Penalty notice under section 110 of the Enterprise Act 2002

Anticipated acquisition by AL-KO Kober Holdings Limited of Bankside Patterson Limited

Case ME/6776/18

Addressed to:
AL-KO Kober Holdings Limited

21 May 2019

The Competition and Markets Authority has excluded from this published version of the market study report information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. [Some numbers have been replaced by a range. These are shown in square brackets.] [Non-sensitive wording is also indicated in square brackets.]

Case ME/6776/18

Anticipated acquisition by AL-KO Kober Holdings Limited of Bankside Patterson Limited

Notice of a penalty pursuant to section 112 of the Enterprise Act 2002

1. The Competition and Markets Authority ('CMA') gives notice under section 110 and 112 of the Enterprise Act 2002 ('EA02') of the following:

   (a) on 21 May 2019, the CMA imposed a penalty on AL-KO Kober Holdings Limited ('AL-KO') under section 110 EA02 because it failed, without reasonable excuse, to comply with the requirements imposed on it by the notices served on it under section 109 EA02 on 29 October 2018 ('the First s.109 Notice') and 27 February 2019 ('the Second s.109 Notice') (together the 'Notices') by the required date;

   (b) the penalty is a fixed amount of £15,000;

   (c) AL-KO is required to pay the penalty in a single payment, by cheque or bank transfer, to an account specified to AL-KO by the CMA; by close of banking business on the date which is 28 days from the date of service of this notice on AL-KO;

   (d) AL-KO may pay the penalty earlier than the date by which it is required to be paid;

   (e) under section 112(3) EA02, AL-KO has the right to apply to the CMA within 14 days of the date on which this notice is served on AL-KO for the CMA to specify a different date by which the penalty is to be paid;

   (f) under section 114 EA02, AL-KO has the right to apply to the Competition Appeal Tribunal against any decision the CMA reaches in response to an application under section 112(3) EA02, within the period of 28 days starting with the day on which AL-KO is notified of the CMA's decision;

   (g) under section 114 EA02, AL-KO has the right to apply to the Competition Appeal Tribunal within the period of 28 days starting with the day on which this notice is served on AL-KO 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;

(h) where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal under section 114 EA02, the CMA may recover the penalty and any interest which has not been paid; in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.

Structure of this document

2. This notice is structured as follows:

(a) section A sets out an executive summary of this notice;

(b) section B sets out the factual background to this notice in chronological order;

(c) section C sets out the legal assessment and considers the statutory requirements for imposing a penalty under section 110 EA02 and sets out the reasons for the CMA's finding that AL-KO has failed to comply with the Notices without reasonable excuse; and

(d) section D sets out the CMA's reasons for finding that a fixed penalty of £15,000 is appropriate and proportionate in this case.

A. Executive Summary

Failures to comply with s.109 Notices

3. The CMA reviewed the anticipated acquisition by AL-KO of Bankside Patterson Limited (BPL, together 'the Parties') under the merger control provisions of the Enterprise Act 2002 (the 'Inquiry') beginning in August 2018, when it received a case team allocation request.

4. The CMA finds that AL-KO failed to produce certain responsive documents in relation to both the Notices and therefore has failed to comply with the requirements of these Notices. In particular:

(a) on 12 March 2019, AL-KO produced almost 500 documents responsive to the First s.109 Notice, over four months after the (extended) deadline of 9 November 2018 for producing documents; and

(b) on 12 March 2019, AL-KO also produced a further 20 documents responsive to the Second s.109 Notice, approximately one week after the deadline of 5 March 2019 for producing documents.

5. This late production of a large volume of documents, which accounted for a significant proportion of the documents required to be produced by the Notices (500 out of the approximately 3,000 documents that were responsive to the Notices), was part of a pattern of errors in responding to the CMA's statutory notices. The late production of the documents had an adverse impact on the conduct of the Inquiry, requiring the CMA to extend the statutory timetable for the Inquiry under section 34ZB(1) of EA02.

No reasonable excuse

6. The CMA finds that AL-KO has no reasonable excuse for its failure to comply with the Notices.

7. The CMA has carefully considered AL-KO's submissions that it made an 'innocent and non-deliberate human error' in the execution of its search methodology. The CMA finds, however, that the explanations provided by AL-KO do not amount to a 'reasonable excuse' for the purpose of EA02. The CMA finds the errors were negligent and not caused by an event beyond the control of AL-KO, or the result of a significant and genuinely unforeseeable or unusual event.[1]

Decision to impose a penalty

8. The CMA has considered AL-KO's submissions that the CMA should apply its discretion not to impose a penalty or, alternatively, impose one at a materially lower level.

9. The CMA finds that AL-KO's general approach to engagement with the CMA in the Inquiry was transparent and cooperative and notes that the breaches that give rise to this penalty (while part of a pattern of errors) occurred in relation to a single custodian (albeit a key custodian, the CEO of AL-KO), within the context of a search conducted across several sites and jurisdictions. The CMA also notes that the breaches were a result of negligence, and that there is no suggestion that AL-KO sought to intentionally withhold responsive documents.

10. The CMA finds, however, that it is appropriate and proportionate to impose a penalty. The failure to comply was serious, in particular because it resulted in the late production of a material volume of documents, involving the CEO of the acquiring business, on matters of central importance to the CMA's investigation. It was the third material failure to respond adequately to a

[1] As described in paragraph 4.4 of Administrative penalties: Statement of Policy on the CMA's Approach (CMA4, referred to as 'the Guidance' in this notice).

statutory request for internal documents during the course of the investigation and had an adverse impact on the conduct of the CMA's Inquiry.

11. The imposition of an administrative penalty under section 110 EA02 is also necessary to impress the seriousness of a failure to comply adequately with a section 109 notice, without a reasonable excuse. Complete and accurate information is crucial to enable the CMA to make evidence-based decisions and generally for the quality and effectiveness of its work in the public interest. Requests for information and documents are therefore a key tool for the CMA to collect the information it needs to carry out its merger investigations. For this reason, the CMA considers that it is of utmost importance to the CMA's ability to conduct effective investigations that merger parties have due regard to the requirements imposed on them by, among other things, section 109 EA02, and adopt adequate approaches to complying with those obligations.

12. Taking these factors in the round, the CMA finds that a penalty of £15,000 (which is below the statutory maximum of £30,000 for a penalty in a fixed amount) is an appropriate and proportionate penalty in this case.

B. Factual Background

13. The Parties both produce caravan chassis which they supply to UK caravan manufacturers. BPL manufactures chassis for caravan holiday homes, leisure lodges and residential park homes (together, static accommodation) and AL-KO manufactures chassis for touring caravans, ie those designed to be towed behind a motor vehicle.

14. AL-KO began the pre-notification process by requesting the allocation of a case team in August 2018.[2] On 13 February 2019, the CMA gave notice under section 34ZA(3) of the EA02 that the initial period in relation to the anticipated acquisition by AL-KO of BPL had commenced.

15. For reasons explained below, on 13 March 2019 the CMA published a notice under section 34ZB(1) of EA02, extending the Inquiry. The extension was cancelled on 27 March 2019.

16. The CMA cleared the merger on 24 April 2018.

[2] Given the extended pre-notification period, and the absence of certainty the transaction would proceed, the case team was stood down in January 2019, although following the signing of the SPA later that month the core original case team was able to be reassigned to work on the case.

The First s.109 Notice

17. Under section 109 of EA02, the CMA has the power to issue a notice requiring a person to provide documents and information for the purpose of assisting the CMA in carrying out any functions in connection with a matter that is the subject of a possible reference under section 33 EA02.

18. During the pre-notification period, the CMA provided AL-KO's solicitors (hereafter 'AL-KO') with a copy of a draft section 109 notice on 23 October 2018. This required the production of internal documents that were necessary for the CMA's Inquiry and included those disclosing the rationale for the Merger, relating to AL-KO's previous exit from the static accommodation chassis market in the UK and AL-KO's consideration of re-entering that market, and its setting of prices for various products in (or being considered for) the market. Having considered AL-KO's representations on the draft, the CMA served the notice in final form on 29 October 2018, with a deadline for response of 6 November 2018.

19. AL-KO engaged with the CMA on an appropriate search methodology to the requirements set out in the First s.109 Notice. The CMA provided comments on AL-KO's proposed methodology, both prior to the search commencing and whilst the search and review took place.[3]

20. On 9 November 2018, having previously requested and been granted an extension by the CMA, AL-KO produced its responsive documents and provided a copy of the final keywords and search methodology it had adopted.[4]

Identification of errors in 2018

21. On 30 November 2018, the CMA made a non-statutory request for information ('RFI'), in which it requested a full copy of a slide deck presentation (from a potential customer to AL-KO), an extract of which had been incorporated within an internal AL-KO document provided to the CMA in response to the First s.109 Notice.

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[3] This is consistent with paragraphs 26 to 28 of 'Guidance on requests for internal documents in merger Investigations', hereafter 'CMA100', the CMA's statutory guidance on document requests. CMA100 came into force on 15 January 2019 and reflects the CMA's existing practice of engaging with parties where practicable on draft information requests.

[4] AL-KO submitted that the relevant factual context included that responding had involved it searching for internal documents over a two-year period by applying 53 search terms (responding to seven questions), to the IT environment of eight custodians, based in three different locations around the world, operating different IT systems. This resulted in over 20,000 responsive documents being identified, and AL-KO had appointed forensic IT specialists to assist with this review

22. AL-KO responded on 7 December 2018, declining to produce the document on the basis that it was subject to a non-disclosure agreement. The CMA reverted that afternoon and requested that AL-KO explain why the slide deck was not produced in response to the CMA's First s.109 Notice and, if it was responsive, to produce it promptly and to describe what steps, if any, it proposed to take concerning production of any other material responsive to the First s.109 Notice which may not yet have been produced.

23. AL-KO produced the document the next working day, 10 December 2018, and explained that it was exploring why the particular document had not been produced in response to the First s.109 Notice.

24. On 11 December 2018, AL-KO explained it had identified that two search terms were omitted in error from the search coding developed by AL-KO's German IT team and that this omission had occurred in respect of one question. AL-KO submitted that as documents containing the terms were produced by the other search terms the coding error would not have been apparent from the documents produced by the search. AL-KO offered to provide affidavits from the relevant individuals 'to confirm the sequence of events that led to the error'.

25. The CMA reverted the same day, stating it expected production of the documents responsive to the First s.109 Notice, but provided:

> In light of the fact that: (i) the source of the omission has been identified as a technical oversight which in the circumstances may not have been readily apparent to AL-KO in the UK; (ii) steps have promptly been taken to investigate and remedy the situation; and (iii) AL-KO has openly acknowledged that further documents, now being identified, may have been omitted as a result of the error, the CMA is satisfied that AL-KO and its advisers are taking the matter seriously; such that the taking of statements or other steps is not considered necessary. Please note that the CMA treats non-compliance with statutory notices very seriously and would urge the Parties and their advisers to take care in ensuring the comprehensiveness of any future submissions.

26. AL-KO duly conducted further searches and on 18 December 2018 produced an additional 253 documents and 5 Excel spreadsheets. On the same day, AL-KO informed the CMA that 'an additional issue' relating to a different AL-KO custodian's inbox had been discovered. Searches of the custodian's inbox had only been conducted by the custodian's personal assistant ('PA') in respect of the specific project file for the transaction rather than the custodian's whole inbox. This had led to responsive documents not being

identified. Following performance of the relevant searches without the errors then identified, a further 388 documents were subsequently produced to the CMA on 20 December 2018.

The Second s.109 Notice

27. On a call with the CMA on 15 February 2019, AL-KO's CEO, [✂], suggested that if AL-KO had been unable to acquire BPL it may instead have looked to acquire [✂].

28. Later on 15 February 2019, the CMA issued a RFI requesting AL-KO to 'provide any documents prepared by or for, or received by, AL-KO senior management (whether prepared internally or by external consultants) within the last three years, which consider, discuss or evaluate a potential acquisition by AL-KO [✂]'.[5]

29. On 21 February 2019 AL-KO responded, telling the CMA,

> [The CEO] and [a senior executive] have both confirmed that, to their knowledge, no such documents have been prepared internally or externally. The prospect of acquiring [✂] was never evaluated. It was simply mentioned by [the CEO] on the call as a response to a hypothetical question. [The CEO] did not produce or submit anything to the AL-KO group that investigated or indeed proposed this possibility. On this basis, AL-KO has not undertaken any additional searches of its IT environment.[6]

30. As a document search had not been undertaken[7] (and in order to ensure its analysis of the appropriate counterfactual was robust), the CMA served AL-KO with the Second s.109 Notice on 27 February 2019 with a response date of 5 March 2019, requiring production of:

> all documents (including emails) produced, received or sent by [the CEO] and/or [a senior executive] and/or any individual who reported directly to one or both of these individuals, between 01 January 2016 and 31 December 2018 and which consider, evaluate or refer to a possible acquisition by AL-KO or one of its group companies of [✂].[8]

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[5] CMA Questions dated 15 February 2019, no.1.
[6] AL-KO Response to CMA questions dated 15 February 2019, 21.02.2019, paragraphs 1.1 – 1.2.
[7] AL-KO submitted in its Response Letter (as described in paragraph 38) that a document search had not been required to respond to the RFI, and that in the circumstances that approach was reasonable.
[8] As AL-KO observed in its response produced in paragraph 32, these documents may have been expected to be produced in response to the First s.109 Notice, 'Question 4. To the extent that AL-KO has in the past two years carried on or has considered, evaluated, or taken any steps towards carrying on the business of designing and/or manufacturing chassis for static accommodation in the UK, please provide any Internal Documents which discuss

31. AL-KO responded on 5 March 2019 and, having conducted a search, produced four responsive documents which comprised chains of correspondence between [the CEO] and [✂], which indicated that the two had once met to discuss, amongst other matters, the subject of AL-KO's possible interest [✂].[9]

Further Responses to First and Second s.109 Notices

32. On 5 March 2019, AL-KO notified the CMA that in responding to the Second s.109 Notice, it had identified that some potentially responsive documents might not have been provided in AL-KO's responses to the Notices and set out the steps it would take. AL-KO observed:

> Finally, the CMA will no doubt question why the attached emails were not provided with the original Section 109 Notice. We have reviewed the entire process and with the platform provider have raised this question with AL-KO's IT team… Some initial searches of [the CEO's] emails were carried out within Outlook in the UK and there may have been limitations to the search functionality of Outlook which were not identified at the time. They can think of no other reasonable explanation given that they were picked up by this search. The rest of the searches were carried out from Germany using Powershell which we understand is more sophisticated. We have asked the searches of Peter's email inbox to be run again using Powershell so that we can compare the results with what was originally reviewed.

33. On 12 March 2019, AL-KO produced 517 further documents which were responsive to the Notices (principally in relation to the First s.109 Notice).[10] In a call on 13 March 2019, the CMA reminded AL-KO of the requirement in the Notices to provide a methodology for the searches that had produced the further 517 documents and invited AL-KO to provide a 'compliance statement'

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the rationale for AL-KO's decision and the consideration for such decision' and Question 5 '… Please provide any Internal Documents produced between 1 September 2016 and 30 September 2018 which consider or set out AL-KO's pricing strategies and/or how prices to particular customers are to be set, in particular Internal Documents which refer to how prices set by AL-KO are influenced by the chassis offer of other suppliers in the UK or overseas.'

[9] AL-KO submitted in its Response Letter that these documents should be understood in the context of these individuals having had many contacts over a number of years, and these documents related to the '*one occasion* [they] *had briefly met to discuss the possible interest* [✂]'.

[10] AL-KO observed that many of these documents were 'family' documents. A further 20 documents responsive to the CMA's Second Section 109 Notice, which were required to be produced by 5 March 2019, were also received on 12 March 2019. AL-KO explained in its Response to the Provisional Decision that 'these documents were produced after the content of initially responsive documents and the emerging problems with Outlook search led to additional search terms being run as a precaution' and noted it made the CMA aware of the approach it was taking.

signed by [the CEO], to the effect that AL-KO had now fully complied with the Notices.[11]

34. The methodology statement was submitted to the CMA on 19 March 2019 and a compliance statement signed by [the CEO] was provided on 21 March 2019. AL-KO explained that further searches of [the CEO's] mailbox were undertaken with improved search functionality, using the PowerShell tool. AL-KO explained that further searches were not necessary for other UK custodians as, unlike [the CEO], these individuals have smaller mailboxes without archive storage, which AL-KO believes was the main factor underlying the deficiency of the original Outlook search of [the CEO's] email account.

35. AL-KO submitted that:

> the [original] searches performed were undertaken in good faith with the full expectation that the exercise would produce what the CMA's First s.109 Notice required. Indeed the initial searches of [the CEO's] email inbox produced a significant number of documents. There was no reason to suspect that potentially responsive emails had not been picked up by the searches undertaken. No-one was aware that the search tool involved in the search of the [CEO's] mailbox would not perform the task to any acceptable standard.

36. AL-KO did not specify what, if any, steps had been taken by [the CEO] or any other custodian to verify the completeness of the documents originally produced to the CMA in response to the First s.109 Notice.

Subsequent interaction between the CMA and AL-KO

37. On 29 March 2019, the CMA sent a letter to AL-KO informing it that it was considering whether to make a provisional decision that AL-KO, in failing to produce certain responsive documents by the prescribed deadlines, had failed to comply with the s.109 Notices served on it without reasonable excuse and, if so, whether to impose a penalty and in what amount.

38. On 5 April 2019, AL-KO sent a letter to the CMA setting out its views in response to the CMA's letter. In its response, (the 'Response Letter') AL-KO submitted that it 'has at all times endeavoured to comply and has at every stage taken the Section 109 Notices and attendant obligations seriously, engaging from the outset an e-discovery platform provider'. However, AL-KO did openly acknowledge that a series of 'errors' had been made and that 'not all responsive documents had been identified'. It submitted that these were

[11] Consistent with paragraph 36 of CMA100.

'innocent and non-deliberate human error which occurred while AL-KO was genuinely trying to achieve compliance'. AL-KO submitted that it considered the 'human errors' which occurred were unforeseen and unforeseeable.

39. Having considered AL-KO's submissions, on 30 April 2019 the CMA sent AL-KO a copy of its provisional penalty decision (the 'Provisional Decision').

40. On 8 May 2019, AL-KO provided its written representations and requested an opportunity to develop those representations orally with the Decision Maker (Response to Provisional Decision). This took place by a teleconference on 14 May 2019. AL-KO submitted that:

    (a) objectively assessed, it had a 'reasonable excuse' for the failures it regretted had been made in complying with the Notices;

    (b) even were that not the case, those circumstances should lead the CMA to exercise its discretion to impose no or a nominal penalty, or a penalty of a materially lower amount; and

    (c) that there were relevant factors the CMA should have regard to which it had not in its Provisional Decision.

41. In accordance with paragraphs 5.2 and 5.9 of the Guidance, the CMA has consulted with the CMA's General Counsel's Office on the reasons for, and level of, the penalty, set out below.

C. Legal Assessment

Relevant legislation

42. Section 110(1) EA02 provides that where the CMA considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice under section 109 EA02, it may impose a penalty of such amount as it considers appropriate (in accordance with section 111 EA02).

43. The CMA finds that the statutory requirements for imposing a penalty under section 110 EA02 are met, and that the imposition of a penalty of £15,000 is appropriate and proportionate in this case.

Statutory requirements for imposing a penalty under section 110 EA02

44. The CMA finds that AL-KO is a person within the meaning of sections 109 and 110 of the EA02 and Schedule 1 of the Interpretation Act 1978 and has failed to comply with a requirement of a notice issued under section 109 EA02, as set out below.

(a) The First s.109 Notice required AL-KO to produce responsive documents by 6 November 2018. This deadline was extended, at AL-KO's request, to 9 November 2018. On 12 March 2019, AL-KO produced further documents in response to the notice. This was over four months after the extended deadline prescribed by the notice and so constituted a failure to comply with that notice.

(b) The Second s.109 Notice required AL-KO to produce responsive documents by 5 March 2019. On 12 March 2019, AL-KO produced further documents in response to the Second s.109 Notice. This was a week after the deadline prescribed by the Second s.109 Notice and constituted a failure to comply with that notice.

45. For the reasons set out above, the CMA finds that AL-KO has failed to comply with certain of the requirements of the Notices served on it.[12]

46. For the reasons described in paragraph 25, the CMA decided not to prioritise enforcement action against the late production of documents responsive to the First s.109 Notice described in paragraphs 21 to 26 (which resulted from the IT team failing to code certain of the required search terms into the initial search or the decision of a custodian's PA to search a project folder rather than the custodian's whole inbox).

Without reasonable excuse

47. Section 110 of the EA02 provides that penalties can be imposed if a failure to comply is "without reasonable excuse". The Competition Appeal Tribunal has recently considered the concept of 'without reasonable excuse' in the Electro Rent judgment[13] finding it is 'an objective test as to whether the excuse put forward (…) was reasonable' (*Electro Rent* [69]).

48. The Guidance provides:

> The circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond [a person's] control has

[12] On the facts of this case, where the cause of failure to comply with both of the Notices, the submissions on 'reasonable excuse', and the consequences of the failures on the CMA Inquiry, were closely correlated, the CMA has exercised its discretion to enforce against both failures in a single notice and to impose a single penalty for the failure to comply with each of the Notices.
[13] *Electro Rent Corporation* v *CMA* [2019] CAT 4 ('Electro Rent').

caused the failure and the failure would not otherwise have taken place.

49. The CMA has considered AL-KO's submissions in the Response Letter and Response to Provisional Decision as to why AL-KO considered that it had a reasonable excuse. AL-KO submitted that the non-production of all responsive documents was 'a result of innocent and non-deliberate human error which occurred whilst AL-KO was genuinely trying to achieve compliance', that the inadequacy of the search tool was an issue 'that it would not be reasonable to require all involved to know or to anticipate' and that these were 'human errors which were unforeseen and unforeseeable'. AL-KO also stressed that 'individuals, and in particular, management of AL-KO have been open and co-operative in responding to the CMA'.

50. The CMA finds that these factors do not constitute a reasonable excuse for this failure to comply with the Notices. The CMA expects a person on whom a Notice is served to be responsible for ensuring the requirements are fully understood and that the CMA's Notices are complied with, including through the use of tools and methodologies which are adequate for their intended purpose.[14]

51. In its Response Letter, AL-KO acknowledged the responsibility to comply with the Notices but submitted that obligation:

> does not exclude applying appropriate and proportionate methods and efforts, with efficiency being a perfectly relevant factor, assuming there is no expectation of foreseeability that doing so jeopardises the object of responding appropriately to the CMA's requirements … to use an existing IT team; or PA or a search tool – that is not unreasonable where there is every intention and reasonable expectation of meeting the CMA's requirement and the company's statutory obligation.

52. The CMA finds that the failure which took place was not a result of the search methodology adopted by AL-KO following engagement with the CMA case team being inadequate in principle. The CMA is content the methodology was sensible and practical in the circumstances.[15]

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[14] The Guidance paragraph 4.5.

[15] In any event, as provided for in CMA100, paragraph 28 'It is ultimately the parties' responsibility to ensure that relevant material is produced in response to a document request. The CMA may engage with merging parties on whether the proposed approach is sensible and practical (and, in particular, seek to ensure that specific questions do not impose a disproportionate burden on the merging parties). The CMA may, in particular, engage with parties on the number of responsive documents generated by specific search terms in order to ensure that the approach envisaged would not result in a disproportionate number of documents being produced. The CMA will not, however, be able to pre-emptively give assurances that no breach of the section 109 notice would occur in the event that relevant material later comes to light which parties could and should have provided.'

53. In this case, AL-KO used a local Outlook search (for UK-based custodians but not for custodians located in other countries), which failed to adequately search the archived emails of a key custodian, the CEO of the acquiring business.[16] In response to questions at the oral representations as to why it did so, AL-KO explained that it had not made an active choice to adopt a different approach to searching the IT environment in the UK. Rather, it explained that with the search needing to be completed to a deadline, a different approach had arisen simply because UK searches had been undertaken by local IT staff who had been available to assist colleagues who were leading the search overseas, but had done so without agreeing a consistent approach to how searches would be conducted.[17]

54. The CMA considers that it is reasonable to expect the addressee of a s.109 Notice to understand the functionality of any tool it decides to use to interrogate its own IT environment, as well as the location of potentially responsive documents within its IT environment. Preparing an adequate response to a s.109 notice that requires the production of internal documents will involve considering the parts of the IT environment that will be searched and how this search will be carried out.[18] Prior to undertaking a search using any tool, the addressee of a s.109 Notice ought to make itself (or those who are to conduct the search) sufficiently aware[19] of the functionality of the tool being used to carry out the search in order to determine if the way that it is intended to be used will achieve compliance with the requirements of the statutory notice which has been served on it.

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[16] AL-KO explained it believed the issue arose only with a UK custodian who used archive storage with their Outlook mailbox, and had not arisen with the local searches of other mailboxes in the UK where the archived email facility in Outlook was not used (in other jurisdictions a different search tool was used). Having identified this issue, AL-KO adopted the use of the search approach it had used in non-UK jurisdictions which did allow it to search the archived Outlook files of the custodian and produce responsive documents within the relevant date range of the search. Whilst the default search settings adopted will depend on the choices made by the operator of an IT environment, the CMA does note that this explanation is consistent with information on the Microsoft Support website, which provides that for certain editions of Outlook 'By default, when you use Outlook's search tools, Outlook only searches the current mailbox. Any additional Outlook data files stored on your computer won't be searched unless you change your search scope to All Mailboxes.', https://support.office.com/en-us/article/Open-and-find-items-in-an-Outlook-Data-File-pst-2e2b55a4-f681-4b93-90cb-31d39349fb95 (accessed 29 April 2019).

[17] In any event, this submission is supported by the fact that [a member of the IT team], when the issues were identified following CMA probing, was able to identify the likely issue promptly and through limited research on Google, which made him realise that 'there do appear some problems [he] was not aware of. Indexing etc…' (further evidence submitted alongside the Response Letter). AL-KO submitted that this was evidence that the mistake was a result of innocent and non-deliberate human error. The CMA has considered this submission in relation to its discretion to impose a penalty and the level of any penalty imposed.

[18] Whilst not in force at the time of the request, the CMA's 'standard methodology question' 29(c) in CMA100 provides the addressee should 'Provide a detailed description of the methodology used to identify and produce the documents and information responsive to Question [X]. This description should identify: … (c) The parts of the custodian's IT environment that have been searched (e.g., email, local folders, shared folders, cloud services, external media etc.), and the approach taken to retrieving this data'.

[19] The Guidance, footnote 36, which provides for the purpose of the Guidance a failure to comply is committed negligently 'if P ought to have known that its conduct would result in a failure to comply with an Investigatory Requirement'.

55. In its Response to the Provisional Decision, AL-KO submitted that it was surprising that the CMA had found using Outlook to search a mailbox was negligent. This misunderstands (and mischaracterises) the position set out in the Provisional Decision. The CMA had provisionally found, and finds in this decision, that the tool used to carry out a search must be able to access all potentially relevant emails that fall within the scope of a given question. For example, where certain emails relating to a custodian that fall within the scope of a request for internal documents have been archived, the way a tool is used to search for documents must be able to search those archived emails. In some cases, Outlook should be able to effectively search for all responsive documents (either because responsive emails have not been archived or because Outlook is used to search for archived emails). That was, however, not the case in relation to the archived emails of one of the key custodians, AL-KO's CEO, for the purposes of the First s.109 Notice.

56. The CMA finds that adopting a search approach that was inadequate to comply with the specific requirements of the Notices, and which AL-KO ought to have known would be inadequate, is not a 'human error [] which [is] unforeseen and unforeseeable' as submitted by AL-KO; rather, it is an error which could and should have been foreseen by AL-KO. It is distinct from the 'significant and genuinely unforeseeable or unusual event and/or an event beyond [a person's] control has caused the failure and the failure would not otherwise have taken place' described in the Guidance.[20]

57. AL-KO also submitted in its Response Letter that it is 'not reasonable in every case to expect a custodian to check the completeness of the documents originally produced to the CMA', that 'in many circumstances, it is quite reasonable for a custodian to believe that an electronic search carried out by reasonably competent people acting in good faith would produce the required documents'. AL-KO properly acknowledged 'that in some cases doing so could be a requirement, … bearing in mind the proportionality' but submitted this was not a case where reviewing an index might reveal an error in the process and that 'to require all custodians to go through lists of all responsive documents to determine if any are missing could take a considerable number of hours or days and would be virtually guaranteed to be inaccurate'. In its Response to the Provisional Decision it developed those submissions.

58. However, as noted in paragraphs 54 and 56, it is the failure to adopt an appropriate search of the particular custodian's IT environment for the relevant period that is the focus of the CMA's finding, rather than any failure to

[20] The Guidance, paragraph 4.4, this error is unlike the illustrative example provided in the Guidance of a wider IT failure which prevented a deadline being met.

adopt a quality assurance process. In any event, as AL-KO has not indicated that a quality assurance process was carried out by custodians in respect of its response to the First s.109 Notice (and the methodology statements provided by AL-KO suggest that no such quality assurance process took place), the CMA does not find the abstract submission that a quality assurance process may have risked not identifying the failure can constitute a reasonable excuse for the purpose of EA02.[21]

D. Appropriateness of imposing a penalty at the level proposed

Appropriateness of imposing a penalty

59. Having had regard to its statutory duties and the Guidance, and having considered all relevant facts, the CMA finds that the imposition of a penalty is appropriate. In reaching this view, the CMA has considered the seriousness of the failure including the adverse impact of the failure on the Inquiry involving the need for an extension of the Inquiry due to a significant number of responsive documents being produced late and separately the need to review such documents at a late stage of the Inquiry, as well as having regard to the need to achieve general deterrence.

60. The CMA also considered AL-KO's submission that as this was the first time the CMA had penalised an infringement of this type (a s.109 notice issued in pre-notification), the CMA should apply its discretion to not apply a penalty or adopt a lower or nominal amount. The CMA does not accept that submission. Imposing a penalty is consistent with the CMA's practice in setting penalties, and the approach set out in the Guidance (and the CMA's wider practice and guidance on setting penalties in other competition 'tools'). The CMA considers that the penalty notice addressed to *Hungryhouse Holdings Limited* in November 2017[22] made clear to merger parties and their advisers the seriousness with which the CMA treats achieving full compliance with its requests for internal documents, and the subsequent necessity of conducting searches for internal documents adequately.

61. This Decision now sets out the factors the CMA has had regard to in determining that it is appropriate to impose a penalty and at what level.

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[21] The CMA has not needed to make a finding on this hypothetical process, however the CMA considers a reasonable and proportionate quality assurance check by custodians may have identified that certain of the over 500 documents were missing and may have led to the error being identified and rectified earlier. It is the sort of step that may have captured the earlier errors by AL-KO, such as the custodian's PA only searching a project file and not other potentially relevant emails.

[22] *Penalty notice under section 110 of the Enterprise Act 2002 – Addressed to Hungryhouse Holdings Limited, Anticipated acquisition by JUST EAT plc of Hungryhouse Holdings Limited, Case ME/6659-16, 24 November 2017*'.

Adverse impact on the Inquiry and Seriousness

62. The failure was a serious one, with a significant number of documents not produced from a key custodian, AL-KO's CEO, and was part of a pattern of errors in responding to the CMA's statutory notices, that resulted in a delay to the Inquiry and a diversion of resources in the Inquiry at increased public expense. In particular, following AL-KO's production of 517 documents on 12 March 2019, after the deadlines prescribed in the Notices, the CMA had to:

(a) extend its Inquiry under section 34ZA(3) EA02 by 10 working days; and

(b) review the entire body of documents to assess their relevance to the Inquiry; conducting this unexpected document review at this late stage of the Inquiry (which AL-KO recognised was 'an onerous exercise for the CMA at that stage of the Inquiry'), when the systematic review of internal documents had already been conducted by the case team, required duplicative work and which was an inefficient burden on public resources.

63. Although the CMA has had due regard to AL-KO's regret for the 'onerous exercise' that it had caused, and its submission that the documents did not ultimately change the CMA's assessment of the transaction, the need to conduct a review of these documents during the Phase 1 Inquiry at such a late stage disrupted the Inquiry.

64. The Guidance provides 'The CMA may be more likely to impose a penalty for failure to comply with Investigatory Requirements where the CMA has provided a draft request or set a deadline for compliance which takes P's comments into account.'[23] In this case the CMA provided the First s.109 Notice in draft, engaged with AL-KO on the scope and search methodology to identify responsive documents, and following a request from AL-KO granted an extension to the deadline prescribed in the First s.109 Notice.

65. AL-KO's Response Letter submits that 'human error can creep into any process, especially one undertaken under tight timescales' (while also noting that 'the CMA might object to the term "tight timescales"'). The letter also submits that the 'fact that they are agreed to or necessarily extended does not alter the fact they are relatively short for what are extensive document searches'.

66. In light of the CMA's engagement on the First s.109 Notice, as described in paragraph 64, the CMA considers that the fact the First s.109 Notice had to be complied with within a deadline which AL-KO now characterises as 'tight'

[23] The Guidance paragraph 4.3.

(but which was set following a process of engagement between the CMA and AL-KO and was considered to be proportionate by the CMA) does not militate against imposing a penalty in this case.

General deterrence

67. The CMA requires a wide range of information to discharge its functions. The availability and receipt of complete and accurate information is crucial to enable it to make evidence-based decisions and generally for the quality and effectiveness of its work. Requests for information and documents are therefore a key tool for the CMA to collect the information it needs to carry out its merger investigations.

68. The CMA accordingly considers that it is of utmost importance to the CMA's ability to conduct effective investigations that parties have due regard to the requirements imposed on them by, among other things, section 109 EA02. The imposition of an administrative penalty under section 110 EA02 is critical to achieve deterrence, i.e. to impress on those who may be subject to investigatory requirements in future, the seriousness of a failure to comply with a section 109 notice, without a reasonable excuse.

69. The CMA has considered AL-KO's submissions on the reputational impact of a penalty on it, and its position that this should be a relevant factor to consider in assessing whether imposing a penalty is appropriate and, if so, its level. However, the CMA notes that the effect of the legislative scheme is that administrative penalties are published and therefore Parliament has chosen that they may have a reputational impact on those who are penalised. Accordingly, the CMA considers that this is not a reason not to impose a penalty in this case.

Other considerations relevant to the breaches

70. The CMA finds that AL-KO had available to it sufficient internal administrative and financial resources to ensure compliance.[24] While AL-KO rectified the failures prioritised in this notice, and others which were identified in the course of the Inquiry, committing an appropriate amount of internal and external resources to do so, this in and of itself is not sufficient to lead the CMA to decide not to prioritise penalising these latest failures which disrupted the CMA's Inquiry and for which it is appropriate to achieve deterrence.

[24] The Guidance at paragraph 4.11.

71. For the above-mentioned reasons, the CMA finds that it is appropriate to impose a penalty in this case.

Appropriateness of the amount of the penalty imposed

72. Consistent with its statutory duties and the Guidance[25], the CMA has assessed all relevant circumstances to determine an appropriate level of penalty.

Aggravating factors

73. As set out in paragraphs 62 and 63, the failures to comply with the Notices disrupted the CMA's Inquiry and gave rise to a serious failure resulting in the late production of over 500 responsive documents which should have been produced in response to the CMA's Notices (over four months earlier for the vast majority of these documents).

74. The CMA also considered the pattern of errors described in paragraphs 21 to 26 be an aggravating feature when setting the level of penalty. When the earlier errors were identified in late 2018, the CMA, when informing AL-KO that it was not minded to prioritise further action at that time, emphasised 'that the CMA treats non-compliance with statutory notices very seriously and would urge the Parties and their advisers to take care in ensuring the comprehensiveness of any future submissions.' The CMA notes that a further error was identified and resolved at that time, but that the failures resulting from the inadequate search were not and therefore also impacted the response to the Second s.109 Notice. However, on the facts of this case the CMA has given this factor limited weight (ie it has not treated this as a case of 'recidivism'),[26] in light of this error not coming to AL-KO's attention until it was responding to the Second s.109 Notice, at which time it promptly notified the CMA of the issue, and in light of AL-KO's wider approach to engagement with the CMA.

Mitigating factors

75. In its Response to the Provisional Decision, AL-KO invited the CMA to have regard to the reputational impact on it of an adverse penalty decision. AL-KO's 'position is that it sought to co-operate in good faith, openly and fully with the CMA' and 'that it has been transparent and cooperative'. The CMA finds that those submissions are consistent with how AL-KO (and its advisers)

[25] Ibid.
[26] The Guidance 4.11.

conducted themselves in the Inquiry. As set out in paragraphs 25 and 70, the CMA finds that AL-KO sought to promptly remedy the errors which led to the failures identified in this decision. It was, in part, that approach to the conduct of the Inquiry which in late 2018 in part led the CMA not to prioritise taking action in relation to errors which came to light then, and it is also a factor the CMA weighs as a factor as to penalty in this decision. Its absence would have led to a higher penalty.

76. Although the CMA finds that the explanation of 'human errors' leading to the failures to comply with the Notices does not constitute a 'reasonable excuse' for the purpose of EA02, it has had regard to the nature of the errors when setting the appropriate level of penalty which otherwise would have been higher. Although the CMA has assessed the failure which occurred as serious, the CMA finds the failure was not 'flagrant'.

77. AL-KO submits that the documents that were not produced were not ultimately key to the CMA's Inquiry and did not change the outcome of the Inquiry. The CMA accepts that this is broadly correct and so does not treat the nature of the documents produced in this case as a feature which increases the level of penalty. However, the documents that were not produced could have been key to the CMA's Inquiry, given that they were emails from a key custodian, AL-KO's CEO, about matters that were integral to the substantive assessment of the case, and so the CMA does not accept that this can be treated as a mitigating factor as to the level of penalty.

78. Finally, AL-KO submits that the search methodology adopted was proportionate. As set out in paragraph 52, the CMA notes AL-KO engaged with the CMA on the search methodology and the CMA did not (and still does not) consider the search methodology used by AL-KO to be inadequate in principle. The breach in this case arose because of inadequate search, brought about by an error which ought not to have been made. On that basis the CMA finds the adoption of an otherwise proportionate methodology is not a factor which mitigates this breach.

79. The CMA also considered a number of submissions developed or advanced by AL-KO in its Response to the Provisional Decision but did not accept them:

    (a) AL-KO submitted the CMA was required to consider the level of its penalty by comparison to its previous published infringement decisions, and that not doing so would be a failure to have regard to required relevant considerations. The CMA disagrees and notes that the Competition Appeal Tribunal has observed that previous penalty decisions, in relation to Competition Act 1998 infringements, have limited precedent value, other than in matters of legal principle, because each

case is very dependent on its facts (*Ping v CMA* [2018] CAT 13 [233] and *Kier Group Plc v OFT* [2011] CAT 3 [116]). The CMA's position is consistent with the Guidance, which provides that the CMA will decide whether to impose an administrative penalty, and at what amount, on a case-by-case basis, having regard to the Guidance and taking into account all relevant circumstances. The CMA has adopted this approach in this case and has identified and considered above the relevant factors when reaching a view in the round as to what level of penalty is appropriate and proportionate.

(b) AL-KO also submitted that the CMA was not entitled to take the approach taken in previous administrative penalty cases of considering all the relevant circumstances and taking a view in the round as to the appropriate and proportionate level of penalty; rather that it was necessary for the CMA to adopt a 'starting point' and then describe its treatment of the aggravating and mitigating factors it had found. The CMA disagrees and notes that considering the relevant factors in the round is consistent with the Guidance[27] and the judgment of the Competition Appeal Tribunal in *Electro Rent*.[28]

Financial resources available to AL-KO

80. Consistent with the Guidance, the CMA has also had regard to certain of the financial indicators relating to the financial resources available to AL-KO[29], and its UK subsidiary AL-KO Kober Limited[30] respectively:

(a) Profit after tax – £350,242 and £2,961,000;

(b) Net assets with dividends added – £ 2,956,692 and £9,899,000; and

(c) Turnover – AL-KO as intermediate holding company received dividends from AL-KO Kober Limited which had a turnover of £47,645,000.

81. These indicators show that AL-KO has significant resources available in respect of the imposition of a penalty of £15,000 for the breach in question in this case.

[27] Paragraph 4.1 the Guidance.
[28] *Electro Rent* [75].
[29] AL-KO Holdings Limited Full accounts made up to 31 December 2017.
[30] AL-KO Kober Limited Full accounts made up to 31 December 2017.

Conclusion on the imposition of a penalty

82. Although the CMA has the power to impose a penalty of up £30,000 the CMA does not consider that the breaches in this case are so serious or flagrant as to warrant a penalty at the upper end of the scale.

83. In all the circumstances, the CMA considers that the imposition of a penalty of £15,000 is appropriate on the basis that it: (i) would reflect the seriousness of the breaches, and the adverse impact on the CMA's Inquiry, (ii) would act as a deterrent to other persons in the future, and (iii) is substantially below the statutory maximum of £30,000 for a penalty in a fixed amount and is not disproportionate in this case.

Signature:

Colin Raftery, Senior Director of Mergers

Date: 21 May 2019

Competition and Markets Authority