

Completed acquisition by PayPal Holdings, Inc. of iZettle AB

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

1. Pursuant to sections 94A and 112 of the Enterprise Act 2002 (**EA02**), the Competition and Markets Authority (the **CMA**) hereby gives notice of the following:
 - (a) The CMA has imposed a penalty on PayPal Holdings, Inc., PayPal (Europe) Sarl et Cie SCA and PayPal SE (jointly and severally **PayPal**) under section 94A of the EA02 because PayPal has, without reasonable excuse, failed to comply in certain respects with the requirements imposed on PayPal by the Initial Enforcement Order issued by the CMA under section 72 of the EA02 on 19 September 2018 (the **IEO**)¹.
 - (b) The penalty is a fixed amount of £250,000.
 - (c) PayPal is required to pay this penalty in a single payment, by cheque or bank transfer to an account specified to PayPal by the CMA, by close of banking business on the date which is 28 days from the date of service of this notice on PayPal.
 - (d) PayPal may pay the penalty earlier than the date by which it is required to be paid.
 - (e) Pursuant to section 112(3) of the EA02, PayPal has the right to apply to the CMA, within 14 days of the date on which this notice is served on PayPal, for the CMA to specify a different date by which the penalty is to be paid.

¹ The Initial Enforcement Order of 19 September 2018 is attached at Annex 1.

- (f) Pursuant to section 114 of the EA02, PayPal has the right to apply to the Competition Appeal Tribunal (the **CAT**) within 28 days starting with the day on which this notice is served on PayPal 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.
- (g) If PayPal applies to the CMA pursuant to section 112(3) of the EA02 for the CMA to specify a different date by which the penalty is to be paid, then the period of 28 days referred to in relation to (f)(iii) above shall start with the day on which PayPal is notified of the CMA's decision on the section 112(3) application.
- (h) Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal under section 114 of the EA02, the CMA may recover the penalty and any interest which has not been paid; in England and Wales such penalty and interest may be recovered as a civil debt to the CMA.

Structure of this document

2. This notice is structured as follows:
- (a) Section A sets out an executive summary of this notice.
 - (b) Section B sets out the factual background to this notice.
 - (c) Section C sets out the legal framework to this notice.
 - (d) Section D sets out the legal assessment and considers the statutory requirements for imposing a penalty under section 94 of the EA02 and sets out the reason for the CMA's findings that PayPal has, without reasonable excuse, failed to comply in certain respects with the IEO.
 - (e) Section E sets out the CMA's reasons for finding that a penalty of £250,000 is appropriate and proportionate in this case.

A. Executive Summary

Failure to comply with the IEO

3. The CMA has investigated the completed acquisition by PayPal of iZettle AB (iZettle) (the **Merger**).
4. On 2 April 2019, the CMA informed PayPal that it was actively investigating a potential breach of the IEO, in particular paragraphs 4 and 5 of the IEO, and that it was considering taking enforcement action (the **Concerns Letter**).² PayPal responded on 15 April 2019 by letter (the **First Response Letter**).³
5. On 18 June 2019, the CMA informed PayPal that it was of the preliminary view that PayPal had failed to comply with the IEO, specifically, paragraphs 4(c), 5(a), 5(d) and 5(g) (the '**Minded to**' **Letter**).⁴ PayPal responded on 27 June 2019 (the **Second Response Letter**).⁵ On 7 August 2019, the CMA served a Provisional Decision on PayPal notifying it that the CMA had provisionally decided to impose a financial penalty on PayPal because it had, without reasonable excuse, failed to comply with the IEO. PayPal responded on 21 August 2019 (the **Provisional Decision Response**).
6. Following careful consideration of PayPal's representations, the CMA has decided to issue this decision for the reasons set out in this notice.
7. In some circumstances, the CMA may be willing to grant a derogation to allow the integration of the parts of the merging parties' businesses that have no relevance to their relevant activities in the UK.⁶ In this case, PayPal sought a derogation from the IEO to permit it to engage in international integration activities that included conducting cross-selling pilot campaigns involving its non-UK businesses. In support of its derogation request, PayPal submitted that any integration activities would be confined to non-UK potential customers and would not impact on the UK. Subsequently, the CMA granted the derogation on the basis that any international activities did not affect the UK and were confined to non-UK jurisdictions.
8. Despite its assurances and contrary to the derogation, PayPal conducted cross-selling pilot campaigns (intended to target customers in France and Germany) that led to it contacting UK potential customers. Having assessed

² Attached at Annex 4.

³ Attached at Annex 5.

⁴ This is attached at Annex 6.

⁵ Letter from [redacted] to the CMA dated 27 June 2019, attached at Annex 7.

⁶ See 'Interim Measures in merger investigations' dated 28 June 2019, CMA108 at paragraphs 3.49 to 3.56.

the approach taken by PayPal to these cross-selling pilot campaigns for a sample of the customers contacted, the CMA has identified that 76 UK potential customers, 16 of which had an online and offline presence in the UK, were contacted as part of the campaigns. Moreover, because PayPal failed to put in place sufficient safeguards to ensure that only non-UK potential customers were included in its cross-selling pilot campaigns, there remains a risk that significantly more UK potential customers were contacted given the total number of customers contacted.

9. The CMA finds that PayPal has failed to comply with the IEO, specifically, paragraphs 4(c), 5(a) and 5(g). By contacting UK potential customers PayPal risked impairing the ability of iZettle and PayPal to compete independently, contrary to paragraph 4(c) of the IEO; it risked undermining the separate sales or brand identities of PayPal, PayPal Here and iZettle, contrary to paragraph 5(a) of the IEO; and, by directing potential UK customers to the iZettle offering, PayPal was not operating the customer lists of the two businesses in the UK separately contrary to paragraph 5(g) of the IEO.
10. The impact of the breach was that, at the very least, UK potential customers could have perceived that the two businesses were integrated and were not being maintained separately. This carried the risk of weakening PayPal Here and its brand in the UK by implying that PayPal Here was being replaced with iZettle. This in turn risked removing a source of potential customers for PayPal Here in the UK and providing iZettle with an additional source of potential customers that it would not have otherwise had access to, had it been operating independently of PayPal.

No reasonable excuse

11. The CMA finds that PayPal has no reasonable excuse for its failure to comply with the IEO. The CMA has carefully considered all submissions made by PayPal but does not consider that the explanations provided for its actions amount to a reasonable excuse. Moreover, the failure was not caused by a significant and genuinely unforeseeable or unusual event. Nor was it caused by an event beyond the control of PayPal.⁷

⁷ Administrative penalties: Statement of Policy on the CMA's Approach (CMA4, referred to as the **Guidance** in this decision) at paragraph 4.4.

Decision to impose a penalty

12. The CMA considers that it is appropriate to impose a penalty in the interests of general deterrence and because of the seriousness of the breach.
13. In determining the amount of the penalty, the CMA has taken into account these factors, as well as certain aggravating and mitigating factors and the financial position of PayPal.
14. The CMA considers that a penalty of £250,000 (which is substantially below the statutory maximum of 5% of the total value of the global turnover of the enterprises owned or controlled by PayPal) is an appropriate and proportionate penalty.

B. Factual Background

Chronology – Phase 1 of the Merger inquiry

15. In July 2018, the CMA identified the anticipated acquisition of iZettle by PayPal and contacted PayPal to discuss notifying the Merger for assessment by the CMA. Following subsequent discussions, PayPal notified the transaction on 28 September 2018, shortly after the Merger completed.⁸
16. In anticipation that an initial enforcement order would be made by the CMA, PayPal submitted⁹, alongside a proposed draft initial enforcement order, a derogation request which PayPal asked to be granted by the CMA simultaneously, or immediately after making such order.
17. In its derogation request, PayPal requested, among other things, that the application of an initial enforcement order be limited to PayPal's UK businesses to enable PayPal to advance its integration planning efforts outside of the UK. PayPal submitted that ***'any integration occurring in the ex-UK territories should have no adverse impact on the UK businesses and should not pre-empt the CMA's procedure. These activities would be subject to safeguards to ensure no irreversible steps are taken.'*** (emphasis added)

⁸ Paragraph 49 of the Parties' Merger Notice dated 28 September 2018. The Merger completed on 20 September 2018.

⁹ PayPal letter to the CMA dated 12 September 2018 attached as Annex 3.

18. Further, as part of its international integration planning, PayPal requested specifically to be allowed to proceed to *'Integration Planning for Joint Propositions in ex-UK Territories'* and explained that:

*'To the extent this is not considered to fall within the exception to para. 5(l) IEO for integration planning, **the parties also request an exemption for [X]. Any trials would be limited in time and scope and confined to a representative sample of non-UK potential customers** without suggesting that any proposition/[X] is the parties' current joint proposition. There would be no non-reversible changes to iZettle's or PayPal's UK business. The individuals conducting these activities would not be involved in commercial decision making for either of the iZettle UK or PayPal UK businesses and would be required to sign non-disclosure agreements to ensure that they do not share commercially sensitive information with the iZettle UK or PayPal UK businesses.'* (emphasis added)

19. On 18 September 2018, PayPal¹⁰ submitted its observations on the draft initial enforcement order proposed by the CMA and provided further explanation of its planned integration of the international businesses:

- ***'Any trials would be limited in time and scope and confined to a representative sample of non-UK potential customers.***
- *There would be no changes to iZettle's or PayPal's UK businesses.*
- *The individuals conducting these activities would not be involved in commercial decision making for either of the iZettle UK or PayPal UK businesses.*
- *The individuals would be required to sign non-disclosure agreements to ensure that they do not share commercially sensitive information with the iZettle UK or PayPal UK businesses.'* (emphasis added)

20. On 19 September 2018, the CMA made the IEO¹¹ which required, among other things, that PayPal: maintain and operate the enterprises separately and refrain from taking any action which might impair their ability to compete independently (paragraph 4); take certain steps to procure their continued

¹⁰ Letter from [X] to the CMA 'Observations on the draft IEO and Derogation 18 September 2018'. Whilst the Derogation refers to PayPal's submissions of 12/9, 17/9, 18/9, 19/9 and 20/9, the CMA notes that for the purpose of this Decision the relevant submissions are those of 12 and 18 September 2018. The other submissions noted in the derogation refer to the other issues PayPal requested a derogation from the IEO on.

¹¹ The CMA made the IEO prior to the completion of the Merger. As noted above, the Merger completed on the 20 September 2018.

separate operation (paragraph 5); ensure compliance with the IEO (paragraphs 6 and 7); keep the CMA informed of any material developments relating to the two businesses (paragraph 8); and notify the CMA immediately of any suspected breach of the IEO (paragraph 9).

21. On 20 September 2018, the CMA granted a derogation in respect of paragraphs 4, 5 and 8 of the IEO to exclude the PayPal International business¹² and the iZettle International business¹³ from the scope of the obligations in paragraphs 4, 5 and 8 of the IEO thereby permitting PayPal to progress with the integration of the businesses in non-UK territories within the confines of clean teams (the **Derogation of 20 September**)¹⁴. The Derogation of 20 September states:

*'After due consideration of your request for derogations from the Initial Order, **based on the information received from you and in the particular circumstances of this case, PayPal Holdings, Inc, PayPal SE and PayPal (Europe) Sarl et Cie SCA and iZettle may carry out the following actions, in respect of the specific paragraphs:***

1. Paragraphs 4, 5 and 8 of the Initial Order

PayPal has sought CMA consent to exclude the PayPal International business and the iZettle International business from the scope of the obligations in paragraphs 4, 5 and 8 of the IEO.

*The CMA consents that the obligations in paragraphs 4, 5 and 8 of the IEO do not apply to the iZettle International Business and the PayPal International Business. **This derogation is granted based on PayPal's representations that the subsidiaries making up the iZettle International business do not have any activities that affect the UK and their roles are confined to activities in their respective jurisdictions.**' (emphasis added)*

¹² 'the PayPal International business' was defined in the Derogation of 20 September as the businesses of PayPal and its subsidiaries carried on outside the UK excepting any business activities outside of the UK which are necessary for the effective functioning of PayPal's and its subsidiaries' business activities in the UK, as at the commencement date.

¹³ 'the iZettle International business' was defined in the Derogation of 20 September as the businesses of the following subsidiaries of iZettle: iZettle do Brasil Meios de Pagamento S.A., iZettle Merchant Services SAS (841 368 RCS Paris, 124 Reaumur 75002 Paris, France), iZettle Mexico S. de R.L. de C.V., iZettle Marketing Germany GmbH, iZettle España S.L.U, and iZettle Merchant Services AS.

¹⁴ The Derogation of 20 September is attached at Annex 2.

22. PayPal submitted a further derogation request¹⁵ on 2 October 2018 seeking the CMA's consent to engage 'in the following preparatory non-UK activities [✂]
- [✂]
 - [✂]
 - **Conducting a pilot marketing campaign promoting the iZettle point-of-sale solution to a sample of existing PayPal customers in Germany, France, Brazil and Mexico.** (emphasis added)
23. In its letter seeking a further derogation request, PayPal also explained that '**None of these steps will take place in relation to UK users and none give rise to irreversible changes**'. (emphasis added)
24. PayPal explained that the derogation request was made on a precautionary basis, noting that the Derogation of 20 September was likely to cover this anticipated activity. PayPal noted¹⁶:
- 'The request is made on a precautionary basis. We agree that the activities proposed may be viewed as the corollary of the international business derogations already granted, as the activities proposed solely involve the activities of the international businesses as defined in the first derogation.'*
25. The CMA agreed that the planned activities fell within the scope of the Derogation of 20 September and therefore did not need a further derogation. However, the CMA granted a derogation permitting PayPal to receive input and assistance in relation to the non-UK integration of the iZettle business and the PayPal business from individuals employed by iZettle AB.
26. On 5 December 2018, the CMA referred the Merger for a phase 2 in-depth investigation.

Chronology – Phase 2 of the Merger inquiry

27. On 24 December 2018, pursuant to the IEO, the CMA directed¹⁷ PayPal to appoint a Monitoring Trustee (the **MT**) to ascertain the current level of

¹⁵ PayPal letter to the CMA dated 2 October 2018.

¹⁶ In follow-up correspondence dated 5 October 2018.

¹⁷ The Directions are accessible here:

https://assets.publishing.service.gov.uk/media/5c24a42940f0b66cf30dc3a6/Directions_to_paypal.pdf?_ga=2.49378913.691638435.1566899511-920182506.1523884788

compliance with the IEO (the **Directions**), to assess the arrangements made to ensure compliance and to monitor compliance going forward.¹⁸ The Directions required PayPal to cooperate fully with the MT, in particular by providing the MT with all cooperation, assistance and information as the MT reasonably required in order for it to discharge its functions.¹⁹

28. On 8 January 2019, PayPal²⁰ contacted the CMA and requested a meeting with the CMA and the MT²¹ to talk through its approach to compliance with the IEO throughout the Phase 2 process. PayPal explained²² that the meeting was necessary as:

'The parties' thoughts on how they would like to proceed outside the UK in the next few months have now crystallised and we thought this might be a good opportunity to brief RBFA²³ (with the newly-appointed monitoring trustee) on the planned approach and take on board any early feedback or questions they may have, all whilst representatives from the PayPal business are in the UK for the site visit.

I appreciate that this isn't usual practice for the CMA, but in the interests of full transparency and continuing to build on a constructive working relationship with the CMA, PayPal is keen to explain to RBFA, directly from the business, what they are planning to do and the rationale behind it. As a result, we'd be grateful if the team could find time for this session.'

29. The meeting took place on Wednesday 16 January 2019 at PayPal's office in London.²⁴ At the meeting PayPal:²⁵
- provided an overview of the non-UK integration activities explaining that the cross-selling of iZettle products to PayPal customers outside of the UK was at the time being piloted through clean teams pursuant to the IEO;
 - provided assurances that the risk of contamination with UK customers arising from the cross-selling pilot campaigns was very low as customers targeted by the

¹⁸ As part of its mandate, the MT provided the CMA with biweekly reports. It also provided ad hoc notes. The relevant extracts from the biweekly reports and ad hoc notes provided by the MT to the CMA which are relied on in this decision are at Annex 8.

¹⁹ See paragraph 12 of the Directions.

²⁰ Email from [redacted] to the CMA dated 8 January 2019.

²¹ [redacted] were appointed as the MT on 11 January 2019.

²² Email from [redacted] to the CMA dated 9 January 2019.

²³ The CMA's Remedies Business and Financial Analysis (RBFA) Group.

²⁴ The meeting was attended by representatives of the CMA's phase 2 case team, members of the MT's team, certain PayPal employees and both PayPal and iZettle's external legal representatives.

²⁵ As per the MT's Ad Hoc note dated 18 January 2019 at paragraphs 13 to 16.

campaigns were small local businesses that did not have a cross-border presence;

- explained that as PayPal's offline offering (PayPal Here) did not operate in the markets in question there were no competition concerns. PayPal was using its online customer base to approach customers offering iZettle as an additional offline product. It noted that these activities should not be considered as a joint service beyond the cross-selling, instead contacting existing customers to offer them a point of contact within iZettle with a view to providing the product. As this was happening ex-UK, the parties believed that there was no read across from these sorts of activities to what was happening in the UK and they provided the example of approaching coffee shop owners in Brazil, which would have no bearing or relevance to the performance of such businesses in the UK; and
- explained that using the clean teams added a layer of bureaucracy and effort which it considered was unnecessary and potentially disproportionate given the UK focus of the CMA's inquiry. PayPal noted that it intended to submit a derogation request that standard cross-selling activities with no UK connection could proceed without the involvement of the clean team process.

30. Following the meeting PayPal submitted a derogation request²⁶ (the **7th Derogation request**) which sought a variation to the Derogation of 20 September to progress with the integration plans in the ex-UK territories outside the scope of the clean team structures. PayPal explained that:

*'As it moves forward with these activities, PayPal believes that there will be no competitively sensitive information which will flow between the parties relating to these ex-UK territories. That is because (i) PayPal and iZettle do not compete in these ex-UK territories as PayPal has no mPOS offering in those territories (PayPal is only present with its mPOS offering in the US, UK, and Australia); and (ii) **customers, competitors and prices are entirely different in those territories.**' (emphasis added)*

31. In addition to reviewing the 7th Derogation request and providing the CMA with its recommendation²⁷, the MT²⁸ raised questions with PayPal to *'ensure the*

²⁶ Email from [redacted] to the CMA dated 18 January 2019.

²⁷ The MT recommended that consent should only be granted once PayPal could demonstrate that proper controls were in place which ensured that no merchants with a UK presence were contacted in the cross-selling campaigns— paragraph 2 of the fourth biweekly report of the Monitoring Trustee to the CMA dated 6 March 2019. The CMA having duly considered PayPal's representations made in relation to the 7th Derogation request and taking account of the MT's recommendations, concluded that the consent could not be granted.

²⁸ Ad hoc note of the Monitoring Trustee to the CMA dated 18 January 2019, paragraph 33.

UK and ex-UK businesses are held separate in line with the IEO before [the cross-selling pilot campaigns] are progressed any further, including:

- i. documentation of how [redacted] have been implemented and tested;*
- ii. evidence that PayPal webpages created for non-UK customer (sic) would not be indexed for search;*
- iii. a list of customers that have been targeted with regard to pilot cross-sales (to determine whether they are indeed ex-UK (sic);*
- iv. detailed reports on [redacted];*
- v. an overview of the measures implemented to ensure clean teams have a restricted access to sensitive information;*
- vi. an overview of how the ring-fence is managed between the Clean Team and the rest of the teams; and, finally*
- vii. any testing around [redacted].'*

32. The CMA also requested that the MT seek further information about the cross-selling pilot campaigns run to date to assist the CMA in considering PayPal's derogation request to reduce the role of the clean teams in future cross-selling campaigns.²⁹

The MT's findings

33. In its reports to the CMA,³⁰ the MT provided a summary of the first two waves of the cross-selling pilot campaigns³¹ based on information obtained from PayPal, the following of which is of note:
- PayPal operated the cross-selling campaigns in Germany and France with a staggered roll out that commenced in November 2018. In these countries, PayPal created emails that were sent to a selection of PayPal small³² business

²⁹ On 23 January 2019 the CMA requested the MT to confirm with PayPal the selection method used for selection of customers on the pilot campaigns, the timescale for the next phase of the pilot campaign, and to explain how PayPal ensured that the customers selected did not have UK operations.

³⁰ Third biweekly report of the MT to the CMA dated 20 February 2019 and Fourth biweekly report of the MT dated 6 March 2019.

³¹ The first and second waves of the cross-selling pilot campaigns in France and Germany were run from November 2018 to January 2019; the third wave was run between 15 March to 15 April 2019; the fourth wave was planned to be launched in May 2019, however PayPal postponed it because of the CMA's concerns.

³² As PayPal explained to the MT during a call on 1 February 2018 (see Third biweekly report of the MT to the CMA dated 20 February 2019 at paragraph 40). The term 'small' is not defined or elaborated on further by the MT.

merchants highlighting iZettle's card reader and offering. The email pointed the merchants to a webpage with a joint branding of PayPal and iZettle, which if clicked through, would take the customer to iZettle's website where they could sign up for an iZettle account.

- The aim of the cross-selling campaigns was to promote the iZettle card reader to the targeted audience, i.e. a selected group of PayPal customers matching predefined criteria.
 - PayPal used [redacted] and the landing pages were in the local language of the email recipient.
 - PayPal explained that it had ensured that the pilot customers did not have UK operations by choosing targeted customers based on [redacted]. PayPal expected that in most (if not all) cases, these types of small businesses would not have international operations, an assumption PayPal said was supported by a report from Google Analytics that recorded visits to the German and French pilot pages.³³
34. The first wave of the campaigns ran from November to December 2018. Businesses were identified by applying filters³⁴ to identify merchants [redacted].
35. The second wave was run from January 2019 with the target audience filtered [redacted]. These customers were targeted with banners and/or emails³⁵ depending on the marketing preferences declared by the customer.
36. Customers were also contacted by [redacted].
37. In its 20 February 2019 report, the MT noted that PayPal was conducting high volumes of email marketing in the target countries and that the German and French PayPal webpages provided a link to iZettle which was accessible from a UK IP address from where it was possible to register and purchase the iZettle card reader. It noted that there was no proper check of whether the customers contacted had a UK presence³⁶; PayPal appeared to have

³³ The MT raised queries regarding the Google Analytics report with PayPal as the MT had accessed the landing pages from the UK and therefore did not accept the report's findings that no visits had been made from the UK. PayPal clarified why these UK visits had not registered and the MT was satisfied that a very small number of visitors from the UK accessed the French and German webpages.

³⁴ PayPal applied [redacted].

³⁵ The MT's reports focused on UK potential customers *contacted* via email as opposed to *targeted*.

³⁶ In determining whether UK potential customers were contacted the MT investigated whether customers with a 'UK presence' were contacted. The MT defined 'UK presence' to mean those customers with a ".co.uk" or "en-gb" domain that specially targets the UK market - see Ad hoc note of the Monitoring Trustee to the CMA dated 12 April 2019.

assumed that due to the size of the business, the customer did not have a business in another country. Given the high volume of merchants contacted, the MT requested PayPal to provide details of the top 5 customers by TPV³⁷ for each of the first two waves of email campaigns in France and Germany, in total 20 companies, to verify the type of customer and to better assess the potential risk of PayPal having contacted customers with a UK presence.

38. In its 6 March 2019 report, the MT notified the CMA that the result of the sample test showed that 11 of the top 20 customers being targeted by PayPal had a UK presence. The MT drew the CMA's attention to the fact that this finding contradicted PayPal's earlier submission that the customers targeted were highly unlikely to have a UK presence.³⁸ It also showed that the campaigns were not limited to small companies and that it included large enterprises which also had UK operations. Some of these large enterprises included [redacted] and [redacted]. Although noting that targeting large enterprises was not PayPal's intention, the MT expressed concern about the lack of control in the first two waves of the campaigns run in Germany and France especially considering the high volume of merchants contacted overall.³⁹
39. The MT also confirmed that the German and French webpages were accessible from the UK but that they were in German and French and analysis of the locations of visitors showed minimal visitors directly from the UK (0.26% of the total page views for the webpages for both countries).⁴⁰
40. On 15 March 2019, the MT informed⁴¹ the CMA that for the next wave of the email campaign, due to run from 15 March to 15 April 2019, PayPal⁴², which was aware that the MT's sample from the first two campaigns had revealed that UK potential customers had been contacted as part of those campaigns, was implementing additional controls to ensure that large enterprise merchants and merchants with entities which had a PayPal account in the UK would be excluded. In commenting on whether the 7th Derogation Request made by PayPal should be granted by the CMA, the MT expressed its concerns again that no proper controls had been put in place in the first two

³⁷ Total payments volume (TPV).

³⁸ Fourth biweekly report of the Monitoring Trustee to the CMA dated 6 March 2019, paragraphs 61 – 62.

³⁹ PayPal contacted approximately [between 400,000 and 500,000] customers in total during the three campaigns - Eighth biweekly report of the Monitoring Trustee to the CMA dated 15 May 2019, paragraph 20.

⁴⁰ Commenting on the specifics of the landing pages, the MT noted that it did not consider that the campaigns in France and Germany raised concerns for the UK market – paragraph 70(iii) of the Fourth biweekly report of the Monitoring Trustee to the CMA dated 6 March 2019.

⁴¹ Ad hoc note of the Monitoring Trustee to the CMA dated 15 March 2019.

⁴² Following the MT's sample of 20 customers where the MT identified 11 customers had a UK presence, PayPal refined its approach going forward – Fourth biweekly report of the Monitoring Trustee to the CMA dated 6 March 2019, paragraphs 61.

campaigns, noting ‘we found this disappointing and contradictory in light of their earlier submissions that it was highly unlikely that the merchants contacted could have a UK presence due to their size. As a result of the high volume of customers which were contacted during the campaign, we are currently not able to reliably estimate the number of customers contacted with UK presence and cannot therefore definitively say it is not a wider issue at this stage.’

41. In response to concerns raised by the CMA in relation to the MT’s initial investigation of the first two waves of the cross-selling campaigns, the MT proposed to widen its sample check to include the top 50 customers for each of the three waves which would provide a sample size of 300.⁴³ In addition, the MT proposed to check if any of the customers with a UK presence purchased iZettle card readers in Germany or France as a result of the campaign.
42. On 12 April 2019, the MT reported⁴⁴ back to the CMA on its further investigative steps noting (and in some case confirming information already provided in earlier reports) that:
 - The MT had received the updated sample of 300 customers (221 without double counting customers) that were contacted as part of the three waves of cross-selling pilot campaigns in France and Germany and identified that a total of 76 customers (34%) had a UK online presence out of which 16 customers (7%) had a UK online and offline presence.⁴⁵
 - The sample testing further showed that the email campaigns were not limited to small companies, but that they also included large enterprises with UK operations. In fact, some of the 16 customers that had both an online and offline presence were large international enterprises such as: [redacted].⁴⁶
 - The number of customers with a UK online or a UK online and offline presence declined in the sample of the third wave, once PayPal put in place additional filters intended to exclude any customers with a UK presence. Nonetheless, in

⁴³ After accounting for customers that were contacted on more than one occasion as part of the three pilot campaigns, the total sample size for the MT’s analysis amounts to 221 customers.

⁴⁴ Ad hoc note of the Monitoring Trustee to the CMA dated 12 April 2019.

⁴⁵ PayPal contended that only 13 customers from the sample had a UK offline presence and that none of these had purchased iZettle offline services following the cross-selling campaign in Germany and France.

⁴⁶ The 16 customers which also had a UK offline presence are identified in the Sixth biweekly report of the Monitoring Trustee to the CMA dated 17 April 2019, paragraph 62.

the sample of the third wave, 23 customers contacted had an online presence in the UK and 3 of these also had an offline UK presence.

43. The MT noted that some of the customers contacted as part of the campaign had an online presence only and noted that this contrasted with PayPal's submissions that it wished to target small merchants that had an offline presence.
44. The MT defined UK presence to mean those customers with a ".co.uk" or "en-gb" domain that specifically targets the UK market. In turn, it considered UK offline presence to mean those customers that have a physical store/sales point in the UK.
45. The updated Google Analytics reports showed "de minimis" visits from the UK on the German and French landing pages.
46. The CMA expressed its concerns regarding PayPal's compliance with the IEO in the Concerns Letter dated 2 April 2019. The letter brought to PayPal's attention the CMA's concerns regarding PayPal's compliance with its obligations under the IEO, explained the circumstances surrounding the potential breach of the IEO of which the CMA had been made aware, and asked PayPal to confirm what measures it took, if any, to address this issue and what safeguards it had put in place to prevent any further cross-selling pilot campaigns involving international customers that had a UK presence. The CMA also informed PayPal that it had asked the MT to investigate this matter further and requested PayPal's full cooperation with the MT.
47. On 15 April 2019 PayPal responded to the Concerns Letter. The main points made are summarised below in paragraphs 82 to 111.
48. On 15 May, the MT reported⁴⁷ back to the CMA on its further investigative steps noting that:
 - PayPal provided 10 emails sent to customers as part of their pilot campaigns in Germany and France under waves 1, 2 and 3. Following the review of these emails, the MT observed that in waves 1 and 2, the PayPal and iZettle brand logos were presented as distinct logos and in the text of the emails PayPal introduced the new product (which given the distinct logo might be understood to belong to a distinct company from PayPal) to its customers. In wave 3, the logos

⁴⁷ The Eighth biweekly Report of the MT to the CMA dated 15 May 2019. The MT provided (i) a copy of the emails sent to customers in Germany and France; (ii) the proposed approach for identifying customers with a UK registered PayPal account; and, (iii) links to landing pages in Germany and France from the pilot campaign.

were presented in a different manner with the two company logos separated by a '+' sign which may suggest that the two companies operated together.

- In addition, in respect of emails sent for waves 1 and 2 to customers in France only, there was an indication that the iZettle product belonged to the PayPal product family with references such as “[Paiements par carte et sécurisés avec] iZettle de PayPal”, translated to “[...] PayPal’s iZettle”; and reference to “activité grâce à notre application intelligente de terminal de point de vente”, translated to “[...] our intelligent application of point of sales terminal”.⁴⁸
49. On 18 June 2019, the CMA informed PayPal in the ‘Minded to’ Letter that it was of the preliminary view that PayPal had failed to comply with the IEO, specifically, paragraphs 4(c), 5(a), 5(d) and 5(g) by contacting UK potential customers as part of the cross-selling pilot campaigns in France and Germany.
 50. PayPal responded to the ‘Minded to’ Letter by way of its Second Response Letter dated 27 June 2019. PayPal disagreed with the CMA’s preliminary view that it had not complied fully with the IEO and submitted that no UK potential customers were contacted by the campaigns; there was no practical risk that any customers contacted would perceive that PayPal and iZettle were no longer independent; and the campaign had no impact on the ability of the parties to compete independently in the UK.
 51. PayPal requested that the CMA consider the points made in its First Response Letter before reaching a provisional decision, and highlighted a number of further points as set out below in paragraphs 82 to 111.

C. Legal Framework

Relevant legislation

52. Section 72 of the EA02 is the basis for the IEO. Section 72(2) provides that the CMA may, by order, for the purpose of preventing pre-emptive action, impose certain restrictions and obligations.
53. Section 72(8) of the EA02 defines ‘pre-emptive action’ as “*action which might prejudice the reference concerned or impede the taking of any action...which may be justified by the CMA’s decisions on the reference*”.

⁴⁸ The MT noted in its Eight biweekly report that, based on the content of the emails reviewed, the *[t]rustee does not consider these instances of drafting taken as a whole to be strongly suggestive of common ownership*.

54. Section 72(3C) of the EA02 provides that the CMA may (on application by the merging parties) grant a derogation, giving consent to the merging parties to undertake certain actions that would otherwise be prohibited by the IEO.
55. Paragraphs C.19 to C.23 of the CMA Guidelines⁴⁹ set the procedure that should be followed where derogation requests are made and note that the CMA will be best able to deal efficiently with derogation requests where these are fully reasoned and supported by relevant evidence.
56. Section 86(6) of the EA02 provides that an order made pursuant to section 72 is an enforcement order. Sections 94(1) and 94(2) of the EA02 provide that any person to whom an enforcement order relates has a duty to comply with it. A company is a person within the meaning of section 94(2) of the EA02 and Schedule 1 of the Interpretation Act 1978.
57. Section 94A(1) of the EA02 provides that *“Where the appropriate authority considers that a person has, without reasonable excuse, failed to comply with an interim measure, it may impose a penalty of such fixed amount as it considers appropriate”*.
58. Section 94A(2) of the EA02 provides that *“A penalty imposed under subsection (1) shall not exceed 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom it is imposed”*.⁵⁰
59. Section 94A(8) of the EA02 defines ‘interim measure’ as including an order made pursuant to section 72 of the EA02.
60. Section 94B(1) of the EA02 requires the CMA to prepare and publish a statement of policy on how it uses its powers to impose a financial penalty and how it will determine the level of the penalty imposed.⁵¹
61. Section 114 of the EA02 provides an appeal mechanism for a person on whom a penalty is imposed.

⁴⁹ Mergers: Guidance on the CMA’s jurisdiction and procedure, dated January 2014, CMA2 (the CMA’s Guidelines).

⁵⁰ The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 (**Interim Measures Order**) makes provision for when an enterprise is to be treated as controlled by a person and the turnover of an enterprise.

⁵¹ On 10 January 2014, the CMA published its statement of policy regarding its powers under section 94A of the EA02 amongst other provisions (the **Guidance**).

Relevant case law

62. The meaning of ‘pre-emptive action’ and role of interim orders in merger control has been considered by the CAT on a number of occasions.
63. In *Stericycle*,⁵² the CAT considered the meaning of pre-emptive action in section 80(1) of the EA02⁵³, and held that “*the word ‘might’ implies a relatively low threshold of expectation that the outcome of a reference might be impeded*”.⁵⁴
64. In *ICE/Trayport*,⁵⁵ the CAT observed that “‘pre-emptive action’ is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA’s ultimate decision” and held that “[t]he word ‘might’ means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The IEO catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the IEO to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment”.⁵⁶ The CAT also held that “... where an IEO has been issued, it is incumbent on parties to take a carefully considered view as to whether their conduct might arouse the reasonable concern of the CMA that the agreements that they reach are significant enough that they might prejudice the reference or impede justified action...”.⁵⁷
65. More generally, in *Electro Rent*,⁵⁸ the CAT noted that “[the] CMA’s role in regulating merger activity, and its ability to do so effectively, is a matter of public importance” and agreed with the CMA’s submission that interim orders serve a particularly important function where, as in the case in question, the merger has been completed before it was examined by the CMA.⁵⁹

⁵² *Stericycle International LLC v Competition Commission* [2006] CAT 21 (**‘Stericycle’**).

⁵³ Section 72 of the EA02 relates to orders made during a Phase 1 merger investigation. The orders made during a Phase 2 merger investigation are made under section 81 of the EA02. The definition of “pre-emptive action” for the purposes of section 81 of the EA02 is defined in section 80(10) of the EA02 and is in identical terms to the definition in section 72(8) of the EA02.

⁵⁴ *Stericycle* at [129].

⁵⁵ *Intercontinental Exchange v CMA* [2017] CAT 6 (**‘ICE/Trayport’**).

⁵⁶ *ICE/Trayport* at [220].

⁵⁷ *ICE/Trayport* at [223].

⁵⁸ *Electro Rent Corporation v CMA* [2019] CAT 4 (**‘Electro Rent’**).

⁵⁹ *Electro Rent* at [120].

The purpose of an IEO

66. The Supreme Court has held that “[t]he purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets.”⁶⁰ It is of central importance to the UK’s voluntary, non-suspensory merger regime to regulate in advance the impact of a merger on the competitive structure of markets that interim measures should be effective, particularly where, as in this case the merger is completed, before it is identified and examined by the CMA.
67. The purpose of the IEO is to prevent any action which might prejudice the merger investigation or impede the taking of any action which may be justified by the CMA’s decision on the reference.⁶¹ The broad nature of pre-emptive action is reflected in the similarly broad wording of the IEO which the CAT held in *ICE/Trayport* “*should be interpreted to give full effect to its legitimate precautionary purpose*”.⁶²
68. The IEO contains positive obligations on the addressees to do certain things as well as obligations to refrain from taking certain actions. As noted above in paragraph 64, the onus is on the addressees to seek consent if their conduct creates the possibility of prejudice or impediment.⁶³
69. Where a merger has been completed, it is critical that the acquired business continues to compete independently with the purchaser’s business and is maintained as a going concern. If the acquired business was to be integrated more than is necessary or its viability undermined pending the outcome of the merger investigation, this would risk impeding any action the CMA might need to undertake should it find the merger had resulted in an adverse effect on competition.

Relevant provisions of the IEO

70. The IEO is attached as Annex 1 to this decision.
71. PayPal gave fortnightly compliance statements both confirming in general terms that PayPal and its subsidiaries had complied with the IEO and affirming specifically that they had complied with each of the provisions set out in the IEO.

⁶⁰ *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75 at paragraph 4; see also paragraph 35.

⁶¹ Section 72(8) of the EA02.

⁶² *ICE/Trayport* at [220].

⁶³ *ICE/Trayport* at [220] (emphasis added).

D. Failure to comply with an interim measure

Assessment

72. Based on the evidence described above, it is clear that PayPal contacted UK potential customers as part of the cross-selling pilot campaigns conducted in France and Germany.
73. Whilst PayPal was granted a derogation from the IEO allowing it to engage in international integration activities that included the cross-selling pilot campaigns concerning the PayPal International business and the iZettle International business, it was clear on its face, and when read with the IEO, that the Derogation of 20 September did not extend to activities that affected the UK and that any integration activities were confined to non-UK jurisdictions. Moreover, the Derogation of 20 September was granted on the basis of PayPal's submissions that any integration of the international businesses would be confined to non-UK potential customers and would not impact on the UK.
74. In seeking the Derogation of 20 September PayPal submitted⁶⁴ that *“any integration occurring in the ex-UK territories should have **no adverse impact on the UK businesses** and should not pre-empt the CMA's procedure. These activities would be **subject to safeguards** to ensure no irreversible steps are taken”* and that *“any trials would be limited in time and scope and confined to a representative sample of **non-UK potential customers**”* (emphasis added).
75. Despite such assurances, PayPal undertook three cross-selling pilot campaigns in France and Germany that led to it contacting UK potential customers.
76. As detailed by the MT, a total of 76 customers contacted as part of the three waves of the cross-selling pilot campaigns, out of a sample of 221 customers (34%), had a UK online presence out of which 16⁶⁵ customers (7%) had a UK online and offline presence. The MT confirmed that the 16 customers included large international enterprises such as [X].
77. The CMA has reviewed the list of 76 customers found by the MT to have a UK presence and finds that such customers were UK potential customers in that they had an online and, in some instances, also an offline presence in the UK

⁶⁴ PayPal letter to the CMA dated 12 September 2018.

⁶⁵ PayPal's own investigation identified 12 customers with a UK offline presence. The additional four customers noted by the MT were [X]. - Ad hoc note of the Monitoring Trustee to the CMA dated 12 April 2019, paragraph 48.

during the cross-selling pilot campaigns. The CMA considers that the MT's approach to identifying UK potential customers, by considering whether any customers had a UK presence online or offline (based on whether they had a ".co.uk" or "en-gb" domain that specifically targets the UK market and/or those customers that have a physical store/sales point in the UK), is a reasonable way of identifying UK potential customers which has been checked and relied upon by the CMA for the purposes of this decision. Through either of these channels, these customers are active in the UK (and in many cases are clearly active in the provision of goods or services in the UK) and it is therefore reasonable for the CMA to identify them as UK potential customers for a PayPal Here or iZettle card reader in the UK.

78. The CMA notes that in the first two waves of the cross-selling pilot campaigns in France and Germany, no controls were in place to check whether a customer also had a presence in the UK. Even after additional controls were put in place, the MT's investigation uncovered that out of a sample of 100 customers from the third wave, 23 customers contacted had an online presence in the UK, three of which also had a UK offline presence. Moreover, by failing to put in place sufficient safeguards to ensure that only non-UK potential customers were included in PayPal's three cross-selling pilot campaigns, there remains a risk that significantly more UK potential customers were contacted given the total number of customers contacted.
79. Contacting UK potential customers risked undermining the separate sales or brand identities of PayPal, PayPal Here and iZettle contrary to paragraph 5(a) of the IEO. By presenting PayPal customers with an iZettle card reader, there was a risk that such customers would perceive that the two brands were under common ownership or at the very least that iZettle's card reader had replaced PayPal Here's offering in the UK. Whilst the emails sent to potential customers during the first two campaigns and the landing pages to which they were directed were, according to the MT, clear that PayPal was recommending iZettle and the two brand logos appeared separately (see paragraph 48 above), there was a risk that in the UK where both PayPal Here and iZettle were active brands (unlike in France and Germany), by using both brands logos, UK potential customers would perceive that the iZettle brand was integrated with PayPal or at the very least to be preferred to the PayPal Here brand.
80. By contacting UK potential customers as part of the three waves of the pilot campaigns, PayPal also risked impairing the ability of iZettle and PayPal to compete independently contrary to paragraph 4(c) of the IEO. This is because, by contacting PayPal UK customers who might have been interested in an offline service, i.e. UK potential customers, such customers were unlikely to sign-up for PayPal's card reader (PayPal Here) but rather be

inclined to sign-up to iZettle's offering. This carried the risk of weakening PayPal Here in the UK as it risked removing a source of potential customers for its PayPal Here offering and risked providing iZettle with a source of potential customers that it would not have otherwise had access to if it was operating independently of PayPal. As such this was action that might have prejudiced the reference or impeded the taking of any necessary remedial action such as the divestment of PayPal Here.

81. By directing potential UK customers to the iZettle offering, PayPal was not operating the customer lists of the two businesses in the UK separately and, whilst the actual sign-up process for an iZettle account was not conducted by PayPal staff, the commencement of that process was initiated by PayPal through the sending of emails. This action was contrary to paragraph 5(g) of the IEO in that the customer lists of the two businesses were not operated separately.
82. PayPal made a number of submissions in its First Response Letter, Second Response Letter and Provisional Decision Response as to why it had not breached paragraphs 4(c), 5(a) and 5(g) of the IEO⁶⁶. The CMA has grouped these submissions under the following headings: (i) the technical nature of the pilot; (ii) what constitutes a UK presence is unclear; (iii) no perception that the two businesses were integrated; (iv) the IEO and Derogation of 20 September were not limited by reference to non-UK potential customers; and (v) materiality threshold for an IEO infringement.

(i) The technical nature of the cross-selling pilot campaigns

PayPal's submissions⁶⁷

83. In its representations, PayPal submitted that:
 - it did not have an existing offline payment offering in Germany or France, and so the campaign was intended to introduce the option of an iZettle card reader to PayPal customers in those countries who might be interested in an offline payment solution – primarily small online businesses which might have an offline presence;

⁶⁶ Some of these points were reiterated in its Second Response Letter. For completeness, the CMA notes that PayPal also addressed why its actions had not breached paragraph 5(d) of the IEO as set out by the CMA in the Minded to Letter.

⁶⁷ PayPal's First Response Letter, Section 1; PayPal's Second Response Letter, Sections 1 and 2; PayPal's Provisional Decision Response, Section 1.

- the sign-up process required the customer to click through from PayPal’s site to iZettle’s site; there was not a joint website;
 - the campaign was targeted at businesses located in France and Germany and not the UK, with customers selected on the basis of certain criteria, primarily that:
 - (i) they were an existing PayPal customer in France or Germany with a billing address in France or Germany; and
 - (ii) they operated in an industry that PayPal’s research indicated appeared likely to use offline payments.
84. PayPal explained that the emails that were sent to customers and the landing pages referred to in those emails were in French and German only, with prices advertised in Euro which demonstrates that this campaign was not targeting the UK. Even if a customer did receive the email, it would have been apparent that PayPal was offering a referral to iZettle as opposed to offering a joint product or promotion thus removing any risk that such customers would perceive the businesses as being integrated. Customers with UK operations were not targeted during the campaigns and the fact that they may have been part of a corporate group that did have UK operations is not relevant.
85. Even if a UK-based business had been forwarded the email (and was able to understand French or German), it was not possible for a UK company to sign-up for an iZettle card reader using the French or German landing pages. The sign-up process was conducted entirely in French or German. Potential customers were asked for KYC⁶⁸ information, such as their ‘steuernummer’ (German tax ID number) and a German post-code for German customers and, for French customers, a valid SIRET code (akin to a company registration number).
86. Further, PayPal submitted that the CMA had failed to address how an email received by one part of a corporate group might have been received by a UK-based entity. In its view, it seemed highly unlikely that the emails sent to French and German customers would have made their way to UK based customers with sufficient language skills to understand the content of the emails. Even if this chain of events had occurred, it would have been no more than a handful of times and not prevalent enough to create the risk of a change in perception of customers in the UK.

⁶⁸ Know Your Customer

87. PayPal submitted that the pilot schemes were operated in accordance with the IEO and the relevant derogations and, in particular, were designed to be ‘*confined to a representative sample of non-UK potential customers*’. PayPal took steps to select only customers for the pilot whom it could verify were based in the local jurisdictions and the process of communicating with the customers and the steps they would need to sign up reinforced at every stage that these were local offers with specific relevance to France and Germany. Even if a customer based in the UK saw the campaign email it was very difficult to see how that UK client could think the offer was in any way relevant to the UK market.
88. PayPal submitted that it was not its intention that large companies were targeted by the campaign and this appears to have resulted from an oversight when the campaign was being finalised large customers were accidentally not excluded. It noted that as iZettle is used by small and medium sized businesses for offline sales, larger organisations and those with online only activities are not potential iZettle customers. If PayPal wanted to target large customers, [✂] these customers were, therefore, anomalies in the list and not potential UK customers for an iZettle card reader.⁶⁹
89. PayPal introduced additional measures to safeguard against large customers or customers that were likely to have some presence in the UK by introducing two additional filters for wave 3 of the campaign.

Our assessment

90. The CMA considered PayPal’s arguments that a UK potential customer would have to open the relevant webpage in French or German and have country specific information to sign up for an iZettle reader. However, it is the CMA’s view that the IEO was breached by the fact that UK potential customers were contacted regardless of whether they may then have had difficulties signing up for an iZettle reader directly from the landing pages to which they were directed.
91. The precautionary purpose of the IEO seeks to protect against the *possibility* of prejudice to the CMA’s investigation. The IEO was not just concerned with actual prejudice that might be caused when a UK customer signed up for an iZettle reader, but the possibility of prejudice that might arise from a UK

⁶⁹ PayPal noted that large customers represented less than 1% of waves 1 and 2 and zero for wave 3. As the MT’s sample asked for the top 50 customers by TPV per category, PayPal submitted that larger enterprises were over-represented.

customer becoming aware of the iZettle offering in the UK to the potential detriment to the PayPal Here business.⁷⁰ It is for this very reason that the Derogation of 20 September did not permit PayPal to conduct such integration activities in the UK. In seeking the derogation, PayPal submitted⁷¹, and confidently assured the CMA, that *“any integration occurring in the ex-UK territories should have **no adverse impact on the UK businesses** and should not pre-empt the CMA’s procedure. These activities would be **subject to safeguards** to ensure no irreversible steps are taken”* and that *“any trials would be limited in time and scope and confined to a representative sample of **non-UK potential customers**”* (emphasis added).

92. In terms of the technical difficulties raised by PayPal, the CMA notes that potential customers could click through from the French and German landing pages to iZettle’s website where they could sign up for an iZettle account in the UK, irrespective of whether they faced any difficulties in signing up for the iZettle reader as per the French and German campaigns. In addition, the CMA notes that despite the country specific aspects of the pilot campaigns highlighted by PayPal at paragraphs 84 to 85 above, PayPal has confirmed that the campaign pages were accessed on approximately 75 occasions by unique users in the UK.⁷² Nonetheless, the CMA has taken PayPal’s submissions as to the technical challenges facing UK potential customers in signing-up for an iZettle offering into account in its assessment of the level of the penalty.
93. Even if PayPal did not intend to target UK potential customers, it is clear that nonetheless it contacted at least 76 such customers because of its failure to take sufficient steps to ensure that UK potential customers were not contacted. This number may have been even greater given the total number of customers contacted.
94. Thus, PayPal, contrary to the submissions made to the CMA when seeking the Derogation of 20 September and its subsequent assurances, conducted its international integration activities in a manner that was not confined to non-UK potential customers and which had the potential to have an impact in the UK.
95. Finally, the CMA notes that the CMA’s finding that PayPal failed to comply with the IEO is not dependent upon it showing how an email received by the

⁷⁰ ICE/Trayport at [220] and [223].

⁷¹ PayPal letter to the CMA dated 12 September 2018.

⁷² The CMA notes that the MT may have accessed the pages on some of these occasions as the MT has confirmed accessing the pages on several occasions, but PayPal is unable to say how many of these instances were from the MT, PayPal or iZettle as opposed to UK potential customers.

French or German part of a corporate group might have been received by the UK-based entity or how that email was translated into English, if indeed translation was necessary. The fact that the French or German customers contacted were part of a business that had a UK presence is sufficient to raise the possibility of prejudice to the CMA's investigation through a UK potential customer being contacted as part of the cross-selling campaigns (see further below at paragraphs 97 to 101). It is not necessary for the CMA to determine, through assessing the business model, corporate structure and/or language skills of each of the customers contacted, the degree of risk of prejudice to the investigation from such contact in order to determine they are a UK potential customer and that a breach of the IEO has occurred.

(ii) What constitutes 'UK presence' is unclear

*PayPal's submissions*⁷³

96. PayPal disagreed with the MT's approach of equating a customer with an online UK presence as a potential UK customer. It submitted that what constitutes a 'UK web presence'⁷⁴ is far from clear and that it would be extremely difficult for PayPal to rule out that any customer might have some sort of online presence that could be relevant to the UK. Moreover, having a web presence was not a relevant threshold to identify a UK potential customer in this context. As iZettle is specifically an offline payments system solution the only customers who might have a potential interest in taking an iZettle card reader are those who have some sort of offline presence.

Our assessment

97. PayPal's submission misses the point that the precautionary purpose of the IEO seeks to protect against the *possibility* of prejudice to the CMA's investigation, as noted above in paragraph 64 .
98. As the Derogation of 20 September did not permit PayPal to conduct integration activities in the UK and was granted on the basis of PayPal's express assurances that there was no possibility of an impact in the UK, it was incumbent on PayPal to ensure that no UK potential customers, whether online or offline, were contacted as part of the cross-selling campaigns.

⁷³ PayPal's First Response Letter, Section 2.

⁷⁴ As noted above, see footnote 36 at paragraph 37, to determine whether customers were UK potential customers, the MT investigated whether customers contacted had a UK presence.

99. The CMA notes that a key rationale for the Merger was the opportunity for PayPal to cross-sell iZettle's offline offering to PayPal's existing customers, a significant proportion of which are online customers. Indeed, in its First Response Letter PayPal confirmed that the campaign was intended to introduce the option of an iZettle card reader to PayPal customers who *'operated in an industry that PayPal's research indicated **appeared likely to use offline payments** [...] primarily small online businesses which **might have an offline presence**' (emphasis added)*. In addition, the MT reported that a number of customers with an online business only (and which did not have any offline presence) were contacted as part of the campaigns in Germany and France.⁷⁵ In light of these factors, the CMA does not accept PayPal's submission that UK online only customers should not be identified as UK potential customers.
100. Moreover, PayPal did not put in place any safeguards to ensure that the customers it was contacting as part of the French and German campaigns did not have an online or offline UK presence to ensure no UK potential customers were contacted. The CMA notes that it conducted additional filtering of the French and German online customers to [redacted]. It should have been possible for PayPal to have conducted further filtering at this stage to ensure that these customers did not have a UK presence.
101. In any event, it appears to be accepted by PayPal that customers with a UK offline presence should not have been contacted as part of the cross-selling pilot campaigns, although, as noted above, whilst the CMA finds that 16 such customers were contacted, PayPal disputes that these offline customers were UK potential customers, as they were large enterprises that would not have been interested in an iZettle card reader. Again, this submission fails to properly reflect the precautionary nature of the IEO and the fact that it was incumbent on PayPal not to contact such customers in the first instance. Whether these customers would have signed (or did sign) up to an iZettle offering is not determinative of whether the IEO was breached, although it is a factor the CMA has considered in assessing the seriousness of the breach.

⁷⁵ Ad hoc note of the Monitoring Trustee to the CMA dated 12 April 2019, paragraph 46.

(iii) There was no perception that the two businesses were integrated

*PayPal's submissions*⁷⁶

102. PayPal submitted that its own inquiry discovered 13 customers with a UK offline presence were contacted, none of which were small businesses that would want an iZettle card reader.⁷⁷ It also confirmed that no customers based in the UK had signed up for the iZettle card reader as a result of the campaigns.
103. Based on the Google Analytics reports, PayPal submitted that there were fewer than 75 instances of the campaign pages being accessed by unique users in the UK, which represents only 0.01% of the [between 400,000 and 500,000] emails sent across the whole campaign.⁷⁸
104. PayPal also submitted that even if a UK potential customer became aware of the email campaign there was no risk that they would perceive the PayPal and iZettle businesses as integrated as the emails made clear that PayPal was making a referral to iZettle and it was not a joint product or promotion. PayPal said that both brands continued to appear prominently on the emails and there was no suggestion that they had been integrated. Even if a customer had mistakenly interpreted the emails as suggesting the parties' brands had been combined or their businesses integrated, this was not an error PayPal should be held responsible for.
105. PayPal submitted that, as the practical risk of any impact was remote at best, the campaigns did not impact the ability of PayPal or iZettle to continue to compete independently in the UK, nor did it interfere with the CMA's ability to impose remedies if warranted.

Our assessment

106. The CMA rejects PayPal's submission that a customer would not perceive the two businesses to be integrated given the content of the emails. As noted above in paragraph 97, the IEO was not just concerned with actual prejudice that might be caused when a UK customer signed up for an iZettle reader but the possibility of prejudice that might arise from a UK customer becoming

⁷⁶ PayPal's First Response Letter, Section 2 and PayPal's Second Response Letter, Section 3.

⁷⁷ See footnote at paragraph 76 above for explanation for the discrepancy between PayPal and the MT's figures.

⁷⁸ PayPal also notes that these results are not absolutely accurate for technical reasons and due to Mazars and possibly PayPal and iZettle UK accessing the pages but are the best information available.

aware of the iZettle offering in the UK to the potential detriment to the PayPal Here business.

107. In addition, the CMA notes that the whole purpose of the cross-selling campaign was to promote the iZettle card reader and to refer customers to iZettle (see PayPal's submissions at paragraph 22 and the MT's summary of the campaigns informed by information provided by PayPal at paragraph 33). Where UK potential customers were contacted it is likely that, notwithstanding any practical challenges in signing up to receive the iZettle card reader in the UK, there was a serious risk that they would have perceived that the iZettle brand was integrated with PayPal or at the very least to be preferred to the PayPal Here brand. The CMA has taken into account PayPal's representations on the actual impact of the risk on the ability of PayPal or iZettle to continue to compete independently in the UK in assessing the seriousness of the breach.

(iv) The scope of the IEO and Derogation of 20 September

PayPal's submissions⁷⁹

108. PayPal did not agree with the interpretation of the scope of the IEO and the Derogation of 20 September. It submitted that the Derogation does not refer to any limitation by reference to 'potential UK customers' or to contacting customers outside the UK that have a 'UK presence'. PayPal submitted that to the extent its pilot campaigns involved contacting UK potential customers, by acting in accordance with the Derogation of 20 September, PayPal's conduct was not capable of amounting to a breach of the IEO.

Our assessment

109. It is clear on its face, and from its plain wording, that the key purpose of the Derogation of 20 September was to exclude the PayPal International business and the iZettle International business, to the extent that they did not have any activities that affected the UK and their roles were confined to activities in their respective jurisdictions, from the scope of certain obligations in the IEO. It would be directly contradictory to this key purpose if such a derogation allowed for UK potential customers to be contacted as part of cross-selling campaigns.
110. Moreover, as set out above in paragraph 21, the Derogation of 20 September was granted following consideration of submissions and information provided

⁷⁹ PayPal's First Response Letter, Section 3.

by PayPal to the effect that any cross-selling initiatives involving the international businesses of PayPal and iZettle would be confined to a sample of non-UK potential customers. There was no ambiguity in PayPal's submissions as to the scope of the derogation request and the CMA's reliance on these submissions is clear from the face of the Derogation of 20 September. Furthermore, PayPal, through its subsequent representations to the CMA and MT, demonstrated that it was fully aware that UK potential customers were not to be contacted as part of its international integration activities.⁸⁰

111. Accordingly, the CMA rejects PayPal's submission that the Derogation of 20 September was not limited in scope with reference to UK potential customers.

(v) Materiality threshold for an IEO infringement

*PayPal's submissions*⁸¹

112. PayPal maintains that, as it was only a remote possibility that a French or German customer contacted as part of the cross-selling campaigns could have passed the email to individuals in counterpart or other related entities located in the UK, the risk of prejudice to the CMA's investigation was so remote as to be immaterial.
113. PayPal accepted that the relevant test is of possibility rather than actual harm, but it submitted that there is a materiality threshold below which a possibility is too remote to constitute an infringement,⁸² and that this was also sensible in policy terms, otherwise it would be very difficult to undertake any activities on the basis that any risk, however remote or immaterial, would have to be checked with the CMA or could be interpreted as a breach.
114. PayPal submitted that this case does not meet that threshold for an infringement finding.

⁸⁰ PayPal confidently assured the CMA at its meeting on 16 January 2019 that safeguards were in place to ensure that there was no risk of contamination of UK customers. In its interaction with the MT, it was clear from the questions asked that the MT and CMA were concerned about UK potential customers being contacted and PayPal noted that it was alert to this and was taking steps to improve its filtering methodology for the third wave of the campaigns.

⁸¹ Provisional Decision Response section 1.

⁸² Provisional Decision Response, paragraph 1.5. PayPal relies on comments made by the CAT in *Intercontinental Exchange v CMA [2017] CAT 6* at paragraph 223 and in *Electro Rent Corporation v CMA [2017] CAT 4* at paragraph 200.

Our assessment

115. As summarised in paragraphs 62 to 69, the case law makes clear that the threshold for determining whether action ‘might’ prejudice a CMA reference and/or justified remedial action is “*relatively low*”, and is the “*possibility of prejudice*”.⁸³ However, the case law does not establish a materiality threshold below which a possibility is too remote to constitute an infringement. In contrast, the CAT has held that ‘pre-emptive action’ should be interpreted broadly to give full effect to the legitimate precautionary purpose of an initial enforcement order, and that it is a “*matter of public importance that... the duties that [the merger control process] creates, are strictly, and conscientiously, observed*”.⁸⁴ Indeed, by virtue of an IEO catching more than just actual prejudice or impediments, the CAT has held that “*the onus is on the addressee of the IEO to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment*”.⁸⁵
116. Accordingly, having identified the possibility of prejudice to the CMA’s investigation or to the CMA taking justified remedial action, it is not necessary nor is it appropriate to assess the materiality of the possibility of prejudice in order to establish that a breach of the IEO has occurred.
117. In any event, as regards the conduct discussed in this decision, the CMA does not accept that the risk of prejudice to the CMA’s investigation arising from PayPal’s international integration activities was remote (nor was it so remote as to be immaterial).
118. It should have been obvious to PayPal that contacting UK potential customers risked prejudicing the CMA’s investigation and was something the CMA would be concerned about. The CMA had referred the Merger for an in-depth phase 2 investigation and imposed the IEO to prevent any further integration activities that might impact on the UK businesses of the merging parties. In granting the Derogation of 20 September 2018, the CMA was clear that any international integration activities must not affect the UK and were confined to non-UK jurisdictions. It should have been clear to PayPal and its advisers that any action that might have had an impact on the UK activities of the merging parties was likely to be of concern to the CMA.
119. Indeed, despite its submission that PayPal should not be penalised for failing to identify and address immaterial risks⁸⁶, it is clear that PayPal did identify

⁸³ *Stericycle* at [129]; *ICE/Trayport* at [220].

⁸⁴ *Electro Rent* at [120]; *ICE/Trayport* at [220].

⁸⁵ *ICE/Trayport* at [223].

⁸⁶ Provisional Decision Response, paragraph 2.5.

the serious risk that UK potential customers might be contacted as part of its cross-selling campaigns as it (i) made representations when seeking the Derogation of 20 September 2018 that the campaigns would be confined to a sample of non-UK potential customers; and (ii) proactively engaged with the CMA on the scope of the cross-selling campaigns. PayPal also made representations to the CMA that it was addressing this risk by putting safeguards in place to prevent customers with a cross-border presence from being contacted. Moreover, given that 76 UK potential customers were contacted and that the campaign pages were accessed on approximately 75 occasions by unique users in the UK (see paragraph 92), this is clear evidence that a serious risk existed that, amongst other things, UK potential customers would perceive PayPal and iZettle as an integrated business.

120. The CMA has taken into account the seriousness of the risk in its assessment of the appropriateness of imposing a penalty and its level.

Conclusion on failure to comply with an interim measure

121. Having assessed the approach taken by PayPal in relation to a sample of 221 customers contacted, the CMA has identified that 76 UK potential customers, 16 of whom had an online and offline presence in the UK, were contacted as part of the campaigns (34% and 7% of the sample respectively). Moreover, by failing to put in place sufficient safeguards to ensure that only non-UK potential customers were included in PayPal's cross-selling pilot campaigns, there remains a risk that significantly more UK potential customers were contacted given the total number of customers contacted.
122. The CMA finds that PayPal has, by this conduct, failed to comply with the IEO, specifically, paragraphs 4(c), 5(a) and 5(g), as a result of PayPal contacting a significant number of UK potential customers in each of three waves of cross-selling pilot campaigns held in Germany and France. As set out in paragraphs 79 to 81 above, by contacting UK potential customers PayPal risked impairing the ability of iZettle and PayPal to compete independently contrary to paragraph 4(c) of the IEO; it risked undermining the separate sales or brand identities of PayPal, PayPal Here and iZettle contrary to paragraph 5(a) of the IEO; and, by directing potential UK customers to the iZettle offering, PayPal was not operating the customer lists of the two businesses in the UK separately contrary to paragraph 5(g) of the IEO.
123. The impact of the breach was that, at the very least, UK potential customers could have perceived that the two businesses were integrated and were not being maintained separately. This carried the risk of weakening PayPal Here and its brand in the UK as it could have implied that PayPal Here was being replaced with iZettle and thereby risked removing a source of potential

customers for PayPal Here in the UK and providing iZettle with an additional source of potential customers that it would not have otherwise had access to if it was operating independently of PayPal.

124. In conclusion, the CMA finds that this was action which might have prejudiced the reference or impeded the taking of any action by the CMA under Part 3 EA02 which might have been justified by the CMA's decision on the reference.

Without reasonable excuse

125. Section 94A(1) of the EA02 provides that penalties can be imposed if a failure to comply is "without reasonable excuse".
126. Once a breach of an IEO is established, the person who has committed the breach bears the evidential burden of setting out a prima facie case for reasonable excuse. Any excuse must be objectively reasonable.⁸⁷
127. The Guidance states that the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis; and that the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond the company's control, has caused the failure to comply (and the failure would not otherwise have taken place).⁸⁸ There is nothing to suggest that any such event has occurred in this case. The CMA accepts that it may be possible to establish other objectively reasonable excuses for breaching an IEO.
128. PayPal submitted that it had a reasonable excuse for believing that no infringement would arise because any possibility of prejudice was so remote as to be immaterial.⁸⁹
129. As noted above (paragraphs 115 to **Error! Reference source not found.**), the CMA does not accept that the risk of prejudice to its investigation arising from PayPal's conduct was remote and PayPal's actions suggest that it had identified the serious risk that UK potential customers might be contacted for the reasons set out above in paragraph 119. Therefore, the CMA considers that PayPal's belief that the risk was remote is not reasonable in all the circumstances.

⁸⁷ *Electro Rent* at [69] and [112].

⁸⁸ The Guidance paragraph 4.4.

⁸⁹ Provisional Decision Response, paragraph 1.6.

130. Therefore, the CMA concludes that PayPal had no reasonable excuse for failing to comply with the requirements of the IEO which have been identified above.

Conclusion on the statutory requirements for imposing a penalty under section 94A EA02

131. The CMA has concluded on the basis of the assessment in paragraphs 72 to 111 above that PayPal failed to comply with the IEO and that in paragraphs 125 to 130 that it has no reasonable excuse for the failure to comply.

132. The CMA therefore has reached the conclusion that the statutory requirements for imposing a penalty under section 94A of the EA02 are met.

E. Appropriateness of imposing the penalty

Appropriateness of imposing a penalty

133. Having had regard to its statutory duties and the Guidance, and having considered PayPal's submissions and all relevant facts, the CMA considers that the imposition of a penalty is appropriate. In reaching this view, the CMA has had regard to the need to achieve general deterrence, as well as the serious nature of the breach in this case.

General deterrence

134. PayPal submitted that if the CMA is determined that there was some impact from PayPal's conduct, it would be at most a technical infringement of the IEO that does not justify a financial penalty.⁹⁰ It also submitted that penalties should only be imposed for infringements that cause some actual harm.⁹¹

135. The CMA considers that it is of utmost importance to the UK's voluntary, non-suspensory regime that interim measures should be effective, particularly in the small number of completed mergers which the CMA identifies as warranting review. Interim orders (including the IEO) serve a particularly important function where, as in this case, the Merger was completed. Their function is to prevent conduct that might prejudice a reference or impede action justified by the CMA's final decision. The purpose of an IEO, as noted

⁹⁰ Second Response Letter at paragraph 4.1.

⁹¹ Provisional Decision Response at paragraph 2.8.

by the CAT, is precautionary, guarding against the possibility of pre-emptive action.⁹²

136. It is important that parties take such obligations seriously, recognise the importance of conducting their business within the parameters of any IEO, and exercise due care and attention over any activities that might be permitted under a derogation, to ensure they do not engage in a breach, whether inadvertently or otherwise.

Seriousness of the breach

137. PayPal submitted that a fine was not appropriate for the following reasons⁹³:

- it engaged with the CMA, requesting additional meetings with the CMA and the MT for the specific purpose of explaining its proposed approach and inviting questions;
- its understanding was that by sending the pilot campaign emails only to individuals located in France and Germany it was in compliance with the IEO since it was not contacting UK customers;
- it provided the MT with information and explanations and proactively took steps to address the questions raised. It also put safeguards in place before wave 3 of the cross-selling campaign and stopped future waves in light of the CMA's concerns;
- it did not identify any material risks from its integration activities and therefore to impose a financial penalty for failing to identify and address immaterial risks would be unfair and should not be considered negligent;
- any infringement, if found, was not particularly serious and this categorisation should only be used for infringements that cause some actual harm; and
- the risks identified by the CMA were highly unlikely to arise in practice and were highly unlikely to have material negative effects even if they did.

138. The CMA finds that the failure to comply was of a serious nature. For the reasons set out at paragraphs 121 to 124 above, the IEO provisions that were breached reflect core objectives of interim measures, namely to maintain the PayPal and iZettle businesses separately and that no action was taken that

⁹² *ICE/Trayport* at [220].

⁹³ Provisional Decision Response at paragraphs 2.3 to 2.9, 3.6.

might lead to the integration of the businesses' sales, brand and/or customers that may affect how such services were supplied in the UK or their ability to compete independently.

139. As noted above at paragraph 21, PayPal was granted the Derogation of 20 September allowing it to engage in cross-selling pilot campaigns concerning the PayPal International business and the iZettle International business and it was clear on its face, and when read with the IEO, that the Derogation of 20 September did not extend to activities that affected the UK and that any integration activities were confined to non-UK jurisdictions. Moreover, the Derogation of 20 September was granted following consideration of PayPal's submissions that any integration of the international businesses would be confined to non-UK potential customers and would not impact on the UK.
140. In seeking the Derogation of 20 September PayPal submitted⁹⁴, that *“any integration occurring in the ex-UK territories should have no **adverse impact on the UK businesses** and should not pre-empt the CMA's procedure. These activities would be **subject to** safeguards to ensure no irreversible steps are taken.”* and that *“any trials would be limited in time and scope and confined to a representative sample of **non-UK potential customers**”* (emphasis added).
141. Despite its assurances that the risk of breaching the IEO by contacting UK potential customers would be prevented, PayPal undertook three cross-selling pilot campaigns in France and Germany that led to it contacting UK potential customers.
142. Furthermore, when updating the CMA and the MT on its compliance with the IEO on 16 January 2019, PayPal provided further assurances that there was no risk that the non-UK integration planning would impact on UK customers as the cross-selling pilot campaigns were targeting small local businesses that did not have a cross-border presence and that there was no read across from their activities to what was happening in the UK. PayPal relied on this basis to seek a further derogation from the IEO to remove the cross-selling activities from the confines of clean teams, a request the CMA refused upon the discovery that UK potential customers were being contacted as part of the cross-selling pilot campaigns.
143. As set out above at paragraphs 96 to 101, the CMA disagrees with PayPal that the breach is limited to UK potential customers with an offline presence

⁹⁴ PayPal letter to the CMA dated 12 September 2018.

and has identified that PayPal contacted at least 76 UK potential customers, 16 of which had a UK offline presence.

144. In addition, the CMA has, with the assistance of the MT, only considered the extent of the potential breach from within a sample of 221 customers, representing approximately 0.045%, out of a total of [between 400,000 and 500,000] customers that were contacted. Given the high volume of customers contacted, the absence of effective controls in the execution of the cross-selling campaigns leaves open the risk that further UK potential customers were contacted.
145. The CMA has also considered PayPal's submissions as set out above in paragraph 137.
146. The CMA notes that the IEO and the Directions issued pursuant to paragraph 10 of the IEO make clear that PayPal was under an obligation to cooperate fully with the CMA and the MT, which included providing information and explanations when requested. Therefore, the CMA does not consider compliance with these provisions of the IEO and Directions to be a relevant factor in determining whether it is appropriate to impose a financial penalty.
147. As noted above at paragraph 129, the CMA does not accept that PayPal's belief that the risk of prejudice to the CMA's investigation was remote and immaterial and that it was in compliance with the IEO was reasonable in all the circumstances. Indeed, the CMA finds that PayPal did recognise the serious risk posed by its international integration activities given the assurances it gave to the CMA that it would put safeguards in place to ensure that UK potential customers were not contacted as part of its cross-selling campaigns.
148. The CMA also rejects PayPal's submission that only the existence of actual harm from a breach of an IEO or a particularly serious breach should attract a financial penalty. This would severely undermine the precautionary nature of IEOs and the deterrence inherent in section 94A of the EA02. However, as set out below in paragraph 171, it is a factor that will be taken into account when assessing the level of the financial penalty.
149. For these reasons, the CMA considers this failure to comply with the IEO to be serious.

Other considerations relevant to the breach

150. The CMA has considered PayPal's submissions that it was never its intention to target UK potential customers and that it believed it had taken sufficient steps to mitigate any risk of contamination of UK potential customers. Whilst

the CMA accepts that PayPal has not intentionally breached the IEO, it is our view that PayPal was negligent in the manner in which it planned and conducted its cross-selling pilot campaigns. In light of our view that PayPal had identified the risk of breaching the IEO and had assured the CMA that it was addressing it, the CMA cannot accept that PayPal's conduct in contacting UK potential customers was inadvertent.

151. Given the assurances it had given to the CMA, assurances which played a pivotal role in granting the Derogation of 20 September, PayPal ought to have known that by not putting in place sufficient safeguards, its conduct risked giving rise to a breach of the IEO. It is clear from the facts that PayPal did not pay sufficient regard to the identification of non-UK potential customers and, despite submissions to the contrary, contacted UK online and offline customers, many of which were very large international customers.
152. The CMA does not consider it reasonable that PayPal, as it asserted in its Provisional Decision Response, did not identify that its conduct risked breaching the IEO. First, PayPal did not confine its campaigns to small local businesses as it had submitted it would do. Second, PayPal did not put in place any safeguards to assess the risk of contracting UK potential customers. Third, PayPal reassured the CMA and the MT that it had sufficient safeguards in place to prevent a breach of the IEO. PayPal clearly identified through its submissions that there was a risk of breach but provided assurance to the CMA that it was being safeguarded (which was not the case).
153. The CMA considers that PayPal had sufficient internal administrative and financial resources available to ensure compliance⁹⁵. PayPal is a well-resourced company which had engaged two external law firms to advise it over the course of the CMA's investigation.
154. PayPal did not bring the failure to comply to the CMA's attention and the full extent of the breach only became clear following an extensive investigation by the MT.
155. For the abovementioned reasons the CMA believes that it is appropriate to impose a penalty in this case.

⁹⁵ See the Guidance at paragraph 4.11. PayPal's turnover was \$ 13,094 million in the financial year ending 31 December 2017.

Appropriateness of the amount of the penalty imposed

156. Consistent with its statutory duties and the Guidance,⁹⁶ the CMA has assessed all relevant circumstances to determine an appropriate level of penalty. It has also taken account of PayPal's submissions as set out in the Provisional Decision Response and the following aggravating and mitigating factors in line with the Guidance.

Aggravating factors

157. The CMA has considered the following aggravating factors, which point towards a higher penalty: (i) PayPal's conduct in providing assurances to the CMA that the risk of UK potential customers being contacted was being safeguarded; (ii) the public expense involved in investigating the infringement; (iii) the inclusion of large international customers in the cross-selling campaigns; and (iv) the filters applied for wave 3 of the campaign did not prevent UK potential customers from being contacted.

(i) PayPal's conduct in providing assurances to the CMA

158. The CMA considers that PayPal's conduct towards the CMA misrepresented the approach it was taking with regard to the cross-selling campaigns. Whilst PayPal was providing assurances to the CMA that it was taking the IEO seriously and ensuring that there was no risk of UK customers being contacted, it had in fact failed to put in place proper controls to ensure that it was in compliance with the IEO.

159. PayPal refuted that its conduct should be seen as an aggravating factor and submitted that it had devoted significant resources to ensure compliance with the IEO and had engaged with the CMA and the MT proactively and in good faith. It also noted that as its view of the risk associated with the cross-selling campaigns was immaterial and remote, its assurances to the CMA and the MT regarding compliance should be considered in that light.⁹⁷

160. As noted above (paragraph 146), PayPal was obliged by the terms of the IEO and subsequent Directions to comply with requests for information from the CMA and the MT and to provide regular updates on its state of compliance with the IEO. As such, the CMA does not consider that PayPal's efforts to comply with these requirements are relevant to whether the assurances it

⁹⁶ The Guidance at paragraph 4.11.

⁹⁷ Provisional Decision Response at paragraphs 3.6.

provided to the CMA were misrepresentative and amount to an aggravating factor.

161. As noted in paragraphs 115 to 120 above, the CMA does not accept that the risk of prejudice to its investigation arising from PayPal's conduct was remote and immaterial and it finds that PayPal's belief that the risk was remote is not reasonable in all the circumstances. Accordingly, the CMA does not accept PayPal's submissions these factors affect the assessment of whether its assurances should be considered an aggravating factor.

(ii) the public expense involved in investigating the infringement

162. PayPal submitted that had the risk of prejudice to the CMA's investigation been serious and obvious there would have been no, or less, investigation of the matter thereby resulting in less public expense. PayPal submitted that the complexity involved in this case was driven by the concerns raised by the CMA, concerns it considered remote and immaterial. PayPal considers that by identifying an increased public expense as an aggravating factor, PayPal is being punished more severely for being engaged in an inadvertent, marginal or questionable infringement than a serious and obvious one.
163. In the CMA's view, PayPal's failure to comply with the IEO resulted in increased public expense in investigating this serious breach. PayPal did not bring this failure to comply to the attention of the CMA, nor did it proactively raise concerns about its ability to comply with the IEO because *[i]t would be extremely difficult for PayPal to rule out that any customer might have some sort of online presence that could be relevant to the UK*.⁹⁸ Indeed, PayPal appears to have been confident in its compliance with the IEO, given it sought the CMA's consent to reduce the role of the clean teams in the cross-selling campaigns.
164. It was incumbent on PayPal to present the risks from its integration activities when it sought derogations from the IEO and on an on-going basis as and when those risks were identified so that the CMA could consider how best to mitigate such risks and/or what further Directions pursuant to the IEO might have been necessary. It would have been clear to PayPal that the CMA relies on being provided with information that is accurate and complete to enable it to take appropriate action.⁹⁹ It is for this reason that the CMA encourages parties on whom interim measures are imposed to engage proactively and constructively with the CMA at all times and to raise any concerns regarding

⁹⁸ First Response Letter, at paragraph 2.7(a).

⁹⁹ See paragraph 3.1 of the Guidance and section 117 of the EA02.

compliance. Although PayPal engaged with the CMA and the MT, it did so to provide assurances that it was compliant with the IEO when in reality it was not. As such, its interactions with the CMA did not contribute to a reduction in the public expense incurred in investigating this matter, an investigation that was initiated by the MT and not by any concerns raised by PayPal.

165. As noted above at paragraph 150, the CMA does not accept that PayPal's conduct in contacting UK potential customers was inadvertent. In addition, the CMA does not consider that the increased public expense incurred investigating this matter points towards this being an inadvertent breach as suggested by PayPal. Moreover, the CMA does not agree that a serious breach of an IEO might incur less public expense than an inadvertent one.
166. For the reasons set out above, the CMA considers that the increased public expense of investigating this matter is an aggravating factor that points to a higher penalty.

(iii) the inclusion of large international customers in the cross-selling campaigns

167. PayPal accepts that the inclusion of large customers in waves 1 and 2 of the cross-selling campaigns was an error and due to an oversight on its behalf. However, it submits that in the absence of an actual impact from such action, this should not be an aggravating factor.
168. Despite submissions to the CMA that the aim of the campaigns was to target small local businesses with no cross-border presence, where there would be no read across from their activities to what was happening in the UK,¹⁰⁰ several of the customers identified in the sample tested by the MT not only had an offline presence in the UK but were also large international customers such as [redacted]. The CMA does not accept that PayPal could not have identified such customers to exclude them from the pilot campaigns. As the MT did not find it difficult to identify such customers, a company with the technical, legal and financial resources of PayPal should have been able to do so. As this action clearly ran contrary to the objectives of the IEO and the assurances given by PayPal, the CMA considers it to constitute an aggravating factor regardless of whether such customers signed up for an iZettle reader or not.

(iv) the filters applied for wave 3 of the campaign did not prevent UK potential customers from being contacted

¹⁰⁰ Ad hoc note of the Monitoring Trustee to the CMA dated 18 January 2019, paragraph 14.

169. PayPal submitted that, after the CMA raised concerns about potential UK customers being targeted during the cross-selling pilot campaigns in Germany and France, which the MT was actively investigating, it immediately and proactively proposed and implemented further filters for wave 3 as soon as it identified unexpected results from the pilot email campaigns and that this good faith engagement should not count against it in determining the appropriate penalty.
170. However, the additional filters PayPal put in place to address these concerns were not adequate to prevent UK potential customers being targeted in the third wave of the campaign. In the sample of 100 customers from the third wave the MT found that 23 customers contacted had an online presence in the UK, three of which also had an offline UK presence. As such, the CMA does not accept that PayPal engaged seriously with the risk of contacting UK potential customers in the third wave of the campaign even after the CMA's concerns were made known to it, and that this therefore amounts to an aggravating factor.

Mitigating factors

171. The CMA has taken account of the following mitigating factors in line with the Guidance:
- following the CMA raising concerns, PayPal stopped the launch of the fourth wave of the pilot campaigns; and
 - that it was technically difficult for UK potential customers to sign-up for the iZettle card reader through the French and German cross-selling campaigns, although the CMA notes that customers could click through to the iZettle UK webpage from where they could purchase an iZettle reader; no customers with either an online or offline presence in the UK have signed up for the iZettle card reader nor have any of the customers in the MT's sample signed up for an iZettle or PayPal Here account in the UK in the period since the Merger was announced.
172. The CMA considered PayPal's submission that it had funded the MT as required and incurred additional costs as it had engaged with the MT over and beyond the level that might have been expected of it by the CMA, for example by hosting the MT at its office in California and providing budget for the MT to continue investigating this matter after its appointment had come to an end.¹⁰¹

¹⁰¹ See Provisional Decision Response at paragraphs 3.10-3.12.

173. The CMA does not consider that the costs incurred by PayPal complying with the IEO and Directions would have been out of the ordinary and/or would have been disproportionate for a business of its size and financial resources. Therefore, the CMA has not placed any weight on PayPal's submissions that the costs it has incurred should be regarded as a mitigating factor.

Financial resources available to PayPal

174. The CMA has also had regard to the financial resources available to PayPal.

175. In determining the appropriate level of penalty, the CMA has considered the published financial statements for PayPal Holdings Inc for the year ended 31 December 2017.¹⁰² According to this statement:

- the turnover for the PayPal group in the year ended 31 December 2017 was approximately \$ 13,094 million¹⁰³. In the same period, the profit after tax (net income) for the PayPal group was approximately \$ 1,795 million;
- at 31 December 2017, PayPal had cash and cash equivalents of approximately \$ 2,883 million.

176. The above information indicates that PayPal had sufficient financial resources available to it to ensure compliance with the IEO. Further, for the purposes of imposing a penalty, section 94A(2) of the EA02 provides that turnover is the turnover both in and outside the UK of the enterprises owned or controlled by the person on whom it is imposed. In this case, the relevant turnover for the purpose of imposing a penalty is the turnover of PayPal Holdings Inc.

Other submissions on the appropriateness of the amount of the penalty imposed

177. PayPal submitted that the level of the penalty imposed is unduly high in the context of the facts and when compared to the fact patterns underlying previous decisions to impose penalties for breaches of IEOs. It stated that this would be the highest fine in absolute terms for a single infringement of an IEO to date and within the wider context of the CMA's enforcement activity appears disproportionate.¹⁰⁴

178. The CMA considers the appropriateness of the amount of the penalty in any given case in accordance with its statutory duties, the Guidance and the

¹⁰² See Article 3 of the Interim Measures Order.

¹⁰³ <https://investor.paypal-corp.com/static-files/69fe62b6-0756-4a86-9666-cae4c4c5c387> .

¹⁰⁴ Provisional Decision Response at paragraph 3.2 to 3.3.

relevant circumstances of each case. As the fact patterns and concerns arising in any given merger investigation vary from one case to another, the CMA does not place any weight on PayPal's submission that the nature of a breach and amount of penalty should be compared against previous decisions.

179. Notwithstanding the above, whilst the penalty may be the highest imposed to date for a single IEO infringement, it is the lowest fine by proportion of profits after tax and is therefore not disproportionate in terms of the level of penalties imposed in previous cases.
180. Taking account of the factors set out above in section E in considering the appropriateness of imposing the penalty, the CMA considers that the penalty is not disproportionate in terms of the seriousness of the breach, the aggravating and mitigating factors considered, and the proportion of PayPal's turnover the penalty represents.

Conclusion on the imposition of a penalty

181. Although the CMA has the power to impose a penalty of up to 5% of global turnover (which in this case would amount to approximately \$ 655 million) the CMA does not consider that the breach in this case is so serious as to warrant a penalty at the upper end of the scale.
182. In all the circumstances, the CMA considers that the imposition of a penalty of £250,000 is appropriate on the basis that it: (i) would reflect the seriousness of the breach, (ii) would act as a deterrent to other companies (iii) is substantially below the statutory maximum of 5% of PayPal's global turnover (at approximately 0.002% of turnover and 0.02% of profits after tax¹⁰⁵) and (iv) is not disproportionate in terms of the serious of the breach, the aggravating and mitigating factors considered and the proportion of PayPal's turnover the penalty represents.

Andrea Gomes da Silva
Executive Director, Mergers and Markets
18 September 2019
Competition and Markets Authority

¹⁰⁵ An exchange rate of \$1.22 = £1 has been used for these calculations.

Annexes:

Annex 1 – The Initial Enforcement Order of 19 September 2018

Published here

https://assets.publishing.service.gov.uk/media/5ba38861e5274a54b9d28c07/paypal_izettle_initial_enforcement_order.pdf

Annex 2 – The Derogation of 20 September 2018

Published here

https://assets.publishing.service.gov.uk/media/5ba3873540f0b6064612b0cb/paypal_izettle_derogation.pdf

Annex 3 – PayPal letter to the CMA dated 12 September 2018

[✂]

Annex 4 – CMA letter of 2 April 2019 (the Concerns Letter)

[✂]

Annex 5 – PayPal letter of 15 April 2019 (the First Response Letter)

[✂]

Annex 6 – CMA letter of 18 June 2019 (the 'Minded to' Letter)

[✂]

Annex 7 – PayPal letter of 27 June 2019 (the Second Response Letter)

[✂]

Annex 8 – contains the relevant extracts from the biweekly reports and ad hoc notes provided by the MT to the CMA which are relied on in this notice

[✂]