Penalty notice under section 110 of the Enterprise Act 2002

Completed acquisition by Rentokil Initial plc of MPCL Ltd (formerly Mitie Pest Control Ltd)

Case ME/6784-18

Addressed to:
Rentokil Initial plc

7 August 2019

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 [Some numbers have been replaced by a range.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

Case ME/6784-18

Completed Acquisition by Rentokil Initial plc of MPCL Ltd (formerly Mitie Pest Control Ltd)

Notice of a penalty pursuant to sections 110 and 112 of the Enterprise Act 2002

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

   (a) on 7 August 2019, the CMA imposed a penalty on Rentokil Initial plc (**Rentokil**) under section 110 of the Act (the **penalty**) because it failed, without reasonable excuse, to comply with the requirements imposed on it by the notices served on it under section 109 of the Act on 30 October 2018 (the **October Notice**), 21 November 2018 (the **November Notice**), and 11 January 2019 (the **January Notice**) (together the **Notices**) by the required date;

   (b) the penalty is a fixed amount of £27,000;

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

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

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

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

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

(h) under section 115 of the Act, 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 Act, 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 provides a description of Rentokil's relevant conduct;

(d) section D sets out the legal assessment and considers the statutory requirements for imposing a penalty under section 110 of the Act and sets out the reasons for the CMA's finding that Rentokil has failed to comply with the Notices without reasonable excuse; and

(e) section E sets out the CMA's reasons for finding that a fixed penalty of £27,000 is appropriate and proportionate in this case.

A. Executive Summary

Failures to comply with section 109 Notices

3. The CMA reviewed the completed acquisition by Rentokil of the pest control business of Mitie Pest Control Ltd (since renamed MPCL Ltd (**MPCL**), together the **Parties**) (the **Transaction** or the **Merger**) under the merger

control provisions of the Act[1] (the **P1 Inquiry**) beginning in October 2018, when it received a case team allocation request.

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

   (a) Rentokil failed to respond fully to the October Notice by the relevant deadline of 7 November 2018. Rentokil provided documents and information responsive to questions 11, 13, 14 and 15 of the October Notice following this deadline in response to subsequent notices: a statutory notice issued on 3 December (the **December Notice**) (response submitted to the CMA on 21 December 2018), January Notice (response submitted to the CMA on 30 January 2019[2]) and the statutory notice issued on 11 February (the **February Notice**) (response submitted to the CMA on 18 February 2019).

   (b) Rentokil failed to respond fully to the November Notice by the relevant deadline of 28 November 2018. Rentokil provided documents responsive to question 10 of the November Notice in response to the January Notice and February Notice.

   (c) Rentokil also failed to respond fully to the January Notice by the relevant deadline of 23 January 2019. Rentokil provided documents responsive to question 38 of the January Notice in response to the February Notice.

5. The failure to comply comprised a pattern of errors in responding to the CMA's Notices which had an adverse impact on the P1 Inquiry, requiring the CMA to expend additional resources and time in ensuring that it had full responses to its statutory notices and all the necessary information to conduct the P1 Inquiry.

6. In addition, Rentokil failed to provide evidence which was highly relevant to the CMA's assessment of the Transaction and which was inconsistent with Rentokil's submissions. Had the CMA not made proactive efforts to obtain this evidence, it might have come to a different conclusion on its substantive assessment of the case which might have been expected to benefit Rentokil.

---

[1] In particular, the CMA considered whether to make a reference in relation to the Merger under section 22 of the Act.

[2] Responses to the January Notice were received on 30 January 2019, following the 23 January 2019 deadline. However, the CMA has chosen not to prioritise this one week delay for enforcement action.

No reasonable excuse

7. The CMA finds that Rentokil has no reasonable excuse for its failure to comply with the Notices.

8. The CMA has carefully considered Rentokil's submissions that it engaged with, and received approval from, the CMA regarding its proposed internal document search methodology, including the use of manual searches which Rentokil submitted are necessarily less exhaustive than keyword-based searches performed through specialist IT programmes, and sought to apply the methodology in good faith. The CMA finds, however, that the explanations provided by Rentokil do not amount to a 'reasonable excuse' for the purpose of the Act.

9. The CMA finds the errors that arose during Rentokil's manual searches were negligent and not caused by an event beyond the control of Rentokil, or the result of a significant and genuinely unforeseeable or unusual event.[3]

Decision to impose a penalty

10. The CMA has considered Rentokil's submissions that the CMA should apply its discretion not to impose a penalty or, alternatively, impose one at a low level given that none of the factors listed in paragraph 4.2 of the Guidance is present in this case and any inadvertent failure to comply lacks the aggravating factors in the Hungryhouse decision[4] and that Rentokil acted in good faith.

11. The CMA finds that it is appropriate and proportionate to impose a penalty in this case owing to the adverse impact the failure had on the P1 Inquiry and the significant and flagrant nature of the failure.[5] In particular:

    (a) Rentokil failed to provide a material number of highly relevant documents in response to the Notices (in particular the October Notice), often failing to provide more than half of the responsive documents.

    (b) Much of the evidence which was not provided related to issues which were central to the CMA's analysis, including the scope of the relevant

---

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

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

[5] On the facts of this case, where the cause of failure to comply with each of the Notices, the submissions on 'reasonable excuse', and the consequences of the failures on the P1 Inquiry, were closely correlated, the CMA has exercised its discretion to enforce against all failures in a single decision and to impose a single penalty for the failure to comply with each of the Notices.

merger situation (**RMS**) (one of the statutory questions which the CMA is required to answer), the counterfactual (ie the benchmark against which the effect of the merger is assessed in order to determine whether there is a significant lessening of competition (**SLC**)) and the scale of any SLC. As a result, the CMA had to spend time and resources in reviewing Rentokil's evidence and carrying out further information-gathering over the course of November 2018 to February 2019 in order to ensure that its evidence base was complete.

(c) Rentokil made flagrant errors and its responses to the Notices were clearly deficient.

(d) Senior management was involved in the search and should have identified the deficiencies.

(e) Rentokil's failure comprised multiple errors evidencing a pattern of behaviour across the Notices.

(f) The evidence Rentokil failed to provide was inconsistent with the written and oral submissions of Rentokil. Had the CMA not asked additional questions and proactively required the provision of further evidence, the responsive documents may never have come to the attention of the CMA. This would have risked the CMA's assessment of the Transaction being made on the basis of incomplete evidence, which might have been expected to benefit Rentokil.

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

Appropriateness of the amount of the penalty imposed

13. Consistent with its statutory duties and the Guidance,[6] the CMA has assessed all relevant circumstances to determine an appropriate level of penalty.

14. The CMA considers that the penalty must reflect the following factors present in this case:

    (a) the material impact on the P1 Inquiry of the failure to comply;

    (b) the nature and gravity of the failure, which the CMA considers evident from the multiple errors evidencing a pattern of behaviour and flagrant errors in its responses;

    (c) the very serious nature of some of the errors which were fundamental to the CMA's assessment of the Transaction and from which Rentokil could reasonably be expected to derive benefit;

    (d) the role of senior management in preparing Rentokil's responses; and

    (e) the size of, and administrative and financial resources available to, Rentokil.

15. Taking these factors in the round, the CMA finds that a penalty of £27,000 (which is below the statutory maximum of £30,000 for a penalty in a fixed amount) is an appropriate and proportionate penalty in this case.

B. Factual Background

16. As a result of documents executed on 29 and 30 September 2018, Rentokil acquired the pest control business of MPCL.

17. The Parties are both active in the supply of pest control services in the UK to commercial customers.

18. Prior to the Transaction, MPCL was part of the Mitie Group (ultimate parent Mitie Group plc) (**Mitie**), which is a UK strategic outsourcing and energy service provider. Mitie offers a variety of facilities management services, including engineering services, pest control, security, cleaning, property management and catering services (**FM services**). MPCL provided pest control services to customers either on a stand-alone basis or bundled with other FM services together through integrated facilities management contracts (**IFM Contracts**).

---

[6] The Guidance, paragraph 4.11.

19. The Parties entered into two contracts: on 29 September 2018, they signed a 'Preferred Supplier Agreement' (the **PSA**) for the provision by Rentokil of pest control services to certain customers of Mitie who enter into IFM Contracts with Mitie Limited.[7] On 30 September, they signed and completed a sale and purchase agreement (the **SPA**) whereby Rentokil acquired 100% of MPCL.

20. The CMA reviewed the Transaction under the merger control provisions of the Act beginning in October 2018 when it received a case team allocation request.

21. Between 12 and 14 October 2018, the CMA [✂].

22. As a result, the CMA issued a notice under section 109 of the Act on 16 October 2018 requiring information on integration steps and on the PSA and its scope. The deadline to reply was 24 October 2018. Rentokil submitted its answers on 24 October 2018, but the reply was deemed incomplete by the CMA. Accordingly, pursuant to section 25(2) of the Act, the four-month clock[8] was stopped on 25 October 2018.

23. On 30 October 2018, the CMA issued the October Notice containing questions regarding the rationale for the merger, the extent of overlap between the Parties as well as a description of the negotiation of the SPA and PSA with a deadline of 7 November 2018. Rentokil informed the CMA on 5 November 2018 that it would not meet the deadline. The CMA did not grant an extension to the October Notice as it considered the stipulated deadline to be reasonable. When Rentokil failed to provide complete information by the deadline, the CMA issued a separate notice pursuant to section 25(2) of the Act on 7 November 2018 stopping the four-month clock.[9]

24. Subsequently, the CMA issued a number of additional notices seeking information on the impact of the Merger, including the link between the SPA and the PSA. These included: the November Notice, the December Notice (in which the CMA team identified areas/questions where it considered Rentokil's response to the October Notice had been incomplete and also queried Rentokil's search methodology), the January Notice and the February Notice.

25. The CMA cancelled the extension(s) of the four-month clock on 15 February 2019 noting that this cancellation should not be interpreted as indicating that the CMA considered the previous responses to the Notices were complete. On the same date, the CMA gave notice under section 96(2A) of the Act that

---

[7] A subsidiary of Mitie and therefore, prior to the Transaction, a sister company of MPCL.

[8] The CMA has four months from material facts of the merger being made public or it being completed (whichever is the later) to decide whether or not to launch an in-depth phase 2 assessment.

[9] Rentokil ultimately submitted its response on 19 November 2018.

the initial period of 40 working days within which the CMA must decide whether the duty to make a reference in relation to the Merger applies[10] had commenced.

26. The CMA issued its phase 1 decision on 12 April 2019 (the **Merger Decision**)[11] in which it found that the merger gave rise to a realistic prospect of a SLC as a result of horizontal unilateral effects in the supply of pest control services to national customers in the UK and that it would refer the merger to a phase 2 investigation unless the Parties offered acceptable undertakings to address the CMA's concerns.

27. On 30 April 2019, the CMA confirmed that Rentokil had offered undertakings in lieu of a reference and that it considered that there were reasonable grounds for believing that the undertakings offered by Rentokil, or a modified version of them, might be accepted by the CMA under the Act. The CMA is currently considering whether to accept the undertakings pursuant to section 73 of the Act.

The link between the SPA and PSA

28. Many of the statutory requirements which the CMA considers Rentokil failed to comply with, described further below, concern the PSA.

29. The CMA wished to establish whether there was a link between the SPA and PSA as this would affect both (i) the scope of the RMS, one of the statutory questions which the CMA is required to answer, and (ii) the relevant counterfactual, which provides a benchmark against which to assess competitive effects arising from a merger. Insofar as the PSA affected the scope of the RMS, it could be expected to affect the existence and/or scale of any SLC (the other statutory question the CMA has to answer) and the scope of any acceptable undertaking in lieu (ie the remedy offered by a merger party which the CMA would accept in lieu of a reference to a phase 2 assessment).

30. MPCL's turnover from standalone pest control services in 2018 was approximately [✂], representing [10-15]% of supply for national customers in the UK. The IFM Contracts, which formed the subject of the PSA, generated approximately [✂] of turnover and represented [0-5]% of the supply for national customers in the UK. The inclusion of the PSA in the scope of the RMS was thus likely to, and did, have a material impact on the CMA's

[10] In accordance with section 34ZA(3) of the Act.

[11] Decision ME/6784-18, Completed acquisition by Rentokil Initial plc of MPCL Ltd (formerly Mitie Pest Control Ltd), published on 21 May 2019.

assessment of the Transaction and the scope of acceptable undertakings in lieu.

31. At the start of its P1 Inquiry in October 2018, the CMA knew that the PSA and the SPA were signed one day apart from each other and both concerned pest control services. However, they were not contractually inter-conditional. In order to assess whether they formed part of the same RMS (and what the correct counterfactual was), the CMA sought information from the Parties regarding the circumstances surrounding, and steps involved in, the negotiation and approval of the PSA.

32. Rentokil stated in written and oral submissions that the PSA was not relevant to the scope of the RMS because it was a standalone contract which was not conditional on the SPA, and that Rentokil would have entered into the PSA without the SPA and vice versa. Rentokil also argued that the arrangements within the scope of the PSA did not constitute an enterprise.[12]

33. As stated in the Merger Decision,[13] the CMA ultimately considered that the PSA and SPA were commercially and substantively inter-conditional and gave rise to one single enterprise being acquired by Rentokil. The CMA had regard to the substance of the arrangement under consideration rather than merely its legal form, basing its finding on evidence from a number of sources, including:

(a) that Mitie itself viewed the two agreements as connected;

(b) notwithstanding Rentokil's submissions to the CMA that it would have entered into the PSA without the SPA, Rentokil's internal communications indicated that Rentokil considered the PSA and SPA as achieving one aim, ie the transfer of the MPCL pest control business as a whole, and considered that the agreements were the most convenient mechanism to effect that transfer;[14]

(c) the parallel timing and interrelated nature of discussions and negotiations of the PSA and SPA, for example, a disagreement about the PSA during the negotiation phase led to a delay of the whole Transaction;[15]

---

[12] Rentokil statements made at the issues meeting dated 21 March 2019, Rentokil response to the Issues Letter dated 25 March 2019 (in particular Annex 5), Rentokil submission of 18 February 2019.

[13] Merger Decision, paragraphs 20 to 26.

[14] Footnote 11 of the Merger Decision: 'For example, an internal Rentokil email from [a senior executive] states as follows: [✂]

[15] Emails from Mitie to Rentokil exchanged in early September 2018 indicate that Mitie had concerns regarding the terms and scope of a draft PSA provided by Rentokil. The CMA considers that these emails indicate that the

(d) the valuation of the MPCL pest control business during the Transaction negotiations and the consideration paid in the Transaction appears to have been assessed on a holistic basis, which included the combined revenues generated from IFM Customers and other customers.[16]

C. Description of relevant conduct

34. Set out below is a description of the requirements which the CMA considers Rentokil failed to comply with. The requirements are divided between those for documentary evidence and information. For each requirement, the CMA lists the evidence which it considers responsive to the original requirement and when it was submitted to the CMA.

Document requirements

Question 15 of the October Notice – internal documents regarding the negotiation of the PSA

35. The CMA issued the October Notice with the purpose of gathering evidence on a number of topics, including the rationale for the merger, the extent of overlap between the Parties as well as a description of the negotiation of the SPA and PSA. At that point in time, no draft merger notice had been provided by Rentokil. Responses were due by 7 November 2018.[17]

36. The October Notice included a number of requirements with which the CMA considers Rentokil failed to comply. They are described in turn below.

37. Question 15 of the October Notice required Rentokil to:

> 'Please provide all Internal documents which were produced to inform and record negotiation and approval of the PSA. Please provide all documents specifying the terms of the PSA and/or the Transaction, including but not necessarily limited to side letters otherwise etc.'

- - - - - - - - - -

PSA formed an integral part of the Transaction noting in particular that the difficulties articulated in those emails in relation to reaching agreement on the terms of the PSA had direct implications for the Transaction timing.

[16] For example, an internal Rentokil email of [✂] sets out assumptions of the Rentokil's offer of [✂] to Mitie on the same date, with [✂] attributed to the 'M bundled pest business and washrooms tender' and a value of [✂] was attributed to the 'rest of the business'. The CMA notes that the overall consideration ultimately paid under the SPA did not vary materially from this (at £40 million), which suggests that the MPCL IFM Pest Control Services continued to play a role in the SPA consideration and that the Transaction was valued as a whole.
In September 2018, Mitie proposed making the deal consideration of [✂], in light of the stronger than anticipated financial performance of the target business. In support of its proposal, Mitie referred to overall revenues of [✂] and a portfolio value forecast of [✂] which the CMA understands, based on internal Mitie communications, included both expected revenues from IFM and non-IFM Pest Control Services.

[17] Although Rentokil did not meet this deadline and submitted its response on 19 November 2018.

38. Internal documents are defined in the October Notice[18] as:

> 'Documents in any form which have been prepared by or for, or received by, any member of the board of directors (or equivalent body) or senior management or the shareholders' meeting of either merger party (whether prepared internally or by external consultants) *in the last two years.*
>
> *All responses to internal documents should include name, date, purpose for which they were produced and who they were produced by and for (names and roles) and should set out the methodology used to identify and produce responsive documents, including but not limited to: (i) description of the search criteria used and why; (ii) description of the individuals/custodians consulted with or focused on and why* (for example, in terms of the relevant organisational structure and decision making processes at the business, which explains why that individual custodian would be likely to have access to responsive documents).' (emphasis added)[19]

39. In response, Rentokil provided the following four documents:

(a) the board minutes approving the PSA on 27 September 2018 (Annex 002-028 of the Merger Notice[20]);

(b) the CEO's request for board approval (Annex 002-053 of the Merger Notice);

(c) a copy of the PSAs for hygiene and pest control signed on 29 September 2018 (Annex 002-049 of the Merger Notice); and

(d) the side letter also entered on 30 September covering other services offered and possibility of extending the PSA (Annex 002-051 of the Merger Notice).[21]

40. The CMA notes that the above documents record the terms agreed but not the negotiation of the PSA, or which considerations informed this.

---

[18] As well as in all subsequent Notices.

[19] As such, the Notices require a description of methodology which follows, in part, the template methodology question contained in Guidance on requests for internal documents in merger investigations (CMA100), paragraph 29 (and paragraph 28 of draft guidance (CMA77 CON) issued on 28 March 2018).

[20] For ease of access, we have provided, wherever possible, the annex number of the document from the final Merger Notice, dated 15 February 2019 (the **Merger Notice**).

[21] In response to questions 14 and 15 of the October Notice which related to the PSA, Rentokil submitted Annex 002-034 which described the process whereby Rentokil and Mitie entered into the PSA. These documents are referred to in this Annex.

41. After the 7 November 2018 deadline, the CMA sent a number of further notices to Rentokil as it did not consider that it had a complete understanding of the negotiations that led to the PSA being entered into (and in particular how it related to the SPA negotiations). In response to these later notices, Rentokil submitted at least 14 additional documents. The 14 documents detailed in (a) to (c) below were responsive to question 15 of the October Notice and were particularly relevant to the CMA's wish to understand the circumstances surrounding and steps involved in the negotiation and approval of the PSA:

(a) Seven documents were provided on 21 December 2018 in response to question 6(a) of the December Notice which required 'the documents setting out the initial offer and revised offers'. The CMA noted, in relation to this question, that '[t]he answers to the questions below [questions 5 and 6 of the December Notice] would be helpful in completing your response to questions 14a-k and 15 of the s109 request of 30 October.' They are described further below:

- copies of a letter of intent dated 23 March 2018 (Annex 002-074 of the Merger Notice) where Rentokil suggested to Mitie that it was open to an ongoing future relationship regarding many areas, including pest control;

- subsequent letters of intent dated 4 May 2018 (Annex 002-078 of the Merger Notice), 14 May 2018 (Annex 002-079 of the Merger Notice), 16 May 2018 (Annex 002-080 of the Merger Notice), 21 May 2018 (Annex 002-081 of the Merger Notice) and 11 July 2018 (Annex 002-099 of the Merger Notice); and

- a draft PSA agreement dated 4 September 2018 (Annex 31 of the December Notice).

(b) One document provided on 30 January 2019 in response to question 45 of the January Notice, which required all internal documents evidencing the discussions that took place at meetings held on various dates between July and September[22] regarding the Transaction structure and/or the PSA. In response, Rentokil provided Annexes 41-48, including Annex 46 which specifically related to the PSA negotiations (see also Annex 002-198 of the Merger Notice).

[22] Ie meetings on 11 July 2018, 1 August 2018, 12 September 2018, 19 September 2018, 24 September 2018, 25 September 2018 and 27 September 2018.

(c) Six documents provided on 18 February 2019 in response to question 2 of the February Notice, which required Rentokil to 'describe the discussions that took place internally (at Rentokil) and externally (between Rentokil and Mitie Group Limited) on [larger Mitie Group contracts] and provide the Internal documents recording this'.[23] This included six emails (Annex 1-6 to the response) evidencing a number of contacts between Rentokil and Mitie in the period of June-July 2018 regarding the PSA (including email exchanges and notes of calls/meetings), noting that these were 'in addition to those meetings and phone conversations already highlighted by the Parties in Annex 002-034'.

42. The CMA notes Annex 3 of Rentokil's response to the February Notice in particular. This reflects internal discussions between Rentokil senior management regarding the negotiation of the PSA in July 2018. [A senior executive] writes to [other senior executives]: [✂]

Question 13 of the October Notice – internal documents regarding the rationale for the Transaction

43. In question 13 of the October Notice, the CMA required Rentokil to:

> 'provide copies of all internal documents which relate to the reasons for undertaking the Transaction, such as its investment case and/or the benefits for Rentokil of undertaking the Transaction.'

44. In response, Rentokil submitted two documents: a copy of the final authorisation request and a related financial model spreadsheet which were presented in their final form to Rentokil's Investment Committee on 27 September 2018 (Annexes 002-066 and 002-067 of the Merger Notice).

45. After the 7 November 2018 deadline, the CMA sent a number of further notices to Rentokil to ensure that it understood the rationale for the Transaction. In response to these later notices, Rentokil submitted at least 10 documents detailed in (a) to (b) below which the CMA considers were responsive to question 13 of the October Notice as they make reference to the reasons for undertaking the Transaction:

(a) Nine documents were provided on 21 December 2018 in response to question 2(b) of the December Notice which asked 'When were relevant meetings of the Rentokil Investment Committee held? What documents

---

[23] The documents are also responsive to question 38 of the January Notice, discussed further below. Indeed, the February Notice states, in relation to question 2, that 'The answers to the questions below would be helpful in completing your response to questions 38(b) and 38(c) of the s109 request of 11 January 2019.'

were prepared by and for the Investment Committee to aid their deliberations?'. The CMA noted in the December Notice that '[t]he answers to the questions below [questions 2 and 3] would be helpful in completing your response to questions 12a-12g and 13 of the s109 request of 30 October.' Rentokil responded that the Investment Committee (**IC**) 'considers investments via group emails as well as meetings. In relation to the MPCL Transaction, the IC considered it and gave its approval via email. The Rentokil IC considered the MPCL Transaction in several email chains initiated by [a senior executive] and including all members of the IC on 23 March, 4 May, 12 May and 27 September 2018. The emails and attachments for each stage are attached at Annexes 13 to 22' (see Annexes 002-082 to 002-091 of the Merger Notice). These ten documents are useful in understanding the business rationale for the Transaction as the purchase price evolves during the Transaction negotiation.

(b) One document provided in response to question 42(a) of the January Notice which required 'In relation to Annex 002-063 (2018.07.12 Hydra Board Paper.pdf): (a) Please provide a final version of this paper and confirm when it was provided to the Board.' In response, Rentokil provided Annex 39, the final version of the board paper which was provided to the Board on 24 July 2018.

Question 11 of the October Notice – business plans

46. In question 11 of the October Notice, the CMA required Rentokil to provide:

> 'copies of all Internal documents which set out the competitive conditions, market conditions, market shares, competitors, and/or the Parties' business plans in relation to the Overlap Services and the Vertically Related Services.'

47. In response, Rentokil provided a number of industry and internal reports regarding pest control but no business plans.

48. After the 7 November 2018 deadline, the CMA sent question 40 of the December Notice, requiring the Parties to '[p]lease submit the pre-Merger business plans of MPCL and Rentokil.' In response, Rentokil provided a copy of its UK pest control budget for 2018 as well as MPCL's budget for 2019 as new Annexes (Annexes 36 and 37; see also Annexes 002-105 and 002-106 of the Merger Notice respectively). The CMA considers these two documents were responsive to question 11 of the October Notice, in particular its request for the Parties' business plans in relation to the Overlap Services and the Vertically Related Services.

Question 10 of the November Notice / question 38 of the January Notice – consideration for the SPA/PSA

49. In question 10 of the November Notice, the CMA required Rentokil to:

> 'explain and describe how the relevant consideration for each of the SPA and PSA was determined and provide Internal documents relating to the same.'

50. In response, Rentokil referred to internal documents previously provided, stating that:

> 'The consideration attributable to the MPCL business is set out in the Rentokil board paper presented to the Board on 25 July 2018 (see Annex 002-029 to the draft Merger Notice of 19 November 2018) as [✂] (subsequently increased to [✂] in the final stages of the negotiation). […] More detailed Rentokil internal documents explain the rationale for the consideration, namely the Final Authorisation Request and related financial model spreadsheet which were presented in their final form to Rentokil's Investment Committee on 27 September 2018 (see Annexes 002-066 and 002-067 of the draft Merger Notice of 19 November 2018).' […] 'No upfront consideration was paid or attributable to the PSA. In consideration for work undertaken under the PSA, [✂], as set out in Board paper provided at Annex 002-053 to the draft Merger Notice of 19 November 2018.'

51. After the 28 November 2018 deadline, the CMA sent a number of further notices to Rentokil to understand how the consideration for the Transaction had been calculated. In response to these later notices, Rentokil submitted at least 14 additional documents, detailed in (a) to (d) below, which the CMA considers were responsive to question 10 of the November Notice as they record discussions regarding the consideration for the Transaction:

(a) Documents provided in response to question 38(d) of the January Notice. In question 38 of the January Notice, the CMA noted changes in the calculation of the consideration for the SPA and PSA. In particular, the CMA noted that the ultimate consideration for the business changed to £40 million from the [✂] which indicated an offer price of [✂] with [✂] paid at completion and [✂] after agreement of the Take-On Contract Portfolio and the Closing Balance Sheet.[24] In question 38(d), the CMA required Rentokil to 'confirm when the consideration of £40 million set out

[24] As those terms were defined in the Offer Letter.

in the SPA was agreed between Rentokil and Mitie. Please describe why and how this amendment was agreed. Please describe what discussions took place within Rentokil and between Rentokil and Mitie and what considerations were taken into account. Please provide all Internal documents recording these considerations.' In response, Rentokil provided a number of new documents (eight in total) recording negotiations on price and structure during the period of May to September 2018, in addition to referring to documents which had been submitted previously (in response to other questions but not question 10 of the November Notice) (see Annexes 28 to 36 of the response; see also Annexes 002-180 and 002-182 to 002-188 of the Merger Notice). In particular, Annex 31 sets out correspondence between Rentokil and Mitie senior management regarding the status of the PSA in early September 2018. [A Mitie representative] stated in an email to [a senior executive]: [✂]

(b) Documents provided in response to question 5 of the February Notice in which the CMA required 'all communication between Rentokil and Mitie (ie e-mails and attachments, notes of call) in the period of 5 September 2018 until 18 September 2018 that discussed and agreed that the purchase price of £40m should [✂].' In response, Rentokil referred to additional meetings and provided one additional email conversation in response to question 5 of the February Notice (Annex 9 of the Response) which discussed Rentokil dropping the portfolio take on adjustment in return for some concessions from Mitie. The CMA considers these documents were responsive both to question 10 of the November Notice and question 38 of the January Notice.

(c) Documents provided in response to questions 7 and 8 of the February Notice which required that Rentokil:

> 'confirm whether there is a more detailed and comprehensive calculation than the model of 12 May 2018 (described as 'quick and dirty') and submit this calculation.' and
>
> 'provide all internal valuation models setting out how the MPCL business was valued, explaining each of the assumptions used and, for each valuation model, the reasons why these assumptions changed from previous valuation models, if any. Please also provide the final model used with the same accompanying explanation.'

(d) In response, Rentokil referred to additional meetings and provided one additional email conversation in response to question 5 of the February

Notice. In response to questions 7 and 8 of the February Notice, Rentokil submitted an additional five documents setting out calculation models and assumptions (Annexes 10 to 14 of the response to the February Notice).

Search methodology

52. Following receipt of the October Notice, Rentokil discussed a possible methodology for identifying relevant internal documents with the CMA on a call between the case team and Rentokil's legal advisers Freshfields Bruckhaus Deringer (**Freshfields**) on 24 October 2018 (**24 October Call**). During this call, the CMA case team confirmed that Rentokil did not need to carry out electronic word searches in order to respond to document requests in section 109 notices.

53. The CMA had another call with Freshfields on 1 November 2018 to discuss, amongst other issues, the scope of the October Notice (**1 November Call**). Freshfields advised that the use of keyword searches (as part of a forensic document retrieval and review process) in relation to requirements in the October Notice (including questions 11 and 15) resulted in large number of responsive documents which it would be very onerous to review for relevance. The CMA reiterated that this kind of keyword searches was not considered necessary in the circumstances of the case and invited the Parties to set out their preferred methodology in the October Notice response (along with the results of the search methodology) so that the CMA might follow up on the results and methodology.

54. Rentokil provided a search methodology in its response to the October Notice[25] (the **Methodology**). This stated that the Rentokil central Legal Team had:

(a) identified relevant persons considered by Rentokil to be most closely involved in strategic decisions relating to the Rentokil UK pest control services business. This included the UK Leadership Team, [✂] and any other individuals who were likely to hold responsive documentation, taking into account their job roles and functions;

(b) asked these individuals to carry out a search of their emails and/or of that part of the Google drive which they have created or which has been shared with them in order to locate responsive documents;

(c) asked these individuals to cascade all responsive documents down to the Rentokil Legal Team for review; and

---

[25] Annex 003-001.

(d) ensured that where any documents responsive to a question contained in the s.109 Notice are held by a central function, those documents have been requested from members of the relevant central team.

55. In addition, follow-up document requests were sent to the relevant individuals requesting that they each confirm whether they are in possession of any further documents which are responsive to the Relevant Questions; and, if so, to provide them to the Rentokil Legal Team for review.

56. The importance of complete disclosure was emphasised where necessary in follow-up email requests. Follow-up took place both by way of e-mail and telephone.

57. The CMA subsequently asked several questions in relation to the application of Rentokil's Methodology. In particular, in question 38 of the December Notice the CMA asked: 'As regards your methodology statement in Annex 003-01, please explain for each Party how many documents were initially identified as being relevant and then filtered out'. In response to this question, Rentokil replied that 'In compliance with the methodology statement, Rentokil provided to the CMA all Internal documents (as defined in the s.109 notice of 30 October 2018 on substance) that it identified as relevant to answer the questions i) contained in the s.109 notice of 30 October 2018 on substance; and ii) as required to be submitted with the draft Merger Notice. As such, Rentokil only filtered out what it considered to be irrelevant documents.'

58. In addition, in question 39(b) of the December Notice, the CMA asked Rentokil to '[p]lease explain how MPCL and Rentokil assessed whether an Internal Document was responsive to question 11 of the s109 request of 30 October' and in question 39(c) to 'please confirm that the Parties have reviewed the relevant custodian mailboxes and folders for documents received by the custodians and for documents produced by them.' In response, Rentokil noted that '[t]he legal team at Rentokil, acting through [✂], identified relevant people from throughout the pest control business that could potentially have access to documents responsive to question 11 of the [October Notice] […], ie documents that addressed competitive conditions, market conditions, market shares, competitors, and Rentokil's pest control business plan. Such individuals provided documents to the Rentokil legal team as described in Annex 003-001 to the DMN. After these documents were provided, [✂] reviewed them to determine whether they were responsive.' Rentokil also added '[a]s described in the methodology, having identified individuals with access to potentially relevant information, the Rentokil legal team asked those individuals to manually search their emails and relevant shared document drives for relevant materials.'

59. The CMA followed up in question 16 of the January Notice, asking 'With regard to the methodology statement at Annex 003-001 to the DMN and paragraphs 38.1 – 38.4 of the Response, please explain for each Party how many documents were initially identified as being responsive to the relevant Party's searches and how many documents were then filtered out on the basis that they were deemed to be irrelevant.' Rentokil replied that '[a]s noted in response to question 38 of the section 109 notice dated 3 December 2018, the methodology used by the Parties to identify the relevant Internal documents has been set out in Annex 003-001 to the DMN. As described in section 2 of that Annex, the documents collected based on this methodology were manually reviewed, so as to check whether they are relevant. As such, the Parties only filtered out what they considered to be irrelevant documents. Neither MPCL nor Rentokil kept record of how many documents they considered irrelevant.'

60. The CMA sought further information from Rentokil regarding the application of the Methodology in its 'minded to' letter issued on 25 April 2019 (the **Minded to Letter**), inviting comments 'regarding the application of its methodology to the information requests listed above, including in particular what steps were taken in accordance with paragraphs 2.3, 2.4 and 3.1 of the Methodology to respond to the Rentokil Relevant Questions (as that term is defined in the Methodology).'

61. In response, Rentokil advised that it had followed the following steps:

> '(a) The Rentokil legal team identified employees within the business with decision-making responsibility for pest control.
>
> (b) The legal team asked those individuals to: (i) search their own email inboxes and Google drives for relevant documents; and (ii) identify further individuals who should be asked similar questions. As was clear from the Methodology Statement, no specific search terms were applied to the searches, which were – as agreed with the CMA – conducted manually.
>
> (c) Relevant documents were forwarded to the Rentokil legal team. As a result of the manual nature of the exercise, no documents that were sent to the Rentokil legal team were irrelevant. As described above, therefore, no record was kept of how many documents were considered irrelevant (as set out in Rentokil's response to question 16 of the s. 109 notice dated 11 January 2019).

(d) Documents were sent on to Freshfields for inclusion in the responses to s.109 notices.

(e) As noted in paragraph 3.1 above, the importance of complete disclosure was emphasised in follow-up emails and telephone calls to the relevant individuals.'

62. In its provisional decision dated 5 July 2019 (the **Provisional Decision**), the CMA noted that, despite several requests (as described above), the CMA had still not been provided with certain key information relating to the search Methodology adopted by Rentokil. In particular, the CMA had not, at that point, been provided with a list of the individuals who had been asked to search for relevant documents or the instructions given about how to perform that search (or a description of how the manual search was otherwise carried out).

63. In its response dated 12 July 2019 (the **Provisional Decision Response**), Rentokil provided an annex setting out details of its document collection Methodology. This annex provided much of the information that the CMA had previously requested (including a list of the individuals who had been asked to search for internal documents and a description of the process followed to collect potentially responsive documents). The annex indicated that no written record was kept of certain key aspects of the search Methodology. In particular, Rentokil submitted that the definition of internal documents and the seriousness of Rentokil's obligations under section 109 of the Act were discussed only by phone or in follow-up oral discussions.[26]

Information request

Question 14 of the October Notice

64. In question 14 of the October Notice, the CMA required Rentokil to provide:

'a detailed description and timeline of the negotiation and agreement of the PSA. This should include but not necessarily be limited to a description of:

a. when and how Mitie (or any other entity with the Mitie Group) indicated that it was seeking a supplier for some of the services it currently supplied to facilities managers;

[26] The annex also explained that custodians raised additional queries throughout the process orally with the Rentokil legal team. No records of such queries were provided to the CMA.

b. When Rentokil found out about the opportunity;

c. Which other suppliers were approached, if any;

d. What the services for which bids were requested included;

e. When Rentokil received feedback on its offer, including that it had been selected as preferred bidder;

f. When Rentokil made an offer and what the terms of this were;

g. When Rentokil revised or updated its offer and why;

h. When Mitie (or any other entity with the Mitie Group) expanded the services required and why, including how this was communicated; […]

j. Dates of key meetings and discussions (whether internal or external) to negotiate, review and approve the PSA for each of the Parties including individuals involved […] and subject matter discussed;

k. Description of the internal documents produced to inform and record negotiation and approval of the PSA for each Party.'

65. In response to question 14 of the October Notice, Rentokil submitted a separate annex (Annex 002-034 of the Merger Notice) consisting of eight paragraphs. Rentokil explained, by way of summary, that Mitie approached Rentokil in March 2018 regarding a partnership to service Mitie's IFM customers,[27] following which meetings were held in late April / early May regarding pest control and washrooms respectively. Following these meetings, Rentokil circulated a PSA covering pest control, washrooms and other services (including hygiene) on 11 July 2018. This was followed by a draft PSA encompassing all services circulated in early September 2018. However, shortly thereafter, Mitie requested that the PSA be redrafted and split into two separate agreements, one encompassing washrooms and another pest control. Following further negotiations on the pest control PSA, in late September 2018 the price and rate card were agreed between Rentokil and Mitie. Rentokil's board approved entering into the PSA on 27 September 2018 and it was signed by the Parties on 29 September 2018.

66. The CMA subsequently sent question 5 of the December Notice[28] which yielded information the CMA considers responsive to question 14 (in particular

---

[27] IFM customers are Mitie customers that have an integrated facilities management contract with Mitie covering a range of different facilities management services.

[28] The CMA clarified that 'the answers to the questions below [questions 5 and 6 of the December Notice] would be helpful in completing your response to questions 14a-k and 15 of the s109 request of 30 October.'

14(a) and 14(g) of the October Notice). Question 5 of the December Notice required Rentokil to explain in more detail:

> ‘a. When exactly did [Mitie representative] inform Rentokil about a potential preferred supplier relationship with Mitie.
>
> b. How exactly were the two PSA services (cleaning rooms and pest control) marketed (ie how was the opportunity described and presented) to Rentokil? Were they marketed together? In what form?
>
> c. Rentokil has submitted (see Annex 002-34, para. 2) that “[a senior executive] from Rentokil and [✂] of Mitie discussed a potential PSA concerning pest control” Please describe the nature of this discussion and confirm whether a record was kept of this discussion.
>
> d. At paragraph 3 of Annex 34 Rentokil states: “Subsequent to that meeting, Rentokil (acting through [a senior executive]) revised its offer for a preferred supplier relationship encompassing pest control, washrooms, property care, ambius and specialist hygiene. The offer was revised on 11 July 2018.” Please confirm:
>
> i. The terms of the initial Rentokil offer;
>
> ii. Whether the Rentokil offer was revised twice or whether the last sentence is intended to indicate when the revision at the beginning of the statement was made;
>
> iii. How many times and when the Rentokil offer was revised; and
>
> iv. For each instance when the Rentokil offer was revised, what the revisions entailed and why.
>
> e. The feedback received on each of Rentokil’s initial and revised offer or offers.
>
> f. The reasons provided by Mitie to Rentokil for requesting that the agreements be split.
>
> g. What the points being further negotiated between Rentokil and Mitie in September 2018 were.
>
> h. When the final structure for the PSAs was discussed.’

67. In response to this question, Rentokil added the following information which the CMA considers responsive to question 14 of the earlier October Notice:

(a) Rentokil clarified that Mitie approached Rentokil about a PSA in late March 2018 following Rentokil sending Mitie a letter of intent in which it stated that it was interested in an ongoing future relationship concerning many areas, including pest control.

(b) Rentokil clarified that the washroom and pest control PSAs had not been jointly marketed. In relation to the washroom PSA, on 22 September 2017, Mitie informed Rentokil that it had launched a review of its supply chain solution for washroom and hygiene services and that it would be inviting service providers, including Rentokil, to provide a quotation for those services. A request for quotation was subsequently sent by Mitie on 3 October 2017.

(c) Rentokil referred to further iterations of the offer letter providing more background on the connection between the PSA and the SPA. Rentokil provided information on letters of intent dated:

(i) 4 May 2018 (under which Rentokil would have the right to replace Mitie's current service providers in medical waste collection, specialist hygiene and property care and would give Rentokil the exclusive right to take on Mitie's future pest control work where the customer did not object in writing);

(ii) 14 May 2018 (where the price contained in the letter of intent (containing the SPA and PSA provisions) was increased from [✂] to [✂] on 14 May 2018);

(iii) 21 May 2018 (amending the provision of future pest control work from Mitie to Rentokil);

(iv) 11 July 2018 (where the PSA was separated from the SPA and covered washrooms and pest control as well as other services);

(v) 4 September 2018 (where the PSA was amended to reflect Mitie's commitment to 5-year term in relation to pest control and washrooms);

(vi) 11 September 2018 (where the washroom and pest control PSAs were separated); and

(vii) 28 September 2018 (the day on which the draft was finalised).

D. Legal assessment

Relevant legislation

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

69. The CMA concludes that the statutory requirements for imposing a penalty under section 110 of the Act are met, and that the imposition of a penalty of £27,000 is appropriate and proportionate in this case.

Statutory requirements for imposing a penalty under section 110 of the Act

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

71. The CMA finds that Rentokil has failed to comply with requirements of notices issued under section 109 of the Act, as set out below:

(a) The October Notice required Rentokil to respond fully by 7 November 2018. Rentokil provided documents and information responsive to questions 11, 13, 14 and 15 of the October Notice following this deadline in response to the December Notice (submitted to the CMA on 21 December 2018), January Notice (submitted to the CMA on 30 January 2019) and February Notice (submitted to the CMA on 18 February 2019). Accordingly, the CMA received documents responsive to the October Notice over three months after the deadline prescribed by the notice.

(b) The November Notice required Rentokil to respond fully by 28 November 2018. Rentokil provided documents responsive to question 10 of the November Notice in response to the January Notice and February Notice. Accordingly, the CMA received documents responsive to the October Notice over a month and a half after the deadline prescribed by the notice.

(c) The January Notice required Rentokil to respond fully by 23 January 2019. Rentokil provided documents responsive to question 38 of the January Notice in response to the February Notice. Accordingly, the CMA received documents responsive to the October Notice over three weeks after the deadline prescribed by the notice.

72. The CMA has thus decided that Rentokil has failed to comply with certain of the requirements of the Notices served on it.[29]

Without reasonable excuse

73. Section 110 of the Act provides that penalties can be imposed if a failure to comply is 'without reasonable excuse.' The Competition Appeal Tribunal has recently considered the concept of 'without reasonable excuse' in the Electro Rent judgment[30] finding it is 'an objective test as to whether the excuse put forward […] was reasonable.'[31]

74. The Guidance provides:

> 'The circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond [a person's] control has caused the failure and the failure would not otherwise have taken place.'[32]

Rentokil's submissions

75. Rentokil submitted in the response to the Minded to Letter dated 2 May 2019 (the **Response Letter**) and the Provisional Decision Response that it has a reasonable excuse for failing to comply the requirements of the Notices for the following reasons:

(a) Rentokil engaged with the CMA about the Methodology (described in more detail in paragraphs 52 to 63 above) and the CMA did not raise any concerns;

(b) That 'it must be the case that a manual search risks being less exhaustive and brings in greater scope of human error';[33]

(c) That the CMA gave Rentokil comfort during the 1 November Call; and

---

[29] On the facts of this case, where the cause of failure to comply with each of the Notices, the submissions on 'reasonable excuse', and the consequences of the failures on the P1 Inquiry, were closely correlated, the CMA has exercised its discretion to enforce against all failures in a single decision and to impose a single penalty for the failure to comply with each of the Notices.

[30] *Electro Rent Corporation v CMA* [2019] CAT 4 (**Electro Rent**).

[31] Electro Rent, paragraph 69. The CMA notes, however, that this case related to the breach of an initial enforcement order, governed by section 94A of the Act.

[32] The Guidance, paragraph 4.4.

[33] Response Letter, paragraph 2.6.

(d) That Rentokil applied the Methodology in good faith.

76. These are considered in turn below.

No challenge to Rentokil's Methodology

77. The CMA rejects Rentokil's submission that, because 'at no point did the CMA raise any specific concerns about any of the content from the Methodology Statement or suggest that any of the methods of finding documents were flawed,'[34] Rentokil has a reasonable excuse for its failure to comply with requirements contained in the Notices.

78. In accordance with the CMA's guidance on internal documents, '[i]t is ultimately the parties' responsibility to ensure that relevant material is produced in response to a document request. The CMA may engage with merging parties on whether the proposed approach is sensible and practical (and, in particular, seek to ensure that specific questions do not impose a disproportionate burden on the merging parties). […] The CMA will not, however, be able to pre-emptively give assurances that no breach of the section 109 notice would occur in the event that relevant material later comes to light which parties could and should have provided'.[35]

79. This guidance makes clear that it is for the relevant party to determine whether its proposed methodology is sufficiently robust to elicit the responsive material. The CMA will merely review the methodology to ensure that it is 'sensible and practical'.

80. This approach reflects the information asymmetry between the CMA and the party, with the latter being in a better position to ascertain what documents may be responsive to a section 109 requirement and how best to gather them, as well as to ensure that the methodology is applied appropriately.

81. The CMA's practice in this case was consistent with its guidance[36] (as well as broader principles of procedural fairness). In particular, the CMA (having previously discussed the intended approach to document-gathering on calls on 24 October and 1 November) reviewed the Methodology submitted by Rentokil in response to the October Notice and considered it to be sensible and practical on the basis that it included steps:

---

[34] Response Letter, paragraph 2.5.

[35] Guidance on requests for internal documents in merger investigations (CMA100) paragraph 28. The CMA notes that this guidance came into force on 15 January 2019. However, the draft guidance (CMA77 CON) issued on 28 March 2018 for consultation contains the exact same wording at paragraph 27.

[36] Including the Guidance and Guidance on requests for internal documents in merger investigations (CMA100).

(a) to identify the correct members of senior management who may hold responsive documents;

(b) to instruct them to search for responsive documents;

(c) for the Rentokil legal team to review responsive documents for relevance;

(d) to convey the importance of the task; and

(e) to confirm with individual custodians that the search was complete.

82. The CMA considers that, if properly applied, this Methodology should have yielded complete responses to the requirements of the Notices and thus there was no reason for the CMA to query its scope.

Robustness of manual searches

83. Insofar as Rentokil considered that manual searches were less exhaustive and brought in greater scope for human error, the responsibility was Rentokil's to ensure that appropriate steps were taken to mitigate this risk. Accordingly, the CMA would not consider the use of a manual search, in and of itself, to amount to a 'reasonable excuse'. It was incumbent on Rentokil to ensure that the manual searches were carried out in a way that ensured that the results produced were sufficiently robust. As the Guidance states, while the circumstances that constitute a reasonable excuse are not fixed, 'the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond P's control has caused the failure and the failure would not otherwise have taken place.'[37] The fact that manual searches were used does not mean that the errors that resulted were beyond Rentokil's control.

84. The CMA notes that there were a number of reasons why the use of a manual search was sensible and practical within the specific circumstances of this case. In particular, the responsive documents were held by a limited number of custodians and were, in most instances, recent (for example, the PSA negotiation had only ended one month before the issuance of the October Notice).

85. However, while the Methodology proposed was, in principle, appropriate in this case, Rentokil failed to provide a large number of responsive documents of central importance to the CMA's P1 Inquiry in response to the October Notice.

---

[37] The Guidance, paragraph 4.4.

86. As discussed in paragraphs 91 to 97 below, Rentokil provided further information on the application of the Methodology in the Provisional Decision Response.[38] This information does not alter the CMA's view regarding the robustness of the Methodology and its capacity to generate all relevant documents.[39]

Discussions on 1 November Call

87. Rentokil states that, during the 1 November Call, it informed the CMA that questions 11, 13 and 15 were very broad and, given the potential difficulties with document collection highlighted on the call, the CMA advised the Parties that they should 'make a first go' of the request and then 'we [would] assess'.

88. Rentokil submitted that, '[t]his alone should be enough to disqualify the CMA, acting reasonably, from reaching a provisional decision that it should penalise Rentokil for any breaches of this, and subsequent notices.'[40]

89. The CMA considers this description of the 1 November Call to be inaccurate. During the call, Freshfields raised concerns regarding the large number of documents responsive to requirements of the October Notice. In response, the CMA confirmed that it was not necessary for Rentokil to conduct keyword searches. The CMA then advised Freshfields that it should provide its methodology as part of the response to the October Notice (as requested in the notice). The CMA's comments to 'make a first go' and 'we would assess' were made in this context and related to the adequacy of the methodology only and not to the comprehensiveness of the response to the request itself. This is consistent with the CMA's approach of reviewing whether a methodology is 'practical and sensible', but the party conducting the search retaining responsibility for the application of the methodology (and whether the information request in question has been complied with) as discussed in paragraph 79 above.

90. To construe the CMA's statement differently would be inconsistent with the purpose of issuing a section 109 notice, namely to 'support the CMA's ability to carry out its statutory functions which is dependent, in large part, on being

[38] The Methodology is outlined in paragraphs 77 to 82 above.

[39] In fact, as discussed in paragraphs 98 to 102 below, Rentokil's failure to comply may have arisen, at least in part, from incorrect instructions regarding the definition of internal documents.

[40] Response Letter, paragraph 2.3.

able to rely on the accuracy and comprehensiveness of merging parties' submissions.'[41]

Application of the Methodology

91. Rentokil submitted that it sought in good faith to follow the Methodology and this provides a reasonable excuse for its failure to comply.

92. In support of its submissions, Rentokil provided information regarding the application of the Methodology in the Annex to Provisional Decision Response, described in paragraph 63 above.[42] Rentokil noted that 'internal instructions and communications regarding document collection support Rentokil's statement that it acted in good faith and intended to respond to the CMA's requests fully and accurately.'[43]

93. As noted above, however, the description provided by Rentokil indicates that no written record was kept of certain key aspects of the search Methodology. Nor were the definition of internal documents and the seriousness of Rentokil's obligations under section 109 of the Act conveyed in writing to those carrying out the searches. It is therefore not possible for the CMA to verify Rentokil's submissions or to meaningfully review how the Methodology was applied in practice.

94. Rentokil submitted, in this regard, that it is not reasonable for the CMA to seek to verify certain elements of the search after the event. In particular, Rentokil suggested that it is not possible for Rentokil to retroactively verify how many documents initially identified by custodians were considered to be non-responsive by Rentokil's legal team (within the process described in paragraphs 52 to 63 above).[44]

95. For the avoidance of doubt, the CMA would not expect Rentokil to be able to retroactively gather this information. The CMA would, however, generally expect parties to be able to appropriately explain and evidence how the key

---

[41] Guidance on requests for internal documents in merger investigations (CMA100), paragraph 16. The same language appears in paragraph 15 of the CMA's consultation draft guidance (CMA77 CON) issued on 28 March 2018.

[42] Rentokil submitted that the CMA had not requested information regarding the Methodology and its application prior to the Provisional Decision (Provisional Decision Response, paragraphs 3.4 to 3.11). In relation to the Methodology itself, the CMA notes that the definition of internal documents in the Notices (as set out in paragraph 38) does request a description of methodology, including custodians and search terms applied. In relation to requests for information on the application of the Methodology, the CMA refers to the instances described in paragraphs 52 to 63 and in particular the Minded to Letter which required that, in light of previous requests, 'the CMA invites comments from Rentokil regarding the application of its methodology to the information requests listed above, including in particular what steps were taken in accordance with paragraphs 2.3, 2.4 and 3.1 of the Methodology to respond to the Rentokil Relevant Questions.'

[43] Provisional Decision Response, paragraph 2.1(a).

[44] Provisional Decision Response, paragraphs 3.12 to 3.16.

stages of a given search Methodology were carried out (which would include, in this case, a description of the number of documents that were initially identified by custodians as being responsive that were subsequently considered to be non-responsive by Rentokil's legal team).

96. The lack of contemporaneous evidence to support Rentokil's submission that the Methodology was applied rigorously limits the weight that the CMA is able to place on Rentokil's submission that it applied the Methodology in good faith (particularly where the way in which the Methodology was applied resulted, as explained in detail in this decision, in the non-production of a material number of responsive documents).[45]

97. Rentokil submitted 'that, due to the manual nature of the review, records of how many documents were considered irrelevant were not kept'.[46] The CMA considers that there is no reasonable basis for Rentokil's submission that the manual nature of the search necessarily prevented the keeping of records. By contrast, it was entirely possible for Rentokil to keep a record of the manner in which custodians carried out their searches and which documents custodians deemed irrelevant. Indeed, this would have been a prudent course of action given that the CMA might reasonably be expected, in certain circumstances (such as where a material number of responsive documents appears not to have been produced), to verify how a search methodology has been applied in practice.

Instructions regarding internal documents

98. To the extent that written evidence about the way in which the Methodology was applied is available, it indicates that there were significant flaws in its application.

99. In particular, emails setting out [a senior executive]'s further queries to the custodians regarding questions 11, 14 and 15 of the October Notice (described above in paragraph 58 above) suggest that [the senior executive] was seeking to collect internal documents *prepared for* the board and/or senior management (see paragraph 61 bullets (a) and (c) ((emphasis added)).

100. The definition of internal documents (set out in paragraph 38) includes 'documents in any form which have been prepared by or for, *or received by*,

---

[45] The CMA does not agree with Rentokil's submission that this failure to provide records was 'implicitly an aggravating factor' (paragraph 3.16 of the Provisional Decision Response). The lack of such records was not a relevant factor in the CMA's determination of the level of the fine.

[46] Response Letter, paragraphs 2.6 and 3.2(c).

any member of the board of directors […] or senior management' (emphasis added).

101. The discrepancy is significant as it is likely that a large subset of documents would be responsive to the Notices on the basis that they were received by senior management, rather than prepared for them.

102. While this decision does not require the CMA to reach a finding on the cause of Rentokil's failure to comply, the CMA notes that instructions that conveyed an incorrect description of the definition of internal documents may have contributed to this failure.[47]

Flagrant nature of failure to comply

103. The CMA considers that Rentokil's response to the Notices in relation to the questions outlined in paragraph 71 above (particularly as regards the October Notice) was clearly deficient, and should have been identified by Rentokil as such. For example:

(a) In response to a requirement for internal documents including business plans, Rentokil failed to provide responsive business plans (question 11 of the October Notice);

(b) In response to a requirement to provide internal documents negotiating and recording the PSA, Rentokil provided only those documents recording the PSA itself (Question 15 of the October Notice);

(c) In response to a requirement to provide internal documents considering the rationale for the transaction, Rentokil failed to provide documents relating to the Rentokil Investment Committee's discussions (Question 13 of the October Notice); and

(d) Despite the definition of 'internal document' for the purposes of the Notices clearly including emails, Rentokil failed to provide a large number of responsive emails between the senior management of Rentokil and Mitie and between individuals within Rentokil's senior management (for example, see questions 2 and 5 of the February Notice which were responsive to question 15 of the October Notice and 10 of the November Notice respectively).

---

[47] In this regard, the Guidance makes clear that it is for the addressee of the statutory notice to ensure that 'Investigatory Requirements and Merger IMs are fully understood and that the CMA's powers are complied with, even when, for example, using external advisers to assist them with their response' (paragraph 4.5).

104. The CMA notes that Rentokil's senior management was heavily involved in the Transaction and that the documents requested by the CMA related to central elements of the Transaction. The CMA therefore considers that the senior management tasked with carrying out the manual searches (including in particular [senior executives], who were closely involved in the negotiation of the SPA and PSA) should have been aware of the errors in Rentokil's responses.

Acting in good faith is not a reasonable excuse

105. Finally, the CMA notes that, as a general principle, acting in good faith (even where supported by the available evidence) does not, by itself, amount to a reasonable excuse. Consistent with the approach set out in the Guidance (as noted in paragraph 74 above), whether a party has acted in good faith would only be relevant in considering whether an event was genuinely unforeseeable or unusual and/or beyond a party's control. For the reasons explained in detail elsewhere in this decision, none of these circumstances apply in this case.

Conclusion on reasonable excuse

106. The CMA finds that none of the submissions made by Rentokil constitute a reasonable excuse for its failure to comply with the Notices.

107. Moreover, the CMA notes that all of Rentokil's arguments related to its failure to produce responsive documents from the manual searches. It has not advanced any justification for its failure to comply with the requirement for information contained in question 14 of the October Notice.

E. Appropriateness of imposing a penalty

Appropriateness of imposing a penalty

108. Having had regard to its statutory duties and the Guidance, and having considered all relevant facts and submissions by Rentokil, the CMA finds that the imposition of a penalty is appropriate. In reaching this view, the CMA has considered the adverse impact of the failure on the P1 Inquiry, the flagrant and significant nature of the failure as well as having regard to the need to achieve deterrence and all factors highlighted in the Guidance.[48]

[48] The Guidance, paragraph 4.2.

Adverse impact on the P1 Inquiry

109. The failure was a serious one, with a material number of highly relevant documents not provided in response to the Notices (in particular the October Notice). The failure required the CMA to issue follow-on questions in further statutory notices to ensure that it had received complete responses to the October Notice.

110. Rentokil submitted that 'the failure to comply did not have an impact on the CMA's investigation or ability to meet statutory or administrative timetables [because] each s.109 notice contained a number of entirely new and/or follow-on questions […]. These required a response by Rentokil (and therefore time to respond) regardless of whether questions in earlier s.109 notices were regarded by the CMA has having been fully addressed or not' [49] and that 'the CMA's need to extend the procedural timetable between 7 November 2018 to 15 February 2019 cannot be justified on the basis of Rentokil's failure to correctly respond to the Notices. As set out in the Annex to the Minded to Response, the CMA continued to ask new and/or non-replicative follow-on questions in each of the Notices, and any timing extensions were largely a result of the CMA's desire to ask new non-replicative questions.'[50]

111. The CMA rejects the suggestion that the disruption caused to its investigation by Rentokil's failure to comply has been overstated. In order for the CMA to be satisfied that it had received complete responses to the October Notice, it needed to send an additional three section 109 notices (the December Notice, the January Notice and the February Notice).[51] Had Rentokil complied fully with the requirements of the Notices, the questions identified in paragraph 71 above would not have needed to be raised and the CMA would likely have been in a position to restart the investigative clock significantly earlier than 15 February 2019. Rentokil's submission that its 'actions did not cause the procedural timetable to be unduly extended' is clearly inconsistent with the extent of additional information-gathering that was required as a direct result of Rentokil's omissions.

112. The CMA also rejects any suggestion that it is the CMA's responsibility to highlight to a merger party which questions are being asked to complete a response to a previous section 109 notice, in particular (as in this case) where

[49] Response Letter, paragraph 4.1.

[50] Provisional Decision Response, paragraph 4.3.

[51] Rentokil also failed to comply with requirements contained in the November Notice and January Notice.

the CMA has already advised the party that the response to a notice is incomplete.[52]

113. While additional questions were raised in subsequent statutory notices covering some separate issues, the CMA had to spend time and resources in reviewing Rentokil's evidence and carrying out further information gathering as a result of Rentokil's failure to comply with the Notices over the course of a four month period in order to ensure that its evidence base was complete (and in each case had to follow-up with at least one further statutory request up until the February Notice).

114. The CMA also notes that the material submitted in response to the February notice was highly relevant to the CMA's conclusions regarding the scope of the RMS, counterfactual and SLC. As such, the late provision of information had a significant impact on the CMA's ability to progress its P1 Inquiry in the interim.

115. Rentokil further submits that 'the CMA stated in the call of 1 November 2018 that it was using the s.109 notice procedure with stop-the-clock in mind to allow for sufficient time to review the case. This was also clear from the very short deadline the CMA set to respond to the October Notice, i.e. 9am on 7 November 2018, despite a number of data-intensive questions.'[53]

116. The CMA rejects this submission. During the 1 November 2018 call, Freshfields advised that Rentokil was resource-constrained and that the deadline for the October Notice was, in their view, ambitious. The CMA made clear that statutory notices were not a tool for managing an investigation's timetable but that the CMA would be willing to engage with Rentokil regarding reasons for a potential delay in their response.

117. The CMA considers that, in the particular circumstances of the case, the initial deadline for the October Notice was reasonable. In particular, the October Notice contained the most relevant questions asked in the merger inquiry letter template which largely correspond to the merger notice template questions. Rentokil had already indicated in the case team allocation form submitted to the CMA on 2 October 2018, that it intended to submit a first draft merger notice on 5 November 2018. Shortly after the receipt of the October Notice, Rentokil suggested that it should answer the October Notice requests in its draft merger notice, which had not been provided at that stage. The CMA therefore considers that Rentokil would already have known well in

[52] The CMA advised Rentokil in the December Notice that a number of questions were being asked to complete their response to the October Notice.
[53] Response Letter, paragraph 4.3.

advance of the October Notice that it would be required to produce much of the information requested in that notice for the purpose of the CMA's P1 Inquiry (and that, given Rentokil's own submissions about the timing of the submission of the draft merger notice, the gathering and preparation of that information would likely already have been at an advanced stage by the time that the October Notice was sent).

The failure was significant and/or flagrant

118. The CMA considers that Rentokil's failure to comply was significant in its magnitude, and many of the errors were flagrant, including in particular regarding the PSA-related requirements.

Significant failure

119. For the reasons set out in paragraphs 103 to 117, the CMA considers Rentokil's failure to be significant, denoting a pattern of errors in responding to the CMA's statutory notices that resulted in a delay to the P1 Inquiry and a material diversion of resources in the P1 Inquiry at increased public expense.

120. Rentokil submitted that 'a penalty in the circumstances would not be appropriate as any failure to comply was entirely inadvertent. Rentokil has submitted that it answered each s.109 notice in good faith'[54] and that 'the CMA has not presented any evidence in the Decision that would contradict this statement [i.e. that the failure to comply fully with the Notices was unintentional and Rentokil acted throughout in good faith]. The fact that Rentokil did not initially provide certain documents where relevant to the CMA's assessment, but did provide them at a later stage, cannot be considered evidence of bad faith.'[55]

121. The CMA does not consider that a party should be considered to have acted in good faith absent any evidence of a deliberate intention to mislead.

122. The CMA considers that a penalty in these circumstances is appropriate, in particular because of the serious deficiencies in Rentokil's responses, the multiple instances of non-compliance, the importance of the documents that were not provided for the proper assessment of the case and the involvement of senior management in the document searches. For the reasons set out above, the CMA considers that Rentokil ought to have known that its

[54] Response Letter, paragraph 4.5. See also Provisional Decision Response, paragraphs 2.1(a), 4.1 and 4.4.
[55] Provisional Decision Response, paragraph 4.4.

responses to the Notices were inadequate (ie that it was negligent in responding to the Notices[56]).

123. As described in detail in paragraphs 91 to 97, the CMA is unable, given the available evidence, to place material weight on Rentokil's submissions that it applied the Methodology in good faith (particularly where the way in which the Methodology was applied resulted, as explained in detail in this decision, in the non-production of a material number of responsive documents).

124. In particular, the fact that Rentokil ultimately provided the responsive documents at a later stage cannot be considered to support Rentokil's position that it acted in good faith. These documents were not provided voluntarily but rather only in response to subsequent requirements issued by the CMA (with, as a result, some documents being produced over three months after they should have been).

Flagrant failure

125. The CMA considers that many of Rentokil's responses contained flagrant errors, as discussed in paragraph 103 above.

126. In addition, the CMA considers that Rentokil's failure to comply with the questions relating to the PSA (ie questions 14 and 15 of the October Notice, question 10 of the November Notice and question 38 of the January Notice) was particularly flagrant. The link between the PSA and SPA was fundamental to determining the proper scope of the RMS in this case (one of the statutory questions which the CMA is required to answer), the correct counterfactual (ie the benchmark against which the effect of the merger is assessed in order to determine whether there is an SLC) and the scale of the SLC (as the CMA included PSA-related turnover in its assessment of Rentokil's share of supply).

127. Rentokil submitted that there was no link between the PSA and the SPA as the SPA was a standalone contract which was not conditional on the PSA, and that Rentokil would have entered into the PSA without the SPA and vice versa.[57]

---

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

[57] Rentokil statements made at the issues meeting dated 21 March 2019, Rentokil response to the Issues Letter dated 25 March 2019 (in particular Annex 5), Rentokil submission of 18 February 2019.

128. The CMA notes however, that evidence which was responsive to requirements of the October Notice, but which was only provided in response to the subsequent January Notice and February Notice, includes the following:

(a) Annex 3 of Rentokil's response to the February Notice, which reflects internal discussions between Rentokil senior management regarding the negotiation of the PSA in July 2018. [A senior executive] writes to [other senior executives]: [✂]

(b) Annex 31 of Rentokil's response to the January Notice, which sets out correspondence between Rentokil and Mitie senior management regarding the status of the PSA in early September 2018. [A Mitie representative] stated in an email to [a senior executive]: [✂]

(c) Annex 17 of Rentokil's response to the December Notice, in which [a senior executive] sent an internal email to the IC to authorise the revised offer being made for the pest business. The email sets out assumptions of the Rentokil's offer of [✂] to Mitie on the same date, with [✂] attributed to the 'M bundled pest business and washrooms tender' and a value of [✂] was attributed to the 'rest of the business'. The CMA notes that the overall consideration ultimately paid under the SPA did not vary materially from this (at £40 million), which suggests that the MPCL IFM Pest Control Services continued to play a role in the SPA consideration and that the Transaction was valued as a whole.

129. This evidence is inconsistent with, or does not support, Rentokil's submissions that there was no link between the PSA and SPA and in particular that Rentokil would have entered into the PSA regardless of the SPA and vice versa.

130. Rentokil submitted that '[t]he additional documents referred to by the CMA do not change Rentokil's analysis in this regard. Although the CMA has chosen to interpret some of the additional documents as evidence to support the CMA's views on the PSA, Rentokil does not agree with this interpretation.'[58]

131. Leaving aside Rentokil's disagreement with the CMA's interpretation of this evidence, the documents were clearly responsive to the October Notice, relevant to the connection between the PSA and the SPA and, at the very least, not supportive of Rentokil's submissions. As such, the CMA believes that the failure to provide them is particularly flagrant.

---

[58] Provisional Decision Response, paragraph 2.1(b).

132. Rentokil also submits that 'on receipt of more precise follow-up questions from the CMA, Rentokil provided the documents in question. This demonstrates that there was clearly no intention to withhold the information.'[59]

133. This does not address the key issue that, had the CMA not asked multiple additional questions and proactively required the provision of further evidence, the responsive documents may never have come to the attention of the CMA. Rentokil's failure to provide this evidence therefore risked the CMA's decision regarding the scope of the RMS, correct counterfactual and the scale of any SLC being taken on the basis of incomplete evidence and, in particular, without access to evidence which was inconsistent with Rentokil's written and oral submissions.[60]

Deterrent effect of the penalty

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

135. Therefore, the CMA considers that it is of utmost importance to the CMA's ability to conduct effective investigations that parties have due regard to the requirements imposed on them by, among other things, section 109 of the Act. The imposition of an administrative penalty under section 110 of the Act is critical to achieve deterrence, ie to impress both on Rentokil in this specific case, and more widely to those who may be subject to investigatory requirements in future, the seriousness of a failure to comply with a statutory notice, without a reasonable excuse.

Other considerations relevant to the failure to comply

136. Rentokil also submits that a penalty would be inappropriate because in this case:

(a) there is no element of recidivism;

(b) a penalty is not required to encourage swift compliance;

---

[59] Provisional Decision Response, paragraph 2.1(c).

[60] Rentokil statements made at the issues meeting dated 21 March 2019, Rentokil response to the Issues Letter dated 25 March 2019, Rentokil submission of 18 February 2019.

(c) Rentokil did not seek to obtain an advantage or derive any benefit from the failure to comply; and

(d) Rentokil was not provided with drafts of the statutory notices.[61]

137. The CMA notes that none of the factors listed above are requisites for the imposition of a penalty and it is not necessary to demonstrate that all of the factors listed in paragraph 4.2 of the Guidance are present in order to impose a penalty. Rather, paragraph 4.2 of the Guidance states that the presence of one or more of the factors listed in that paragraph may make the CMA more likely to impose a fine. Other relevant factors listed in that paragraph, such as the adverse impact on the investigation and significance of the failure to comply, are discussed above. The CMA has considered all relevant facts and submissions by Rentokil and, for the reasons provided in paragraphs 108 to 135 above, has come to the view that a penalty is appropriate in this case.

Appropriateness of the amount of the penalty imposed

138. Consistent with its statutory duties and the Guidance,[62] the CMA has assessed all relevant circumstances to determine an appropriate level of penalty.

139. The CMA notes Rentokil's submission that 'the present case lacks a number of the aggravating circumstances that led to a fine in the Hungryhouse decision.'[63] In this regard, the CMA notes that the Competition Appeal Tribunal has observed that previous penalty decisions (in relation to Competition Act 1998 infringements) have limited precedent value, other than in matters of legal principle, because each case is very dependent on its facts.[64] The CMA's position is consistent with the Guidance, which provides that the CMA will decide whether to impose an administrative penalty, and at what amount, on a case-by-case basis, having regard to the Guidance and taking into account all relevant circumstances.

---

[61] Response Letter, paragraphs 4.6 to 4.9.

[62] The Guidance, paragraph 4.11, which lists factors similar to those in paragraph 4.2 regarding the imposition of a penalty.

[63] Response Letter, Paragraph 5, referring the Hungryhouse Decision.

[64] This is supported by observations made by the Competition Appeals Tribunal in *Ping v CMA* [2018] CAT 13 [233] and *Kier Group Plc v OFT* [2011] CAT 3 [116].

140. Listed below are the factors which the CMA considered particularly relevant in determining the level of the penalty, noting the existence of some overlap with those factors that were relevant in the decision to impose a fine.[65]

Aggravating factors

Scale of any adverse effect

141. As set out in paragraphs 103 to 117, the failures to comply with the Notices disrupted the CMA's P1 Inquiry, diverting the CMA case team from its work at increased public expense. The CMA considers the adverse effect to be particularly significant given the relevance of the missing information and the multiple iterations of questions the CMA had to issue to obtain complete responses.

Nature and gravity of the failure

142. The CMA considers the failure to comply to be particularly serious on the basis that it displayed a pattern of offending behaviour which resulted in a material number of documents not being provided in response to the Notices.

143. As well as having regard to the pattern of earlier errors when deciding to impose a penalty (paragraphs 125 to 126), the CMA has also treated this pattern of errors as an aggravating feature when setting the level of penalty. The CMA advised Rentokil in the December Notice that it was asking follow-up questions to complete Rentokil's response to the October Notice. Despite the CMA putting Rentokil on notice of a failure to comply, Rentokil continued to commit errors in response to statutory notices (notably the January Notice). The CMA finds that a failure to comply with a statutory notice in the context of prior failures necessitates a higher penalty. This reflects both the disruption that such errors caused to the P1 Inquiry[66] but also acts as a deterrent to ensure Rentokil and other parties subject to investigatory requirements in future, take sufficient care with the conduct of searches for documents, avoiding errors which ought not to happen.

144. Rentokil submits in this regard that the CMA did not put Rentokil on notice of a potential breach because the sentence 'the question below would be helpful in completing your response to question [..] of 30 October 2018' stated in relation to various questions 'was not sufficient to inform Rentokil that it had

---

[65] In accordance with paragraph 4.11 of the Guidance, the assessment of the level of the penalty may include the factors referred to in sections A (factors influencing decision to impose a penalty) and B (factors affecting the type of penalty imposed) of chapter 4.

[66] Requiring, as discussed in paragraph 111, extensive additional information-gathering.

breached the section 109 notice process, particularly given that many of the questions asked in the December Notice were new and/or non-replicative follow-on questions.'[67]

145. The CMA rejects this submission. The sentence explicitly indicates that information is being sought to 'complete' a previous response and therefore clearly indicates that the statutory requirement has not been fully complied with.

146. Rentokil also submits that the CMA should have raised concerns earlier as 'had the CMA explicitly raised concerns during the s.109 process, Rentokil would have done its best to remedy the CMA's concerns and would have adapted its Methodology and its application accordingly.'[68]

147. The CMA rejects this submission. The CMA notified Rentokil in the December Notice that it was seeking information to complete responses to the October Notice. In the December Notice and January Notice, it also raised queries about the application of the Methodology.[69] As such, the CMA considers that it put Rentokil on notice when it became aware of the failure to comply.

148. For the reasons discussed in paragraphs 103 to 104 and 125 to 133, the CMA considers the failure to comply to be flagrant and to demonstrate negligence. This failure to comply is all the more serious given that the manual search was to be conducted by senior management of Rentokil,[70] which ought to have been aware that Rentokil's responses omitted highly relevant documents and information responsive to the Notices.

Benefit reasonably expected to derive from the failure

149. Finally, the CMA considers that the failure to comply with the requirements relating to the PSA (ie questions 14 and 15 of the October Notice, question 10 of the November Notice and question 38 of the January Notice) to be an aggravating factor. The relationship between the PSA and SPA was fundamental to the CMA's assessment of the Transaction as it would determine the scope of the RMS, the correct counterfactual and the scale of any SLC.

---

[67] Provisional Decision Response, paragraph 4.5.

[68] Provisional Decision Response, paragraph 4.6.

[69] See Question 38 of the December Notice and Question 16 of the January Notice.

[70] As discussed in paragraphs 54 and 104 above, the Methodology provides for the identification of relevant persons 'with decision-making responsibility for the UK pest control services business', including 'members of the UK Leadership Team and any other individuals who are likely to hold responsive documentation, taking into account their job roles and functions.'

150. Rentokil argued that there was no connection between the PSA and the SPA. This argument favoured Rentokil as it meant that the increment in Rentokil's share of supply resulting from the Transaction was limited to the business transferred under the PSA and excluded the pest control business transferred under the PSA as part of the bundled IFM Contracts.

151. However, the evidence which came to light following the issuance of additional statutory notices did not support Rentokil's oral and written submissions regarding the PSA.

152. Had the CMA not proactively sought further information, the incomplete information submitted by Rentokil would have seriously impeded the CMA's ability to adequately assess the impact of the Transaction and take remedial action to mitigate the risk of the SLC, to Rentokil's benefit.

153. As is clear from the Guidance,[71] a finding that a party might be expected to benefit from a failure to comply is an objective assessment based on the CMA's view acting reasonably. It does not require any finding of intent.

154. Rentokil submits that 'Rentokil considers that its position in this regard is not undermined by the documents that the CMA says were responsive to earlier s.109 notices […]. As such, the idea that Rentokil reasonably expected to derive benefit from the failure is false. Indeed, Rentokil was not even aware at the time of its responses to the Notices that it had failed to comply. In short, there is no evidence on which to base the CMA's claim that Rentokil sought to derive "advantage from its failure" (nor that it "reasonably expected to do so")."[72]

155. The CMA rejects this submission. Firstly, as discussed in paragraphs 143 to 147 above, the CMA considers that it did put Rentokil on notice of a failure to comply. Secondly, the Guidance indicates that the applicable question for the CMA to consider is whether Rentokil 'derived any advantage from its failure or (objectively) *might reasonably be expected to do so*', (emphasis added)[73] and therefore not whether Rentokil (subjectively) reasonably expected to derive a benefit. For the reasons described in paragraphs 149 to 153 above, the CMA considers that this test is clearly met in this case.

156. The CMA notes that, as discussed in paragraphs 120 to 124, Rentokil has not provided robust evidence of how it has carried out its searches in support of its submissions that it acted in good faith and any errors were inadvertent. As

---

[71] The Guidance, paragraph 4.11.

[72] Provisional Decision Response, paragraph 4.7.

[73] The Guidance, paragraph 4.11.

such the CMA is unable to verify whether the failure to provide these documents until February 2019 was inadvertent or intentional.

Involvement of senior management

157. Rentokil's Methodology provided for persons in senior management and decision-making roles to carry out the searches.[74] The failure to comply is thus all the more serious given that senior management of Rentokil, which ought to have been aware that Rentokil's responses omitted highly relevant documents and information responsive to the Notices, contributed to the failure to comply. In line with the Guidance, the CMA considers this to be an aggravating factor in relation to the penalty to set.

Mitigating circumstances

158. Rentokil submitted that, unlike in the Hungryhouse decision, Rentokil sought to discuss the scope of the section 109 requests and its Methodology with the CMA and was not given an opportunity to review the draft Notices.[75] It also submitted that 'the CMA has been aware of how much effort Rentokil's employees have expended in answering its queries throughout'[76] and that it attempted in good faith to respond to the Notices.

159. As noted above, the CMA considers Rentokil's Methodology to be sensible and, in principle, if applied correctly should have been sufficient to identify responsive documents.

160. In relation to the lack of draft notices, in accordance with its guidance on transparency,[77] the CMA will attempt to send draft statutory notices to parties where practicable and appropriate. It is not always practicable to do so in the context of phase 1 mergers where the CMA is conducting complex investigations under strict statutory timelines. While in this case the CMA did not send draft notices, the CMA nonetheless considers that it acted proportionately and fairly in setting the scope and deadline for the Notices. Moreover, the CMA made itself available on multiple occasions to discuss the Notices and how to respond to them.[78] It also showed flexibility in allowing Rentokil to conduct manual searches.

---

[74] As confirmed in Annex 1 of the Provisional Decision Response.
[75] Response Letter, paragraph 5.2.
[76] Response Letter, paragraph 5.2.
[77] Transparency and disclosure: Statement of the CMA's policy and approach, January 2014 (CMA6).
[78] Including on the 24 October Call and 1 November Call.

161. Finally, and as stated previously, owing to the flagrant and serious nature of the errors and the pattern of behaviour displayed by Rentokil, the CMA considers that Rentokil acted negligently and has failed to provide evidence to alter the CMA's views.

Financial resources available to Rentokil

162. Consistent with the Guidance, the CMA has also had regard to certain of the financial indicators relating to the financial resources available to Rentokil:

(a) Operating profit – £245.5m;[79]

(b) Net assets– £832.6m;[80] and

(c) Turnover – £2,472.3m.[81]

163. These indicators show that Rentokil has significant resources available in respect of the imposition of a penalty of £27,000 for the failure to comply in question in this case.

164. In addition, the CMA considers that it is appropriate to impose a penalty at this level, having regard to Rentokil's size and financial position.

Andrea Gomes da Silva

Executive Director, Markets and Mergers

Date: 7 August 2019

Competition and Markets Authority

[79] Rentokil Initial PLC's annual report 2018, page 108.
[80] Rentokil Initial PLC's annual report 2018, page 109.
[81] Rentokil Initial PLC's annual report 2018, page 108.