Case ME/6762/18

Completed acquisition by Nicholls' (Fuel Oils) Limited of the oil distribution business of DCC Energy Limited in Northern Ireland

Notice of a penalty pursuant to section 94A of the Enterprise Act 2002

1. Pursuant to sections 94A and 112 of the Enterprise Act 2002 (**EA02**), the Competition and Markets Authority (the **CMA**) hereby gives notice of the following:

   a) The CMA has imposed a penalty on Nicholls' (Fuel Oils) Limited (**Nicholls**) under section 94A of the EA02 because Nicholls has, without reasonable excuse, failed to comply in certain respects with the requirements imposed on Nicholls by the Initial Enforcement Order (the **IEO**) issued by the CMA under section 72 of the EA02 on 8 June 2018.

   b) The penalty is a fixed amount of £120,000 for Breach 1 (relocation of staff), £20,000 for Breach 2 (use of Nicholls mini-tanker and driver) and £6,000 for Breach 3 (compliance statements), giving a total penalty of £146,000.

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

   d) Nicholls may pay the penalty earlier than the date by which it is required to be paid.

   e) Pursuant to section 112(3) of the EA02[1], Nicholls has the right to apply to the CMA within 14 days of the date on which this notice is served on Nicholls for the CMA to specify different dates by which the penalty is to be paid.

   f) Pursuant to section 114 of the EA02, Nicholls has the right to apply to the Competition Appeal Tribunal (the **CAT**) against any decision the CMA

[1] Section 94A(7) of the EA02 states that sections 112-115 of the EA02 apply in this situation.

reaches in response to an application under section 112(3) of the EA02, within the period of 28 days starting with the day on which Nicholls is notified of the CMA's decision.

g) Pursuant to section 114 of the EA02, Nicholls has the right to apply to the CAT within the period of 28 days starting with the day on which this notice is served on Nicholls 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 of the 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.

c) Section C sets out the legal framework to this notice.

d) Section D sets out the legal assessment and considers the statutory requirements for imposing a penalty under section 94 of the EA02 and sets out the reasons for the CMA's findings that Nicholls has failed to comply in certain respects with the IEO without reasonable excuse.

e) Section E sets out the CMA's reasons for finding that a penalty of £120,000 for Breach 1 (relocation of staff), £20,000 for Breach 2 (use of Nicholls mini-tanker and driver) and £6,000 for Breach 3 (compliance statements), giving a total penalty of £146,000 is appropriate and proportionate in this case.

A. Executive Summary

Failures to comply with the IEO

3. The CMA has investigated the completed acquisition by Nicholls[2] of the former oil distribution business of DCC Energy Limited in Northern Ireland (the **ex-DCC business**[3]) (the **Merger**).

4. The CMA finds that Nicholls failed to comply in certain respects (as set out in more detail below) with the IEO. The failures to comply comprised the following conduct:

   a) Nicholls moved the staff of the ex-DCC business located at 197 Airport Road, Belfast (the **ex-DCC Premises**) to premises used and occupied by the Nicholls business at [✂] (the **Nicholls Premises**) between 29 June and 2 July 2018. This move occurred prior to the CMA giving its written consent for such action to be taken, contrary to paragraphs 4(a), 5(a) and 9 of the IEO. This failure to comply is referred to as **Breach 1** in this decision.

   b) A Nicholls-owned and branded mini-tanker and drivers employed by Nicholls were used to make deliveries to domestic customers of the ex-DCC business. Whilst the decisions to use the Nicholls mini-tanker and drivers in this way appear to have been taken before the IEO commenced, the CMA is of the view that any deliveries made on the basis of these decisions after the IEO commenced required consent from the CMA. Nicholls did not seek the CMA's consent under the IEO to do so, contrary to paragraphs 4(c), 5(a), 5(e)(i), 5(l) and 9 of the IEO. This failure to comply is referred to as **Breach 2** in this decision.

   c) Failing to provide certain compliance statements to the CMA by the deadline specified in paragraph 7 of the IEO, specifically, the compliance statements Nicholls was required to provide the CMA on 17 August, 31 August and 14 September 2018. This failure to comply is referred to as **Breach 3** in this decision.

No reasonable excuse

5. The CMA finds that Nicholls has no reasonable excuse for any of its failures to comply with the IEO. The CMA has carefully considered several

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[2] Nicholls company number NI005816.
[3] Note: the former oil distribution business of DCC Energy Limited in Northern Ireland has also been referred to as 'the acquired DCC business' in various documents produced during the course of the CMA's investigation.

submissions made by Nicholls but does not consider that the explanations provided for its actions amount to a reasonable excuse. Moreover, the failures were not caused by a significant and genuinely unforeseeable or unusual event. Nor were they caused by an event beyond the control of Nicholls.[4]

Decision to impose a penalty

6. The CMA considers that it is appropriate to impose a penalty in the interests of general deterrence and because of the serious and in some respects flagrant nature of the breaches.

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 Nicholls.

8. The CMA considers that a penalty of £146,000 (which is below the statutory maximum of 5% of the total value of the global turnover of the enterprises owned or controlled by Nicholls) is an appropriate and proportionate penalty.

B. Factual Background

9. On 22 March 2018, Nicholls entered into a business transfer agreement with DCC Energy Limited (**DCC Energy**), a wholly-owned subsidiary of DCC plc, for the acquisition of the ex-DCC business. On 30 April 2018 this acquisition completed. The transaction was not notified to the CMA but was identified as warranting an investigation by the CMA's mergers intelligence function.

10. On 7 June 2018 the CMA sent an enquiry letter to Nicholls requiring information about the transaction.

11. On 8 June 2018 the CMA made the IEO applying to Nicholls. The IEO required, among other things, that Nicholls: 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 (paragraphs 6 and 7); and to notify the CMA immediately of any suspected breach of the IEO (paragraph 9). Under the IEO no act or omission constitutes a breach of the IEO and nothing in the IEO obliges Nicholls to reverse any act or omission, in each case to the extent that it occurred or was completed prior to the IEO commencing (paragraph 3).

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[4] Administrative penalties: Statement of Policy on the CMA's Approach (CMA4, referred to as the **Guidance** in this decision) at paragraph 4.4.

12. On Friday 29 June 2018 the relocation of staff from the ex-DCC Premises to the Nicholls Premises started, with staff from the ex-DCC Premises moving into the Nicholls Premises on Monday 2 July 2018.

13. On 11 July 2018 the CMA issued directions to Nicholls to appoint a monitoring trustee (the **Monitoring Trustee**) for the purpose of securing compliance with the IEO. The Monitoring Trustee was appointed on 27 July 2018.

14. On 12 July 2018 the CMA consented to derogations to the IEO, including to staff of the ex-DCC business being relocated to the Nicholls Premises, subject to certain conditions.

15. On 17 July 2018 the CMA's case team received an anonymous letter dated 10 July 2018 which said that the ex-DCC business "has relocated to Nicholls' Fuel Oil Ltd owned premises".

16. On 3 August 2018 the CMA consented to a further derogation to the IEO for certain temporary appointments of staff to the ex-DCC business to help operate the business.

17. On 9 August 2018 the Monitoring Trustee provided the CMA with its initial report. A non-confidential version of this report was provided to Nicholls.

18. On 21 August 2018 the CMA consented to a further derogation to the IEO, allowing the appointment of [✂] as acting General Manager of the ex-DCC business for the duration of the IEO, subject to the execution of a hold-separate agreement between Nicholls and [✂].

19. On 4 September 2018 the Monitoring Trustee provided the CMA with its second report. A non-confidential version of this report was provided to Nicholls.

20. On 19 September 2018 the CMA launched its inquiry into the Merger and issued directions to Nicholls to appoint a formal hold separate manager[5] for the ex-DCC business for the purpose of securing compliance with the IEO.

21. On 24 September 2018 the CMA consented to two further derogations to the IEO, one of which was to, subject to certain conditions, allow Nicholls to make

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[5] Defined in the Directions as the hold separate manager "appointed in accordance with these Directions". Paragraph 7 of these Directions provided that the functions of the hold separate manager will be to exercise day-to-day management and control of the acquired DCC business so that:
(a) it is operated separately from and competes actively with the Nicholls business;
(b) appropriate management, reporting and decision-making systems are put in place to preserve the independence of the acquired DCC business and ensure such independence on an ongoing basis;
(c) the business is maintained as a going concern with access to sufficient resources for its continued operation and development.

available a number of truck drivers on an interim basis to the ex-DCC business.

22. On 27 September 2018 the CMA issued directions to Nicholls to comply with certain obligations related to Nicholls agreeing a budget with the ex-DCC business and granting the hold separate manager the authority to independently authorise payments related to the day-to-day operations of the ex-DCC business. In the preamble to the annex to the directions the CMA stated:[6]

> *…On 4 September 2018, the CMA received a report from the [Monitoring Trustee] which identified certain actions necessary to ensure the independence and the economic viability of the acquired DCC business. Nicholls has failed to address certain actions identified by the [Monitoring Trustee] and requested by the CMA following the report.*
>
> *The CMA wishes to ensure that no action is taken pending final determination of any reference under section 22 of [the EA02] which might prejudice that reference or impede the taking of any action by the CMA under Part 3 of [the EA02] which might be justified by the CMA's decision on the reference…*

23. On 5 October 2018 the CMA consented to a further derogation to the IEO in relation to the location of one of the ex-DCC business' trucks.

24. On 18 October 2018 the CMA revoked the IEO pursuant to section 72(4)(b) of the EA02 and on 7 November 2018 decided to clear the Merger.[7]

25. In reaching this decision, the CMA has considered the evidence and information provided by Nicholls, including in response to section 109 information requests, the reports of the Monitoring Trustee and evidence and information gained from submissions and hearings during the investigation of the Merger about how the oil distribution industry operates in Northern Ireland.

26. In accordance with paragraphs 5.2 and 5.9 of the CMA's Guidance,[8] the CMA's General Counsel was consulted on the reasons for the proposed approach to, and level of, the penalty.

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[6] Directions on cma.gov.uk
[7] CMA case page.
[8] Administrative penalties: Statement of Policy on the CMA's approach (CMA4), January 2014.

C. Legal Framework

Relevant legislation

27. Section 72(2) of the EA02 provides that the CMA may, by order, for the purpose of preventing pre-emptive action, impose certain restrictions and obligations.

28. Section 72(8) of the EA02 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.

29. Section 86(6) of the EA02 provides that an order made pursuant to section 72 is an enforcement order. Sections 94(1) and 94(2) of the EA02 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 EA02 and Schedule 1 of the Interpretation Act 1978.

30. Section 94A(1) of the EA02 provides:

    a) 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.

    b) 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 or controlled by the person on whom it is imposed.[9]

31. Section 94A(8) of the EA02 defines "interim measure" as including an order made pursuant to section 72 of the EA02.

32. Section 94B(1) of the EA02 requires the CMA to prepare and publish a statement of policy on how it uses its powers to impose a financial penalty and how it will determine the level of the penalty imposed.[10]

33. Section 114 of the EA02 provides an appeal mechanism for a person on whom a penalty is imposed.

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[9] The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties)(Determination of Control and Turnover) Order 2014 (**Interim Measures Order**) makes provision for when an enterprise is to be treated as controlled by a person and the turnover of an enterprise.
[10] On 10 January 2014, the CMA published its statement of policy regarding its powers under section 94A of the EA02 amongst other provisions (the Guidance).

Relevant case law

34. The meaning of 'pre-emptive action' and role of interim orders in merger control has been considered by the CAT on a number of occasions.

35. In *Stericycle*[11] the CAT considered the meaning of pre-emptive action in section 80(1) of the EA02[12], and held that "*the word "might" implies a relatively low threshold of expectation that the outcome of a reference might be impeded*".[13]

36. In *ICE/Trayport*[14] the CAT observed that "*'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*" and held that *"[t]he word 'might' means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. 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*".[15] The CAT also held that "*… 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…*".[16]

37. More generally, in *Electro Rent*[17], the CAT noted that "*[the] CMA's role in regulating merger activity, and its ability to do so effectively, is a matter of public importance*" and agreed with the CMA's submission that interim orders serve a particularly important function where, as in the case in question, the merger has been completed before it was examined by the CMA.[18] The CAT also observed that "*[i]t is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed*".[19]

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[11] *Stericycle International LLC v Competition Commission* [2006] CAT 21 (***Stericycle***).
[12] Section 72 of the EA02 relates to orders made during a Phase 1 merger investigation. The orders made during a Phase 2 merger investigation are made under section 81 of the EA02. The definition of "pre-emptive action" for the purposes of section 81 of the EA02 is defined in section 80(10) of the EA02 and is in identical terms to the definition in section 72(8) of the EA02.
[13] *Stericycle* at [129].
[14] *Intercontinental Exchange v CMA* [2017] CAT 6 (***ICE/Trayport***).
[15] *ICE/Trayport* at [220].
[16] *ICE/Trayport* at [223].
[17] *Electro Rent Corporation v CMA* [2019] CAT 4 at [120] (***Electro Rent***).
[18] *Electro Rent* at [120].
[19] *Electro Rent* at [200].

The purpose of an IEO

38. The Supreme Court has held that "*[t]he purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets*."[20] It is of central importance to 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 before it is identified and examined by the CMA.

39. The purpose of the IEO is to prevent any action which might prejudice the merger investigation or impede the taking of any action which may be justified by the CMA's decision on a reference.[21] The broad nature of pre-emptive action is reflected in the similarly broad wording of the IEO which the CAT held in *ICE/Trayport* "*should be interpreted to give full effect to its legitimate precautionary purpose*".[22]

40. The IEO contains positive obligations on the addressees to do certain things as well as obligations to refrain from taking certain actions. As noted above in paragraph 36, the onus is on the addressees to seek consent if their conduct creates the possibility of prejudice or an impediment.[23]

41. Where a merger has been completed, it is critical that the acquired business continues to compete independently with the purchaser's business and is maintained as a going concern. If the acquired business were to be integrated more than is necessary or its viability undermined pending the outcome of the merger investigation, this would risk impeding any action the CMA might need to undertake should it find the merger has resulted in an adverse effect on competition.

Relevant provisions of the IEO

42. The IEO is at **Appendix A** to this decision.

43. Subject to the failure to provide three compliance statements by the deadline specified in the IEO (see paragraphs 113 to 120 below), Nicholls gave fortnightly compliance statements both confirming in general terms that Nicholls and its subsidiaries had complied with the IEO and affirming specifically that they had complied with each of the provisions set out in the

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[20] *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75 at paragraph 4; see also paragraph 35.
[21] Section 72(8) of the EA02.
[22] *ICE/Trayport* at [220].
[23] *ICE/Trayport* at [220], emphasis added.

IEO. The compliance statements were signed by [Nicholls Senior Manager] who runs the Nicholls business day-to-day as [Senior Manager].

D. Failures to comply with an interim measure

Breach 1 – relocation of the staff of the ex-DCC business to premises used and occupied by Nicholls

Facts

44. On 8 June 2018 the CMA made the IEO and served it on Nicholls.[24] On the same day a telephone discussion between the CMA and [Nicholls Senior Manager] took place in which the CMA briefly explained the purpose and impact of the IEO.

45. On 18 June 2018 a further telephone discussion between the CMA and [Nicholls Senior Manager] and Nicholls' legal advisers took place.[25] The purpose of the IEO was discussed again. The integration steps Nicholls had already taken and the next steps in the CMA's investigation were also covered on this call. The CMA's contemporaneous attendance note of this discussion (the **CMA 18 June Attendance Note,** attached at **Appendix B**) records the CMA saying the following to Nicholls on the call:

    …

    - *Stressed the seriousness of Initial Enforcement Orders (**IEO**), including its enforceability and penalties for breaching.*

46. The CMA 18 June Attendance Note records Nicholls providing information to the CMA in relation to integration steps already taken. This note also records Nicholls advising the CMA that it "*has until 13 July 2018 to vacate the EMO/DCC premises and transfer the acquired business staff to the Nicholls' (Fuel Oils) Limited truck depot in Belfast*. *This depot is separate from the [Nicholls] head office but does include staff of Nicholls' (Fuel Oils) Limited"* and "*Reason – office lease to terminate and not included in SPA"*. This was the first time Nicholls had made the CMA directly aware of this matter. Under "follow-up actions" the CMA 18 June Attendance Note reads "*CMA to…consider position re office premises once derogation requests and further detail received from Nicholls' (Fuel Oils) Limited"*.

[24] Email from the CMA to [Nicholls] dated 8 June 2018.
[25] See email from the CMA to Nicholls' legal advisers, [Nicholls Senior Manager] and [✂] dated 19 June 2018 attaching the attendance note of the discussion the day before. The recipients did not respond to this email.

47. On 22 June 2018 the CMA received a derogation request from Nicholls in respect of the IEO. The document contained a number of requests, including a request in relation to relocating staff from the ex-DCC business. This request was described by Nicholls as follows:

> *During the conduct of the auction process by which the acquired DCC business was sold, DCC Energy Limited had served notice to quit its premises at 197 Airport Road, Belfast on 31st July 2018 and Nicholls has agreed to vacate those premises on 13th July 2017 in order that DCC Energy Limited can carry out certain remediation works. In order to accommodate the staff of the acquired DCC business who were accommodated there and ensure the effective operation of the acquired DCC business, Nicholls requests the consent of the CMA to accommodate such staff of the acquired DCC business at one of Nicholls NI premises at* [✂]. *Such premises also accommodate five members of Nicholls staff but are located approximately 70 miles from Nicholls head office at 176 Clooney Road, Greysteel, Londonderry.*[26]

48. Nicholls referred to this action as a "derogation in respect of paragraphs 4(a) and 5(a) of the IEO".[27] On the same day, Nicholls provided the CMA with its first compliance statement, signed by [Nicholls Senior Manager], confirming that, except with the prior written consent of the CMA, Nicholls and its subsidiaries had complied with the IEO during the period 8 June to 22 June 2018.

49. On 25 June 2018 the CMA sent Nicholls some clarification questions in relation to Nicholls' derogation request of 22 June 2018.[28] In this email, the CMA, in keeping with its established practice[29], asked Nicholls to provide certain supporting information to inform its consideration of the derogation request:

> *Please clarify how / what steps Nicholls would take to ensure that the staff and operations of the acquired DCC business are kept separate from the Nicholls business at the Nicholls Belfast site, if the CMA were to grant such derogation. How many staff from the acquired DCC business will transfer across to the Nicholls site? Is it proposed that the staff from the acquired DCC business would be ringfenced?*

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[26] Derogation request sent by Nicholls' legal advisers to the CMA by e-mail on 22 June 2018. [Note: a correction was made to paragraph 46 above following representations from Nicholls on the penalty notice issued on 28 June 2019.]
[27] Ibid at page 3.
[28] Email from the CMA to Nicholls' legal advisers dated 25 June 2018.
[29] See paragraphs C20 and C21 of CMA2 (Mergers – Guidance on the CMA's jurisdiction and procedure) and paragraphs 3.1 – 3.5 of CMA60 (Guidance on IEOs and derogations in merger investigations).

Alternatively, has Nicholls considered whether the Nicholls staff could be transferred to another premises?

50. On 3 July 2018 Nicholls responded to the CMA's clarification questions as follows:[30]

> *As mentioned in the derogation requests, DCC Energy Limited had served notice to quit its premises at 197 Airport Road, Belfast on 31st July 2018 prior to the completion of the sale of the acquired DCC business to NFO.*
>
> *35 of the staff of the acquired DCC business located at 197 Airport Road, Belfast will transfer across to the NFO premises at* [✂]. (emphasis added)
>
> *NFO does not have any other premises available in Belfast to accommodate the staff of the acquired DCC business who were located at 197 Airport Road, Belfast.*
>
> *The NFO business and the acquired DCC business operating at the [Nicholls] premises at [✂] will have separate telephone numbers, computer systems and servers and the NFO business will trade under the name "Nicholl" whilst the acquired DCC business will trade under the name "Fuel Services EMO". Only NFO staff will deal with NFO business and only staff of the acquired DCC business will deal with the business of the acquired DCC business. In addition, NFO staff will have no access to the computer system of the acquired DCC business and the staff of the acquired DCC business will have no access to the NFO computer system. In this manner, the staff and operations of the acquired DCC business are to be kept separate from the NFO business at the NFO premises at [✂].*

51. On 4 July 2018 a telephone discussion between the CMA and Nicholls took place and on the following day the CMA emailed Nicholls a summary of the points that were discussed on this telephone call regarding the derogation requests, "in order to assist you in making proposals to the CMA".[31] That email continued with "[w]e note that we reserve our position in relation to all derogation requests and the below is intended to serve as a guide only" and contained the following comments in relation to the derogation request relating to the transfer of staff from the ex-DCC business:

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[30] Email from Nicholls' legal advisers to the CMA dated 3 July 2018.
[31] Email from the CMA to Nicholls' legal advisers dated 5 July 2018.

We take on board the situation with regard to the termination of the lease at 197 Airport Road and the 35 DCC employees who currently work there. Please therefore submit a proposal to separate the five Nicholls employees at [the Nicholls Premises] from those of the acquired DCC business who will vacate the premises at 197 Airport Road, Belfast. The potential solutions that we suggested included (i) transferring the five Nicholls employees to another Nicholls premises; (ii) renting alternative temporary office space for the Nicholls employees; or (iii) proposing security / separation measures for the employees of Nicholls and the acquired DCC business at [✂]. If option (iii) is proposed, please describe in detail the current layout of the Nicholls premises at [✂] and how it is proposed such separation would operate in practice. Please also provide the names and description of the roles of the five Nicholls employees, who may be asked to sign an NDA.

In addition, please provide details of Nicholls' current tenancy arrangements at [✂] and who else currently operates from this building; what work will be required to install IT, telephony and other infrastructure and how long this will take to enable the 35 DCC employees to operate at the new site; and more detail on the 35 DCC employees moving to [✂] (who are they and what do they do).

52. On 6 July 2018 Nicholls provided the CMA with its compliance statement, signed by [Nicholls Senior Manager], confirming that, except with the prior written consent of the CMA, Nicholls and its subsidiaries had complied with the IEO during the period 23 June to 6 July 2018. This compliance statement did not refer to the relocation of staff from the ex-DCC Premises to the Nicholls Premises.

53. On 9 July 2018 Nicholls sent the CMA a revised version of the derogation request it had submitted to the CMA on 22 June 2018.[32] The revised request (attached as **Appendix C**) contained significantly more background information in support of and in relation to the derogation to relocate staff from the ex-DCC Premises to the Nicholls Premises. The CMA highlights the following passages from this document:

It is proposed that 35 of the staff of the acquired DCC business located at 197 Airport Road West, Belfast will transfer across to the [Nicholls] premises at [✂]… (emphasis added)

[32] Email from Nicholls' legal advisers to the CMA dated 9 July 2018.

[Nicholls] does not have any other premises available in Belfast to accommodate the staff of the acquired DCC business who were located at 197 Airport Road West, Belfast.

….

In order to ringfence the staff of the [Nicholls] business from the staff of the acquired DCC business, it is proposed that the following steps should be taken with <u>immediate effect</u>:- (emphasis added)

 The 7 staff of the [Nicholls] business will be moved from the Main Building into [✂] marked [✂] on the Map and a temporary link made from [✂] to the Main Building in order that the computer system of those 7 staff remains linked to Nicholls' head office at 176 Clooney Road, Greysteel, Londonderry.

 The 3 staff of the acquired DCC business located [✂] will be moved to the Main Building marked "EMO Office" on the Map and will be joined in the Main Building by the 35 staff of the acquired DCC business <u>who are moving</u> from 197 Airport Road West, Belfast. As [Nicholls] was aware that DCC Energy Limited had served notice to quit its premises at 197 Airport Road West, Belfast on 31st July 2018 and [Nicholls] had agreed to vacate those premises on 11th July 2017, steps had already been taken to ensure that the separate computer system of the acquired DCC business would be in a position to allow trade of the acquired DCC business to continue after 11th July 2018. (emphasis added)

In all other respects, the pre-merger position at [the Nicholls Premises] will remain as set out above. In addition, it is proposed that:-

…

Any proposal to move the 7 [Nicholls] business staff to different premises would not be feasible as there would be a lengthy delay in obtaining a link to the server at Nicholls head office at 176 Clooney Road, Greysteel, Londonderry, and it is estimated that this could take 2 months.

As noted above, in light of the arrangements at the premises that prevailed pre-merger, what is proposed in relation to the ringfencing of the staff at the [the Nicholls Premises] premises is not a significant operational change post-completion of the acquisition.

54. Nicholls also provided certain documents with its revised derogation request of 9 July 2018. These comprised (1) a list of staff of the ex-DCC business transferring to the Nicholls Premises. Thirty-five staff appeared on this list, of which twenty were sales staff; (2) a map of the Nicholls Premises; and (3) a list of Nicholls staff located at the Nicholls Premises. Seven staff appeared on this list, of which three were sales staff.

55. This derogation request referred to the relocation of staff from the ex-DCC business as a future action. It made no reference to the fact that the action that Nicholls was seeking the CMA's consent to take under the IEO had in fact already occurred (as explained in paragraphs 62 to 66 below).

56. On 11 July 2018 the CMA issued directions to Nicholls to appoint a monitoring trustee for the purpose of securing compliance with the IEO.[33] In the cover email to Nicholls' legal advisers attaching the directions, the CMA highlighted the importance of compliance with an IEO and the potential sanctions for failing to comply with the terms of an IEO (noting, in particular, a recent fine that had been imposed on a company for failing to comply with an IEO).[34]

57. On 12 July 2018 the CMA consented to the relocation of staff from the ex-DCC business to the Nicholls Premises, subject to certain safeguards being implemented.[35]

58. On 17 July 2018 the CMA's case team received an anonymous letter dated 10 July 2018 regarding the CMA's investigation of the Merger. Among other things, the letter said "*Emo [the ex-DCC business] has relocated to Nicholls' Fuel Oil Ltd owned premises"*. This letter was the first time the CMA became aware that the relocation of staff from the ex-DCC business may have occurred prior to the CMA's consent being given for this action.

59. On 20 July 2018 Nicholls provided the CMA with its compliance statement, signed by [Nicholls Senior Manager], confirming that, except with the prior written consent of the CMA, Nicholls and its subsidiaries had complied with the IEO during the period 7 July to 20 July 2018.

60. On 27 July 2018 the Monitoring Trustee was appointed and on 9 August 2018 the Monitoring Trustee provided its initial report to the CMA. The Executive Summary of this report said[36]:

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[33] Paragraph 2.12 of CMA60 *Guidance on initial enforcement orders and derogations in merger investigations*, notes that "…if there are relatively high risks of pre-emptive action or concerns about compliance with the IEO, the CMA may require the appointment of a monitoring trustee."
[34] Email from the CMA to Nicholls' legal advisers dated 10 July 2018.
[35] CMA's consent of 12 July 2018.
[36] Initial Monitoring Trustee report dated 9 August 2018, page 2.

On 2 and 3 August we performed a site visit of the [the Nicholls Premises], [✂] *and* [✂]. *As discussed with the CMA, we have focussed our attention on the ex-DCC business. We interviewed 12 ex-DCC Business staff and one representative of Nicholls ([Nicholls Senior Manager]).*

All safeguards outlined in the derogation of 12 July 2018 are in place save for one (minor) deficiency.

Overall, we consider that there is no evidence to suggest that a breach of the [IEO] has occurred.

We make a number of recommendations, including several changes to the current arrangements, most notably…

61. Even though the Monitoring Trustee's initial report observed that there was no evidence to suggest that a breach of the IEO had occurred (save for the "one (minor) deficiency"), the same report indicated that the ex-DCC business moved from the ex-DCC Premises to the Nicholls Premises on the weekend of 6 – 9 July 2018 (ie before the CMA's derogation of 12 July 2018).[37],[38] For the reasons set out more fully below, it is therefore apparent that the observation made in the initial report that there was no evidence to suggest that a breach of the IEO had occurred was not correct.

62. On 4 September 2018 the Monitoring Trustee provided its second report to the CMA. The Executive Summary of the report started with "[w]e are concerned about the slow implementation of the recommendations we made in our first report."[39] The report also noted further information-gathering had revealed that the relocation of staff from the ex-DCC business had started to occur a week earlier than indicated in the Monitoring Trustee's initial report. Under the heading "IT changes" the Monitoring Trustee reported:[40]

...A summary of the key events as we understand them from our conversation with [✂] [about their role in transitioning the ex-DCC business between offices]:

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[37] The "deficiency" related to paragraph 4(f) of the 12 July 2018 derogation, one of the conditions the CMA required be met as part of giving consent for this move to take place. This paragraph required that notices be placed at the premises to remind staff of the need for the separation of the staff of the Nicholls business and the staff of the ex-DCC business.

[38] The CMA also received an email from Nicholls' legal advisers on 9 August 2018 providing photos of the notices pursuant to paragraph 4(f) of the derogation. See email from Nicholls' legal advisers to the CMA dated 9 August 2018. This meant there was a period from 12 July 2018 (when the derogation was granted) up until 2/3 August 2018 at the very earliest (the date of the Monitoring Trustee's site visit) when the required notices were not in place.

[39] Second Monitoring Trustee report dated 4 September 2018, page 2.

[40] Second Monitoring Trustee report dated 4 September 2018, pages 18 and 19.

- *[✂] were contacted during May by [Nicholls Senior Manager] to arrange for the ex-DCC business to be supported for its upcoming shift between offices…*

- *…*

- *Staff transitioned from the ex-DCC offices over the course of the week 2 July to 9 July, at least partly because the temporary phone system took some days to arrange.* (emphasis added)

We note that the date of the office move is a week earlier than what we had understood from our discussions in the lead up to our first report. This means that the move started more than one week before the respective derogation was granted. (emphasis added)

63. On 27 September 2018 the Monitoring Trustee forwarded the CMA an email it had received on 31 August 2018 from [✂] (at the time, acting General Manager of the ex-DCC business) which included the following information:

> *The transfer of IT equipment from [ex-DCC Premises] offices to [the Nicholls Premises] as below*
>
> *29th June 18 [✂] travelled to [✂] to collect server*
>
> *30th June 18 and 1st July 18 [✂] installed equipment at [the Nicholls Premises]*
>
> *2nd July 18 Staff moved into [the Nicholls Premises]* (emphasis added)

64. On 1 October 2018 the CMA issued an information notice to Nicholls under section 109 of the EA02. This notice required Nicholls to "*confirm the date on which the staff and infrastructure (eg IT systems) of the ex-DCC business that were initially located at the ex-DCC premises at 197 Airport Road, Belfast… moved to the Nicholls premises at [✂]"* and to provide all documents in the possession of Nicholls in relation to this move.

65. On 4 October 2018 Nicholls submitted its response to the CMA's information request.[41] In its response, Nicholls provided the following information (including footnotes)[42]:

> *The premises at 197 Airport Road West, Belfast, never formed part of the Acquisition. Nicholls understands that sometime before the Business Transfer Agreement (dated 22 March 2018) was executed, DCC Energy*

[41] Email from Nicholls' legal advisers to the CMA dated 4 October 2018.
[42] Nicholls makes similar submissions in the First Response Letter at page 3.

*Limited ("**DCC Energy**") served notice to its landlord to quit its premises at 197 Airport Road West, Belfast by 31 July 2018 and to vacate those premises by no later than 13 July 2018 (effectively 11 July 2018 with public holidays in Northern Ireland) to allow DCC Energy to carry out remediation works prior to returning the premises to its landlord.*[43]

Therefore, on the date that the Business Transfer Agreement was signed, Nicholls had accepted that it would need to accommodate staff of the ex-DCC business located at 197 Airport Road West, that transferred as part of the Acquisition, at an alternative premises. To effect the full transfer of staff, property, IT and phone lines to [the Nicholls Premises] by 11 July 2018, in a manner which would enable the business to remain full-functioning from 12 July 2018 at the new premises, it was necessary to begin preparations to transfer staff and equipment immediately.[44]

- *With regard to the relevant dates of the transfer, Nicholls notes that:*
  - *staff and IT equipment at 197 Airport Road West began transferring to [the Nicholls Premises] on a staggered basis from 29 June 2018;* (emphasis added)
  - *inward calls became live at [the Nicholls Premises] from 5 July 2018; and*
  - *the ex-DCC Premises at 197 Airport Road West were vacated on 16 July 2018.*[45]
- *With regard to the interaction (if any) between the transfer of staff and IT equipment and the Initial Enforcement Order issued on 8 June 2018 (the "**Order**"), Nicholls notes that:*

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[43] See, for example, the Business Transfer Agreement dated 22 March 2018 provided to the CMA on 14 June 2018 as Annex B to Nicholls' response to Question 3 of the Section 109 Notice. On 18 June 2018, on a telephone call with the CMA case team, Nicholls informed the CMA that it had until 13 July 2018 "at the latest" to vacate the premises at 197 Airport Road West and to transfer the acquired business staff to the Nicholls truck depot in Belfast (as recorded in minutes of the call which were prepared by the CMA and sent to [Nicholls' legal advisers] after the call). The CMA also stated on that call that it would "consider position re office premises once derogation requests and further detail received from Nicholls' (Fuel Oils) Limited". Further, Nicholls submitted a derogation request on 22 June 2018 and a revised derogation request on 9 July 2018, again stating (at paragraph 6) that Nicholls was required to vacate the premises at 197 Airport Road West by 13 July 2018 (effectively 11 July 2018 with public holidays in Northern Ireland) and requesting that the ex-DCC staff be accommodated at [the Nicholls Premises].

[44] In fact, Nicholls began preparation for the transfer from 197 Airport Road West to [the Nicholls Premises] immediately on acquiring the business. By way of example, this included an initial meeting with Nicholls, DCC Energy and the ex-DCC business on 2 May 2018 and email correspondence with phone and email contractors regarding the transfer commencing from 8 and 10 May, respectively, and continuing up to 1 July 2018. See further Annex B to this Response.

[45] On this date, Nicholls visited the premises to confirm that all assets had been removed (including phones which had remained at the premises) and confirmed that the premises had been vacated on the same day to [✂] of DCC Energy.

- *the requirement to transfer staff and IT equipment to [the Nicholls Premises] arose on signing of the Business Transfer Agreement on 22 March 2018 and, at the latest, when the Acquisition completed on 30 April 2018. The actual transfer of staff and IT equipment was therefore the inevitable consequence of actions that occurred prior to the Order coming into force; and*

- *the ex-DCC business already operated out of [the Nicholls Premises].*[46]

66. Nicholls also provided certain internal documents with its response of 4 October 2018. These included:

a) An email from [Manager at Nicholls] to senior managers of the ex-DCC business dated 27 June 2018. The email attached a memo asking "[a]s line management can you ensure that this Memo is received by all staff, via email". The attached memo noted that the move to the new offices at [the Nicholls Premises] is "scheduled to take place during this coming weekend beginning Friday 29 June" and "[o]n Monday you will find your boxes in-situ in the designated office or workstation...".

b) A series of emails involving [Nicholls Senior Manager], phone and email contractors retained to assist with the move[47] and the ex-DCC business starting on 8 May and ending on 20 July 2018. These documents show that from at least 13 June 2018, the move was proposed for the last week of June 2018.

Assessment

67. Based on the evidence described above at paragraphs 62 to 66 it is clear that from 2 July 2018 the ex-DCC business staff were operating from the Nicholls Premises. Nicholls does not dispute this.[48] The CMA did not consent to Nicholls taking this action until 12 July 2018 and this consent was not retrospective.[49] The CMA consented to this action taking place subject to

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[46] *On 9 July 2018, Nicholls submitted a further response, which noted that "3 staff of the acquired DCC business […] were located [at the Nicholls Premises] under the terms of a sub-lease to DCC Energy Limited and their computer system was linked to 197 Airport Road West, Belfast [and] approximately 30 delivery vehicles of the acquired DCC business were entitled to park in the yard of the premises and approximately 30 drivers were entitled to park their cars in the area marked 'Main Car Park' on the map and to use the canteen and toilet facilities in the area indicated on the Map".*

[47] Including [✂], the [✂] and [✂]. Also see page 3 of the First Response Letter.

[48] See para 1.20 of the Second Response Letter and paragraph 65 above.

[49] As explained in paragraph C19 of CMA2, any derogation granted giving consent to the parties to undertake certain actions prohibited by the interim order will cover only actions taken after that consent has been given and will not be given so as to permit retrospectively actions that have already occurred that may have been in breach of the interim order or undertakings.

certain safeguards being implemented.[50] The CMA imposed these safeguards to ensure that its ability to take any action that might be required under the EA02 was not impeded by any further integration of the ex-DCC business with the Nicholls business.

68. The CMA finds that the relocation of staff from the ex-DCC Premises to the Nicholls Business as outlined above constitutes action which might, and did, lead to the integration of the ex-DCC business with the Nicholls business **contrary to paragraph 4(a)** of the IEO. Staff from the ex-DCC business were co-located with staff from the Nicholls Business without the necessary safeguards in place to prevent further integration of the two businesses. This created the risk that staff from both businesses would inter-mingle in ways that would be harmful to the viability of the ex-DCC business. For one, it increased the opportunities for exchange of commercially-sensitive information between the ex-DCC business and the Nicholls Business.

69. The CMA also finds that relocating staff from the ex-DCC Premises to the Nicholls Premises might have undermined the separate sales identity of the ex-DCC business **contrary to paragraph 5(a)** of the IEO. This action clearly undermined the operational independence of the ex-DCC business. This is particularly so in this case where the action resulted in sales staff from both businesses co-locating with some shared facilities without the necessary safeguards in place to prevent further integration of the two businesses.

70. Moreover, Nicholls did not notify the CMA of the fact that the relocation of staff from the ex-DCC Premises to the Nicholls Premises had occurred by 2 July 2018[51], contravening **paragraph 9** of the IEO which required Nicholls to immediately notify the CMA and any Monitoring Trustee if it has any reason to suspect the IEO might have been breached. In the First Response Letter[52], Nicholls submitted that[53]:

> *Nicholl engaged with the CMA in good faith. We notified the case team of the move and engaged with the CMA to ensure that protections were in place to mitigate any potential risk to the CMA's remedial powers….This engagement began in earnest shortly after the [IEO] was issued and continued through to 12 July 2018 when a derogation*

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[50] In summary, the safeguards imposed by the CMA included that the staff of the ex-DCC business operated from a separate building on the premises to the staff of the Nicholls business, notices were placed at the premises reminding staff of the need for separation of staff and the Nicholls business and the ex-DCC business operating at the premises had separate telephone numbers, computer systems and servers.
[51] The CMA notes that during this period the CMA was still seeking clarification from Nicholls on matters relating to its derogation request. See paragraphs 49 - 51.
[52] On 12 December 2018 the CMA informed Nicholls that it was actively considering imposing a penalty under the IEO. Nicholls responded on 19 December 2018 by letter from [Nicholls Senior Manager] (the **First Response Letter**).
[53] First Response Letter page 3.

was eventually obtained. The CMA was aware of the necessity of the move since at least 18 June 2018 (as recorded by the CMA in its note of a call with the business) and at no time sought an unwinding order preventing the move.

71. Moreover, in its representations on the Provisional Decision[54], Nicholls did not consider that the derogation request should be imputed to mean that it understood the requirement to seek prior approval from the CMA and referred to various interactions between the CMA and Nicholls between 18 June and 9 July 2018 in support.[55] However, the CMA does not agree that the interactions referred to by Nicholls made clear that Nicholls did not consider that prior CMA approval was necessary.

72. In contrast, on the call between the CMA and Nicholls on 18 June 2018, the purpose and effect of the IEO was discussed, including that Nicholls would be providing a derogation request in relation to the move. Furthermore, Nicholls submitted its derogation request to the CMA on 22 June 2018 explicitly seeking the CMA's consent to move the staff from the ex-DCC Premises to the Nicholls Premises and, in response to concerns expressed by and queries from the CMA, subsequently submitted a revised version of this request on 9 July 2018. Nicholls ought therefore to have suspected that, by relocating staff from the ex-DCC Premises to the Nicholls Premises before the CMA's consent was obtained, it was failing to comply with the IEO and accordingly should have notified the CMA of this action in accordance with paragraph 9 of the IEO. Nicholls also omitted to report the move as a material development relating to the ex-DCC business in its compliance statements provided to the CMA covering the relevant period.[56] In fact, Nicholls only informed the CMA that the relocation of staff had occurred prior to the CMA's consent being given when providing information and documents in response to specific questions in the CMA's Section 109 Notice dated 1 October 2018.

73. Further, the fact that Nicholls had on 18 June 2018 made the CMA aware of the necessity of the move did not negate Nicholls' obligations under the IEO in relation to this matter. The CMA 18 June Attendance Note records the CMA indicating that it would consider its position on this matter once a derogation request and further detail was received from Nicholls (see paragraph 46

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[54] On 15 March 2018 the CMA decided to issue a provisional decision (the **Provisional Decision**). On 27 March 2019 Nicholl responded in writing to the Provisional Decision (the **Second Response Letter**).
[55] Second Response Letter, paras 1.22 – 1.23.
[56] Being the compliance statements provided on 6 July and 20 July 2018. Paragraph 8 of the IEO required Nicholls to "actively keep the CMA informed of any material developments relating to the acquired DCC business or the Nicholls business" or procure that the acquired DCC business do so.

above). The CMA continued to reserve its position on this matter to Nicholls' legal advisers on 5 July 2018 (see paragraph 51 above).

74. Nicholls also submitted that the move was the unavoidable consequence of integration that had occurred prior to the IEO and was fully covered by paragraph 3 of the IEO, such that no breach under any other provision of the IEO can be upheld.[57] In the First Response Letter, Nicholls stated[58]:

> *[DCC Energy] had served notice on its landlord in January 2018 to terminate the lease of 197 Airport Road West within six months and Nicholl had no input into this decision. Given public holidays in Northern Ireland (ie the 12 July public holiday), Nicholl had to vacate the premises by 11 July 2018. The Nicholl business began preparation for the transfer of staff from the [ex-DCC Premises] to the [Nicholls Premises] immediately on acquiring the ex-DCC business. When the [IEO] was issued on 8 June 2018, over 5 weeks had passed since the Transaction had completed and substantial integration had already taken place between our business and the acquired business. By then, an initial meeting with Nicholl, DCC Energy and the ex-DCC business had taken place (on 2 May 2018) and phone and email contractors had already been retained to assist in the transfer (from 8 and 10 May, respectively) and continuing up to 11 July 2018.*
>
> *…[T]here was a commercial imperative to ensure that the ex-DCC business could continue to function after 11 July 2018 and that the transition to the new premises would be orderly. Such preparations were entirely consistent with paragraph 5(b) of the [IEO], which imposed an imperative on the Nicholl business to procure that "at all times during the specified period […] the acquired DCC business [is] maintained as a going concern." Nicholl had no ability before or after the [IEO] was issued to prevent the landlord taking possession and, as the CMA is aware, the [IEO] does not bind third parties. To effect the full transfer of staff, property, IT and phone lines to [the Nicholls Premises], in a manner which would enable the business to remain a going concern from Monday the following week (ie 16 July 2018), it was necessary to begin preparations to transfer staff and equipment in early June and continue those preparations up to the deadline on a phased basis. This was imperative to ensure business continuity and it would have been reckless and itself a breach of the [IEO] for the*

[57] Second Response Letter, para 1.2 and the First Response Letter.
[58] First Response Letter, page 2, first bullet point and page 3.

Nicholl business to have postponed such preparations and to have failed to make adequate arrangements ahead of the deadline.

75. Nicholls made similar points in its representations on the Provisional Decision, submitting that, (i) as of 1 May 2018, the permanent location of the ex-DCC staff was the Nicholls Premises and it was imperative that the move to that premises be effected in an orderly fashion; (ii) it was anticipated that the move would take around two months to complete, preparations had begun in earnest to arrange the move and were well-advanced by the date the IEO was made and (iii) it would have been impossible, at the point the IEO was issued, to cancel the move, without severe interruption in ex-DCC business continuity.[59] Nicholls also said the "*CMA acknowledges that there was no flexibility as regards the requirement to vacate the ex-DCC Premises by 13 July and therefore the presence of the ex-DCC staff at the ex-DCC Premises was a short temporary arrangement and could not be prolonged or maintained*".[60]

76. **Paragraph 3** of the IEO provides that no act or omission constitutes a breach of the IEO to the extent that it occurred or was completed prior to the commencement date.[61] While the CMA accepts that the decision to vacate the ex-DCC Premises was taken by DCC Energy and could not be reversed, the choice as to where the staff from the ex-DCC Premises would be relocated was for Nicholls. Although Nicholls stated that it would not have been practicable to transfer the Nicholls staff to another location without incurring substantial delay and expense[62], this does not mean that no alternative premises were available. Nicholls also had some choice about when staff from the ex-DCC Premises moved. It was incumbent on Nicholls to impress upon the CMA the urgency of this issue. Nicholls did not do this, instead it chose to unilaterally move staff from the ex-DCC Premises to the Nicholls Premises without obtaining the CMA's prior consent.

77. The action to co-locate the staff from the ex-DCC Premises with Nicholls staff at the Nicholls Premises was therefore not an unavoidable consequential effect of DCC Energy's decision; it was a decision for Nicholls and one that Nicholls made, as reflected in the options presented in the email from the CMA to Nicholls on 5 July 2018, as set out in paragraph 51 above. For these

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[59] Second Response Letter, paras 1.6 – 1.9 and Oral Representations, paras 18 – 20 of the note of the call.
[60] Second Response Letter, paras 1.4 and 1.5.
[61] C.12 of CMA2 explains the effect of an interim order, noting that "*integration that has already occurred prior to the interim order being made, and any unavoidable consequential effects of this integration, will not be in breach of the interim order*".
[62] See email from Nicholls' legal advisers to the CMA on 3 July 2018 and Nicholls' derogation request of 9 July 2018. See Second Response Letter paras 1.10 – 1.15.

reasons, the CMA does not consider that **paragraph 3** of the IEO applies to this action.

78. Nicholls also submitted that the move was "managed responsibly" and "the risk of integration was fully mitigated so far as practicable".[63] However, it is not necessary to show that the potential harm mentioned in the previous paragraphs actually occurred in order to establish a failure to comply with the IEO. As stated by the CAT in *ICE/Trayport*:

> *[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.*

79. Accordingly, the CMA concludes that Nicholls has failed to comply with paragraphs 4(a), 5(a) and 9 of the IEO.

Breach 2 – making deliveries to customers of the ex-DCC business with a Nicholls-owned and branded mini-tanker and Nicholls drivers

Facts

80. In its initial report dated 9 August 2018 and provided to Nicholls, the Monitoring Trustee reported:

> *[7.a] We understand that all/most articulated trucks…of the ex-DCC Business were sold. These trucks are usually used to lift product at the terminal and deliver it to the depots. We understand that these deliveries are currently being made by ex-DCC Business drivers using (at least partly) Nicholls articulated trucks.*
>
> *…*
>
> *[7.b.] We understand that articulated Nicholls trucks are only used at the supply level (supplying ex-DCC Business depots with product but not customers of the ex-DCC Business) and deliveries are only performed by ex-DCC Business drivers. Therefore, we are not concerned about the use of these Nicholls vehicles. <u>We recommend that ex-DCC Business management should ensure that the use of the</u>*

[63] Second Response Letter paras 1.19 – 1.21.

vehicles is limited to the supply level and only ex-DCC Business drivers perform the deliveries. (emphasis added)

81. On 29 August 2018 Nicholls' legal advisers wrote to the CMA noting:[64]

> *Separately, to ensure the continuing viability of the ex-DCC business, Nicholl proposes to transfer two drivers for the exclusive use of the ex-DCC business for the duration of the Order. Please confirm that the CMA has no objection to this under the IEO. We noted that drivers cannot be considered 'key staff' under the IEO (and so a transfer of two drivers between the two businesses does not breach paragraph 5(i) and does not therefore require a derogation) but are confirming this with you out of an abundance of caution. Nicholl would recharge the ex-DCC business for the remuneration due to these drivers for the relevant period.*

82. On 5 September 2018 Nicholls' legal advisers asked if the CMA's response to "*our previous query regarding Nicholl drivers of fixed trucks being contracted to the ex-DCC business could also cover the opposite (ie surplus ex-DCC driver of articulated truck being contracted to Nicholl business)*".[65] The CMA responded the same day saying:[66]

> *The CMA considers that such action would need a derogation from the IEO, which the CMA is not minded to grant. The drivers of the Nicholl and ex-DCC businesses must be kept separate, in line with the obligation to carry on the businesses separately as set out in the IEO. If extra drivers are required by either business, they could be hired on a contract basis. These kind of decisions should be taken by the target business without direction from Nicholl.*

83. Nicholls' legal advisers sought clarification of the CMA's above response by asking "*[i]f one business makes an independent decision to request the other to hire it drivers on market terms, would this be acceptable as ordinary course business not requiring an IEO derogation?"*.[67] The CMA responded saying: "*Absent the merger, the parties would not use a competitor's drivers to deliver fuel to their customers. Likewise, such practice cannot take place while the CMA's investigation is ongoing*".[68]

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[64] Email from Nicholls' legal advisers to the CMA dated 29 August 2018.
[65] Email from Nicholls' legal advisers to the CMA dated 5 September 2018.
[66] Email from the CMA to Nicholls' legal advisers dated 5 September 2018.
[67] Email from Nicholls' legal advisers to the CMA dated 5 September 2018.
[68] Email from the CMA to Nicholls' legal advisers dated 5 September 2018.

84. On 12 September 2018 the CMA emailed Nicholls' legal advisers a list of actions that Nicholls and/or the hold separate manager of the ex-DCC business "should take to prevent pre-emptive action" [69] and requested Nicholls provide the CMA with written confirmation of their implementation by close of business on 14 September 2018. In relation to the request by Nicholls to second truck drivers the CMA largely re-stated the points made in its email of 5 September 2018.[70]

85. On 14 September 2018 Nicholls responded to the CMA's list of actions, submitting material in support of the derogation request in relation to the secondment of truck drivers.[71] The CMA responded on 17 September 2018 indicating it was minded to grant this derogation given the circumstances outlined in the response provided by Nicholls on 12 September 2018 (a shortage of truck drivers in Northern Ireland).[72] On 24 September 2018 the CMA consented to Nicholls and the ex-DCC business entering into an arms-length commercial agreement to allow the secondment of Nicholls truck drivers to the ex-DCC business subject to certain safeguards being followed.[73]

86. On 1 October 2018 the CMA issued a section 109 information request to Nicholls requiring Nicholls to confirm whether, after the IEO came into force and prior to the derogation granted by the CMA on 24 September 2018 (i) any Nicholls' trucks or Nicholls' drivers made deliveries to customers of the ex-DCC business on behalf of the ex-DCC business; or (ii) any trucks or drivers of the ex-DCC business made deliveries to customers of Nicholls on behalf of Nicholls. The information notice also required Nicholls to provide the exact details (covering time, date, amount, cost and customer) and all documents in relation to any such deliveries.

87. On 4 October 2018 Nicholls provided the following information and documents in response to this request[74]:

> *1.1 Prior to the acquisition by Nicholls of the ex-DCC business on 30 April 2018 (the "**Acquisition**"), some small orders to ex-DCC domestic customers were fulfilled both by the DCC Energy business using a hired mini tanker and a number of third party distributors which made these deliveries using their own drivers and tankers.*

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[69] Email the CMA to Nicholls' legal advisers dated 12 September 2018.
[70] Email from the CMA to Nicholls' legal advisers dated 12 September 2018.
[71] Email from Nicholls' legal advisers to the CMA dated 14 September 2018.
[72] Email from the CMA to Nicholls' legal advisers dated 17 September 2018.
[73] CMA Derogation 24 September 2018. For completeness, the CMA notes that Nicholls had suggested a reciprocal secondment arrangement but later changed the request.
[74] Paragraphs 1.1 to 1.3 were repeated by Nicholls in the First Response Letter at page 4. In relation to (b) above, Nicholls provided an annex containing copies of documentation showing the daily total volumes of kerosene delivered by a Nicholls mini-tanker to customers invoiced by the ex-DCC business.

1.2 On completion of the Acquisition, Nicholls assessed the hired mini tanker as very old, [✂] and expensive ([✂]). Nicholls determined that it was not viable or [✂] to continue to use that tanker. As the ex-DCC business did not own another suitable tanker, the only option available was either to discontinue the sales or for Nicholls to provide its own mini-tanker.

1.3 Therefore, since 1 May 2018, Nicholls has provided its own mini tanker to the ex-DCC business to fulfil these orders using an ex-DCC driver. Following a number of minor incidents involving the tanker, and given that it was more efficient for Nicholls to use the mini-tanker and driver to make deliveries to both its own customers and ex-DCC customers, Nicholls decided from 1 June 2018 to use its own driver to make the deliveries using its own mini-tanker.

1.4 These orders have always been received and processed by ex-DCC staff. Once an order is received and an arrangement is made by that customer to pay the ex-DCC business, an 'EMO' branded delivery docket is printed. These dockets are provided to a Nicholls driver operating the mini-tanker who delivers the product and presents the 'EMO' branded docket to the customer. A copy of the EMO branded docket is left with the customer and the original completed delivery docket is returned to the ex-DCC office to be processed at the end of the drivers shift. Nicholls retains a copy of this docket for compliance purposes given that the delivery is made by a Nicholls mini-tanker and driver.

1.5 Nicholls does not re-charge the ex-DCC business for the use of the mini-tanker and driver.

1.6 So far as Nicholls is aware, no trucks or drivers of the ex-DCC business have made deliveries to customers of Nicholls on behalf of Nicholls.

88. After considering Nicholls' response dated 4 October 2018, on 25 October 2018 the CMA issued a further section 109 information request to Nicholls. On 1 November 2018 Nicholls provided information and documents in response. In relation to the CMA's request to describe all the types of information that appeared on the 'EMO' branded delivery dockets (EMO dockets) printed for orders made between the period 8 June 2018 to 19 October 2018, Nicholls stated:

> *The information contained on the EMO dockets includes the customer name, customer address, load number, product type and quantity, amount due, (unit price, vat due, amount due before and after vat, type*

of payment, due by date, vehicle used to make delivery, account number, ticket number, delivery/tax date, order date, order number, tank size and ullage. It is also printed on delivery with further information including: Meter ID, ticket number, start reading, finish reading, totalizer start, totalizer end and volume litre start. Please see attached as ***Annex 2*** *examples of EMO branded dockets and the information printed on the EMO dockets.*

This information was only viewed by the driver for the purpose of delivering the product to the endcustomer and the original docket was returned to the ex-DCC business premises at the end of a day's shift. Drivers have no involvement in pricing at either business. Further, so far as [Nicholls Senior Manager] is aware, the driver did not share any of the information contained on the docket with other staff members at Nicholls. Finally, daily published prices quoted by suppliers, including the ex-DCC business for home heating oil, for domestic customers, are available on www.cheapestoil.ni*.*

89. In its section 109 information response of 4 October 2018 (see paragraph 87 above) Nicholls stated that it "*retains a copy of the [ex-DCC business] branded docket for compliance purposes given that the delivery is made by a Nicholls mini-tanker and driver*". However, in this later section 109 information response of 1 November 2018, Nicholls provided a contradictory factual explanation, stating that the original EMO docket "*was returned to the ex-DCC business premises at the end of a day's shift*" and "*the driver did not share any of the information contained on the docket with other staff members at Nicholls*". In its representations on the Provisional Decision[75], Nicholls stated that at the time it responded to the CMA's section 109 Notice dated 1 October 2018:

Nicholl believed that the ex-DCC business was following the same procedures as the Nicholl business (ie that a copy of the delivery docket was being sent by the dispatch team to the compliance team to be filed in preparation for completing RDCO and VAT accounts.

However, after the [IEO] had been revoked, and the CMA had issued the Section 109 Notice dated 25 October, Nicholl discussed this further with [✂], who explained that a decision had in fact been taken by the ex-DCC business not to pass a copy of the ex-DCC docket to Nicholls, since this could be requested at a later date. Therefore, Nicholl's response to the CMA on 1 November is correct insofar as the mini-

[75] Second Response Letter, paras 2.14 and 2.15.

truck driver did not share any of the information contained on the ex-DCC delivery docket with any other Nicholl staff.

90. Nicholls reiterated this explanation in its Oral Representations.[76] [Nicholls Senior Manager] told us that he had not consulted with the ex-DCC business at the time about whether the EMO dockets were being shared by the ex-DCC business with Nicholls and had had no intention of misleading the CMA.[77] The CMA has taken into account this conflicting information and Nicholls' explanation, in determining whether it is appropriate to impose a penalty and the level of any penalty imposed.

91. In relation to the CMA's information request to explain how many deliveries were made by Nicholls through its own driver and mini-tanker on behalf of the ex-DCC business between the period 8 June 2018 to 19 October 2018, Nicholls responded as follows:

> *During the period 8 June 2018 to 19 October 2018, [✂] deliveries were made using the mini-tanker to [✂] customers of the ex-DCC business. This equates to approximately [✂] delivery per day during that period. During the same period, the ex-DCC business made a total of [✂] deliveries to home heating oil customers. Therefore, deliveries to ex-DCC domestic customers using the mini-tanker accounted for approximately 0.01% of the total number of deliveries to domestic customers of the ex- DCC business requiring home heating oil during that period.*

Nicholls repeated this submission in the First Response Letter. [78]

92. The CMA notes that the percentage of deliveries to ex-DCC domestic customers affected by this action is higher than suggested by Nicholls in the above submissions, accounting for approximately 1% rather than 0.01% of the total number of deliveries to domestic customers of the ex-DCC business during the period the IEO was in effect, and this was acknowledged by Nicholls in its representations on the Provisional Decision.[79]

93. In relation to the CMA's information request to explain what, if any, branding appeared on the Nicholls mini-tanker that was used to make deliveries to customers of the ex-DCC business on behalf of the ex-DCC business

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[76] Nicholls requested an opportunity to make oral representations on the Provisional Decision and on 8 May 2019 Nicholls made oral representations to the CMA (the **Oral Representations**). On 23 May 2019 the CMA requested clarification of one point arising from the Second Response Letter and Nicholls responded to the CMA's clarificatory questions on 4 June 2019 (the **Clarification**).
[77] Oral Representations, para 50 of the note of the call.
[78] See the First Response Letter at page 4.
[79] Second Response Letter, para 2.18.

between the period 8 June 2018 to 19 October 2018, Nicholls responded as follows:

> *The mini-tanker had originally been used to deliver to Nicholls customers. Consideration was given to removing the branding; however, it was noted that customers do not generally respond positively to being delivered product using unmarked vehicles. Therefore, as it would have been cost-prohibitive to change the branding each time a delivery was required to be made to the ex-DCC business, and to ensure that neither business lost customers by using an unbranded mini-tanker, it was decided to retain the Nicholls branding, given that the majority of deliveries by the mini-tanker would be to customers of the Nicholls business.*[80] *No complaints were received from ex-DCC customers who were delivered fuel using a Nicholls mini-tanker.*
>
> *As previously explained, the decision to sell the ex-DCC tanker and use the Nicholls mini-tanker was taken on 1 May 2018 and the decision to use a Nicholls driver was taken on 1 June 2018. These deliveries would have been discontinued altogether had the decision not been taken to use the Nicholls mini-tanker to fulfil them.*

Assessment

94. Nicholls did not seek the CMA's consent under the IEO to use a Nicholls-owned and branded mini-tanker and drivers employed by Nicholls to make deliveries to domestic customers of the ex-DCC business while the IEO was in effect.

95. The CMA considers this constitutes action which might undermine the separate sales and brand identity of the ex-DCC business, impairing its ability to compete independently **contrary to paragraphs 4(c) and 5(a)** of the IEO. By sharing a Nicholls branded mini-tanker and drivers to make deliveries to their customers, the ex-DCC business and the Nicholls business were not competing independently. Nor were the two businesses maintaining their separate sales and brand identities by taking this action. Delivering heating oil to ex-DCC customers in a Nicholls branded mini-tanker had the potential to blur the ex-DCC business' brand identity with the brand identity of Nicholls.

96. Nicholls submitted that there was no material risk of any impact to the ability of the CMA to order a divestiture, should this have been required at a later point, as the "*ex-DCC customers supplied using this mini-tanker continued to*

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[80] Nicholls repeated this submission in the First Response Letter at page 4.

be invoiced by the ex-DCC business, continued to receive an ex-DCC branded invoice and continued to pay the ex-DCC business. It had no impact on the independence of the ex-DCC business or its commercial strategy on the market".[81] The CMA does not consider that these points obviate the need for prior consent. Customers placed an order with the ex-DCC business but received their deliveries from a mini-tanker with Nicholls branding and driver. In the CMA's view, using another competitor's assets in the way the ex-DCC business did is contrary to the purpose of the IEO. This is the type of action which might have prejudiced a reference of the transaction, particularly in this case where the merger had already completed. Even if Nicholls considered this action would have no impact on the independence of the ex-DCC business, Nicholls should have consulted the CMA and sought a derogation. Further, as noted above in paragraph 78, it is not necessary to show that the potential harm mentioned in this paragraph actually occurred to establish a failure to comply with the IEO. For these reasons, the CMA finds that this action was contrary to paragraphs 4(c) and 5(a) of the IEO.

97. Moreover, the CMA considers that this blurring of sales and brand identity engages **paragraph 5(e)(i)** of the IEO, which requires that, except in the ordinary course of business[82] for the separate operation of the two businesses, Nicholls maintain and preserve the goodwill of the ex-DCC business. Nicholls submitted that this arrangement was in the ordinary course of business and continued similar arrangements between the ex-DCC business and other fuel suppliers in place pre-Merger.[83] In its representations on the Provisional Decision, Nicholls provided information about the ex-DCC business's use of third party suppliers pre-Merger to make deliveries requiring a mini-tanker. The CMA's review of this information showed that the ex-DCC business used [✂] third party suppliers in the two years prior to the Merger. Nicholls was not one of the third parties that the ex-DCC business used prior to the Merger. Third parties also used the ex-DCC business to deliver their fuel over the same period. It appears from the information provided that the ex-DCC business used third parties [✂] for some of its deliveries requiring a mini-tanker. However, as a proportion of the total volume of home heating oil delivered over this period for the ex-DCC business, the volumes delivered by third party suppliers on behalf of the ex-DCC business were very small, and

[81] Page 4 of the First Response Letter and the Oral Representations, para 43 of the note of the call.
[82] In the IEO 'the ordinary course of business' means "matters connected to the day-to-day supply of goods and/or services by the acquired DCC business or Nicholls and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of the acquired DCC business and Nicholls" (paragraph 12).
[83] Page 4 of the First Response Letter, Second Response Letter, paras 2.8 – 2.13 and Oral Representations, para 36 of the note of the call.

much smaller than the approximately 1% of the ex-DCC business's deliveries which Nicholls made during the term of the IEO.

98. Nicholls told us that the factors relevant to the pre-Merger decisions by the ex-DCC business whether to self-deliver or to use third party suppliers for mini-tanker deliveries were mainly based on logistical considerations. For example, the ex-DCC business used third parties where [✂].[84]

99. In the CMA's view this evidence, taken together, points to the ex-DCC business using third party suppliers on a very limited and ad hoc basis only prior to the Merger.[85] In contrast, post-Merger, all of the ex-DCC business's mini-tanker deliveries were switched to Nicholls. In the CMA's view, deliveries of this quantity, by Nicholls, was not in the ordinary course of business.

100. Nicholls further submitted that these arrangements are common across the oil distribution industry and provided the names of oil suppliers who offer a nationwide delivery service based on third-party delivery to those areas where that company is not present.[86] The CMA has placed very little weight on these submissions. In the CMA's view, whether other companies also use third party logistics suppliers is relevant to whether the CMA would have granted a derogation if asked, rather than whether it was in the ordinary course of business for the ex-DCC business prior to the Merger.

101. Accordingly, the CMA considers that the use of a Nicholls branded truck to make deliveries of home heating oil to customers of the ex-DCC business was not "in the ordinary course of business".

102. Nicholls told the CMA that no complaints were received from ex-DCC customers who were delivered fuel using a Nicholls branded mini-tanker (paragraph 93 above). Given the importance that appears to be attached to brand (in light of Nicholls' submissions that customers do not like receiving deliveries in an unmarked vehicle (see paragraph 93 above)), it is at least plausible that some customers of the ex-DCC business would have been unhappy or confused to have received their heating oil from a competitor and therefore this action had the potential to impact the goodwill of the ex-DCC business. Additionally, as noted above in paragraph 78, it is not necessary to show that the potential harm mentioned in the previous paragraphs actually occurred to establish a failure to comply with the IEO. Accordingly, the CMA finds this action was also contrary to **paragraph 5(e)(i)** of the IEO.

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[84] Second Response Letter, para 2.9 and the Clarification, page 2.
[85] See also Oral Representations at paras 47 and 48 of the note of the call.
[86] Second Response Letter, paras 2.11 to 2.13 and Oral Representations, para 39 and 40 of the note of the call.

103. The CMA considers that this action also engages **paragraph 5(l)** of the IEO which, in summary, required Nicholls to procure that no confidential information relating to either of the two businesses pass, directly or indirectly, from the ex-DCC business to the Nicholls business or vice versa, except where strictly necessary in the ordinary course of business.[87] The EMO branded delivery dockets contained information about the customer, the quantity of product delivered and the price to be paid (see paragraph 88 above). This is clearly information that is generally not publicly available. The CMA considers that this type of information, particularly information about the prices charged by the ex-DCC business, is confidential and commercially-sensitive to the ex-DCC business.[88] [✂]. We note that we received conflicting responses from Nicholls as to the extent of the disclosure of the EMO branded dockets (containing the confidential ex-DCC business information) within the Nicholls business.[89] In the Second Response Letter, Nicholls clarified that these dockets were passed to the Nicholls driver but this driver did not share any of the information contained on this docket with any other Nicholls staff.[90] Notwithstanding these conflicting responses, and although limited, it is clear that confidential information relating to the ex-DCC business did pass to certain staff members of the Nicholls business while the IEO was in effect. Accordingly, the CMA finds this action was also contrary to **paragraph 5(l)** of the IEO.

104. Moreover, Nicholls did not notify the CMA of the fact that it was using a Nicholls-owned and branded mini-tanker and drivers employed by Nicholls to make deliveries to domestic customers of the ex-DCC business, contravening **paragraph 9** of the IEO. As noted above, paragraph 9 of the IEO required Nicholls to immediately notify the CMA and any Monitoring Trustee if it has any reason to suspect the IEO might have been breached.

105. Nicholls understood the requirement to seek prior approval from the CMA. The CMA considers this is demonstrated by the fact that Nicholls had sought a number of derogations from the CMA during the course of the investigation.[91] Nicholls had contacted the CMA on 29 August 2018 on the

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[87] This includes, for example, where required for compliance with external regulatory and/or accounting obligations or for due diligence, integration planning or the completion of any merger control proceedings relating to the transaction.
[88] For example, see paragraph 3.13 of CMA60.
[89] In its response of 4 October 2018, Nicholls told the CMA that it "retains a copy of this [EMO branded delivery] docket for compliance purposes given that the delivery is made by a Nicholls mini-tanker and driver". However, in its response to 1 November 2018, Nicholls told the CMA that "…[t]his information [on the EMO branded delivery dockets] was only viewed by the driver for the purpose of delivering the product to the endcustomer and the original docket was returned to the ex-DCC business premises at the end of a day's shift…so far as [Nicholls Senior Manager] is aware, the driver did not share any of the information contained on the [EMO branded delivery] docket with other staff members at Nicholls".
[90] Second Response Letter, para 2.15.
[91] See Factual Background above.

issue of seconding Nicholls drivers to the ex-DCC business. Nicholls was aware that the CMA had concerns about this secondment arrangement and only consented to this arrangement in light of the shortage of truck drivers in Northern Ireland and on the condition that certain safeguards were put in place (see paragraphs 81 to 85 above). In its representations on the Provisional Decision, Nicholls submitted that there was no intent to mislead the CMA, "*Nicholl approached the CMA when a requirement arose after the IEO to second truck drivers to the ex-DCC business and viewed that as a completely separate point to the existing arrangement with the mini-tanker*".[92] While the CMA accepts that any arrangement with the mini-tanker would have required a separate derogation request from Nicholls, the CMA considers this shows that Nicholls was aware of the general requirement to seek prior consent from the CMA. Further the CMA notes that Nicholls was aware that the Monitoring Trustee had recommended in its initial report that ex-DCC business management should ensure that the use of Nicholls trucks was limited to supplying ex-DCC business depots and only ex-DCC business drivers perform the deliveries to customers of the ex-DCC business (see paragraph 80 above). In light of these circumstances, the CMA considers that Nicholls ought to have suspected that, in making deliveries to customers of the ex-DCC business using a Nicholls-owned and branded mini-tanker, it was failing to comply with the IEO and accordingly should have notified the CMA of this action in accordance with paragraph 9 of the IEO. In fact, Nicholls only informed the CMA of this action when providing information and documents in response to the CMA's information request dated 1 October 2018.

106. Nicholls submitted that the arrangement was agreed prior to the IEO coming into force between the remaining management of the ex-DCC business and Nicholls and, therefore, the CMA's consent was not required as the arrangement was covered under paragraph 3 of the IEO.[93]

107. As noted above, **paragraph 3** of the IEO provides that no act or omission constitutes a breach of the IEO to the extent that it occurred or was completed prior to the commencement date.[94] The CMA has seen no evidence of an outsourcing arrangement as suggested by Nicholls in its responses.[95] While the decisions to use the Nicholls mini-tanker to make deliveries to domestic

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[92] Second Response Letter, para 2.17.
[93] Second Response Letter, paras 2.3 and 2.4.
[94] As noted above, C.12 of CMA2 explains the effect of an interim order, noting that "*integration that has already occurred prior to the interim order being made, and any unavoidable consequential effects of this integration, will not be in breach of the interim order*". Footnote 354 to C.12 explains that *"[t]he CMA does not consider such unavoidable consequential effects of integration to include situations where parties could, rather than continuing with an existing integrated practice, instead operate such practices separately with the resources available at the acquired party (for example, separate negotiations instead of joint negotiations)."*
[95] First Response Letter page 2, second bullet point and page 4, paragraph 3. See also the Second Response Letter, para 2.1.

customers of the ex-DCC business and to use Nicholls drivers appear to have been taken before the IEO commenced[96], the CMA is of the view that any deliveries made on this basis, after the IEO commenced, required consent from the CMA.

108. The act of using the Nicholls mini-tanker and drivers to make deliveries to customers of the ex-DCC business for orders made after the commencement of the IEO was not an unavoidable consequential effect of the decisions taken by Nicholls to use the Nicholls mini-tanker and drivers for orders made before the IEO commenced. Nicholls still had a choice about what to do for each order placed and to make a decision in light of the obligations under the IEO, including applying to the CMA for a derogation regarding orders placed after the commencement of the IEO.

109. Nicholls further submitted that this arrangement was designed to protect the value of the ex-DCC business and had no impact on the viability of the ex-DCC business or on the CMA's remedial powers should they have been required.[97] The CMA considers that these submissions ignore the purpose of the IEO. Once the IEO was in place, these were matters to bring to the attention of the CMA for consideration under the established derogation process.[98]

110. Nicholls also submitted that the arrangement was not reversible without significant cost – at that time, the ex-DCC business did not have any spare drivers to undertake these routes and the hired mini-tanker had been returned to the lessor given that it was deemed too expensive to maintain and was not road worthy.[99] In the CMA's view, these submissions are not relevant to whether or not these actions were a breach of the IEO. If Nicholls had approached the CMA and sought a derogation, these are the types of issues that the CMA could have explored with Nicholls as part of considering any derogation request.

111. For these reasons, the CMA does not consider that **paragraph 3** of the IEO applies to the deliveries made on orders placed after the IEO had commenced.

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[96] In its response of 4 October 2018 to the CMA's information request, Nicholls noted that the decision to sell the ex-DCC tanker and use the Nicholls mini-tanker was taken on 1 May 2018 and it decided from 1 June 2018 to use the Nicholls mini-tanker and driver to make deliveries to both its own customers and ex-DCC customers. In its response of 1 November 2018, Nicholls added that these "deliveries would have been discontinued altogether had the decision not been taken to use the Nicholls mini-tanker to fulfil them".
[97] First Response Letter page 2, second bullet point.
[98] *Electro Rent* at [138].
[99] Second Response Letter, paras 2.5 – 2.7. See also First Response Letter page 2, second bullet point and Oral Representations at para 38 of the note of the call.

112. Accordingly, the CMA finds that Nicholls has failed to comply with paragraphs 4(c), 5(a), 5(e)(i), 5(l) and 9 of the IEO.

Breach 3 – late submission of compliance statements

Facts

113. The IEO required the CEO of Nicholls or other persons of Nicholls, as agreed with the CMA, on behalf of Nicholls, to provide to the CMA a statement in the form set out in the Annex to the IEO confirming compliance with the IEO.[100] Nicholls was required to do this on 22 June 2018 and subsequently every two weeks. Nicholls submitted its compliance statements fortnightly as required under the IEO on 22 June 2018, 6 July 2018, 20 July 2018 and 3 August 2018.

- *17 August and 31 August compliance statements*

114. Between 15 and 21 August 2018, Nicholls' legal advisers corresponded with the CMA in relation to the form of the agreement appointing a hold separate manager for the ex-DCC business. This followed concerns in the Monitoring Trustee's initial report about the independence of the acting General Manager of the ex-DCC business. As part of this correspondence Nicholls proposed that the hold separate manager be required to provide a separate two-weekly compliance statement to the CMA. The CMA indicated that this obligation would not be necessary at this time given the ongoing role of the Monitoring Trustee.[101]

115. On 28 August 2018 the CMA emailed Nicholls' legal advisers to say that the last compliance statement received was on 3 August 2018 and could they "*send the compliance statement for the subsequent two week period and ensure that compliance statements are sent to the CMA every two weeks, as required under the terms of the [IEO]…".*[102] This email concerned the compliance statement due to the CMA ten days prior, on 17 August 2018. Later that day, Nicholls' legal advisers replied to say:[103]

> *…We are happy to provide a compliance statement; however, we were waiting for guidance from the CMA / [monitoring trustee] on the appropriate form (now that Nicholl's has stepped back from the ex-DCC business). The current form of statement requires that Nicholl*

[100] Paragraph 7 of the IEO.
[101] Email from the CMA to Nicholls' legal advisers dated 16 August 2018 and Second Response Letter paras 3.3 – 3.6.
[102] Email from the CMA to Nicholls' legal advisers dated 28 August 2018.
[103] Email from Nicholls' legal advisers to the CMA dated 28 August 2018.

assert that part of their business (ex-DCC) has been compliant Despite [sic] the fact that they no longer exert day-to-day control (and therefore cannot verify compliance with the Order).

I will send you through some suggested drafting in the morning (which carves out the ex-DCC business from the definition of the Nicholls business) and, once agreed with you, we will arrange for that to be signed straightaway.

116. The CMA did not agree with the suggested revisions to the wording of the template for the compliance statements sent through by Nicholls' legal advisers, informing them on 29 August 2018 that:

…

We consider that it is apparent from [the IEO] provisions that it is for Nicholls to procure the compliance by the acquired DCC business with the IEO. Therefore, the compliance statement set out in the Annex to the IEO must be signed on behalf of Nicholls every two weeks. If not, Nicholls is in breach of the IEO.

The compliance statement to which you refer in your email of last night was a separate form of compliance statement discussed with the CMA in the context of the hold separate agreement as a further control to ensure the independence of [✂] in the event that the Monitoring Trustee was discharged. Given that the Monitoring Trustee remains in place, we did not consider that separate confirmation of compliance from [✂] is required.

We would be grateful if you could please confirm as soon as possible that Nicholls has been acting in compliance with the IEO and send the most recent compliance statement signed on behalf of Nicholls.

117. On 29 August 2018 Nicholls' legal advisers responded to the CMA's email saying "*Thank you for this clarification. We will arrange for the signed compliance statement to be sent through to the CMA".*[104]

118. On 3 September 2018, the CMA emailed Nicholls' legal advisers asking when to expect the outstanding compliance statements from Nicholls, noting that "*the last compliance statement was received by the CMA on 3 August 2018 which means that Nicholls has failed to provide two compliance statements to the CMA, as required under the IEO*".[105] Later that day Nicholls' legal advisers

[104] Email from Nicholls' legal advisers to the CMA dated 29 August 2018.
[105] Email from the CMA to Nicholls' legal advisers dated 3 September 2018.

provided the CMA with signed compliance statements for the periods ending 17 August 2018 and 31 August 2018.[106] These compliance statements were submitted after the deadline required by paragraph 7 of the IEO (16 days late for the compliance statement due on 17 August and two days[107] late for the compliance statement due on 31 August 2018).

- *14 September compliance statement*

119. On 19 September 2018, Nicholls' legal advisers provided the CMA with the compliance statement signed by [Nicholls Senior Manager] on 18 September 2018 with the following cover email:

> *…*
>
> *Please note that this document has been provided subject to the same caveats submitted previously regarding [Nicholls Senior Manager's] limited knowledge of the ex-DCC business, which arises by virtue of his compliance with the Order and therefore his inability to oversee the day-to-day running of the ex-DCC business, and notwithstanding previous submissions by Nicholls to the CMA proposing an amended version of the compliance statement that would correctly reflect the extent of his knowledge of the ex-DCC business and / or the submission of a separate compliance statement regarding the ex-DCC business by the current acting General Manager.*
>
> *The CMA has repeatedly threatened enforcement action if [Nicholls Senior Manager] does not sign the compliance statement in the exact form as annexed to the Order.*
>
> *Therefore, [Nicholls Senior Manager] has signed this document, notwithstanding that it is impossible for him to fully verify the activities of the ex-DCC business without breaching the Order.*

120. This compliance statement was due on 14 September 2018 and therefore was provided to the CMA four days late. Nicholls submitted the remaining compliance statements on time until the IEO was revoked on 18 October 2018.[108]

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[106] Email from Nicholls' legal advisers to the CMA dated 3 September 2018. These compliance statements covered the period 4 – 17 August 2018 and 18 – 31 August 2018.
[107] This equates to 10 working days and 1 working day late respectively.
[108] Compliance statements due on 28 September and 12 October 2018.

Assessment

121. The CMA considers the provision of periodic compliance statements to be an important obligation in the IEO. Businesses are required to monitor and report on their compliance with the IEO to the CMA, including notifying the CMA of any material developments relating to the relevant businesses. This transparency helps the CMA to understand what is going on in the businesses subject to the CMA's merger investigation. It also focuses the attention of the business on the requirements in the IEO, which in turn helps to ensure compliance with interim measures. It is why paragraph 7 of the IEO requires the most senior individual of the business (the CEO) or other persons as agreed with the CMA personally to sign statements to confirm compliance with the IEO and for the business to provide these to the CMA on a regular basis while the interim measures are in place.

122. Under paragraph 7 of the IEO, Nicholls was required to submit compliance statements every two weeks, starting on 22 June 2018. Nicholls submitted the compliance statements due on 17 August, 31 August and 14 September 2018 after the deadline specified in the IEO had passed and for two of the three instances, only after the CMA had contacted Nicholls' legal advisers to request they be provided to the CMA.

123. In the First Response Letter, Nicholls submitted that this did not result in a breach of the IEO. In summary, [Nicholls Senior Manager] made the following submissions in the First Response Letter:[109]

    a) Once the Monitoring Trustee had been appointed and issued his first report, he believed that this would obviate the need to provide further statements. [Nicholls Senior Manager] stated that as he had completely stepped back from involvement with the ex-DCC business, he did not understand why statements would still be required. Due to this confusion, they sought advice and clarity on this from the CMA, which resulted in delay.

    b) As regards the compliance statement due on 14 September, this was subject to a short delay during a period when Nicholls' limited resources were "totally focused" on responding to a Section 109 Notice, the second Monitoring Trustee report and a list of actions that had been issued by the CMA.

    c) Any short delay in providing compliance statements reflected how seriously he took the IEO and he regrets that the case team failed to

[109] First Response Letter, pages 4 – 5.

engage with him, seek to explain to him how he could sign the IEO when he was no longer running the ex-DCC business or alert him to deadlines and concerns about delay.

124. In the CMA's view, none of these points support Nicholls' submission that the IEO was not breached as a result of the late submission of certain compliance statements. The CMA recognises that [Nicholls Senior Manager] could not be involved in every aspect of the ex-DCC business. However, as the IEO extended to all Nicholls' subsidiaries, it was for Nicholls to put in place arrangements that would enable it to confirm compliance with all parts of its group, including the ex-DCC business in a manner that did not itself infringe the IEO. Given that a hold separate manager had been put in place for the ex-DCC business[110], confirmation of compliance could have been sought by [Nicholls Senior Manager] from the hold separate manager. Further, rather than waiting for deadlines to pass and for the CMA to follow-up, Nicholls should have made known any difficulties and raised any queries with the CMA as soon as possible. It was also open for Nicholls to have taken legal advice in a timely manner if it had any doubts about its reporting obligations under the IEO. Nicholls is a well-resourced company which had engaged external legal advisers who had been involved in communications with the CMA about the provision of compliance statements by Nicholls (see paragraphs 115 to 119 above). In the Second Response Letter and Oral Representations, Nicholls did not repeat these submissions in support of why the IEO was not breached, instead relying on these points to submit that it is not appropriate for the CMA to impose a fine with regard to the delay in providing compliance statements.[111] In light of this, the CMA has considered Nicholls' submissions here as well as in the context of whether Nicholls had a reasonable excuse and whether it is appropriate to impose a fine on Nicholls, to the extent relevant.

125. Accordingly, the CMA finds that, in failing to provide the CMA with certain compliance statements[112] by the deadline specified in the IEO, Nicholls has not complied with **paragraph 7** of the IEO.

[110] From 21 August 2018 and then formally appointed following CMA directions dated 19 September 2018.
[111] Para 3.1 of the Second Response Letter. [Note: corrections were made to this sentence following representations from Nicholls on the confidential penalty notice issued on 28 June 2019.]
[112] Specifically, those due on 17 August, 31 August and 14 September 2018.

- *Conclusion on failure to comply with an interim measure*

126. For the reasons set out above the CMA has decided that Nicholls has failed to comply with the IEO, which is an interim measure within the meaning of section 94A of the EA02.

Without reasonable excuse

127. Section 94A(1) of the EA02 provides that penalties can be imposed if a failure to comply is "without reasonable excuse".

128. 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.[113]

129. The Guidance states that the CMA will consider whether any reasons for failing to comply with an IEO amount to a reasonable excuse on a case-by-case basis; and that the CMA will consider whether 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).[114] There is nothing to suggest that any such event 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 Nicholls has not established an objectively reasonable excuse for failing to comply with the IEO.

130. In the First Response Letter Nicholls denied any breach of the IEO and did not provide any reasonable excuse for failing to comply with the IEO. However, this response contained various explanations for the actions taken (or not taken) by Nicholls and the CMA considered these in the Provisional Decision. In its representations on the Provisional Decision, Nicholls submitted that "*the information provided in this response and previously provided to the CMA demonstrates that it at all times was and believed itself to be in full compliance with all legal obligations arising from the [IEO]. However, to the extent that the CMA upholds a finding of breach in whole or in part with regard to any of the allegations contained in the Provisional Decision, Nicholl believes that the information set out in this letter demonstrates that it had a reasonable excuse for doing so*".[115] Nicholls further submitted that its "*reasonably held belief that its actions were not in breach of*

[113] *Electro Rent* at [69] and [112].
[114] The Guidance paragraph 4.4.
[115] Page 2 of the Second Response Letter.

the [IEO] amounts to a reasonable excuse".[116] Nicholls said the CMA has adduced no evidence that Nicholls (i) intended to breach the IEO, or (ii) was informed that there was any possibility that its conduct might breach the IEO, or (iii) had sufficient relevant experience such that it ought to have considered the possibility of breach and pro-actively sought clarification on whether its conduct might breach the IEO.[117]

131. In the CMA's view, it is not a reasonable excuse that a party did not intend to breach the IEO. The CMA considers that this submission fails to take into account that the breach consists of failing to obtain the CMA's prior written consent for certain actions which might prejudice the reference concerned or impede the taking of justified remedial action. For the reasons stated above, the CMA considers that Nicholls ought to have suspected that, by taking these actions, it was failing to comply with the IEO.

132. The IEO catches more than just actual prejudice 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.[118] While Nicholls may not have been familiar with the CMA's merger investigation process, as the chronology of events above shows, the CMA explained the IEO and derogation process to Nicholls on more than one occasion. Nicholls was also given specific CMA contact points with whom they could ask questions and the CMA has published guidance on both the merger investigation process and the CMA's approach to IEOs and granting derogations (CMA2 and CMA60 respectively). Further, Nicholls engaged two law firms to assist it with the CMA's investigation. As explained in the Guidance (at paragraph 4.5), the CMA will expect the person to whom the interim measures apply to be responsible for ensuring the interim measures are fully understood and complied with, even when, for example, using external advisers to assist them with their response.

133. The CMA therefore does not consider these submissions demonstrate that Nicholls had a reasonable excuse for its failures to comply.

134. The CMA has also considered Nicholls' representations on reasonable excuse in respect of each breach. While some of these explanations were not explicitly formulated as a reasonable excuse for breaching the IEO, the CMA has nonetheless considered whether any of the explanations might be regarded as a reasonable excuse.

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[116] Para 4.12 of the Second Response Letter.
[117] Para 4.13 of the Second Response Letter as well as para 1.22(b) and page 1 of the First Response Letter.
[118] *ICE/Trayport* at [220].

Relocation

135. In addition to its representations above, Nicholls submitted the following grounds in relation to Breach 1: (i) their legal advisers at the relevant time had no experience in this area[119], (ii) Nicholls believed that the derogation request submitted on 22 June 2018 did not raise any concerns and would be granted shortly afterward[120], and (iii) that it was necessary to begin preparations to transfer staff and equipment in early June and continue those preparations up to the deadline on a phased basis.[121] Nicholls noted that this was "*imperative to ensure business continuity and it would have been reckless and itself a breach of the [IEO] for the Nicholl business to have postponed such preparations and to have failed to make adequate arrangements ahead of the deadline*."[122]

136. The CMA does not consider these submissions demonstrate that Nicholls had a reasonable excuse for relocating the staff of the ex-DCC business to the Nicholls premises prior to obtaining written consent from the CMA.

137. Firstly, it is not a reasonable excuse that a party fails to take appropriate advice as to its proposed actions, knowing that an IEO is in force. Second, the chronology of events above does not support Nicholls' submission that it believed that the derogation request submitted on 22 June 2018 did not raise any concerns and would be granted shortly afterwards. It is clear from the correspondence that the CMA continued to reserve its position on this request until it had received sufficient information to be able to take a decision on it. As noted in CMA60 and CMA2, the CMA will be best able to deal efficiently with derogation requests where these are fully reasoned and supported by relevant evidence, including whether the derogation request is urgent and if so how urgent it is and why.[123] It was Nicholls' responsibility to ensure that the CMA was aware of the urgency of the matter and was provided with sufficient information to be able to take a decision on the derogation request within the appropriate timeframe. Nicholls did not initially provide the CMA with a fully reasoned and supported derogation request in relation to the move. This inevitably prolonged the process as the CMA needed to request further information from Nicholls before it could make a decision on Nicholls' derogation request.

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[119] Oral Representations para 25 of the note of the call.
[120] Second Response Letter para 1.22(c). Nicholls submits that "this belief was reinforced when the CMA asked Nicholls on a call on 27 June to continue to prioritise preparing a full response to the Section 109 Notice over providing additional information requested by the CMA regarding the derogation requests".
[121] First Response Letter page 3, third paragraph.
[122] First Response Letter page 3, third paragraph and Second Response Letter para 1.39(b).
[123] CMA60 at paragraph 3.2 and CMA2 paragraphs C20 and C21.

138. Finally, Nicholls was not precluded from taking preparatory steps in relation to the move. The IEO required Nicholls to seek the prior consent of the CMA before taking any steps that were prohibited by the IEO. At no point did the CMA indicate to Nicholls that it could proceed to co-locate staff from the two businesses prior to obtaining the CMA's consent. It was incumbent on Nicholls to wait for the CMA's consent before taking the step of co-locating staff from the ex-DCC business with staff from the Nicholls business, which was contrary to the requirements of the IEO.

Use of Nicholls-branded mini-tanker to make deliveries to ex-DCC customers

139. In the First Response Letter, [Nicholls Senior Manager] said[124]:

> *This outsourcing arrangement was in place prior to the [IEO] coming into force, and therefore I do not believe that a derogation was required for the arrangement to continue. I do not see any reason why this arrangement, which was ensuring supply to a small number of ex-DCC customers, should have raised any concerns with the CMA then or now and note that no unwinding Order was issued by the CMA in this regard.*

140. The CMA does not consider that these submissions demonstrate that Nicholls had a reasonable excuse for this failure to comply with the IEO. As explained in paragraphs 106 to 111 above, the CMA disagrees with Nicholls' interpretation of the scope of paragraph 3 of the IEO and considers that this action required a derogation once the IEO came into effect. Further, in the CMA's view, the fact that this action affected a small number of ex-DCC customers does not mean it cannot amount to a failure to comply with the IEO nor does it constitute a reasonable excuse for it taking place. The IEO is precautionary in nature.

141. Nicholls also submitted that[125]:

> *… given that the mini-tanker was used predominantly for deliveries to Nicholl customers when it was not on loan to the ex-DCC business, it was not economically viable to change the branding daily. As explained in our response to the Section 109 Notice dated 25 October 2018, individual customers have a preference for some form of branding on trucks delivering home heating oil and would not react positively to the use of an unbranded truck.*

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[124] First Response Letter, page 4, paragraph 3. This submission was repeated in the Second Response Letter at paras 2.5 and 2.4.
[125] Second Response Letter, para 2.16 and First Response Letter, page 4, paragraph 6.

142. The CMA also does not consider these submissions amount to a reasonable excuse for failing to comply with the IEO.[126] As noted above, if Nicholls had approached the CMA and sought a derogation, these are the types of issues that the CMA could have explored with Nicholls as part of considering any derogation request.

Compliance statements

143. In the First Response Letter, Nicholls said that the delay in relation to submitting the compliance statements due on 17 and 31 August 2018 was a result of a misunderstanding as to whether the appointment of the Monitoring Trustee would obviate the need for a compliance statement to be issued.[127] In the Second Response Letter, Nicholls submitted that "*the only material delay in providing a compliance statement (one incident of a two week delay), arose from Nicholl's honestly held belief that compliance statements would no longer be required once the informal hold-separate manager [✂], was appointed. This belief arose from a genuinely ambiguous interaction with the CMA and reflected the seriousness with which it approached verifying compliance with the [IEO]. This misunderstanding was compounded by the fact that the CMA did not notice that a statement had not been provided for 11 days"*.[128]

144. Rather than waiting for deadlines to pass and for the CMA to follow-up, Nicholls should have made known any difficulties or concerns and raised these with the CMA as soon as possible. Nicholls did not do so. Nicholls also engaged lawyers who had been involved in communications with the CMA about the provision of compliance statements by Nicholls. As regards Nicholls' submissions that the delay was a result of a misunderstanding, the CMA does not consider that this constitutes a reasonable excuse. However, the CMA has taken into account the fact there may have been some scope for confusion on the part of Nicholls as to whether a compliance statement was needed in the circumstances when determining the appropriate level of penalty (see paragraph 170 below). The CMA does not agree that its conduct contributed to these delays, nor was it a reasonable excuse for the late submission of these two compliance statements. The obligation lay with Nicholls to ensure it submitted the compliance statements on time.

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[126] Note *Electro Rent* at [138] where the CAT accepted the CMA's submission that, even if Electro Rent believed serving the Break Notice would promote Electro Rent's commercial interests, the company should have consulted the CMA and sought a derogation from the interim order.
[127] First Response Letter, page 2 final bullet point and page 5, third paragraph.
[128] Second Response Letter, paras 3.1(a) and (b) and paras 3.7 – 3.9 and Oral Representations, paras 55, 56 and 58 of the note of the call.

145. In the First Response Letter, Nicholls told us the compliance statement due on 14 September 2018 was subject to a short delay as it was during a period when "*our limited resources were totally focused on responding to a Section 109 Notice issued on 31 August 2018, the second Monitoring Trustee report issued on 3 September 2018 and a list of actions that had been issued by the CMA on 14 September 2018*".[129] Nicholls elaborated on these points in its representations on the Provisional Decision, submitting that this short delay of three working days "*arose given the focus of Nicholl on actioning an extremely detailed list of items that the CMA had identified on 12 September as being urgent and requiring action and a response by Nicholl to the CMA by close of business on 14 September*".[130]

146. The CMA recognises that a merger investigation places additional demands on the parties involved. However, the IEO reporting process is not a material additional burden on the parties (given that compliance with the obligations contained within the IEO should be an ongoing process). Therefore, the CMA does not consider that Nicholls had a reasonable excuse for submitting these compliance statements late.

147. The CMA therefore concludes that Nicholls had no reasonable excuse for failing to comply with the requirements of the IEO which have been identified above.

E. Appropriateness of imposing a penalty at the level proposed

Appropriateness of imposing a penalty

148. Having had regard to its statutory duties and the Guidance, 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 deterrence, as well as the serious and in some respects flagrant nature of the breaches in this case.

149. Nicholls' primary submission was that the CMA should find that no breach of the IEO occurred. In the alternative, Nicholls submitted that the CMA should find that it is not appropriate or proportionate to impose a penalty, on the specific facts and context of this case and withdraw its Provisional Decision in its entirety.[131]

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[129] First Response Letter, page 5 second paragraph. Note that the CMA sent the list of actions to Nicholls on 12 September 2018. See email from the CMA to Nicholls' legal advisers on 12 September 2018.
[130] Second Response Letter, paras 3.1(d), 3.17 to 3.22 and Oral Representations, para 52 of the note of the call.
[131] Second Response Letter, page 2.

General deterrence

150. In the Second Response Letter, Nicholls submitted that the "*honestly held belief by Nicholl throughout that it was acting in a manner consistent with the [IEO], which belief was reasonable in all of the circumstances, is important such that there is no useful deterrent effect in the CMA issuing a penalty notice*".[132] The CMA notes that Nicholls is no longer subject to commitments to maintain the ex-DCC business as a separate business from the Nicholls business. While the CMA does not consider a penalty is warranted in order to achieve specific deterrence in this case, the CMA considers it appropriate to impose a penalty in the interests of general deterrence.

151. The CMA considers that it is of utmost importance to the UK's voluntary, non-suspensory regime that interim measures should be effective, particularly in the small number of completed mergers which the CMA identifies as warranting review. Initial enforcement orders serve a particularly important function where, as in this case, the merger was completed. Their function is to prevent conduct that might prejudice a reference or impede action justified by the CMA's final decision. The purpose of an IEO, as noted by the CAT, is precautionary, guarding against the possibility of pre-emptive action.[133]

Seriousness of the breaches

152. The failures to comply were of a serious nature, to varying degrees. For the reasons set out at paragraph 41 the IEO 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 EA02 via the IEO.

Relocation

153. The CMA considers this failure to comply with the IEO to be particularly serious. In the First Response Letter, Nicholls submitted that "*[w]e notified the case team of the move and engaged with the CMA to ensure that protections were in place to mitigate any potential risk to the CMA's remedial powers*."[134] However, as a result of Nicholls' actions, there was a material period of time (of at least 10 days) when staff from the ex-DCC business were operating from the same premises as staff from the Nicholls business (including sales staff at both businesses), without all the necessary safeguards in place to

[132] Second Response Letter, para 4.16.
[133] *ICE/Trayport* at [220].
[134] First Response Letter page 3, fourth paragraph. See also page 2, first bullet point. Second Response Letter para 1.20.

prevent further integration of the businesses. Without necessary safeguards in place this is the type of action which significantly increases the risk of commercially sensitive information being shared between competitors, which in this case had the potential to impact the viability of the ex-DCC business.[135] [✂ Nicholls] explained why certain steps taken (or not taken) by them meant that the presence of Nicholl staff and ex-DCC staff at the Nicholls Premises during the period 2 July to 9 July 2018, did not result in any transfer of commercially sensitive information.[136] In the CMA's view, Nicholls' submissions do not detract from the seriousness of this breach.

Mini-tanker

154. The CMA has found that the use of a Nicholls branded truck to make 1% of deliveries of home heating oil to customers of the ex-DCC business (at the time, a competitor of Nicholls) was not "in the ordinary course of business". This action undermined the sales and brand identity of the ex-DCC business as well as having the potential to damage the goodwill of the ex-DCC business. Ex-DCC business customers had ordered heating oil from the ex-DCC business but were in fact supplied with heating oil by a Nicholls branded mini-tanker and Nicholls driver.

Compliance statements

155. In its representations on the Provisional Decision, Nicholls submitted that the CMA had a much greater degree of visibility over the level of compliance than would be usual in a "standard phase 1 completed merger" and this much more enhanced view of compliance should be taken into account by the CMA when considering whether the delays were material or serious.[137] However, in circumstances where the CMA has found Nicholls failed to comply with the IEO in several respects and where such action formed part of a pattern of behaviour by Nicholls in its interactions with the CMA[138], the CMA considers that the failure to provide certain compliance statements within the deadline specified in the IEO to be serious in nature.

Flagrant nature of breaches

156. The CMA considers the failures to comply in relation to the relocation of ex-DCC staff and the use of a Nicholls-owned mini-tanker were flagrant in

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[135] See paragraph 68 above.
[136] Second Response Letter para 1.20.
[137] Second Response Letter, para 3.1(e). [Note: a correction was made to paragraph 154 above following representations from Nicholls on the confidential penalty notice issued on 28 June 2019.]
[138] See, for example, the need to appoint both a monitoring trustee and a hold separate manager for the purposes of securing compliance with the IEO.

nature.[139] Nicholls was aware of its obligation to seek the CMA's consent before taking action which may constitute pre-emptive action within the meaning of section 72 of the EA02 and that may lead to a breach of the IEO. Nicholls sought consent from the CMA for derogations from the IEO on multiple occasions during the course of the CMA's merger investigation.[140] Nicholls was also aware that the CMA had recently fined Electro Rent Corporation for failing to comply with an interim order and therefore that failure to comply could have material financial consequences.[141]

157. In the First Response Letter, Nicholls submitted that it "engaged proactively with the CMA prior to the move" and "in good faith."[142] Nicholls elaborated on this submission in its representations on the Provisional Decision, submitting that "*it is not appropriate for the CMA to label the actions relating to the [move] as 'flagrant' or 'egregious' since it was undertaking all endeavours to cooperate with the CMA and keep the CMA informed of all actions it was taking to ensure compliance whilst also ensuring the [move] could be completed by the 11 July deadline*".[143]

158. The CMA does not agree with this characterisation of Nicholls' engagement with the CMA in relation to the move. The CMA considers that Nicholls' conduct concerning the relocation of staff from the ex-DCC Premises to the Nicholls Premises to be particularly flagrant. As described above at paragraphs 49 to 53, Nicholls continued to discuss its derogation request with the CMA over the course of late June and early July 2018 on the basis that it was requesting the CMA's consent to take an action in the future. This included submitting a revised derogation request on 9 July 2018 in relation to the move following concerns expressed by the CMA about Nicholls' original derogation request.

159. Nicholls also provided various explanations as to why it had used certain language in the revised derogation request dated 9 July 2018. Nicholls said it used forward-looking language in the belief that this was the correct format to use[144] and the future tense and continuous tense references to the transfer of ex-DCC business staff in Nicholls' communications on 3 July and 9 July to the

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[139] The Guidance at paragraph 4.2.
[140] See, for example, the derogations granted by the CMA on 12 July, 3 August, 21 August, 24 September and 5 October 2018, available here: https://www.gov.uk/cma-cases/nicholls-fuel-oils-limited-dcc-energy-limited-in-northern-ireland.
[141] See paragraph 56 above.
[142] First Response Letter, page 2, first bullet point and page 3, fourth paragraph.
[143] Second Response Letter, para 1.24 and Oral Representations, paras 32 and 35 of the note of the call.
[144] Nicholls elaborated on this submission in the Oral Representations and told the CMA that it appeared legal advisers at the time based the wording for the derogation on CMA guidance and examples of derogation requests on the CMA's website. They had reviewed publicly available derogation requests and may have believed that the use of future tense wording was a standard approach. It was the first time that these advisers had prepared derogation requests in this context and unfortunately some of the language was open to interpretation. Oral Representations, paras 24 and 29 of the note of the call.

CMA reflected the fact that this transfer remained ongoing up to 11 July and had not been completed on 3 or 9 July.[145] Nicholls' explanations for the language it used in the revised derogation request appear to contradict one another. Moreover, the revised derogation request was not the only communication Nicholls had with the CMA in relation to this action. As Nicholls notes in its representations, Nicholls and the CMA had a number of communications over this period. Thus, the CMA considers that Nicholls had ample opportunities and time to notify the CMA of the situation. In fact, Nicholls appears to have assumed the CMA would grant the derogation and had completed the relocation of staff from the ex-DCC Premises to the Nicholls Premises before the CMA's consent was given. At no point up until the CMA provided its consent for this action on 12 July 2018 did Nicholls advise the CMA that the relocation of staff had already occurred. Nicholls only informed the CMA as part of responding to a specific question in the CMA's formal information request dated 1 October 2018 (see paragraph 65 above).

160. In the CMA's view, similarly flagrant behaviour was shown by Nicholls when responding to the CMA's information requests in relation to the use of a Nicholls-owned mini-tanker. As noted above in paragraph 89, the CMA was given conflicting versions as to the extent of the disclosure of the EMO branded delivery dockets within the Nicholls business.

Other considerations relevant to the breaches

161. Nicholls submitted that the CMA never formed the view that the Merger gave rise to even a 'realistic prospect' of a substantial lessening of competition, such that no actions undertaken by Nicholls could ever have prejudiced an eventual remedy.[146] The CMA does not consider this to be a factor that goes to the appropriateness of imposing a penalty in this case. However, as stated in paragraph 170 below, the CMA has taken into account, the fact that the actual adverse effect which the breach had on the CMA's ability to take remedial action is likely to have been limited, when determining the appropriate level of penalty.

162. In relation to Breach 1 and Breach 2, Nicholls submitted that there was no risk of prejudice to the CMA's ability to remedy any competition concerns arising from these actions.[147] Nicholls made various points in support of these submissions. As noted above in paragraph 36, the onus is on addressees to seek consent if their conduct creates the possibility of prejudice. For the

[145] Second Response Letter, paras 1.22 (c) and (d).
[146] Second Response Letter, para 4.8.
[147] Second Response Letter, paras 1.39 and 2.16.

reasons outlined above[148], the CMA considers these failures to comply created the possibility of prejudice to the reference. In light of these findings, the CMA does not agree that there was no risk of prejudice.

163. As regards the compliance statements (Breach 3), Nicholls submitted that no prejudice arose from the delays since the CMA had a much more enhanced view of compliance (see paragraph 155 above), Nicholls was "operating at a much higher level of cooperation with the CMA than would usually be the case in the context of completed mergers", Nicholls derived no benefit from the delays and in any event, "compliance statements for all periods were provided".[149] Nicholls also said that the delays in submitting the compliance statements due on 31 August and 14 September were so short as to negate even the possibility of prejudice. These delays occurred during a period when the CMA and Monitoring Trustee had concerns about Nicholls' compliance with the IEO[150], and in these circumstances, the CMA considers that the delays, including those relating to the 31 August and 14 September compliance statements, created the possibility of prejudice.

164. In its Oral Representations, Nicholls described the nature of the company as a family business, which does not have multiple layers of management like large corporates and they do not have internal legal counsel.[151] Although Nicholls may not have had significant internal resources, the CMA considers that Nicholls had sufficient financial resources available to ensure compliance[152]. Nicholls' turnover was approximately £283.1million in financial year ended 31 May 2018. The CMA also notes that Nicholls retained two law firms to advise it during the CMA's investigation of the Merger.

165. In the Second Response Letter, Nicholls also submitted that the CMA's own conduct, Nicholls' conduct in seeking to comply with the IEO and the lack of clarity in the CMA's guidance were factors to be taken into account in determining the appropriateness of imposing a penalty and if so, the level of penalty.[153] In the CMA's view, these submissions are more relevant to the level of penalty, than the appropriateness of imposing a penalty and accordingly, have considered them in that context (see below). Nonetheless, for the avoidance of doubt, for the reasons detailed in paragraphs 173 to 183 below, the CMA does not consider these to be factors going to the appropriateness of imposing a penalty in this case.

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[148] See paragraphs 68 and 69 and 95 – 103.
[149] Second Response Letter, paras 3.1 and 3.23 – 3.28.
[150] Second Report of Monitoring Trustee dated 4 September 2018 and email from the CMA to Nicholls' legal advisers dated 12 September 2018.
[151] Oral Representations, paras 8 and 9 of the note of the call.
[152] The Guidance at paragraph 4.11.
[153] Second Response Letter, para 4.1.

166. Nicholls did not bring any of the failures to comply to the CMA's attention. As noted above, Nicholls 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.

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

Appropriateness of the amount of the penalty imposed

168. Consistent with its statutory duties and the Guidance[154], the CMA has assessed all relevant circumstances to determine an appropriate level of penalty. It has also taken account of the following aggravating and mitigating factors in line with the Guidance.

Aggravating factors

169. The CMA has taken into account the following aggravating factors, which point towards a higher penalty:

a) The failures to comply in relation to the relocation of ex-DCC staff (Breach 1) and the delay in providing compliance statements to the CMA (Breach 3) were due to the acts and omissions of the senior management of Nicholls. This includes the [Senior Manager], who signed the compliance statements under the IEO.[155]

b) Nicholls' conduct towards the CMA, in particular the representations it made to the CMA in relation to the relocation of ex-DCC business staff to the Nicholls Premises, was egregious. Nicholls ought to have known that, by failing to inform the CMA of the fact these staff had already moved to the Nicholls Premises, it was misleading the CMA. More generally, it also showed disregard for the CMA's merger investigation process.

c) These failures to comply by Nicholls were part of a pattern of behaviour that resulted in increased public expense in investigating the Merger. Nicholls did not bring these failures to comply to the attention of the CMA and when asked to provide information to enable the CMA to investigate these matters, there were difficulties in getting a complete and accurate understanding of the actions from Nicholls. Further, these failures were committed in circumstances where the CMA had raised concerns about

[154] The Guidance at paragraph 4.11.
[155] The Guidance at paragraph 4.5.

compliance of the IEO with Nicholls and taken steps to address them, including directing Nicholls to appoint a Monitoring Trustee and a hold separate manager and when Nicholls was given a specific instruction by the CMA (in relation to complying with the CMA's derogation dated 12 July 2018), Nicholls did not comply with one of the CMA's requirements until prompted to do so by the Monitoring Trustee (see paragraph 61 above).

Mitigating factors

170. The CMA has also taken account of the following mitigating factors in line with the Guidance, which point to a reduction in the level of penalty, namely:

a) The fact that, although the potential adverse effects of the breaches on the CMA's investigation could have been significant, the actual adverse effect is likely to be limited.[156] In doing so the CMA has taken account of the relatively small number of customers affected by Breach 2 (approximately 1% of the total number of deliveries made to domestic customers of the ex-DCC business during the relevant period).[157] We have also taken account of the reduced impact of Breach 2 on the goodwill and brand identity of the ex-DCC business in light of representations from Nicholls on the Provisional Decision about the use of third party suppliers by the ex-DCC business prior to the Merger (see paragraph 97 above).

b) The reasons given by Nicholls for the failure to provide the compliance statements due on 17 and 31 August 2018 to the CMA in accordance with paragraph 7 of the IEO (Breach 3).[158] While Nicholls should have clarified if it had any doubts about its obligations under the IEO, based on the evidence provided by Nicholls[159], the CMA accepts there may have been some scope for confusion on the part of Nicholls as to whether a compliance statement was needed in the circumstances.

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[156] The Guidance at paragraph 4.11, second bullet point. See the First Response Letter page 1, paragraph 1.
[157] In its response letters, Nicholls submitted that the sales and number of customers affected were negligible and that this should be a factor in the CMA's decision on whether it is appropriate to impose a penalty and if so at what level. As noted above in paragraph 92, the percentage of deliveries affected by this action was actually higher (at approximately 1%) than submitted by Nicholls. The CMA agrees that that this action only affected a small number of ex-DCC customers is a relevant factor to take into account when determining the level of any penalty imposed.
[158] The Guidance at paragraph 4.11, fourth bullet point.
[159] Oral Representations, paras 52 – 58 of the note of the call, pages 4 – 5 of the First Response Letter and paras 3.3 – 3.9 and paras 3.14 – 3.16 of the Second Response Letter.

Nicholls' submissions

171. As noted above, Nicholls' primary submission was that the CMA should find no breach of the IEO occurred and in the alternative find that it is not appropriate or proportionate to impose a penalty. In the further alternative, Nicholls submitted that the CMA should make appropriate adjustments to the level of the fines proposed, which fully reflect the mitigating factors identified throughout the Second Response Letter, such that the eventual fine should be of a nominal amount only.

172. Nicholls submitted that the following factors should be taken into account in determining the appropriateness of imposing a penalty in this case and if so, the level of penalty: (i) the CMA's own conduct; (ii) Nicholls' conduct in seeking to comply with the IEO; (iii) the lack of clarity in the CMA's guidance regarding the scope of paragraph 3 of IEOs; and (iv) that any fine should be proportionate to the risk of prejudice, in light of previous penalty decisions and the CMA's guidance and that any fine should be proportionate to the likely deterrent effect, given that all the CMA's concerns arose from genuine beliefs on the part of Nicholls that it was in full compliance with the IEO and there was never any intention to mislead the CMA. The CMA has considered whether any of these matters should be taken into account as mitigating factors.

- *The CMA's own conduct*

173. In the First Response Letter, Nicholls stated that the CMA's merger investigation had had a detrimental effect on the Nicholls business and certain members of the Nicholls family[160]. Nicholls also submitted that the way the CMA had conducted its merger investigation was a contributory factor[161]. In support, Nicholls submitted that the CMA failed to clarify pre-IEO integration with Nicholls such that it would be "*unfair and discriminatory for Nicholls to be held responsible for the case team failing to follow standard practice*". Nicholls also submitted "*given the unprecedented complexity of this case, arising in large part as a result of the CMA's delay in issuing the [IEO] and then its failure to properly assess ongoing integration at the point the [IEO] was issued, together with the lack of a management structure in place at the ex-DCC business and consequently the huge number of issues the case team identified as requiring action under the [IEO], it is possible that certain elements were not actioned immediately and that there were a number of*

[160] First Response Letter page 1, paragraph 2 and page 5, paragraph 5.
[161] First Response Letter page 2, paragraphs 2 and 3 and page 5, paragraph 5.

unfortunate misunderstandings between our business and the CMA case team which contributed to this."[162]

174. Nicholls repeated and elaborated on these points in the Second Response Letter submitting that allowance must be made for how the CMA's own actions in relation to the IEO "created unusual complexity and scope for misunderstandings between the CMA and Nicholls".[163] Nicholls said this included "severe delay" in the CMA issuing the IEO and requesting information on pre-IEO integration, the CMA purporting to impose requirements unwarranted by the IEO[164] and the CMA requiring the appointment of a Monitoring Trustee and a formal hold-separate manager.[165] Nicholls submitted that all these actions contributed to the CMA's false perception that Nicholl was not cooperating with its investigation when in fact Nicholls was undertaking all possible steps to appease the CMA whilst attempting to protect the value of the business it had just acquired.[166]

175. For the reasons set out in this paragraph, the CMA considers that none of these are mitigating factors.[167] When the CMA's merger intelligence function identified the Merger, the CMA issued the IEO in a timely manner, in just under 3 weeks from Nicholls confirming the Merger to the CMA and just one day after the CMA served its enquiry letter on Nicholls. The CMA considers these actions were undertaken in a timely manner, particularly in circumstances where the Merger was not notified to the CMA by Nicholls.[168] Information on the integration steps that have taken place by the time an IEO is put in place can be – and is in practice – gathered in various ways. Contrary to Nicholls' suggestion, the CMA notes that it asked Nicholls about its pre-IEO integration steps (see the CMA 18 June Attendance Note); ultimately, the information Nicholls provided to the CMA in response was not complete. The CMA does not agree with Nicholls' characterisation of the CMA's conduct in relation to the call between Nicholls and the CMA on 18 June 2018 and subsequent conduct relating to the derogation request process. Nicholls' submissions are not supported by the CMA 18 June Attendance Note and Nicholls did not provide any other evidence in support of its submissions. For the reasons explained above, a derogation request to effect the move was necessary and it is clear from the chronology of events (see paragraph 49

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[162] First Response Letter, page 2 paragraph 3. See also Second Response Letter, para 4.5.
[163] Second Response Letter, para 4.3.
[164] Nicholls said this included the request for unnecessary derogations for pre-IEO decisions, which was compounded by "severe delay" in responding to the draft derogation.
[165] Second Response Letter, paras 1.25 to 1.38 and para 4.3.
[166] Second Response Letter, para 4.4.
[167] These matters were also the subject of separate correspondence between the CMA and Nicholls prior to this decision, see CMA letter to Nicholls dated 17 January 2019, Nicholls letter to the CMA dated 29 January 2019 and CMA letter to Nicholls dated 31 January 2019.
[168] See CMA2, at para C.13 and C.14.

above), that the CMA sent Nicholls some clarification questions two days (1 working day) after receiving Nicholls' derogation request on Friday 22 June 2018 and granted the derogation request as soon as it had sufficient information to make a decision on the request. Finally and as set out in CMA2, in the context of completed mergers, the CMA normally makes an IEO and such interim orders may also require the appointment, at the cost of the merger parties, of a hold separate manager and/or monitoring trustee to oversee the order.[169] In this case, consistent with its guidance, the CMA considered it necessary to appoint both a monitoring trustee and a hold separate manager for the purposes of securing compliance with the IEO.

176. Nicholls' final submission under this heading was that the CMA put Nicholls to unprecedented expense in relation to the IEO "in the context of what was (patently obviously from June 2018) a "no issues" phase 1 clearance".[170] However, Nicholls' submission overlooks the important public function of an IEO, which is integral to the CMA's ability to effectively regulate merger control activity in the UK.[171] Moreover, where the CMA has initiated an investigation on its own initiative through its mergers intelligence function (which will have, by definition, reached the preliminary conclusion that there is a reasonable chance that the reference test will be met), the CMA is unlikely to consider that a transaction self-evidently raises no competition concerns.[172]

177. In this case, the CMA only considered it had sufficient information in relation to the Merger to enable it to begin the initial period for the investigation on 19 September 2018.[173] Prior to this date, the CMA had been waiting for Nicholls to provide the information and documents to the satisfaction of the CMA as required by certain Section 109 Notices. Therefore, the CMA does not accept that it was obvious from June 2018 that this Merger was a "no issues phase 1 clearance".

- *Nicholls' conduct in seeking to comply with the IEO*

178. In relation to its conduct, Nicholls submitted that it "*at all times sought to fully comply with the [IEO] and the requirements imposed by the CMA*".[174] Nicholls made four points in support of this submission: (i) Nicholls' genuine efforts at all times to fully comply with the IEO were repeatedly acknowledged by the CMA and the Monitoring Trustee; (ii) Nicholls acted in all cases with the

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[169] See CMA2 paras 6.21 and C30 and C31.
[170] Second Response Letter, para 4.5.
[171] *Electro Rent*, at [120].
[172] CMA60, para 2.9.
[173] Although in the email from the CMA to Nicholls' legal advisers on 19 September 2018 notifying them of this, the CMA made it clear that while it considered that certain information is still outstanding it has nonetheless decided to commence the initial period (email from the CMA to Nicholls' legal advisers on 19 September 2018).
[174] Second Response Letter, paras 4.6 – 4.7.

honestly held belief that its actions were not in breach of the IEO[175]; (iii) Nicholls voluntarily appointed a hold-separate manager to oversee the ex-DCC business, which mitigated any risk that the delay in providing a compliance statement could have to the CMA's residual remedial powers; and (iv) it voluntarily implemented a large number of recommendations made by the Monitoring Trustee, despite the fact that Nicholls was not legally required to do so.[176]

179. While the CMA acknowledges that Nicholls has provided some examples of cooperating with the CMA's investigation in its representations, the CMA would have expected Nicholls to conduct itself this way at all times during the merger investigation. The CMA has found that that was not always the case and in some instances its conduct was flagrant in respect of certain breaches of the IEO.

180. Nicholls further submitted in relation to Breach 1 that the "Planned Transfer" was managed responsibly and the risk of integration was fully mitigated so far as practicable and notwithstanding that, in its view, the CMA was not legally entitled to prevent the Planned Transfer or require the relocation of the Nicholls staff, absent an unwinding order.[177] The CMA considers that Nicholls required prior consent before it could relocate the staff of the ex-DCC business to the Nicholls Premises and Nicholls' submission fails to take into account that the breach consists of failing to do so.

181. In these circumstances, the CMA does not consider Nicholls' conduct is a mitigating factor.

- *Lack of clarity in CMA guidance*

182. Nicholls also submitted that, in the event the CMA finds that the move or use of the mini-tanker was not covered by paragraph 3 of the IEO, an important mitigating factor is the lack of any clarity in the CMA's guidance as to which actions should or should not be considered unavoidable consequential effects of actions which occurred prior to the IEO coming into force.[178] Nicholls also submitted that the CMA has not published any detailed guidance on what amounts to an unavoidable consequential effect of integration that occurs

[175] Nicholls also submitted that the CMA should not characterise Breach 1 and Breach 2 as 'flagrant' conduct given the lack of clarity in this area and any proposed fine should be reduced accordingly (para 4.13 of the Second Response Letter).
[176] Second Response Letter, paras 4.6 – 4.7. See also paras 1.18 and 4.13.
[177] Second Response Letter, paras 1.19 – 1.21.
[178] Second Response Letter, paras 4.9 – 4.12.

prior to the IEO and the CMA encourages parties to self-assess whether certain conduct amounts to a breach of the IEO or not.

183. As noted above, the CMA has published guidance on both the merger investigation process and the CMA's approach to IEOs and granting derogations (CMA2 and CMA60 respectively). This includes guidance on the effect of the interim measure and requests for derogation. The derogation process set out in CMA2 recognises that in some cases certain actions falling within the scope of an interim order may need to take place, for example in order to maintain the viability of the acquired business. While the CMA generally expects the merging parties to be best placed to identify these actions, parties do have CMA (and where applicable Monitoring Trustee) contact points with whom they can ask questions. In relation to Breach 1, as the CMA 18 June Attendance Note shows, Nicholls was aware from at least 18 June 2018 that a derogation request was required before the move could be effected. As regards to Breach 2, the CMA's guidance (CMA2, para C.12) is clear that the CMA does not consider unavoidable consequential effects of integration to include situations where parties could, rather than continuing with an existing integrated practice, instead operate such practices separately with the resources available at the acquired party. In the CMA's view, this statement clearly contemplates actions falling within Breach 2 and as such would have expected Nicholls to have discussed these actions with the CMA in the context of the derogation process, rather than continuing with it.

184. In these circumstances, the CMA's view is that this is not a mitigating factor.

- *Other submissions on the proportionality of the fine*

185. Nicholls sought to draw out various distinctions between the circumstances of the Merger investigation and those in relation to the three cases to date where the CMA has imposed a penalty under section 94A of the EA02[179]. However, in the CMA's view, the proper approach to the assessment of administrative penalties is on a case by case basis, having regard to the relevant facts, the statutory limits imposed by section 94A(2) of the EA02 and the Guidance.

186. Nicholls also submitted that any fine should be proportionate to the likely deterrent effect, given that all the CMA's concerns arose from genuine beliefs on the part of Nicholl that it was in full compliance with the IEO and there was never any intention to mislead the CMA.[180] In addition to the reasons set out above in paragraphs 132, 150 and 151, the CMA considers that this submission fails to take into account that Breach 1 and Breach 2 consist of

[179] Second Response Letter, para 4.15.
[180] Second Response Letter, para 4.16.

failing to obtain the CMA's prior written consent for certain actions which might prejudice the reference concerned or impede the taking of justified remedial action. As regards Nicholls' submission that it did not intend to mislead the CMA, the CMA's view is that this is not a mitigating factor. Moreover, as the CAT has observed, "*it is of the utmost importance that interim orders be scrupulously complied with, and that a party should not itself form judgments or reach decisions that are properly for the CMA. This is so, whatever the intentions or incentives of the party involved*".[181]

Financial resources available to Nicholls

187. The CMA has also had regard to the financial resources available to Nicholls. According to the published financial statements for Nicholls' (Fuel Oils) Limited for the year ended 31 May 2018[182], the company's turnover was approximately £283.1 million[183], profit after tax was approximately £811,841 and the company had cash and cash equivalents of approximately £26 million. These figures indicate that Nicholls had sufficient financial resources available to it to ensure compliance with the IEO. Further, for the purposes of imposing a penalty, section 94A(2) of the EA02 provides that turnover is the turnover both in and outside the UK of the enterprises owned or controlled by the person on whom it is imposed. In this case, the relevant turnover for the purpose of imposing a penalty is the turnover of Nicholls' (Fuel Oils) Limited.

Nicholls' submissions

188. In the First Response Letter, Nicholls told the CMA[184]:

> *The CMA has put our business to enormous and disproportionate cost which has necessitated a number of cost-cutting measures in turn, including redundancies. We are an ultra-low margin business. In our last financial year to 31 May 2017, whilst our turnover in Northern Ireland was [✂] our oil distribution business [✂].*

189. Nicholls chose not to notify the Merger to the CMA, as it was entitled to do. However, parties voluntarily bear the risk of an investigation by completing a merger without first obtaining clearance from the CMA (and therefore, in such circumstances merging parties accept that it may be necessary to comply with the requirements of an IEO while participating in the information gathering necessary in a merger control investigation and also, in turn, to incur certain

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[181] *Electro Rent* at [206].
[182] See Article 3 of the Interim Measures Order.
[183] NICHOLLS' (FUEL OILS) LIMITED: Directors' Report and Consolidated Financial Statements for year ended 31 May 2018.
[184] Page 5 of the First Response Letter. See also page 2 of the Second Response Letter.

costs in ensuring such compliance).[185] Parties can take some steps to control the amount of such costs by cooperating fully with the CMA's investigation and providing timely and complete responses to information requests from the CMA. The CMA's merger review process is well established and the CMA has published guidance on this (CMA2) as well as specific guidance on the IEO and derogation aspects of this process (CMA60). Finally, the CMA does not consider that its investigation of the Merger raised challenges that were in any way out of the ordinary and/or were disproportionate for a business of the size and with the resources of Nicholls. For these reasons in considering the financial resources available to Nicholls, the CMA has not placed any weight on Nicholls' submissions about the costs of the CMA's investigation.

190. In its representations on the Provisional Decision, Nicholls told us that there is a group business and a trading business. The trading business is the oil distribution business of Nicholls which is active in the market in which the CMA investigated. Nicholls told us that this trading business [✂] and the CMA should take into account [✂].[186] However, the CMA does not consider this to be a factor that reduces the level of penalty in this case. As noted above, the EA02 empowers the CMA to impose a penalty of up to 5% of global turnover. Nicholls did not dispute the relevant turnover figures the CMA proposed using, nor did they elaborate on why the position of its trading business impacted the financial position of the group business (Nicholls' (Fuel Oils) Limited), which is the relevant entity for the purposes of imposing a penalty.

191. Nonetheless, the CMA has considered indicators of Nicholls' financial position, other than total turnover, when determining the appropriate amount of the penalty.

Conclusion on the imposition of a penalty

192. Although the CMA has the power to impose a penalty of up to 5% of global turnover (which in this case would amount to approximately £14.2 million) the CMA does not consider that the breaches in this case are so serious as to warrant a penalty at the upper end of the scale.

193. In all the circumstances, the CMA considers that the imposition of a penalty of £120,000 for Breach 1 (relocation of staff), £20,000 for Breach 2 (mini-tanker) and £6,000 for Breach 3 (compliance statements), giving a total penalty of £146,000 is appropriate on the basis that it: (i) would reflect the seriousness and in some respects flagrant nature of the breaches (ii) would act as a deterrent to other companies, and (iii) is substantially below the statutory

[185] CMA60, paragraph 2.6.
[186] Second Response Letter, Schedule 1 and Oral Representations, paras 11 and 63 of the note of the call.

maximum of 5% of Nicholls' global turnover (at approximately 0.05% of turnover and approximately 18% of profits after tax) and is not disproportionate in this case.

Andrea Gomes da Silva

Executive Director, Mergers and Markets

28 June 2019

Competition and Markets Authority

Appendix A

Initial Enforcement Order dated 8 June 2018

Appendix B

[✂]

Appendix C

[✂]