. On 21 March the CMA wrote to the parties' legal representatives:[14]

> "…following the Group meeting yesterday, where the initial Monitoring Trustee (MT) report was reviewed, the Group is very concerned with how and the speed with which the Initial Enforcement Order has been implemented to date and the number of potential breaches/oversights highlighted by the MT (a copy of which is attached for your information)….In particular, the Group has concerns in relation to:
>
> 1. The high number of areas where there are still interactions between EMR and MWR that do not appear to be properly controlled, documented or covered by a derogation
>
> 2. The clarity of the message communicated to employees and customers in relation to the hold separate arrangements
>
> 3. The lack of delegated authority that has been provided to the management team of MWR and in particular [the Managing Director of MWR] to run the MWR business separate from EMR
>
> 4. Areas where integration has gone beyond that covered by a derogation eg bank facilities (page 38 of the Monitoring Trustee's report)
>
> 5. The ongoing bonus/incentive position of the management team at MWR including [the Managing Director of MWR] and [the Commercial Director of MWR]
>
> 6. Whether MWR is continuing to buy and sell independently to EMR as it would have done pre-merger and should be doing now
>
> 7. Potential gaps in personnel assisting senior management…

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[13] First Monitoring Trustee Report, page 38.
[14] [redacted].

Given the above, we need to speak to you before the end of the week in order for EMR to put in place effective hold separate arrangements which safeguard the independence of MWR during the inquiry period. You may also wish to point out to your client that under section 72(3B) of the Enterprise Act the CMA has the power to order parties to restore the position to what it would have been but for pre-emptive action, and under section 94A of the Enterprise Act the CMA can impose fines of up to 5% of global turnover for failure without reasonable excuse to comply with an interim measure."

33. Following further discussion with the Monitoring Trustee and the CMA, the parties reverted to using separate bank accounts for EMR and MWR. It has not been suggested by EMR or Ausurus that reverting to using separate bank accounts has impaired the ability of MWR to function as a going concern.

Assessment

34. Between the imposition of the IEO in September 2017 and the CMA's intervention in March 2018, MWR funds flowed through the EMR current accounts. EMR has conceded that during the period in question MWR's suppliers were paid from EMR's bank account and that from November 2017 MWR directed its customers to pay into EMR's bank account.[15] In its response to the CMA's Provisional Decision, EMR also noted that "EMR understands the concerns that that CMA has about the bank account issues…"[16]

35. The actions described above were not covered by the derogation of 21 September 2017. The CMA consented to the parties repaying and terminating MWR's existing credit facility agreement (and associated guarantees) with [name of bank] and its gaining access to EMR's group banking facility agreement as a borrower and guarantor. The CMA did not consent to the parties telling MWR customers to make payments into EMR's accounts, or paying MWR's suppliers of scrap from EMR accounts. There is a clear distinction between those activities and accessing credit facilities (which is not a customer-facing or supplier-facing activity).

36. The use of EMR's bank account for MWR's business operations as outlined above clearly constitutes action which might, and did, lead to the integration of the CuFe Business with the Ausurus Business contrary to paragraph 4(a) of the IEO. As noted above, paragraph 4(a) of the IEO requires Ausurus and

[15] First Response Letter, paragraph 3.
[16] Second Response Letter, paragraph 10.

EMR not to take any steps which might lead to the integration of the Cufe business with the Ausurus business.

37. It was also foreseeable that the use of EMR's bank account for these purposes, which would have been reflected on the bank statements of MWR customers and suppliers, might undermine the separate brand identity of the CuFe Business, impairing its ability to compete independently and thereby contravening paragraphs 4(c) and 5(a) of the IEO. As noted above, paragraph 4(c) of the IEO requires Ausurus and EMR not to take any action which might impair the ability of the CuFe Business to compete independently in any of the markets affected by the transaction. Paragraph 5(a) of the IEO requires Ausurus and EMR to procure that the CuFe Business is carried on separately from the Ausurus Business and to procure that the CuFe Business's separate sales or brand identity is maintained.

38. Moreover, this blurring of brand identity contravened paragraph 5(e)(i) of the IEO, which requires that, except in the ordinary course of business for the separate operation of the two businesses, EMR and Ausurus maintain and preserve the goodwill of the CuFe Business.

39. The IEO defines the "ordinary course of business" as "matters connected to the day-to-day supply of goods and services by CuFe or Ausurus/EMR and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of CuFe and Ausrus/EMR". The use by MWR of EMR's bank account was clearly not "ordinary course" for the separate operation of the two businesses and, as noted above, was not a necessary consequence of the derogation granted on 21 September 2017.

40. The use of EMR's bank account potentially damaged the goodwill of the CuFe business. There is evidence that certain of the customers and suppliers of the CuFe business were not happy to deal with EMR, for example, because they did not want EMR to have access to their pricing and volume data.

41. For example, on 16 April 2018 the Monitoring Trustee reported:[17]

> "[the Managing Director of MWR] confirmed that that he is actively managing the business and seeking new customers and new markets. <u>The main points that are impacting the business are the challenge to convince customers and suppliers, especially those that do not have a good track record with EMR, that Metal & Waste is still very much separate</u>…. [emphasis added].

[17] [redacted].

[the Managing Director of MWR] has noted that in the last 1-2 months the company has started to make inroads with third party customers, with the message that Metal & Waste is very much separate starting to reap benefits. He noted that in March 2018 the company sold [redacted] tonnes more steel to third parties than in February 2018 and expects this increase to continue as customers seem to understand that Metal & Waste is separate to EMR. He also noted that [redacted] suppliers who refused to sell to Metal & Waste when it was bought by EMR have also sold scrap to Metal & Waste recently.

42. In the main parties' hearing of 15th June 2018 [the Commercial Director of MWR] said in relation to CuFe's Welsh business:[18]

> "You have got to bear in mind the contracts we won off EMR, the biggest problem we have got today and still have today, is they do not want to go back. Some of the reasons why they changed was different procedures, different whatever. So they are very worried that by this merger or takeover or whatever you want to call it, it goes back to the old way of EMR working, which we have assured them it will not happen."

43. More broadly, [the Managing Director of MWR] and [the Commercial Director of MWR] described the impact of being associated with EMR as follows :[19]

> Answer. ([the Managing Director of MWR]) …. [Name] would not buy from us but they are now.
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> Answer. ([the Commercial Director of MWR]) They do not believe that we are going to sell them anything.
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> Answer. ([the Managing Director of MWR]) Are we going to use their price and give it back to EMR? So it is a bit of a trust issue. So I think we have lost a bit by not being on our own to be honest. What we do not know is what EMR get on the other side, do we? What did they make out of our scrap?
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> Question. Does that affect any particular type of product or is it just across the board?

[18] At page 29, line 7 of the transcript.
[19] At page 65, line 8 to page 67, line 17 of the transcript.

Answer. ([the Managing Director of MWR]) [redacted]. Because we sold most of our material to different traders and they disappeared when EMR bought….

44. EMR and Ausurus gave assurances to the CMA that the CuFe Business continued to operate independently under its own brand. However, such assurances were not consistent with suppliers and purchasers of scrap being told to make payments to, and accept payments from, EMR's bank accounts following the Merger.

45. The Second Response Letter states:

> 9. EMR[20] disagrees with the provisional conclusions that the CMA draws from the statements of [the Managing Director of MWR] and [the Commercial Director of MWR]. EMR respectfully submits that these in fact demonstrate that the businesses were being managed separately and customers and suppliers were aware of this. For example, Welsh customers could not be worried about 'going back to the old way of EMR working' if that had already occurred or was perceived as having occurred. [the Commercial Director of MWR] was clear that MWR's management had taken action to assure customers and suppliers that MWR was being managed separately.
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> 10. Moreover, the CMA appears to suggest that a breach of the IEO was responsible for supplier attrition. Whilst EMR understands the concerns that the CMA has about the bank account issues, EMR does not accept that these resulted in suppliers and customers having doubts about the separate brand identities of MWR and EMR. Rather, the evidence simply shows that suppliers and customers were aware of the fact that MWR had been acquired by EMR and that, as is often the case in any merger or acquisition, some did not want to deal with MWR in light of its new ownership structure.
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> 11. Furthermore, EMR notes that the Monitoring Trustee confirmed in its first report that negative reactions had been limited and that it saw 'no evidence that there had been any erosion of the Metal & Waste brand… no evidence that the Metal & Waste business is not being carried on separately from the EMR business and we have confirmed that the brand identity has been maintained.'

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[20] Both the First Response Letter and the Second Response Letter are drafted as presenting the views of EMR only. The CMA on 14 December 2018 therefore sought clarification from [redacted], the company secretary of both entities, and Eversheds, the legal advisers of both entities, as to whether the responses were made on behalf of both Ausurus and EMR and, if that was not the case, whether Ausurus has anything to add to them. On 18 December 2018 Eversheds responded: "We confirm that the responses dated 19 October 2018 and 4 December 2018 are on behalf of Ausurus Group Limited ("Ausurus") and EMR." All references to EMR's views in the response letters should be read accordingly.

46. However, these passages of the Second Response Letter do not address the potential harm caused by the breach (which EMR has conceded took place).[21]

47. As EMR concedes, some customers and suppliers were averse to dealing with EMR and, while [the Commercial Director of MWR] and [the Managing Director of MWR] were attempting to allay the suspicion that MWR was being directed by, and reporting to, EMR and Ausurus, EMR and Ausurus took an action which might have strengthened that suspicion, namely, putting MWR's transactions through EMR's bank accounts.

48. Secondly, the issue is not whether, with hindsight, it can be shown that the breach *did* cause the supplier and customer attrition or did cause an erosion of the MWR brand. Rather the question is whether, at the time when the breach was committed, it was reasonably foreseeable that it *might* cause such attrition. A different view would undermine the effectiveness of IEOs in enabling a voluntary, non-suspensory merger regime to regulate in advance the impact of concentrations on the competitive structure of markets.[22] As stated by the Competition Appeal Tribunal in *ICE/Trayport:*[23]

> *[220] …"pre-emptive action" is a broad concept. It* concerns *conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. The [IEO] in these proceedings is phrased in similarly broad language and should be interpreted to give full effect to its legitimate precautionary purpose. …. The word "might" means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited.*

49. Accordingly, the CMA's provisional conclusion is that EMR and Ausurus have failed to comply with paragraphs 4a, 4c, 5a, and 5(e)(i) of the IEO.

Failure to give the managing director of MWR and other members of the CuFe Business management team a clear delegation of authority

Facts

50. On 13 September 2017 [the Legal Director and Company Secretary of EMR and Ausurus] told the CMA:

> "[t]he management structure operated by MWR prior to completion of the transaction remains in place as before and will continue to do so for

[21] First Response Letter paragraphs 3.5 and 5; Second Response Letter paragraph 10.
[22] See paragraphs 22-25 above.
[23] *InterContinental Exchange, Inc. v CMA and NASDAQ Stockholm AB* [2017] CAT 6 (ICE/Trayport).

> the duration of the CMA enquiry…[redacted] (Managing Director) and [redacted] (Commercial Director) remained with MWR and they continue to run the business as previously as a standalone operation."[24]

51. The CMA subsequently discovered that, immediately on completion, [the Managing Director of MWR] and [the Commercial Director of MWR] became employees of EMR.[25] The fact that they were employed by EMR was first brought to the CMA's attention by the Monitoring Trustee, on 7 March 2018.[26]

52. The Monitoring Trustee pointed out that, prior to confirmation of bonus arrangements related to the performance of MWR for [the Managing Director of MWR] and [the Commercial Director of MWR], it was questionable whether their incentives were as aligned with those of the CuFe Business as they had been prior to the acquisition.[27] In the Second Response Letter EMR states:[28]

> "[the Managing Director of MWR] and [the Commercial Director of MWR] were aware that their bonuses were dependent upon the performance of the CuFe Business (not the EMR business) and this would have ensured that they remained incentivised in managing the CuFe Business."

53. However, the CMA understands that bonus arrangements for [the Managing Director of MWR] and [the Commercial Director of MWR] based on the performance of MWR were only finalised in May 2018 following the intervention of the Monitoring Trustee and the CMA. Moreover, whether or not the bonuses of [the Managing Director of MWR] and [the Commercial Director of MWR] were linked solely to the performance of the CuFe Business (not the EMR business), that, in itself, does not mean that their incentives were unaffected by the acquisition, in particular in circumstances where they ceased to be employed by MWR following the acquisition.

54. [Legal Director and Company Secretary of EMR and Ausurus] also stated to the CMA that "The MWR management team will be given autonomy over key decisions relating to the MWR business."[29]

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[24] [redacted].
[25] First Monitoring Trustee report (15 March 2018) at page 11. The contracts to transfer [the Managing Director of MWR] and [the Commercial Director of MWR] back to MWR were signed in December 2018.
[26] [Redacted - Monitoring Trustee e-mail] of 7 March 2018 at 17:58. This e-mail provided a quick summary of the Monitoring Trustee's concerns prior to submission of its first report.
[27] First Monitoring Trustee report at page 11.
[28] Second Response Letter, paragraph 4.
[29] [redacted].

55. On 4 October 2017 the parties' legal advisers confirmed on behalf of their client: [30]

> "MWR's strategic direction, decision-making processes and supplier and customer relationships all continue to be managed by MWR's pre-transaction commercial and management team, independently of EMR."

56. On 12 February 2018 (in response to the CMA phase 2 opening letter) the parties' legal advisers stated on behalf of their clients:[31]

> "To date, MWR continues to be managed by its existing management team that is entirely independent of EMR. This comprises, principally, [redacted] (Managing Director) and [redacted] (Commercial Director) together with [redacted] (Group Financial Controller). EMR does not have any influence over or involvement in the management or day-to-day running of any parts of MWR business and there are no reporting lines between EMR and MWR. The MWR business operates under its own separate and distinct brand…"

57. The Monitoring Trustee was appointed on 27 February 2018. On 7 March 2018 the Monitoring Trustee informed the CMA that:[32]

> "It is apparent that there is no delegation of authority in place to guide the MD of MWR on what he can and can't do under his own authority. This creates a tension in relation to whether he needs to discuss points with EMR...MWR has highlighted that the main concern is staff retention, especially amongst staff holding key supplier relationships. In this regard, bonuses have constituted an important part of annual remuneration and MWR is keen to confirm the arrangements in place. We would also highlight that [redacted] (MD) and [redacted] (Commercial Director) are, following the acquisition, both employees of EMR albeit still working on MWR business."

> "…MWR has lost nearly all senior employees in the area of compliance and legal. Accordingly, technical support is required from EMR with resulting interactions. To date, we do not believe there has been any prescriptive guidance in relation to ensuring these interactions do not extend beyond what is required.…MWR considers that it requires ongoing support in regard to Legal, Operational and

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[30] Eversheds response to CMA's fifth request for information on integration, [redacted].
[31] Letter from Eversheds dated 12 February 2018 Para 4.1.
[32] Email from [redacted - Monitoring Trustee] on 7 March 2018 at 17:58. This e-mail provided a quick summary of the Monitoring Trustee's concerns prior to submission of its first report.

Financial areas, due to the loss of individuals. In this regard, there seems to be multiple or uncertain communication channels and we have recommended that one person acts as a single point of contact for each area together with clarification, as confirmed with the CMA, on what kind of requests are permitted without needing additional notification"

58. On 15 March 2018 the Monitoring Trustee issued its first report, confirming that:[33]

> "As a result of the hold-separate process [the Managing Director of MWR] does not appear to be subject to any delegation of authority controls. As a result, he is unsure of what decisions he is able to make with regards to matters such as paying bonuses or awarding pay rises to keep key members of staff…Without a delegation of authority it is not clear what [the Managing Director of MWR] can and cannot do without approval from EMR.
>
> "…one of the main risks for the business relates to the loss of key employees…Prior to the transaction Metal & Waste employees were rewarded through quarterly and annual bonus arrangements. Since the transaction the quarterly bonus arrangements have continued but there is uncertainty over whether the annual bonus arrangements will continue.
>
> "… several of the senior non-trading employees of Metal & Waste have left the business and therefore matters such as health and safety and environmental compliance no longer have a senior individual at Metal & Waste. The area of legal has already been addressed through a derogation. The other areas, including HR, health and safety and environmental, now have senior oversight at EMR."

59. As set out at paragraph 32 above, on 21 March 2018, after reviewing the Monitoring Trustee's first report, the CMA wrote to the parties' legal advisers highlighting these and other apparent breaches of the IEO.[34]

60. On 29 March 2018 the parties' legal advisers wrote to the CMA attaching a proposed document setting out the scope of the authority delegated by EMR to [the Managing Director of MWR].[35] The delegation of authority states:

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[33] First MT Report pages 9, 10 and 12.
[34] [redacted].
[35] [redacted].

Scope of Authority

[The Managing Director of MWR] shall have full power and authority to operate the business of MWR save to the extent that such authority is limited as set out below:

Authority for Purchases/Sales

[The Managing Director of MWR] has full authority to buy and sell scrap metal in the ordinary course of business provided, in the case of sales, that appropriate credit insurance is in place for the customer concerned.

With the exception of items of capital expenditure (in relation to which see below) for other sales and purchases not related to scrap metal, [The Managing Director of MWR] shall have authority to approve invoices up to the value of £[redacted] and for items above this limit, the consent of [EMR Finance Director] shall be required.

Capital Expenditure

All capital expenditure requires the approval of [the EMR Finance Director].

Hiring of Staff

[The Managing Director of MWR] has full authority to hire staff save that for staff with an annual salary in excess of £[redacted], the consent of [the EMR Financial Director] shall be required.

Changes to salary/bonuses

A general pay review for all MWR staff will be agreed with [the Managing Director of MWR]. However, [the Managing Director of MWR] shall have authority to award other ad hoc salary increases up to £[redacted] per annum per individual and any increases in excess of that figure shall require the consent of [the EMR Financial Director].

A general policy on bonuses will be agreed with [the Managing Director of MWR]. However, [the Managing Director of MWR] has authority to award ad hoc bonuses of up to £[redacted] per individual.

Other matters requiring consent

The following matters shall require the consent of [the EMR Financial Director]:

1. Forming any subsidiary or acquiring shares in any other company or participating in any partnership or joint venture.

2. Creating or granting any encumbrance over the whole or any part of the business, undertaking or assets of MWR or agreeing to do so.

3. Making any loan or granting any credit (other than in the normal course of trading) or giving any guarantee (other than in the normal course of trading) or indemnity.

4. Entering into any arrangement, contract or transaction outside the normal course of the Business or otherwise than on arm's length terms.

5. Establishing or amending any pension scheme or granting any pension rights to any director, officer, employee, former director, officer or employee, or any member of any such person's family.

6. Dismissing any director, officer or employee in circumstances in which the Business incurs or agrees to bear redundancy or other costs in excess of £[redacted] in total.

7. Instituting any legal proceedings, or settling or compromising any legal proceedings (other than debt recovery proceedings in the ordinary course of business) instituted or threatened against MWR, or submitting to arbitration or alternative dispute resolution any dispute involving MWR.

61. The CMA approved the delegation of authority on the same day (29 March 2018) without amendment.

62. On 10 April 2018 the Monitoring Trustee reported[36]:

> "The delegation of authority is now in place and the managing director of Metal & Waste has already authorised a one-off pay rise for one individual who had handed in his notice as he had been approached by a rival with a higher salary offer."

Assessment

63. From 11 September 2017, when the IEO took effect, until 29 March 2018, when the CMA intervened following the Monitoring Trustee's e-mails and First

[36] Third Monitoring Trustee Report, p.13.

Monitoring Trustee report, [the Managing Director of MWR] (whose status had changed from being an MWR employee to being and EMR employee) did not have a clear delegation of authority setting out which decisions he could take without signoff from EMR. The correspondence with Ausurus, EMR and their advisers set out above shows that EMR and Ausurus were aware that MWR should have been run independently during that period.

64. The First Response Letter states that "consistent with other subsidiary companies in EMR's group, the management of MWR was left to manage the business on a day-to-day basis as they saw fit… EMR regrets any lack of clarity which MWR's management may have perceived about the scope of their authority…Whilst this confusion was not initially communicated to EMR by the MWR management, as soon as this was raised with EMR by the Monitoring Trustee, EMR took steps to remedy the CMA's concerns."[37] However, given the requirements of the IEO, MWR was not in the same position as other subsidiary companies in EMR's group: the IEO expressly required the CuFe Business to be managed independently of the Ausurus Business.

65. The Second Response Letter states that "EMR remains of the view that the matters identified in the Provisional Decision relating to the management of MWR do not constitute a clear breach of paragraphs 5(a) and 5[(b)] of the IEO…" (emphasis added).[38] It continues:

> 2. EMR disagrees with the CMA's position that a written delegation of authority was required to ensure compliance with paragraphs 5 (a) and 5[(b)] of the IEO.…Furthermore, EMR respectfully disagrees that a written delegation of authority must be put in place in order to comply with paragraphs 5(a) and 5[(b)] of the IEO. This is not contained in the Order itself, nor in CMA60. As noted by the CMA, as soon as matter was raised with EMR, it was swiftly addressed." [CMA60 is the CMA's Guidance on Initial Enforcement Orders and Derogations in Merger Investigations.]

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[37] First Response Letter at paragraphs 8 and 9.

[38] Second Response Letter at the second introductory paragraph.
The Provisional Decision contained a typographic mistake at the second last line of paragraph 54, in that it referred to a breach of paragraph 5c of the IEO. The intention was to refer to paragraph 5b of the IEO (as the CMA did at paragraph 60 of the Provisional Decision). Although paragraph 54 of the Provisional Decision refers to the maintenance of the CuFe Business as a going concern, which is required by paragraph 5b of the IEO, the Second Response Letter of 4 December at paragraph 2, and also in the second introductory paragraph, responded that EMR had not breached paragraph 5(c) of the IEO, which relates to changes to organisational structure or management responsibilities. The CMA pointed this out to Ausurus and EMR on 14 December 2018 and requested clarification of their views on whether there had been a breach of paragraph 5b of the IEO. They replied on 18 December 2018: "Ausurus and EMR … confirm that the references to paragraph 5(c) of the IEO in the response of 4 December 2018 (second introductory paragraph and paragraph 2) should be read as references to paragraph 5(b) of the IEO."

66. The CMA accepts that neither the terms of the IEO, nor the CMA's guidance on interim measures (CMA60), expressly require there to be a delegation of authority. The CMA also accepts that an explicit delegation of authority does not necessarily have to be in writing. However, if the CMA imposes an IEO on a completed merger, it is implicit in the requirements of the IEO that there must be a clear delegation of authority from the acquirer to the manager of the target business while the IEO remains in force, so that it is clear to the person running the target what, without consulting the acquirer, they can and should do. In the present case there was no clear delegation of authority, as evidenced by the fact that [the Managing Director of MWR] had doubts about what he could and should do without EMR's signoff. The obvious way to achieve clarity would have been to communicate the delegation of authority expressly and make a record of the communication for future reference.

67. As to why it should have been clear to EMR and Ausurus that a delegation of authority was required in this case, it was reasonably foreseeable that the transfer of [the Managing Director of MWR] and [the Commercial Director of MWR] from the employment of MWR to that of EMR on 25 August 2017 might affect their incentives in managing the CuFe Business and that, once the IEO was imposed on 11 September 2017, they might require clarification as to the requirements of the IEO and the scope of their authority to manage the CuFe Business independently while the IEO remained in place. The delegation of authority should therefore have taken place on 11 September 2017, not only after the intervention of the Monitoring Trustee in March 2018.

68. The lack of a clear express delegation of authority meant, for example, that from September 2017 to March 2018 it was unclear what steps the CuFe Business management team could take to retain or replace staff, for example the payment of bonuses or pay rises. This was against a background of a significant loss of non-management staff which MWR suffered between September 2017 (when the IEO was imposed) and April 2018 (when the delegation of authority was granted following intervention by the Monitoring Trustee and the CMA).

69. The CMA considers the failure to put in place a clear express delegation of authority after the IEO was imposed, and therefore to delineate clearly the independence of the management team of the CuFe Business, was contrary to paragraph 5(a) of the IEO, which required Ausurus and EMR to procure that the CuFe Business was carried on separately from the Ausurus Business, and paragraph 5(b) of the IEO, which required Ausurus and EMR to procure that the CuFe Business was maintained as a going concern.

70. In the First Response Letter[39] Ausurus and EMR point out that MWR ran a discretionary quarterly bonus scheme for [redacted] staff, a discretionary annual bonus scheme for all staff, and ad-hoc bonuses in [the Managing Director of MWR]'s discretion. They argue that the quarterly bonuses were paid in the same way as before, and that ad-hoc bonuses remained in [the Managing Director of MWR]'s discretion as before. In relation to the annual bonuses, they argue that these were not due to be paid until [month] and that, following discussion with the Monitoring Trustee and the CMA, EMR confirmed that they would be paid in [month] as before.

71. In the Second Response Letter EMR states:[40]

> "The CMA expresses a concern in paragraph 57 of the Provisional Decision that prior to its intervention of 29 March no authority was given to [the Managing Director of MWR] confirming that he could pay annual bonuses. In this regard EMR respectfully submits that the CMA's concerns are not supported by evidence and refers to its submissions in the [First Response Letter paragraphs 10-11]. [the Managing Director of MWR] retained the power to pay annual bonuses as the managing director of MWR and EMR committed to MWR to provide sufficient funds to allow [the Managing Director of MWR] to provide the overall same level of bonuses as the previous financial year, regardless of performance."

72. In their e-mail of 18 December 2018 Ausurus and EMR added:

> "Ausurus and EMR wish to note that the Monitoring Trustee stated in its First Report (dated 15 March 2018) that the MWR business was being maintained as a going concern with sufficient resources being made available for the development of the MWR business (page 16). The Monitoring Trustee also stated (at page 18) that it had not identified any specific actions that it considered gave concerns that EMR was not acting in a manner consistent with the requirement to preserve the MWR business."

73. However, this does not address the CMA's concerns that, as indicated by the Monitoring Trustee's report, [the Managing Director of MWR] had not, prior to the CMA's intervention, received a delegation of authority confirming that he could continue to pay the annual bonuses. The fact that the annual bonuses were eventually paid in the usual way does not address the concern that until April 2018 there was uncertainty as to whether this would occur.

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[39] At paragraphs 10.1 and 10.2.
[40] Second Response Letter paragraph 5.

74. Similarly, [the Managing Director of MWR] did not have a clear delegation of authority to retain or replace staff necessary to ensure that CuFe had the resources to operate in accordance with its pre-merger business plan. Between September 2017 and April 2018 the CuFe Business lost at least [redacted number of] staff without alerting the CMA to the attrition and did not fully replace them.[41]

75. In relation to employee attrition the Second Response Letter says:[42]

> "EMR does not agree that staff losses were a consequence of there being no clear delegation of authority in place as the CMA suggests…. [T]here were a number of reasons why non-key staff… left MWR in the period post-closing. Without further information about the identities of the [redacted number of] staff to which the Provisional Decision refers, EMR is not able to comment on specific cases…
>
> "Moreover, contrary to the CMA's assertion at paragraph 95 of the provisional decision, EMR understands that following a number of staff departures, MWR engaged temporary support staff. EMR accepts that MWR may have struggled to recruit additional permanent resources as a result of the uncertainty associated with the outcome of the CMA's investigation but respectfully submits that this is not evidence of a failure by EMR to comply with paragraphs 5(a) and 5(b) of the IEO."

76. As indicated in the Provisional Decision, the [redacted] employees mentioned are those detailed in the parties' response to the CMA's phase 2 opening letter.[43] The CMA agrees that it cannot prove, in relation to each specific individual who left, whether uncertainty regarding bonuses contributed to their departure. However, as noted at paragraph 48 above, it is not necessary to show that harm actually occurred in order to establish a breach of the IEO. It is sufficient that it was reasonably foreseeable that uncertainty over bonuses and what further steps might be taken to retain staff might lead to the loss of human resources necessary for the CuFe Business to continue operating in accordance with its pre-acquisition business plan. In the context of significant staff attrition and difficulty hiring new permanent staff, it was all the more important that [the Managing Director of MWR] had a clear mandate which enabled him to take positive steps (such as offering bonuses) to retain staff.

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[41] This was revealed in Annex 3 to the parties response of 12 February 2018 to paragraph 21 of the CMA phase 2 Opening Letter of 7 February 2018, which requested further information regarding the integration of the businesses including any staff changes within MWR.
[42] Second Response Letter paragraphs 6-7.
[43] Annex 3 to the parties response of 12 February 2018 to paragraph 21 of the CMA phase 2 Opening Letter of 7 February 2018.

77. In this case, there is evidence that the loss of staff did in fact impair the ability of the CuFe Business to compete independently. This is illustrated by the excessive integration which took place as a result of understaffed CuFe Business teams seeking support from Ausurus Business teams.[44] For example, on 29 March, in its second report, the Monitoring Trustee reported that there were unregulated interactions taking place between Ausurus Business staff and CuFe Business staff in the areas of transport, technical, training, e-mail accounts, compliance and health & safety.[45]

78. The CMA therefore concludes that Ausurus and EMR, have failed to comply with paragraphs 5a and 5b of the IEO.

Provisional conclusion on failure to comply with an interim measure

79. For the reasons set out above the CMA finds that Ausurus and EMR have failed to comply with the IEO, which is an interim measure within the meaning of section 94A of the Act.

80. The failures to comply with the IEO in this case comprised the use of EMR bank accounts for customer-facing and supplier-facing payments in and out of the CuFe Business and the failure to give the managing director of MWR and other members of the CuFe Business management team a clear delegation of authority.

81. The use of EMR bank accounts for customer-facing and supplier-facing payments in and out of the CuFe Business clearly constituted a step towards the integration of the CuFe Business with the Ausurus Business. It also constituted action which might have prejudiced the ability of the CuFe Business to compete independently by undermining its separate sales and brand identity as well as a failure to procure that the goodwill of the CuFe Business was maintained.

82. The failure to provide a clear delegation of authority to the management of the CuFe Business constituted a failure by EMR and Ausurus to take adequate steps to procure that the CuFe Business was carried on separately from the Ausurus Business and was maintained as a going concern. The consequence of this failure was that it was unclear what steps the management of the CuFe

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[44] The First Monitoring Trustee Report of 15 March 2018, page 9 reported: "Our initial meetings with EMR and Metal & Waste have identified that there are a significant number of interactions taking place between EMR and Metal & Waste. The majority of interactions have been instigated by Metal & Waste employees seeking advice or assistance."
[45] Second Monitoring Trustee Report page 8.

Business could take, in particular to retain or replace staff, without consulting EMR or Ausurus.

83. These actions and omissions were a breach of paragraphs 4a, 4c, 5a, 5b and 5(e)(i) of the IEO. Ensuring that the CuFe Business continued to compete independently and was carried out separately from the Ausurus Business, that its goodwill was maintained and that it was maintained as a going concern all go to the heart of what the IEO was intended to achieve, as outlined above.

E. Without reasonable excuse

84. Section 94A(1) of the Act provides that penalties can be imposed if a failure to comply is "without reasonable excuse".

85. Once a breach of an IEO is established, the person who has committed the breach bears the evidential burden of setting out a prima facie case for reasonable excuse. Any excuse must be objectively reasonable.

86. CMA4 states that a reasonable excuse might exist if the breach was as a result of a significant and genuinely unforeseeable or unusual event and/or an event beyond the company's control has caused the failure to comply (and the failure would not otherwise have taken place).[46] There is nothing to suggest that any event which would have prevented Ausurus and EMR from complying with the IEO has occurred in this case. The CMA accepts that it may be possible to establish other objectively reasonable excuses for breaching an IEO but, for the reasons set out below, the CMA considers that Ausurus and EMR have not established an objectively reasonable excuse for failing to comply with the IEO.

87. As noted above, the CMA wrote to Ausurus and EMR on 12 October 2018 in relation to the apparent breaches of the IEO and subsequently issued a Provisional Decision. Their legal representatives, in the First and Second Response Letters, provided various explanations for the actions taken (or not taken) by Ausrus and EMR, which are considered below. While these explanations were not explicitly formulated as a reasonable excuses for breaching the IEO, the CMA has nonetheless considered whether any of the explanations might be regarded as a reasonable excuse.

Considerations relevant specifically to the use of EMR bank accounts for customer-facing and supplier-facing payments in and out of the CuFe Business

[46] CMA 4, paragraph 4.4.

88. In the First Response Letter Ausurus and EMR state that the merged banking arrangements were put in place partly for practical reasons but primarily to ensure that MWR's daily cash position was properly maintained.[47]

89. The practical reason cited is that MWR had been migrated to EMR's Trade 2 financial and trading system prior to the imposition of the IEO. This meant that MWR had limited support with a system with which it was not familiar and the reconciliation of its trading records with its cash flow was difficult. However, on 26 February 2018 the CMA granted a derogation consenting "to the provision of back office support to MWR by EMR's designated support staff in connection with MWR's use of Trade 2 (one of the systems used by both EMR and MWR). This support will include ad hoc assistance with Trade 2 as well as regular support with MWR's stock reconciliation process." This difficulty therefore could be resolved, and was resolved, by way of derogation when a derogation was requested. It did not justify breaching the IEO by merging the accounts through which the business interacted with third parties.

90. The IEO requires Ausurus and EMR to seek the prior consent of the CMA before taking steps prohibited by the IEO. Ausurus and EMR understood the requirement to seek prior consent from the CMA as evidenced by their numerous derogation requests, starting in September 2017.[48]

91. As stated by the Competition Appeal Tribunal in ICE/Trayport:

[220] … The [IEO] catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the [IEO] to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment.…

[223] We recognise that it must obviously be the case that not every agreement between merging parties will in all cases require the CMA's prior consent. However, where an IEO has been issued, it is incumbent on parties to take a carefully considered view as to whether their conduct might arouse the reasonable concern of the CMA that the agreements that they reach are significant enough that they might prejudice the reference or impede justified action if the agreement is non-arm's length."

92. The onus was therefore on Ausurus and EMR to obtain derogations before taking steps such as integration of the banking arrangements which were contrary to the requirements of the IEO.

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[47] Paragraph 3.1.

93. In relation to maintaining MWR's daily cash position, the First Response Letter says that scrap suppliers expect to be paid daily or weekly, that prior to the merger MWR had struggled to do this, that EMR wanted to maintain MWR's goodwill and maintain it as a going concern and therefore wished to enable it to draw on EMR's cash facilities.[49] However, the First Response Letter concedes[50] that it would also have been possible for MWR simply to communicate its cash needs to EMR, a course of action which would have been compliant with the order without the need to seek a derogation. This is the solution which was put in place after the CMA intervened. Ausurus and EMR could, and should, have requested a derogation from the CMA if their managers thought that it was necessary to merge the bank accounts to reduce the burden on MWR.

94. The First Response Letter argues that the Monitoring Trustee, in its first report, did not consider the merging of the bank accounts to be significant.[51] However, the Monitoring Trustee noted the status of this issue as an "[a]rea being consider [sic] further and is subject to CMA views"[52] As noted above, the CMA wrote to the parties' legal representatives shortly after receiving the Monitoring Trustee's first report to note the Group's concerns about, among other things, the integration of the bank facilities.

Considerations relevant specifically to undermining the ability of the CuFe Business to operate independently by failing to give the managing director of MWR and other members of the CuFe Business management team a clear delegation of authority

95. In the First Response Letter[53] Ausurus and EMR submit that, consistent with other subsidiary companies in EMR's group, the management of MWR was left to manage the business on a day-to-day basis as they saw fit. The First Response Letter also notes that following completion of the transaction [the Managing Director of MWR] and [the Commercial Director of MWR] continued to be directors of MWR, and that their roles as managing director and commercial director were unchanged.

96. In the Second Response Letter EMR states:

> "2….EMR maintains its view that [the Managing Director of MWR] and [the Commercial Director of MWR], as statutory directors of MWR, retained all the statutory duties and powers required in order to manage MWR

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[49] At paragraph 3.2.
[50] At paragraph 3.2.
[51] At paragraphs 3.3 to 3.4.
[52] First Monitoring Trustee's report at page 25.
[53] Paragraphs 7 and 8.

independently, including the powers to retain or replace staff and to pay bonuses or make pay rises. The fact that they were not legally trained does not affect this outcome….

"3 Moreover, whist it is true that [the Managing Director of MWR] and [the Commercial Director of MWR] became employees of EMR, EMR wishes to note that their roles did not change…"[54]

97. In their e-mail of 18 December 2018[55] the parties reiterate this point:

"[I]n respect of paragraph 2 of the response dated 4 December 2018, Ausurus and EMR wish to confirm their view that [the Managing Director of MWR] and [the Commercial Director of MWR] retained all the statutory powers and duties required in order to maintain the CuFe business as a going concern, as well as to manage it independently of the Ausurus business, including with respect to the powers to retain and replace staff, pay bonuses and make pay rises."

98. The CMA does not consider that these submissions demonstrate that Ausurus and EMR had a reasonable excuse for their failure to grant a clear delegation of authority.

99. One of the main purposes of the IEO was to ensure that, while the IEO remained in force, CuFe and MWR should not behave in a manner consistent with other subsidiary companies in EMR's group.

100. Moreover, although they remained statutory directors of MWR, the position of [the Managing Director of MWR] and [the Commercial Director of MWR] was not unchanged following the Merger. As set out above at paragraph 51, immediately on completion [the Managing Director of MWR] and [the Commercial Director of MWR], rather than being employees of MWR, were employed by EMR to run MWR, with a corresponding incentive to act in the interest of the owners of EMR. As explained at paragraph 53, their bonus arrangements were not finalised until May 2018. Furthermore, as directors of a company newly subsidiary to the EMR group, their previous incentive to compete with EMR was also affected.

101. It was reasonably foreseeable in these circumstances that [the Managing Director of MWR] and [the Commercial Director of MWR], who are not legally qualified, would have doubts about whether they should act in a way that might be incompatible with the interests of their employer, the parent

[54] Second Response Letter paragraphs 2-3.
[55] [redacted].

company of MWR. Ausurus and EMR, who had the benefit of external and in-house legal support, should have made the implications of the IEO clear to them immediately after 11 September 2017. Instead they were left in doubt until the intervention of the Monitoring Trustee approximately six months later.

102. As set out at paragraphs 50-56, prior to the appointment of the Monitoring Trustee the CMA received repeated assurances on behalf of Ausurus and EMR that the MWR management team would continue to run the business in the same way as before the acquisition. However, having made significant changes to the position of MWR and its management on 25 August 2017 when the acquisition was completed, it was reasonably foreseeable on 11 September 2017, when the IEO was imposed, that Ausurus and EMR would need to take steps to ensure that those assurances were accurate before giving the assurances. The necessary steps were not taken until the Monitoring Trustee and the CMA intervened.

103. The CMA therefore concludes that Ausurus and EMR had no reasonable excuse within the meaning of section 94A of the Act for committing the breaches of the IEO which have been identified above at paragraphs 26-83.

F. Appropriateness of imposing a penalty

104. Having had regard to the Act and CMA4, and having considered all relevant facts, the CMA considers that the imposition of a penalty is appropriate. In reaching this view, the CMA has had regard to the need to achieve general and specific deterrence, as well as the seriousness of the breaches in this case.

General deterrence

105. It is of central importance to the UK's voluntary, non-suspensory merger regime that interim measures should be effective, particularly in the small number of completed mergers which the CMA identifies as warranting review.

106. Where the CMA identifies a failure to comply with an IEO, and there is no reasonable excuse for such a failure, then the CMA is justified in imposing a penalty in the interests of general deterrence. Doing so will reduce the incentive for the parties to future mergers to take actions which may undermine the effectiveness of the regime.[56]

Specific deterrence

[56] CMA4 at 3.1.

107. EMR claims that "compliance with the IEO was raised by the Inquiry Group during the Main Party Hearing on 23 April 2018 during which it was acknowledged that EMR was working with the CMA staff group and that EMR's actions had been well intentioned."[57]

108. While EMR did correct the breaches following action by the CMA and the Monitoring Trustee, a penalty is also justified in this case on the grounds of specific deterrence. EMR and Ausurus remain subject to commitments to maintain the parts of the CuFe Business which are to be divested under the final undertakings accepted on 5 November 2018. It is important that they understand the importance of ensuring compliance with their obligations without waiting for a breach to occur and be detected.

Seriousness of the breaches

109. Both of the failures to comply in this case were of a serious nature.[58] For the reasons set out at paragraph 25 the provisions breached reflect core objectives of interim measures. Their breach is thus a fundamental breach of the obligations imposed in accordance with section 72 of the Act via the IEO.

110. As set out further below, it was reasonably foreseeable at the time that the breaches were committed they might diminish the ability to take remedial action which may be justified by the CMA's decisions on the reference, for example, by affecting goodwill or resulting in the loss of employees.

Seriousness of the breach concerning the use of EMR bank accounts for customer-facing and supplier-facing payments in and out of the CuFe Business

111. It was reasonably foreseeable at the time when the breach occurred that the use of the Ausurus Business bank accounts to conduct the business of the

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[57] First Response Letter, paragraph 14.
The hearing transcript of 23 April 2018 at pages 73-74 shows that the Group Chair, said:
"I have to say that my colleagues and I on the inquiry panel have a number of concerns about the way in which this enforcement order appears to have been implemented by EMR and, in particular, the number of concerns that were raised with us by the monitoring trustee when he was appointed. For example, the extent of contacts between people within MWR and people within EMR; the integration of the bank accounts; the lack of a clear operating mandate to the managing director of MWR; the lack of any clear instructions to staff to maintain a confidentiality barrier; all of that is a concern to us. Some of those matters have been remedied once the monitoring trustee was in place and we have granted some derogations in relation to others, although quite a substantial amount of derogations; more than we would normally expect to grant. We are still concerned about the number of derogation requests we are receiving and the number of people within EMR who, you are asking, should have some involvement in MWR's business.
I know that you have been working with our staff team. There is one outstanding derogation request in relation to financial matters. I do not want to talk about that now. Our team will be getting back to you about this… I am sure some of this has been done out of good intentions to try to support them but we are very keen that it is not an EMR support to MWR which is going forward but that MWR is actually resourced itself."
[58] CMA4 at 4.2.

CuFe Business might constitute a step towards integration of the two businesses and might reduce the ability of the CuFe Business to compete independently by undermining its separate sales and brand identity and, furthermore, it was reasonably foreseeable that it might damage the goodwill of the CuFe Business. Dealing with customers and suppliers through EMR accounts undermined assurances that MWR was still operating independently and there is evidence that certain of MWR's customers were unwilling or reluctant to deal with EMR.

112. In the First Response Letter, Ausurus and EMR argue that the merging of the bank accounts did not have an impact on MWR's brand identity or goodwill because invoices were issued in the name of MWR, supplier tickets were issued by MWR, and suppliers invoiced MWR. The direction to perform the transaction through EMR's account is described as purely administrative.

113. However, as indicated by the previous paragraphs, there is evidence that the impression that MWR was part of EMR was (at least initially) putting off customers and suppliers. It was reasonably foreseeable at the time when the accounts were merged that receiving an administrative instruction to transact via EMR's accounts would strengthen doubts about the independence of EMR. The CMA believes that it was also reasonably foreseeable to the management of EMR that some of MWR's counterparties would be reluctant to trade with an EMR entity for the reasons indicated in paragraphs 41-43 above. Accordingly the CMA considers this to be a factor indicating that a penalty is appropriate irrespective of whether, in the event, the CuFe Business suffered significant harm as a result.

Seriousness of the breach concerning the failure to give the managing director of MWR and other members of the CuFe Business management team a clear delegation of authority

114. At the time that the breach was committed it was reasonably foreseeable that the failure to delegate authority unambiguously to the CuFe Business management team to take independent decisions might impair the ability of the CuFe Business to operate independently. As explained above at paragraphs 51 and 100, following completion of the merger, [the Managing Director of MWR's] and [the Commercial Director of MWR's] employment status changed from being employed by MWR to being employed by EMR. This created an incentive to act in the interest of the owners of EMR and a corresponding need for clarity about the scope of the duty and authority to run the CuFe Business independently of the Ausurus Business. Moreover, the lack of clarity about their authority to take independent management decisions took place against the context of significant staff losses suffered by the CuFe

Business. Between September 2017 and April 2018 EMR and Ausurus allowed the CuFe Business to lose, at least [number] staff without alerting the CMA to the attrition.[59] Losing staff on this scale and failing to replace them as they left cannot be described as being in the ordinary course of business. Had there been greater certainty about what steps the CuFe Business could take to retain staff in these circumstances, as well as clarity about the ability to pay annual bonuses, this might have helped to reduce the scale of such staff losses.

115. The failures to comply were due to the acts and omissions of the senior management of the Ausurus Business. These include the Chief Executive Officer and the Legal Director, who signed the compliance statements under the IEO.[60]

116. EMR asserts that it did not benefit from the breaches.[61] However, judged from the perspective of the time when the breach first occurred, ie, prior to the decision to refer, the CMA believes that EMR and Ausurus could potentially have obtained an advantage or derived benefit from the failure.[62] By losing staff they reduced the wage bill of the CuFe Business, reducing its ability to compete independently in ways that had the potential to have a material and long-lasting impact on the effectiveness of CuFe as an independent competitor to EMR. They also gained potential advantage by putting themselves in a position to integrate it rapidly once the regulatory process had been completed. Had the merger not been referred, with the consequent imposition of a monitoring trustee, the breaches would not have been detected.

Other considerations relevant to both breaches

117. Ausurus and EMR had sufficient internal administrative and financial resources available to ensure compliance[63] and had engaged external legal advisers.

118. Ausurus and EMR had previously sought derogations from the IEO, thus showing awareness of the obligation to seek derogations before deviating from the IEO. Nevertheless in these instances they chose to deviate from the IEO without consulting the CMA.

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[59] This was revealed in Annex 3 to the parties response of 12 February 2018 to paragraph 21 of the CMA phase 2 Opening Letter of 7 February 2018, which requested further information regarding the integration of the businesses including any staff changes within MWR.
[60] CMA4 at 4.5.
[61] First Response Letter at 4.3 and Second Response Letter at page 1, second introductory paragraph.
[62] CMA4 at 4.2.
[63] CMA4 paragraph 4.11.

119. Ausurus and EMR did not bring the failures to comply to the CMA's attention. The failures to comply were only identified following investigation by the Monitoring Trustee for the purpose of preparing its first Monitoring Trustee report and rectified following and instructions from the CMA.

120. For the abovementioned reasons the CMA believes that it is appropriate to impose a penalty in this case.

G. Appropriateness of the amount of the penalty

121. In determining the appropriate level of the penalty in this case, the CMA has had regard to its statutory duties and CMA4, and carefully considered all relevant facts.

122. For the reasons set out in paragraphs 105-119 above, the breaches in this case are of a serious nature and a penalty is warranted in order to achieve both general and specific deterrence.

123. The CMA has also taken into account the following aggravating factors, which suggest a higher penalty:

- The failures to comply were due to the acts and omissions of the senior management of the Ausurus Business. These include the Chief Executive Officer and the Legal Director, who signed the compliance statements under the IEO.[64]

- EMR and Ausurus potentially obtained an advantage or derived benefit from the failure.[65] They reduced the ability of the CuFe Business to compete independently in ways that had the potential to have a material and long-lasting impact on the effectiveness of CuFe as an independent competitor to EMR and put themselves in a position to integrate it rapidly once the regulatory process had been completed.

124. However, whilst the CMA has the power to impose a penalty of up to 5% of global turnover (which in this case would amount to approximately £164.4 million) the CMA does not consider that the breaches are so serious as to warrant a penalty at the upper end of the scale. In reaching that view, the CMA has taken account of the following mitigating factors in line with CMA4:

[64] CMA4 at 4.5.
[65] CMA4 at 4.2.

- Although the potential adverse effects of the breaches could have been significant, the actual adverse effect is likely to be limited.[66]

- In light of remedial action taken (at the CMA's prompting) the imposition of a penalty is not required to encourage swift compliance on the specific facts. Ausurus and EMR were co-operative when directed to remedy the breaches.[67]

125. The CMA has also had regard to the financial resources available to Ausurus and EMR. Ausurus is the parent company of EMR and the great bulk of its business is conducted through EMR. The turnover of EMR in the year to 31 December 2017 was approximately £3,288,000,000. The turnover of Ausurus in the year to 31 December 2017 (which incorporates the turnover of EMR) was approximately £3,296,000,000.[68] In the same period EMR recorded a net profit of approximately £27,000,000 and Ausurus recorded a net profit of approximately £24,000,000.

126. Taking all of these circumstances in the round, the CMA considers that a penalty of £150,000 for each of the two breaches, giving a total penalty of £300,000, is appropriate. This is of a sufficient magnitude to reflect the seriousness of the breaches and to serve as a deterrent to other companies and to EMR and Ausurus in the future, but it is far below the statutory maximum of 5% of global turnover.

127. EMR has submitted that the level of the penalty "is disproportionate in the light of the lack of real or significant harm which could have occurred."[69] However, as explained above, the relevant issue is rather the effects that the breaches might have had, considered at the time when they were committed, and without the benefit of hindsight. At approximately 0.009% of turnover and 1.25% of net profits, the CMA considers that the penalty is not disproportionate. Had the breaches resulted in more serious prejudice to the CMA's ability to remedy the substantial lessening of competition caused by the merger a far larger fine may have been appropriate.

128. The CMA notes that it first imposed a penalty for failure to comply with an IEO after the breaches in question here had taken place.[70] The CMA has taken this into account in determining the level of the penalty. The CMA may

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[66] CMA4 at 4.11, second bullet.
[67] CMA4 at 4.11, seventh bullet.
[68] Annual Reports and Consolidated Financial Statements filed with Companies House.
[69] Second Response Letter, concluding paragraphs.
[70] Penalty imposed on Electro Rent Corporation on 11 June 2018.

consider proportionately larger penalties in future cases should this prove necessary in the interests of general deterrence.

129. Ausurus and EMR are jointly and severally liable for the fixed fine of £300,000. The amount should be paid in the manner specified by the CMA.[71] Payment should be made within 28 days of the date of this decision. The penalty, or portions of it, may be paid before the specified deadline. If the whole penalty, or portions of it, are not paid before the specified deadline, then the unpaid balance from time to time shall carry interest at the rate for the time being specified in section 17 of the Judgments Act 1838.[72]

H. EMR's rights under the Enterprise Act

130. EMR and Ausurus have the following rights in relation to this penalty:

a. Pursuant to section 112(3) of the Act[73], the right to apply to the CMA within 14 days of the date on which any final notice is served on EMR and Ausurus for the CMA to specify different dates by which the penalty is to be paid and, pursuant to section 114 of the Act, the right to apply to the Competition Appeal Tribunal against any decision the CMA reaches in response to an application as described in the preceding paragraph, within the period of 28 days starting with the day on which EMR and Ausurus are notified of the CMA's decision.

b. Pursuant to section 114 of the Act, the right to apply to the Competition Appeal Tribunal within the period of 28 days starting with the day on which the final notice is served on EMR and Ausurus in relation to:

i. the imposition or nature of the penalty;

ii. the amount of the penalty; or

iii. the date by which the penalty is required to be paid.

Andrea Gomes da Silva

Executive Director, Mergers and Markets

20 December 2018

Competition and Markets Authority

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[71] Section 112(2)(f) of the Act. Any sums received by the CMA will be paid into the Consolidated Fund (section 113(4) of the Act).
[72] Section 113(1) of the Act.
[73] Section 94A(7) of the Act states that sections 112-115 the Act apply in this situation.

[The Appendices to the penalty notice are redacted.]