Completed acquisition by ION Investment Group Limited of Broadway Technology Holdings LLC

Decision to impose a penalty on ION Investment Group Limited and ION Trading Technologies Limited under section 94A of the Enterprise Act 2002

The Competition and Markets Authority has redacted from this published version of the decision information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The redactions are indicated as applicable by [✂] or replacement non-confidential text in square brackets.

Decision to impose a penalty

1. The Competition and Markets Authority (the CMA) hereby gives notice[1] to ION Investment Group Limited (ION Group) and ION Trading Technologies Limited (ION Trading) (together ION)[2] of the following:

   a) that it has imposed a penalty on ION under section 94A of the Enterprise Act 2002 (EA02) because it considers that ION has, without reasonable excuse, failed to comply in certain respects with the requirements imposed on it by the initial enforcement order issued by the CMA under section 72 of the EA02 on 2 April 2020 (the IEO);[3]

   b) the penalty is a fixed amount of £325,000.

Structure of this document

2. This document is structured as follows:

   a) Section A sets out an executive summary.

[1] Notice is given pursuant to section 112 of the Enterprise Act 2002.
[2] References in this decision to ION as a defined term should be construed as references to ION Investment Group Limited and ION Trading Technologies Limited on a joint and several basis.
[3] The IEO of 2 April 2020 is published at: Initial enforcement order (publishing.service.gov.uk).

b) Section B sets out the factual background.

c) Section C sets out the legal framework.

d) Section D sets out the assessment of the failures to comply with an interim measure without reasonable excuse.

e) Section E sets out the CMA's reasons for finding that a penalty of £325,000 is appropriate and proportionate in this case.

f) Section F sets out the next steps including ION's right to appeal the CMA's decision to impose a penalty.

A. Executive Summary

Failure to comply with the IEO

3. The CMA has found that, after the IEO came into force on 2 April 2020, ION and Broadway continued their pre-existing very close collaboration on the draft response to a bid proposal for [Q] (the [Q] RFP). The response to the [Q] RFP, submitted by Broadway on 3 April 2020, was the result of extensive and detailed exchanges after the IEO came into force between ION and Broadway, including contributions from ION, on its content. Specifically, the response presented the respondents in various parts as comprising collectively Broadway and [ION division]/ION; [ION division] was expressly presented as the supplier of an integral part of the proposal; and more generally Broadway sought to gain a competitive advantage (over rival bids) as a result of the Merger, noting that 'As part of ION Group, Broadway provides a wide range of [✂] capabilities through partners, including [ION division]' and that 'Broadway, as a member of the ION Group is the only vendor that can offer a complete and proven [✂] solution'.

4. In view of the above, and as explained more fully in this document, the CMA has decided that ION has failed to comply with the IEO as summarised below:

a) Breach 1 – presentation of the Broadway and [ION division] (ION) offers collectively to [Consultant] (failure to comply with paragraphs 4, 5(a) and 6 of the IEO);

b) Breach 2 – failure to provide to the CMA the requisite information for compliance-monitoring purposes (failure to comply with paragraph 7 of the IEO).

Breach 1 – presentation of the Broadway and [ION division] (ION) offers collectively to [Consultant]

Failure to comply with paragraphs 4 and 5(a) of the IEO

5. ION failed to comply with the IEO in particular as follows:

a) ION's conduct (including its failure to take all necessary corrective steps) after the IEO came into force constituted action[4] which might impair the ability of the Broadway business[5] or the ION business[6] to compete independently, since both Broadway services / products and ION services / products, as well as named key senior individuals in Broadway and ION, were included in the response to the [Q] RFP submitted by Broadway on 3 April 2020. At no time did ION obtain the prior written consent of the CMA, as required by the IEO. ION therefore failed to comply with paragraph 4 (and in particular paragraph 4(c)) of the IEO.

b) ION's conduct (including its failure to take all necessary corrective steps) after the IEO came into force also constituted a failure to procure that the Broadway business was carried on separately from the ION business and the Broadway business's separate sales or brand identity was maintained. That was because the response to the [Q] RFP included ION services / products (alongside Broadway services / products), as well as naming the [ION division] CEO as a key contact (alongside several Broadway staff at CEO, COO and managerial levels). The response thereby conveyed to [Consultant] (which was managing the procurement process on behalf of [Q]) that Broadway and ION formed part of the same proposal. At no time did ION obtain the prior written consent of the CMA, as required by the IEO. ION therefore failed to comply with paragraph 5(a) of the IEO.

c) The above failures to comply continued in the communications between variously ION, Broadway and [Consultant] on 21 and 22 April 2020 and on 4 and 11 May 2020.

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[4] Action includes both positive action as well as an omission, such as a failure to act. The IEO itself recognises that an omission can constitute a breach (see the reference to an 'omission' in paragraph 3 of the IEO). Moreover, ensuring compliance with the IEO may require taking specific steps, as well as refraining from specific action (see paragraph 11 of the IEO).

[5] This was defined in the IEO to mean the business of Broadway and its subsidiaries carried on as at the commencement date of the IEO. References to Broadway and to the Broadway business in the remainder of this document include Broadway subsidiaries and their businesses.

[6] This was defined in the IEO to mean the business of ION (which in this document is referred to as ION Group) and its subsidiaries (excluding the Broadway business) carried on as at the commencement date of the IEO. References to the ION business in the remainder of this document are to be construed accordingly.

Failure to comply with paragraph 6 of the IEO in relation to paragraphs 4 and 5(a) of the IEO

6. ION's conduct (including its failure to take all necessary corrective steps) after the IEO came into force, summarised above, also constituted a failure by ION to procure compliance with the IEO by Broadway as if it had been issued to Broadway. That is because Broadway's conduct, after the IEO came into force, in the events summarised at paragraphs 3 and 5(a) to (c) above was contrary to paragraphs 4 (and in particular 4(c)) and 5(a) of the IEO. At no time did ION (for itself or on behalf of Broadway) obtain the prior written consent of the CMA, as required by the IEO. Accordingly, ION failed to procure compliance with the IEO by Broadway as if it had been issued to Broadway as required under paragraph 6 of the IEO.

7. ION also failed to comply with paragraph 6 of the IEO because it failed to communicate the IEO effectively within the ION business, and also failed to procure the effective communication of the IEO within the Broadway business. The manner in which ION chose to disseminate to staff the IEO and the need to comply with the IEO, heightened the risk of pre-emptive action. Specifically, the use of verbal communications entailed avoidable delays, which risked being exacerbated by the Easter holiday period and the impact of the Coronavirus (COVID-19) pandemic. Had appropriate steps been taken by ION, the failures to comply with the IEO could have been avoided. ION should, therefore, have taken action to ensure that the necessary communications were made more quickly and deeper to those engaged with client-facing matters, both within the ION business and the Broadway business.

Breach 2 – failure to provide to the CMA the requisite information for compliance-monitoring purposes (failure to comply with paragraph 7 of the IEO)

8. In the course of its investigation of this matter, the CMA made various requests for information and documents in relation to (among other matters) the response to the [Q] RFP for the purposes of monitoring compliance with the IEO. In addition, the CMA was provided with periodic statements of compliance as required by the IEO (Compliance Statements).

9. However, in various responses provided to the CMA and in the Compliance Statements covering the time periods of key events which are the subject of this decision, there were material inaccuracies and / or omissions as regards the [Q] RFP and the response to it. ION thereby failed to comply with paragraph 7 of the IEO.

Risk of prejudice to a reference or of impeding remedial action

10. The above failures to comply with the IEO risked prejudicing a possible reference for a phase 2 merger investigation (for example, by potentially affecting the competitive structure of the market and / or by failing to provide the requisite information to the CMA) or impeding potential remedial action (which could have included divestment of the Broadway business) following such a reference.

No reasonable excuse

11. The CMA has decided that ION has no reasonable excuse for its failures to comply with the IEO. The CMA has carefully considered several submissions made by ION and concluded that the explanations provided do not amount to a reasonable excuse. Moreover, the failures were not caused by a significant and genuinely unforeseeable or unusual event. Nor were they caused by events beyond the control of ION.

Decision to impose a penalty

12. The CMA has decided that it is appropriate to impose a penalty for each of Breach 1 and Breach 2 in the interests of general deterrence and because of the serious and flagrant nature of the failures to comply with the IEO.

13. In determining the amount of the penalty in each case, the CMA has taken into account these factors, as well as certain aggravating factors and the financial position of ION.

14. The CMA has decided that a penalty of £300,000 for Breach 1 (presentation of the Broadway and [ION division] (ION) offers collectively to [Consultant]) and £25,000 for Breach 2 (failure to provide to the CMA the requisite information for compliance-monitoring purposes), resulting in a total penalty of £325,000 (which is below the statutory maximum of 5% of the total value of the global turnover of the enterprises owned or controlled by each of ION Group and ION Trading) is an appropriate and proportionate penalty.

B. Factual Background

The Transaction

15. On 6 February 2020, ION Trading Technologies Limited, a wholly-owned subsidiary of ION Investment Group Limited,[7] acquired a controlling interest in Broadway Technology Holdings LLC (Broadway). The transaction (the Merger) was announced on 14 February 2020.[8]

16. At the time of the Merger, the principal activities of ION and Broadway were as follows. ION, a software provider headquartered in Ireland, offered trading and workflow automation products to financial institutions worldwide, including sell-side front-office systems for electronic trading of each of fixed income securities and foreign exchange. Broadway, a software provider headquartered in the US, supplied capital markets solutions to sell-side financial institutions in fixed income, foreign exchange, commodities and crypto currency.

The IEO

17. The IEO was imposed on 2 April 2020 pursuant to section 72(2) of the EA02 and was addressed to the following ION entities: ION Investment Group Limited and ION Trading Technologies Limited.

18. On 17 April 2020, the CMA issued directions requiring ION to appoint a monitoring trustee (MT) for the purposes of securing compliance with the IEO.[9]

19. On 28 April 2020, the CMA issued directions requiring ION to appoint a Hold Separate Manager of Broadway to ensure (among other matters) that Broadway operated separately from, and independently of, ION.[10]

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[7] See footnote 2 above regarding references in this decision to ION as a defined term.
[8] See: https://www.broadwaytechnology.com/news/2020/2/14/ion-investment-group-recapitalizes-broadway-technology.
[9] Directions issued on 17 April 2020 pursuant to paragraph 11 of the Initial Enforcement Order imposed by the Competition and Markets Authority on ION Investment Group Limited and ION Trading Technologies Limited on 2 April 2020.
[10] Directions issued on 28 April 2020 pursuant to paragraph 11 of the Initial Enforcement Order made by the Competition and Markets Authority pursuant to section 72(2) of the Enterprise Act 2002.

The [Q] Request for Proposal

20. [Name of customer] ([Q])[11] appointed an external consulting firm, [name of firm] ([Consultant]), to manage the [Q] Request for Proposal ([Q] RFP)[12] for its platform for [✂].[13] [Consultant] has provided the CMA – via the MT – its communications with each of ION and Broadway regarding the [Q] RFP, the most relevant of which are summarised in Table 1 on the next page.[14]

[11] In the documents cited in this decision, [Q] is sometimes referred to as [✂] [and for ease of presentation, this is reflected as [Q] in the published version of this decision].
[12] In summary, the [Q] RFP was defined as [✂] (see Q [✂] Request for Proposal [✂] Abbreviations and Definitions).
[13] In the financial services industry, a platform is a computer software program that can be used to place orders for financial products over a network with a financial intermediary.
[14] See section A of the Appendix to this decision. The timestamps provided in this decision are presented as GMT times. In some cases, the native email file displays a timestamp for a non-GMT time zone in which case this is noted in the relevant reference.

Table 1 – [Consultant] communications with ION and Broadway regarding the [Q] RFP

Date[15]	From	To	Content of communication (summary)
6 February 2020 – ION acquires controlling stake in Broadway			
17 February 2020	[✂] ([Ms G]), Manager at [Consultant]	[✂] ([Mr Y]), COO, [ION division][16] (ION)	[Ms G] called [Mr Y] to give a heads-up on the [Q] RFP.
17 February 2020	[Ms G] ([Consultant])	[✂] ([Mr X]), Head of Sales, [Broadway division][17] (Broadway)	[Ms G] called [Mr X] to give a heads-up on the [Q] RFP.
19 February 2020	[Ms G] ([Consultant]) via [Q] [✂] RFP outbox[18]	All interested vendors including [Mr Y] (ION) and [Mr X] (Broadway)	[Ms G] summarised the [Q] RFP and indicated the deadlines by which NDAs for interested vendors needed to be returned and the deadline for expressions of interest. Submission of bids was set for 27 March 2020.
21 February 2020	[✂] ([Mr F]) Commercial Contracts Manager (ION)	[Ms G] ([Consultant]) at [Q] [✂] RFP inbox[19], cc. [Mr Y] (ION)	[Mr F] emailed [Ms G] to confirm ION's interest in the [Q] RFP and raised questions re the scope of the NDA.
24 February 2020	[Mr X] (Broadway)	[Ms G] ([Consultant]) at [Q] [✂] RFP inbox	[Mr X] emailed [Ms G] to confirm [Broadway division]'s interest in the [Q] RFP.
2 March 2020	[Q] [✂] RFP outbox	[Mr F] (ION) / [Q] [✂] RFP inbox	Details of the [Q] RFP sent to ION.
2-3 March 2020	[Ms G] ([Consultant]) / [Mr X] (Broadway)	[Mr X] (Broadway) / [Ms G] ([Consultant])	Emails scheduling demonstrations of Broadway platform to [Q].
2-4 March 2020	[Mr Y] (ION) / [Ms G] ([Consultant]) / [Mr F] (ION) /	[Mr Y] (ION) / [Ms G] ([Consultant])	Emails scheduling demonstrations of the ION platform to [Q].

[15] Timestamps have been included in this column in some cases to reflect the timings of various communications which occurred on the same date in question.
[16] [ION division] was the ION platform which was being approached to bid for the [Q] business.
[17] [Broadway division] was the Broadway platform which was being approached to bid for the [Q] business.
[18] The [Q] [✂] RFP email address was established for the purposes of communications relating to the [Q] RFP (see Q [✂] Request for Proposal [✂] Communication). A [Q] [✂] RFP email outbox was used to contact interested vendors.
[19] A [Q] [✂] RFP email inbox was used for incoming communications from interested vendors and also for some communications sent to interested vendors (for example, including them as blind copy addressees).

Date[15]	From	To	Content of communication (summary)
	[✂] ([Mr H]) ([Consultant])	/ [Mr F] (ION) / GK ([Consultant])	
11 March 2020	[Q] [✂] RFP outbox	[Ms G] ([Consultant]), bcc. all interested vendors including [Mr Y] (ION) and [Mr X] (Broadway)	Email containing a file with answers to all clarifications requested by vendors regarding the [Q] RFP.
16 March 2020	[Mr Y] (ION)	[Ms G] ([Consultant]) at [Q] [✂] RFP inbox	[Mr Y] emailed [Ms G] to inform that ION would not need its allocated time slot to present its platform as ION and Broadway would be presenting together during Broadway's timeslot.
19 March 2020	[Q] [✂] RFP outbox	[Ms G] ([Consultant]), bcc. all interested vendors including [Mr Y] (ION) and [Mr X] (Broadway)	Email postponing milestone dates set out in [Q] RFP documents by a week due to COVID-19.
26 March 2020	[[✂] Mr M], CEO, [ION division] (ION)	[Ms G] ([Consultant]), cc. [Mr X] (Broadway)	Email attaching slides presented by ION and Broadway to [Q].[20]
1 April 2020	[Ms G] ([Consultant])	[Mr X] (Broadway) and, separately, [Q] [✂] RFP inbox, bcc. [Mr Y] (ION)	[Ms G] emailed each of [Mr X] and [Mr Y] to remind them that the deadline for the [Q] RFP was '**FRIDAY this week**' (emphasis as in the original) (ie 3 April 2020).
2 April 2020 – IEO issued			
3 April 2020 at 12:46	[Ms G] ([Consultant])	[Mr X] (Broadway)	[Ms G] emailed [Mr X] asking '**Is your submission on behalf of [Broadway division]/Broadway and [ION division], too?**' (emphasis added).
3 April 2020 at 12:48	[Mr X] (Broadway)	[Ms G] ([Consultant])	[Mr X] emailed [Ms G], in response to [Ms G]'s email, stating '**Yes we are submitting one joint response**' (emphasis added).
3 April 2020 at 17:24	[Mr X] (Broadway)	[Q] [✂] RFP inbox, cc. [Ms G] ([Consultant])	[Mr X] emailed [Ms G] stating: '**Please find attached Broadway Technology (incorporating Broadway, [Broadway division] and [ION division]) response** to [Q] [✂] RFP' (emphasis added)

[20] The slides provide a high-level overview of each of [ION division] and ION's respective inputs into the various [components] relevant to the [Q] RFP (eg [5 named components]).

Date[15]	From	To	Content of communication (summary)
			The attachments to that email contained further references to [ION division] and ION.
6 April 2020	[Mr X] (Broadway)	[Ms G] ([Consultant])	In response to a request from [Ms G] that day, [Mr X] re-sent by email the RFP Vendor Response Form[21] (.xlsx file), as the version sent on 3 April was corrupted and would not open.
20 April 2020	[Mr X] (Broadway)	[Ms G] ([Consultant])	[Mr X] emailed [Ms G] to ask for a status update on the [Q] RFP process.
21 April 2020	[Ms G] ([Consultant])	[Q] [✂] RFP inbox, bcc. all interested vendors including [Mr Y] (ION) and [Mr X] (Broadway)	[Ms G] emailed all vendors updating them on the status of the [Q] RFP and deadlines for next steps.
22 April 2020 at 09:30	[Ms G] ([Consultant]) via [Q] [✂] RFP outbox	[Ms G] ([Consultant]), bcc. all interested vendors including [Mr Y] (ION) and [Mr X] (Broadway)	[Ms G] emailed asking for additional platform details.
22 April 2020 at 10:12	[Mr X] (Broadway)	[Q] [✂] RFP inbox and [Ms G] ([Consultant])	[Mr X] emailed [Ms G] with additional details requested.
22 April 2020 at 10:27	[Mr X] (Broadway)	[Ms G] ([Consultant])	[Mr X] emailed [Ms G] to schedule a catch up.
22 April 2020 at 14:30	[Mr X] (Broadway)	[Ms G] ([Consultant])	Call subsequent to [Mr X]'s request – [Ms G] explained next steps of [Q] RFP process to [Mr X].
1 May 2020	[Ms G] ([Consultant]) via [Q] [✂] RFP outbox	[Mr X] (Broadway) and [Mr Y] (ION)	[Ms G] emailed asking: '**I understand that you have submitted an RFP response that includes Broadway, [Broadway division] and [ION division] [✂].** We noted that your response seemed to say that you would be using Broadway [✂] for the [✂], is that right? Please could you let me know.' (emphasis as in the original).
4 May 2020 at 11:40	[Mr X] (Broadway)	[Ms G] ([Consultant]) at [Q] [✂] RFP inbox, cc. [Mr Y] (ION)	[Mr X] emailed [Ms G] replying: 'To answer your immediate question - **the [✂] proposed in the RFP is a joint endeavour**. Since Bway is [✂]. But

[21] The document name is '[✂]'.

Date[15]	From	To	Content of communication (summary)
			[✂] then we use [ION division] [✂].' (emphasis added)
4 May 2020 at 19:45	[Mr X] (Broadway)	[Ms G] ([Consultant]), cc. [Mr Y] (ION)	[Mr X] emailed later clarifying: 'It's probably more accurate to say that **our [✂] solution is interchangeable (i.e. optional across [✂] Bway and [ION division] [✂])**. … **[Q] have choice and control and we can / will discuss this with them at any potential future solution design meeting**. I thought this was worth further clarification as I know [Q] already use [ION division] [✂] and so of course if Bway were successful and [Q] preferred to keep all [ION division] [✂] then that is entirely possible.' (emphasis added).
5 May 2020	[Ms G] ([Consultant])	[Mr X] (Broadway) and [Mr Y] (ION)	[Ms G] emailed a list of additional questions on the [Q] RFP response.
11 May 2020	[Mr X] (Broadway)	[Ms G] ([Consultant]), cc. [Mr Y] (ION) and [Q] [✂] RFP inbox	[Mr X] emailed stating: 'Please find attached **our answers** to your additional questions.' (emphasis added).

21. The documents submitted by [Mr X] (Broadway) on 3 and 6 April 2020 to [Q] [✂] RFP contained the following relevant information:

    a) As noted in Table 1 above, the cover email stated: 'Please find attached **Broadway Technology (incorporating Broadway, [Broadway division] and [ION division]) response** to [Q] [✂] RFP' (emphasis added).

    b) One of the attachments to the email was the 'Executive Summary and Commercial Proposal' (3 pages in .pdf format):

        (i) The cover page of this document presented the name 'Broadway Technology' within the heading and the footer stated that '[i]t has been prepared by Broadway Technology'.

        (ii) The 'Introduction' on the next page stated '**Broadway and [ION division], as part of the ION Group are pleased to respond to [Q]'s RFP** …' and the third paragraph stated '**As part of ION Group, Broadway provides** a wide range of [✂] capabilities **through**

partners, including [ION division] and [✂]. **Broadway, as a member of the ION Group is the only vendor that can offer a complete and proven [✂] solution**' (emphasis added).

(iii) The next section, entitled 'Executive Summary', a list of 'Additional unique benefits' included the statement that '**With […] engineers and the biggest [✂] in the industry, ION [✂] is also [✂]**' (emphasis added).

c) Another attachment to the email was the RFP Vendor Response Form (.xlsx file). The first tab of this spreadsheet was entitled 'Company Info' and contained the following information:

(i) At the very beginning, in response to the question 'Company name', the response stated '**Parent Company is ION Financial Group represented in this project by Broadway Technology, [Broadway division] [✂]** (A Broadway Technology Company) **and [ION division]**. Broadway Technology is the lead company to which the following answers apply unless otherwise stated' (row 4, question V1.1, emphasis added). The websites of each of ION Group, Broadway Technology, [Broadway division] [✂] and [ION division] are also listed individually (row 8, question V1.5).

(ii) In response to the question 'Please list all products and services which are included in your proposal', [✂] Broadway products were listed followed by '**[ION division]**' as the supplier of '**[✂]**' (row 98, question V10.7, emphasis added).

(iii) In response to a question on the use of any subcontractors, the response stated that '**Broadway does not anticipate the use of any subcontractors**' (row 44, question V5.2, emphasis added).

(iv) In response to the question 'Provide an organization chart that reflects the titles of key staff, management contacts that will be assigned to our account and this engagement', the response listed '**[Mr M] – [ION division] CEO**' in addition to several Broadway staff at CEO, COO and managerial levels (row 43, question V5.1, emphasis added).

d) The remainder of the RFP Vendor Response Form and the voluminous additional documents which were submitted referred extensively to Broadway and its products without further mention of [ION division] or ION.

22. In response to a request from the CMA, the MT sent an email on 15 May 2020 to [Mr B] (CEO, Broadway and the Hold Separate Manager) to collect information relevant to the [Q] RFP. [Mr B] responded by email on 19 May 2020 in which he stated, among other matters, the following:

a) [ION division] (which was already a supplier to [Q]) and Broadway were originally approached independently to participate in the [Q] RFP. He added that '**Broadway** received the RFP on March 2nd and **submitted the joint proposal on April 3**' (emphasis added).

b) 'Given the breadth of [✂] of [Q] as detailed in the RFP, it was determined that Broadway's product was the best customer fit. Given the existing customer relationship, **it was determined that [ION division] should participate in the bid**. Additionally, **it was decided that Broadway, ION and [ION division] would work together to offer [✂] of desired [Q] [✂]** either from one of or a combination of the [ION division] [✂] or the Broadway [✂] via [✂]' (emphasis added).[22]

c) '**The primary bid and proposal would be a Broadway led proposal … and if accepted would resulting in a Broadway-run project**. … **The exact breakout and split of components between [ION division] and Broadway was expected to be determined during the scoping / analysis phase should it be agreed upon**. Where Broadway had required [✂] not in the [ION division] [✂] already, that would be used. Where [ION division] had required [✂] not in the Broadway [✂] already, that would be used. Where both Broadway and [ION division] had existing [✂], it had not yet been determined which solution would best meet the customer's needs and therefore be provided' (emphasis added).

d) He also listed the 'Key Participants' as being:

(i) for [ION division]: [Mr M] (CEO) and [Mr Y] (COO);

(ii) for Broadway: [Mr A] (CEO, [Broadway division] [✂]) and [Mr D] (CTO); and

(iii) for ION: [Mr E] ([✂] COO).

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[22] This is consistent with the understanding of others within Broadway, as shown in an email dated 1 May 2020 sent by [Mr X] (Broadway) to colleagues which acknowledged that ION and Broadway had provided a combined response to the [Q] RFP: 'In our RFP response for the [✂] section **we provided a combined response** – i.e. Bway answered first, and **any [✂] that we had that [ION division] [✂] then we used [ION division] answer. So between the 2 of us we provided more expansive [✂]**' (email dated 1 May 2020 between individuals at Broadway, emphasis added).

23. However, on 22 May 2020, in response to an email dated 21 May 2020 from the CMA raising concerns about 'the joint bid [that] was submitted by the Parties to [Q] on 3 April 2020', [Mr B] stated 'I just want to clarify that **this was not a joint bid, it was a Broadway only bid and it was not made jointly with ION**' (emphasis added). [Mr B] added that, in order to deal with the CMA's concerns, Broadway was willing, on a voluntary basis, to inform [Q] that the previous Broadway bid no longer stood and either to amend its terms so that it made no reference to ION products,[23] or not to re-submit a bid for this tender.[24] Following further discussion with the CMA, on 3 June 2020, [Mr A] (CEO, [Broadway division] [✂]) sent an email to [Consultant] stating 'Please find attached a new proposal from Broadway to replace the previous bid … Broadway has updated that proposal to clarify how Broadway, acting as a separate entity and independent of any merger, can fulfil and maintain its bid to [Q] …. the proposal … makes no specific reference to [ION division] or any other ION [✂] … Should [Q] decide it wants to use [ION division] or any other ION [✂], we would not be able to discuss in any detail or agree to that without first having formally asked the CMA for permission to do so (which we can do)'.[25] However, the only attachment to that email was a revised Executive Summary, with the previous references to [ION division]/ION excluded. There was no additional attachment to show any changes to the RFP Vendor Response Form, which, as noted in paragraph [21](c) above, included references to [ION division] as a potential supplier.

Involvement of ION

24. Documents that were provided to the CMA[26] during its subsequent investigation into the matter show that ION and Broadway collaborated very closely in the preparation of the response to the [Q] RFP and subsequently in respect of a request from [Consultant] (in May 2020) for additional information in relation to that response.

25. The following senior management members were involved most frequently in the communications that are summarised below (and other senior individuals are mentioned later below where applicable):[27]

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[23] Two variants of this proposal were offered: in summary, either to seek a derogation from the IEO if [Q] decided to use any ION [✂] (so that Broadway could discuss that with [Q]), or to indicate to [Q] that it could not choose any ION [✂] with Broadway's bid.
[24] Email dated 22 May 2020 from [Mr B] (Broadway) to the CMA, including Simmons & Simmons. It appears that Simmons & Simmons [✂] as ION's external legal advisers on this matter at some point after 15 May 2020.
[25] Email dated 3 June 2020 from Broadway to [Consultant].
[26] The documents were provided on 7 and 14 December 2020 in response to a section 109 EA02 notice dated 30 November 2020.
[27] For ease of presentation, the ensuing analysis of the communications denotes which of the ION or Broadway camps each individual represented.

a) ION camp: [Mr M] (CEO, [ION division]); [Mr Y] (COO, [ION division]); and [Mr E] ([✂] COO, ION).

b) Broadway camp: [Mr A] (CEO, [Broadway division] [✂]); and [Mr X] (Head of Sales, [Broadway division] [✂]).

26. On 2 April 2020 and prior to the issue of the IEO, there were two emails from ION ([Mr Y] and [Mr M]) to Broadway (principally, [Mr X] and [Mr A]) providing information for, and comments on, the 'Executive Summary and Commercial Proposal' and the RFP Vendor Response Form.[28] In subsequent internal Broadway emails (to [Mr A] among others), [Mr X] noted that the information and comments from ION had been incorporated to varying degrees.[29]

27. The IEO was issued and communicated to ION's legal advisers, copied to [Mr C] (ION Group General Counsel), by email on 2 April at 14:26.[30] As explained by ION to the CMA (see paragraphs 38 and 39 below), the existence of the IEO and the need to comply with it were communicated verbally within ION, commencing on the evening of 2 April 2020 (Thursday) and going through to the weekend and the end of the following week, due to absences and scheduling conflicts. They were also communicated to Broadway verbally during the evening of 2 April 2020 to [Mr B] (CEO, Broadway), who disseminated that information to the Broadway management team in various calls held during 3 April 2020 and over that weekend.

28. Notwithstanding the above, the very close collaboration between ION and Broadway in relation to the response to the [Q] RFP continued on 2 and 3 April 2020 and also in May 2020, as summarised in the ensuing paragraphs.

29. The following are noteworthy examples of communications occurring on 2 April 2020, after the IEO was issued:

a) At 18:45, [Ms J] (Broadway) emailed various individuals within Broadway, including [Mr B] (CEO, Broadway), attaching the draft '[Q] [✂] RFP - Executive Summary & Commercial Proposal' and requesting that this should be circulated to the same group and to [Mr M] (ION). [Ms J] also stated that '[**first name of Mr A** (Broadway)] **discussed with [first name of Mr E** (ION)] **on our call an hour ago and [first name of Mr E] agreed**

[28] Email dated 2 April 2020 at 04:06 from ION to Broadway; and email dated 2 April 2020 at 07:23 from ION to individuals at Broadway and ION.
[29] Email dated 2 April 2020 at 09:15 between individuals at Broadway; and email dated 2 April 2020 at 11:31 between individuals at Broadway.
[30] Email dated 2 April 2020 at 14:26 from the CMA to Baker McKenzie, copied to ION Group.

with the approach' (emphasis added).[31] [Mr A] (Broadway) replied at 19:14 stating 'I'll discuss this with [first name of Mr M (ION)].'[32]

b) At 20:09, [Mr A] (Broadway) emailed [Mr M] (ION), including [Mr X] (Broadway) and [Mr Y] (ION), attaching the latest draft of the '[Q] [✂] RFP - Executive Summary & Commercial Proposal' and stating the following in his cover email: 'Lots of good ideas in this and we've been round the houses in trying to incorporate with our initial, merging yours, back to a hybrid of sorts … **We've positioned as a Broadway and [ION division], part of the ION group response**. Our [✂], your [✂]. **[misspelling of first name of Mr E** (ION)] **is comfortable with that**' (emphasis added).[33]

c) At 21:26, [Mr M] (ION) replied by email to [Mr A] (Broadway) and [Mr X] (Broadway), copied to various individuals at Broadway and to [Mr Y] (ION) stating his reaction to the changes to the Executive Summary as follows: 'My feeling on the rollback of **the exec sum** is that it **does not market the unique strengths of the combined Broadway-[ION division] union** .. Whatever is ultimately decided, **I will commit and support our team's decision**' (emphasis added).[34]

d) Around one hour later, [Mr M] (ION) included the above email and its accompanying email chain in an email he sent to [Mr K] (ION), copied to [Mr E] (ION) and [Mr L] (ION), attaching drafts of (among other documents) the Executive Summary for the [Q] RFP; the cover email also asked: 'It sounds like [first name of Mr D (CTO Broadway)] had a chat with [first name of Mr E (ION)] today and agreed to drop the ION [✂] joint approach?'[35] It is particularly noteworthy that [Mr K] and [Mr L] were included in that communication, since ION has informed the CMA that they were among the 'senior key managers'[36] directly contacted by [Mr C] (ION Group General Counsel) by phone to inform them of the IEO and the need to comply with it.

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[31] Email dated 2 April 2020 at 18:45 between individuals at Broadway.
[32] Email dated 2 April 2020 at 19:14 between individuals at Broadway.
[33] Email dated 2 April 2020 at 20:09 from Broadway to ION.
[34] Email dated 2 April 2020 at 21:26 from ION to Broadway. This email also appears as an email embedded in other email chains, for example as part of the email chain that appears below [Mr A]'s response to it, with a timestamp of a different time zone (ie it is shown as having been sent on 3 April 2020 at 02:26).
[35] Email dated 2 April 2020 at 22:06 between individuals at ION. The timestamp on the native email is 03:06 on 3 April 2020. The CMA has calculated that this is equivalent to 22:06 GMT on the basis that the email to which it responds (displayed as having been sent at 02:26 in its native time zone) is displayed in the files of GMT-based custodians as having been sent at 21:26 GMT.
[36] ION's response (via Simmons & Simmons) of 7 December 2020 to the CMA's section 109 EA02 notice dated 30 November 2020.

30. The following are noteworthy examples of communications occurring on 3 April 2020 leading to the submission of the response to the [Q] RFP on the same day:

a) At 07:58, [Mr A] (Broadway) sent to [Mr E] (ION) what he described as 'the latest and I hope very close to final' versions of the RFP Vendor Response Form and the Executive Summary and Commercial Proposal and added 'Give me a call any time you want to discuss'.[37]

b) At 13:22, [Ms P] (ION) sent a version of the Company Profile to be used for the RFP Vendor Response Form, marked up with her comments, to individuals at both Broadway (including [Mr X]) and ION (including [Mr C] and [Mr M]).[38] [Mr X] (Broadway) responded at 13:36, including [Mr C] (ION) and [Mr M] (ION) among others, stating 'there were a lot of moving parts in this RFP and a lot had to come together quickly at the end. It was proving a challenge as to how best to present this, so **we reverted to Broadway submitting as lead vendor with [ION division] input as well. We made reference to common ownership under ION and related benefits**. I believe **[first name of Mr E** (ION)] has been kept informed as [sic] **was happy with the approach**' (emphasis added).[39]

c) At 15:22, [Mr X] (Broadway) sent an email to [Mr E] (ION), copied to [Mr A] (Broadway), attaching 'the main excel response sheet, the exec summary and commercial proposal and the supporting docs zip' and asking if [Mr E] had any further edits before submission to [Consultant].[40] [Mr E] responded by email at 15:34, stating that he did not have time to review properly, so would not provide any comments on the submission, but made some suggestions in relation to the format of the submission and some of the supporting documents.[41] In an internal Broadway email at 17:04, it was confirmed that the feedback from [Mr E] had been incorporated.[42]

31. The very close collaboration between ION and Broadway is also evidenced in the exchanges relating to the response provided to the request of 1 May 2020 from [Consultant] for clarification of certain matters:

a) In reaction to [Mr X]'s (Broadway) first email on 4 May 2020 to [Consultant], [Mr Y] (ION) replied by email only to him [Mr X] to state that

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[37] Email dated 3 April 2020 at 07:58 from Broadway to ION.
[38] Email dated 3 April 2020 at 13:23 from ION to individuals at Broadway and ION.
[39] Email dated 3 April 2020 at 13:36 from Broadway to individuals at ION and Broadway.
[40] Email dated 3 April 2020 at 15:22 from Broadway to ION.
[41] Email dated 3 April 2020 at 15:34 from ION to Broadway.
[42] Email dated 3 April 2020 at 17:04 between individuals at Broadway.

he did not think that [Mr X]'s response was correct and that clarification should be provided. He added: '**The [✂] should be fully done by [ION division]** since we are already currently providing them [that is, [Q]] [✂] and that is what we have communicated to [✂] in the past. This is also in line with the longer term plan from [first name of Mr I (CEO, ION)] to have to [sic] [ION division] do the [✂] for all of ION [✂]' (emphasis added).[43]

b) In response to [Mr X]'s (Broadway) reply ('OK but that's news to me …'), [Mr Y] (ION) stated 'If you would like to discuss further **we can schedule an internal call to align**, but **we definitely want to position the value prop for [Q] with our** [✂]' (emphasis added).[44] [Mr X] (Broadway) subsequently agreed with [Mr Y] (ION) that [Mr X] should revert to [Consultant] to explain that their '[✂] solution is interchangeable'[45] and proceeded to do so.[46]

32. In response to a list of additional questions on 5 May 2020 from [Consultant] to [Mr X] (Broadway) and [Mr Y] (ION),[47] [Mr X] responded on 11 May 2020, copying [Mr Y] (ION), attaching a response and stating 'Please find attached **our answers** to your additional questions' (emphasis added).[48]

Conclusion

33. In summary, the evidence set out above demonstrates, among other matters, that:

a) Before the IEO was imposed, ION and Broadway made a joint presentation to [Consultant] prior to the submission of a response to the [Q] RFP.

b) After the IEO was imposed (on 2 April 2020), Broadway confirmed to [Consultant] that it was 'submitting **one joint response**' (emphasis added) and it submitted a response '(incorporating Broadway, [Broadway division] and [ION division])' which in material respects presented both Broadway and ION products / services together as part of one proposal (the RFP Vendor Response Form stated expressly that 'Broadway does not anticipate the use of any subcontractors'). More specifically: in one part, it presented '**Broadway, as a member of the ION Group** [as] **the**

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[43] Email dated 4 May 2020 at 12:43 from ION to Broadway.
[44] Email dated 4 May 2020 at 13:54 from ION to Broadway.
[45] Email dated 4 May 2020 at 14:39 from Broadway to ION; email dated 4 May 2020 at 15:20 from ION to Broadway and email dated 4 May at 15:26 from Broadway to ION.
[46] Email dated 4 May 2020 at 18:45 from Broadway to [Consultant], copied to ION.
[47] Email dated 5 May 2020 from [Consultant] to Broadway, ION and [Q] [✂] RFP inbox, attaching a list of additional questions.
[48] Email dated 11 May 2020 from Broadway to [Consultant], cc. ION and [Q] [✂] RFP inbox.

only vendor that can offer a complete and proven [✂] solution' (emphasis added); in another part, it listed [ION division] as the supplier of one product / service; and in a different part, it listed the [ION division] CEO as one of the contacts to be assigned to this engagement.

c) The response to the [Q] RFP submitted by Broadway on 3 April 2020 followed extensive and detailed exchanges on its content between ION and Broadway both shortly before and after the imposition of the IEO. Broadway had incorporated into the response various comments and information from ION, including text designed to market the strengths of the combined (post-Merger) Broadway and [ION division] (ION) offer and related benefits.

d) The exchanges between ION and Broadway involved individuals at very senior management levels (including, CEO and COO). Significantly, some of the exchanges after the IEO came into force included [Mr C] (ION Group General Counsel), who was directly copied into the CMA's email of 2 April 2020 issuing the IEO and who led the communications about it within ION and also initially to Broadway; [Mr B] (CEO, Broadway), who was briefed about the IEO by [Mr C] in the evening of 2 April 2020 and who subsequently disseminated that information to the Broadway management team; and also [Mr K] (ION) and [Mr L] (ION), who were among the 'senior key managers' directly contacted by [Mr C] to inform them of the IEO and the need to comply with it.

e) Moreover, communications with [Consultant] continued for well over a month afterwards as if ION was a party to the response to the [Q] RFP. For example:

(i) From 21 April 2020 through to 5 May 2020, communications from [Consultant] were sent to [Mr Y] (ION) in addition to [Mr X] (Broadway). In particular, the communications on 1 and 5 May 2020 were addressed to both individuals in the same email; and in its email of 1 May 2020, [Consultant] stated 'I understand that you have submitted an RFP response that includes Broadway, [Broadway division] and [ION division] [✂].

(ii) On 4 and 11 May 2020, responses to [Consultant] from [Mr X] (Broadway) included [Mr Y] (ION) as a copy recipient. The first response of 4 May 2020 stated that 'the [✂] proposed in the RFP is **a joint endeavour**'. Following various email exchanges that [Mr X] then had with [Mr Y] (who was pushing for the [✂] to be fully provided by [ION division] (ION)), the second response clarified that '**our [✂] solution is interchangeable** (i.e. optional across

[✂] Bway and [ION division] [✂]). … **[Q] have choice** and control and **we can / will discuss this with them** at any potential future solution design meeting' (emphasis added). The response of 11 May 2020 stated 'Please find attached **our answers** to your additional questions' (emphasis added).

f) On 19 May 2020, in response to the MT's request for information on the [Q] RFP, [Mr B] (Broadway's CEO and the Hold Separate Manager) stated that [ION division] and Broadway were originally approached independently to participate in the [Q] RFP. He added that Broadway 'submitted the **joint proposal** on April 3' and that '**Broadway, ION and [ION division] would work together to offer the full complement of** desired [Q] [✂]' (emphasis added). On 22 May 2020, [Mr B] responded to an email from the CMA, copying ION's external legal advisers, to clarify that '**this was not a joint bid**, it was a Broadway only bid and **it was not made jointly with ION**' (emphasis added).

Communications to Employees about the IEO

34. In the MT's Initial Report (dated 13 May 2020) on compliance with the IEO,[49] the MT identified a number of instances of non-compliance with the IEO. The MT noted the following in relation to communications about the IEO, both within ION and Broadway:

a) The MT team had been informed that '**little or no written employee communications have been sent within the ION business regarding the hold separate requirement for the Broadway business, and that communications of a relevant nature have mostly been by way of verbal messaging**. As a result, it has not been possible … to review the appropriateness of the hold separate and ring fencing messages delivered' (paragraph 2.6, emphasis added). The MT added that members of ION staff to whom the MT had spoken 'have indicated that they were orally advised of the requirement for separation on or about 2 April 2020' (paragraph 4.5).[50]

b) 'Both ION and Broadway have separately confirmed that all ongoing commercial discussions with customers are carried out independently of the other business. We have been led to believe that **this message has**

[49] ION Investment Group Limited / Broadway Technology Holdings LLC Monitoring Trustee Appointment dated 23 April 2020, Initial Report dated 13 May 2020.
[50] The MT noted also that the MT team had been advised by ION's General Counsel that no formal written communication had been issued to staff informing them of the CMA investigation and the requirements of the IEO; and that oral communications were issued to relevant ION staff, being those that were initially involved, or due to be involved, in integration planning (paragraph 4.63).

been repeatedly made orally to sales staff and other management, in particular within the Broadway business. For example, according to [Mr B], **multiple verbal communications have been made to management regarding the** CMA investigation, **IEO requirements**, and the need to act independently of ION, and that where it was understood that [✂], **Broadway's entire account management and sales teams were cognisant of the need to now promote only the continuing independent brand and Broadway product suite**' (paragraph 4.49, emphasis added).

c) ' … on provision of some relevant correspondence by the CMA, the Trustee Team observes that **ION has stated its intention to implement** a number of 'voluntary' arrangements, including … **communications to staff explicitly instructing the separation of operations and go-to-market approaches and strategies**' (paragraph 4.89, emphasis added).

35. On 14 May 2020, the CMA informed ION that, having reviewed the MT's first report, it was concerned about ION's compliance with the IEO in respect of several matters. In relation to communications to employees and third parties, the CMA stated that (among other matters) little or no written communications had been sent within the ION business regarding the hold separate requirement for the Broadway business, and that communications of a relevant nature had mostly been by way of verbal messaging. The CMA attached draft directions (to be given pursuant to paragraph 11 of the IEO) to require ION to take specific steps to ensure compliance with the IEO and invited ION's comments. Those steps included a requirement on ION to procure that a written communication was issued to employees and third parties to explain ION's obligations under the IEO.[51]

36. On 15 May 2020, ION responded through its external legal advisers disputing the legal basis for the requirement regarding written communications. It stated: '**ION does not consider that issuing written communications to all staff is necessary to ensure compliance with the IEO. Pivotal staff of both ION and Broadway** (such as the CEOs, [Mr B] and [Mr I]) **are already aware of the obligations of the IEO and through their managerial responsibilities are able to procure compliance of others**. Equally, communications to all third parties are only likely to [✂]' (emphasis added).[52]

37. On 19 May 2020, following its consideration of these matters and ION's submissions, the CMA issued directions requiring ION to take specific actions

[51] Email dated 14 May 2020 from the CMA to ION's external legal advisers (Baker McKenzie), copied also to ION.
[52] Email dated 15 May 2020 at 14:05 from Baker McKenzie to the CMA, copied also to ION.

in relation to various matters in order to secure compliance with the IEO.[53] In relation to communications, the directions required, among other matters, ION to procure that a written communication was issued to all employees of the ION business and the Broadway business, and to all third parties, including customers and suppliers of both businesses, explaining ION's obligations under the IEO and in particular that the two business were being held separate.

38. In the course of its investigation of this matter, the CMA required ION and Broadway to produce all written communications, and all contemporaneous written records of verbal communications, made to employees about the IEO in April 2020 (from 2 April 2020 onwards).[54] The key elements of the response were as follows:[55]

a) No written communications to employees within the ION business or the Broadway business were produced.

b) It was confirmed that no contemporaneous written records were made of the verbal communications that took place (summarised below).

c) As regards communications made by ION and ION Trading to employees within the ION business, a summary of events was provided, including the following:

(i) The IEO was communicated by the CMA by email on 2 April 2020 at 14:25[56] to Baker McKenzie, copied to [Mr C] (ION Group General Counsel).

(ii) Having taken advice, [Mr C] contacted 'the senior key managers' of the ION Markets Team[57] and explained the terms of the IEO and how to comply with it (specifically, that ION was not permitted to engage on commercial matters with Broadway or Broadway customers). Phone calls with each manager commenced on the evening of Thursday, 2 April 2020 and due to scheduling conflicts they were completed over the weekend. [Mr C] instructed those managers to have calls with their respective teams and to

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[53] Directions issued on 19 May 2020 pursuant to paragraph 11 of the Initial Enforcement Order made by the Competition and Markets Authority pursuant to section 72(2) of the Enterprise Act 2002.
[54] Section 109 EA02 notice dated 30 November 2020 from the CMA to ION and Broadway.
[55] ION's response (via Simmons & Simmons) of 7 December 2020 to the CMA's section 109 EA02 notice dated 30 November 2020.
[56] In its response dated 7 December 2020 to the CMA's section 109 EA02 notice dated 30 November 2020, ION referred to this email as having been sent at '2:25pm'. However, the CMA's records show this email as having been sent at 14:26.
[57] The response named five individuals, none of whom were the CEO or COO of [ION division] (ION) at the time.

communicate what they had been told about the IEO and the need to comply with it.

(iii) The ION Markets managers subsequently communicated what they had been told to their respective teams covering Europe, Asia and the US. Most of the calls were completed over the weekend, but due to absences and scheduling conflicts related to the Easter holiday period some calls were not completed until the end of the following week.

d) As regards communications made by ION and ION Trading to employees within the Broadway business, a summary of events was provided, including the following:

(i) Reference was made to the points in sub-paragraph (c) above.

(ii) [Mr C] called [Mr B] (CEO, Broadway) during the evening of 2 April 2020 to explain the terms of the IEO, specifically that Broadway was not permitted to engage on commercial matters with ION, and the importance of Broadway's compliance with the IEO. [Mr C] instructed [Mr B] to have calls with his management team and to communicate what he had been told about the IEO and the need to comply with it.

e) As regards communications made by Broadway to employees within the Broadway business, a summary of events was provided, including the following: [Mr B] had conversations with the Broadway management team to inform them about the IEO and its impact. Calls were held during Friday, 3 April 2020 and over that weekend. [Mr B] explained the IEO, specifically its requirements on integration and commercial activities with respect to ION, and instructed the Broadway management team to act accordingly and inform their teams 'as required'.

39. In summary, the evidence set out above demonstrates, among other matters, that:

a) No written communications about the IEO to employees within the ION business or the Broadway business were provided to the MT (in early May 2020) or subsequently to the CMA. More specifically:

(i) In the MT's Initial Report (dated 13 May 2020) on compliance with the IEO, the MT noted that the MT team had been advised by ION's General Counsel that no formal written communication had been issued to staff informing them of the CMA investigation and the requirements of the IEO.

(ii) In responding to the CMA's concerns about ION's compliance with the IEO, among other matters, in relation to communications to employees, ION stated: '**ION does not consider that issuing written communications to all staff is necessary to ensure compliance with the IEO. Pivotal staff of both ION and Broadway** (such as the CEOs, [Mr B] and [Mr I]) **are already aware of the obligations of the IEO and through their managerial responsibilities are able to procure compliance of others** …' (emphasis added).[58]

b) No contemporaneous written records were made of the verbal communications about the IEO to employees within the ION business or the Broadway business that took place in April 2020 (from 2 April 2020 onwards).

c) Within ION, verbal communications about the IEO to senior key managers of the ION Markets Team commenced on the evening of Thursday, 2 April 2020 and, due to scheduling conflicts, they were completed over the weekend. Those managers subsequently communicated what they had been told to their respective teams, however although most of the calls were completed over the weekend, due to absences and scheduling conflicts, some calls were not completed until the end of the following week.

d) ION informed Broadway about the IEO over a phone call to [Mr B] (CEO, Broadway) during the evening of 2 April 2020. In calls held during Friday, 3 April 2020 and over that weekend, [Mr B] explained the IEO to the Broadway management team and instructed them to act accordingly and inform their teams 'as required'.

The Information Provided on Compliance with the IEO

Introduction

40. On 2 April 2020, in accordance with its standard procedures, the CMA required information to be produced to it in response to its initial questionnaire (the Integration Questionnaire) covering, among other matters, any integration (both actual and planned) of Broadway into ION Group, and any changes (both actual and planned) to staff and business operations.[59]

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[58] Email dated 15 May 2020 from Baker McKenzie to the CMA, copied to ION.
[59] Email dated 2 April 2020 at 14:26 from the CMA to Baker McKenzie, copied to ION Group. This attached the IEO and an 'Integration Questionnaire' which was required to be completed pursuant to section 109 of the EA02.

41. However, as demonstrated below, despite the numerous opportunities afforded to bring the [Q] RFP to the CMA's attention, ION Group did not disclose the existence of the [Q] RFP until 14 May 2020[60] (that is, six weeks after the IEO coming into force). Moreover, as explained more fully later in this document, there were material inaccuracies and / or omissions (as regards the [Q] RFP and the response to it) in various responses to the CMA and in the Compliance Statements covering the time periods of key events which are the subject of this decision.

Identifying the [Q] RFP and the response to the [Q] RFP

42. One of the questions in the Integration Questionnaire requested confirmation as to whether customers (and others) continued to be serviced by the Broadway business fully independently of the ION business.[61] However, ION Group's response, dated 9 April 2020, was provided by reference to a different time period. The response purported to answer the question by reference to the integration status of the Broadway business 'prior to the issue of the IEO', stating (among other matters) the following:

> '**Customer initiatives.** Customer engagement has been conducted on a combined basis since closing, with the parties preparing and presenting joint [✂] proposals to [category of customers] such as [8 named potential customers]. The parties have also been engaged by [named customer] to [✂]
>
> **Sales and Marketing.** As a result of the integration of the parties' sales and marketing functions, Broadway has been offering ION products to Broadway customers and conversely, ION has been suggesting Broadway to ION customers as a provider of [✂]. This joint offering and cross-selling initiative will [✂]'[62] (emphasis as in the original).

43. The response cross-referred to its Annex 1, which was dated 3 April 2020[63] (that was the day after the IEO had come into force and it was also the date on which the response to the [Q] RFP had been submitted). Annex 1 provided a 'Drilldown [of] Customer Initiatives' which included, by reference to the customers named above, summary detail of matters such as 'KPI', 'Target

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[60] ION Group's response of 14 May 2020 to the CMA's section 109 EA02 notice dated 6 May 2020 (via Baker McKenzie).
[61] The question asked: 'Confirm whether the customers, supplier lists and other contracts of the Broadway Technology business continue to be serviced by the Broadway Technology business fully independently of the ION business' (question 10).
[62] ION Group's response of 9 April 2020 to the Integration Questionnaire of 2 April 2020 (via Baker McKenzie), para. 10.
[63] *Ibid*, Annex 1. The Annex was entitled 'Broadway Technology Integration | Status Report | Internal | 3 April 2020'.

Due Date' and 'Status Update'.[64] The joint customer engagements listed in Annex 1 had begun prior to the IEO coming into force. However, the majority of them had due dates falling after the IEO was imposed (ranging from 10 to 27 April 2020), and as regards the 'Status Update' three of them were listed as 'Proposal and Deployment plan prepared', one was listed as 'Present joint [✂] plan' and another was listed as 'Proposals sent to customer'.

44. Despite the acknowledgement that '[a]s a result of the integration of the parties' sales and marketing functions, Broadway has been offering ION products to Broadway customers' and despite listing a number of projects which were still at the 'Proposal' stage with a 'Target Due Date' well after the IEO came into force, the [Q] RFP was omitted from the response provided to the CMA.

45. The [Q] RFP was also omitted in subsequent correspondence with the CMA. On 17 April 2020, the CMA emailed ION in relation to the appointment of a Monitoring Trustee and Hold-Separate Manager for the purpose of ensuring compliance with the IEO. The CMA invited ION to provide its proposals for voluntary measures that could be put in place to restore pre-emptive action.[65] In its response of 22 April 2020, ION referred to the CMA's email of 17 April 2020 'in relation to voluntary measures to operate the Broadway business separately and independently of ION and to maintain its viability as a going concern' and provided 'a summary of the steps taken by ION since the IEO was issued', which included the following statements:

> '**Customers**: No joint customer interactions have occurred since April 2nd. Broadway is dealing with its customers in the ordinary course without ION involvement.
> …
> The ION and Broadway businesses are being managed in accordance with the IEO and the compliance certifications given'[66] (emphasis as in the original).

46. No reference was made of the [Q] RFP or to ION's involvement in the response to the [Q] RFP.

47. On 22 April 2020, the CMA, referring to the response to the Integration Questionnaire, stated its understanding that 'joint approaches' had been made to some customers and required ION Group to confirm certain

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[64] *Ibid*, Annex 1, slides 3 and 4.
[65] Email dated 17 April 2020 from the CMA to Baker McKenzie, copied to ION. See paragraph 60 below for the statutory definition of pre-emptive action.
[66] Email dated 22 April 2020 from Baker McKenzie (for ION) to the CMA.

matters.[67] ION Group responded on 26 April 2020 stating: 'As set out in correspondence to the CMA dated 22 April 2020, **no joint customer interactions have taken place since 2 April 2020**' (emphasis added).[68] No reference was made of the [Q] RFP or to ION's involvement in the response to the [Q] RFP.

48. By letter dated 6 May 2020, the CMA informed ION that it was concerned about (among other matters) ION's understanding of, and compliance with, its obligations pursuant to the IEO and the impact ION's actions were having on the CMA's ability to run its investigation effectively and manage the risk of pre-emptive action occurring.[69] The CMA referred expressly to ION's response to the Integration Questionnaire and its responses of 22 and 26 April 2020 (summarised above) and stated that information provided to the CMA by market participants indicated that ION's response of 26 April 2020 (that 'no joint customer interactions have taken place since 2 April 2020') was not accurate.[70] By separate letter, also dated 6 May 2020, the CMA required ION Group to provide certain specified information in relation to every business opportunity tendered for in a specified period in respect of certain [✂] software (including specifically by [ION division] (ION) and [Broadway division] (Broadway)).[71] On 14 May 2020, ION Group responded, identifying for the first time the [Q] RFP and the response to the [Q] RFP as follows:

> 'Please note that **Annex 002 reports a joint bid for [Q]**. This opportunity related to discussions commenced in 2019 (prior to closing of the Broadway transaction) and [ION division] is included as part of Broadway's bid submitted on 3 April 2020. For the avoidance of doubt, **since 2 April** in respect of this opportunity, **[ION division] has had no interaction with [Q]** there have been no joint calls and **the opportunity has been managed solely by Broadway**, as it is Broadway's proposal' (emphasis added).[72]

Production of documents relating to the [Q] RFP

49. In its letter dated 6 May 2020, the CMA had also required ION Group to produce relevant email correspondence between each party (including

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[67] Section 109 EA02 notice dated 22 April 2020 from the CMA to ION Group: 'The CMA understands that joint approaches to some customers have taken place, [✂]. Confirm whether this is correct' (question 9(d)).
[68] ION Group's response dated 26 April 2020 to the CMA's section 109 EA02 notice dated 22 April 2020 (paragraph 34 of the response).
[69] Letter dated 6 May 2020 from the CMA to Baker McKenzie (for ION).
[70] *Ibid*, page 6.
[71] Section 109 EA02 notice dated 6 May 2020 from the CMA to ION Group. The software and relevant period were stated as 'the supply of [✂] software for (i) [✂]; and (ii) [✂], from 1 January 2020 to the present' (question 1).
[72] ION Group's response dated 14 May 2020 to the CMA's section 109 EA02 notice dated 6 May 2020 (paragraph 4 and Annex 002).

specifically [ION division] (ION) and [Broadway division] (Broadway)) and tendering customers in respect of business opportunities tendered for from 6 February 2020 onwards.[73] However, ION Group's response of 14 May 2020 related to correspondence between each of ION and Broadway and tendering customers, other than [Q], listed in Annexes 001 and 002 of ION Group's response. For example, ION Group provided details of an opportunity it tendered for with [name of a potential customer] and Broadway provided details of an opportunity tendered for with [name of a different potential customer]. The response omitted the correspondence between Broadway or [ION division] and [Consultant] (on behalf of [Q]) in the period from 26 March 2020 to 22 April 2020.[74] It appears from examination of the compliance statement of 14 May 2020 (signed by [Mr I] (CEO, ION))[75] that this was the result of ION Group's selective choice of custodians to use for the search. The compliance statement shows that the selected custodians were limited to: (i) for ION, [Ms R], who was said to be responsible for Sales Operations for ION Markets; and (ii) for Broadway, [Mr B], CEO of Broadway, on the basis that 'he leads Broadway's management team and is also directly involved in customer tenders and correspondence with customers during tender opportunities'. However, a number of other custodians (for example, [Mr X] (Broadway) and [Mr Y] (ION)) who were directly involved in communications in respect of the [Q] RFP, and would have generated results accordingly, were not used. [Ms R] does not appear to have been directly involved in the [Q] RFP process, while [Mr B] was involved in the process, but was not captured in any emails sent directly to [Consultant] (on behalf of [Q]), but rather in a series of internal emails relating to the preparation of the response to the [Q] RFP. The exclusive selection of [Ms R] (for ION) and [Mr B] (for Broadway) resulted in relevant evidence being omitted from ION Group's response to the CMA.

50. On 15 May 2020, the CMA wrote to ION stating that it had significant concerns about various aspects of the 14 May 2020 response. The CMA referred (among other matters) to missing correspondence between Broadway/[ION division] and [Consultant]/[Q] in the period from 26 March 2020 to 22 April 2020 and requested ION to provide all responsive emails,

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[73] Section 109 EA02 notice dated 6 May 2020 from the CMA to ION Group. This required the following to be produced to the CMA: 'Copies of all email correspondence between each Party and the tendering customer, in relation to the specific tender(s) identified in response to this question, dated from 6 February 2020 onwards' (question1 i.) For these purposes, a 'Party' was defined to include 'all subsidiaries and brands of each of the Parties, e.g. [✂], [ION division], [✂], [Broadway division]' (footnote 1 to question 1).
[74] This correspondence had previously been provided to the CMA by [Consultant] (email dated 4 May 2020 from [Consultant] to the CMA). See Table 1 above.
[75] Letter dated 14 May 2020 from ION to the CMA. The letter was headed 'COMPLIANCE STATEMENT ON BEHALF OF ION GROUP ("ION")' and set out the steps ION had taken to comply with the document production requirements of the section 109 EA02 notice dated 6 May 2020. This compliance statement was submitted in addition to the periodic Compliance Statements required by paragraph 7 of the IEO.

including in connection with the '[Q] bid'.[76] The CMA also raised significant concerns in relation to the custodians and the search terms used by ION to identify and produce documents that were responsive to the CMA's 6 May 2020 letter.[77] On 18 May 2020, [Mr I] (CEO of ION), responded as follows:

a) A revised compliance statement, dated 18 May 2020 and signed by [Mr I], was provided.[78] This listed the custodians within ION (23 in total) and Broadway (24 in total) by reference to whom searches for relevant documents were made. The ION custodians included staff in sales and account management functions and also [Mr M] (CEO [ION division]) and [Mr Y] (COO [ION division]). The Broadway custodians included staff in sales, account management and product management functions and also [Mr B] (CEO, Broadway), [Mr A] (CEO [Broadway division] [✂]) and [Mr X] (Head of Sales [Broadway division] [✂]). It was further stated that [Mr C] (ION Group General Counsel) had explained to the two individuals ([Ms R] (for ION) and [Mr B] (for Broadway)) who were leading on this piece of work what documents were required to be produced and to provide the search terms and instructions on how to conduct the search. The search terms used for Broadway included '[f]or [Q], all emails to / from [Broadway division] and [Q] … (less meeting invite emails), as Broadway had no email communication with [Q] since Feb 6'. The search terms used for ION did not include any reference to '[Q]'.

b) The cover email from [Mr I] stated 'see attached file for all email correspondence in connection with the [Q] bid between Broadway/[ION division] and [Consultant]/[Q] in the period from 26 March 2020 to 22 April 2020'.[79] The attached file (entitled '[ION division] [Q] 26 Mar to 22 Apr.pdf) contained just 6 emails, all of which were between ION and [Consultant], only 2 of which included [Broadway division]/Broadway as a copy recipient, and none of which were between [Broadway division]/Broadway and [Consultant]:

(i) Two emails dated 26 March 2020 at 16:28 and 16:38 between [Mr M] (ION) and [Consultant], copied to [Mr X] (Broadway). In these emails,

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[76] Email dated 15 May 2020 at 17:41 from the CMA to Baker McKenzie (for ION), copied to ION.
[77] *Ibid*.
[78] Letter dated 18 May 2020 from ION to the CMA. The letter was headed 'COMPLIANCE STATEMENT ON BEHALF OF ION GROUP ("ION")' and set out the steps ION had taken to comply with the document production requirements of the section 109 EA02 notice dated 6 May 2020. This compliance statement was submitted in addition to the periodic Compliance Statements required by paragraph 7 of the IEO.
[79] Email dated 18 May 2020 from ION to the CMA. It is relevant to note that [Mr I] was responding to the CMA's email dated 15 May 2020 which had been addressed to ION's external legal advisers at the time (Baker & McKenzie), copied to [Mr I] among others at ION. The relevant question in the CMA's email (prefaced by the introduction 'Missing correspondence') did not call for a response directly from [Mr I] or any senior manager in ION. However, the response to that question was provided personally by [Mr I], as noted above.

[Mr M] sent to [Consultant] the slides presented by ION and Broadway and [Consultant] said they had passed them on to [Q].

(ii) Email dated 1 April 2020 at 09:54 from [Consultant] to [Q] [✂] RFP mailbox, bcc [Mr Y] (ION), with the reminder sent to all interested vendors that the deadline for the [Q] RFP was on Friday of that week.

(iii) Email dated 21 April 2020 at 15:02 from [Consultant] to [Q] [✂] RFP mailbox, bcc [Mr Y] (ION), updating all interested vendors on the status of the [Q] RFP and deadlines for next steps.

(iv) Email dated 22 April 2020 at 09:30 from [Consultant] to [Q] [✂] RFP mailbox, bcc [Mr Y] (ION), asking for additional platform details in relation to the [Q] RFP.

51. On 7 December 2020, ION and Broadway provided further documents to the CMA in response to a further targeted request.[80] Several of those documents were also responsive to the CMA's requirement of 6 May 2020 to produce relevant email correspondence between each party and the tendering customers in respect of business opportunities tendered for 'from 6 February 2020 onwards' and ought to have been provided at the time of ION's response of 14 May 2020. For example:

a) Email dated 4 May 2020 at 11:40 from [Mr X] (Broadway) to [Consultant], copied to [Mr Y] (ION), stating that 'the [✂] proposed in the RFP is a joint endeavour'.[81]

b) Email dated 4 May 2020 at 19:45 from [Mr X] (Broadway) to [Consultant], copied to [Mr Y] (ION), clarifying that 'it's probably more accurate to say that our [✂] solution is interchangeable (i.e. optional across [✂] Bway and [ION division] [✂])'.[82]

Compliance Statements

52. The IEO required ION Group and ION Trading to provide periodic Compliance Statements, starting on 16 April 2020 and thereafter every two weeks. Specifically, in each case the Compliance Statement was required to be provided by the CEO of ION Group and ION Trading[83] (in the form set out in the IEO) on behalf of each entity, confirming compliance with the IEO (IEO, paragraph 7). The IEO also required ION to procure that Compliance

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[80] The documents were provided in response to section 109 EA02 notice dated 30 November 2020 from the CMA to ION and Broadway.
[81] Email dated 4 May 2020 at 11:40 from Broadway to [Consultant].
[82] Email dated 4 May 2020 at 19:45 from Broadway to [Consultant] at [Q] [✂] RFP inbox, cc. ION.
[83] The IEO also provided that other persons of ION as agreed with the CMA could provide the periodic Compliance Statement.

Statements for the same periods were provided on behalf of Broadway (IEO, paragraph 8).[84]

53. The Compliance Statements listed in Table 2 on the next page were provided in respect of the time periods of key events that are the subject of this decision.

[84] Such Compliance Statements were to be provided by the person responsible for the management of the Broadway business or other persons of Broadway as agreed with the CMA (paragraph 8 of the IEO).

Table 2 – Compliance Statements provided in respect of the time periods of key events that are the subject of this decision

Period for which compliance with the IEO was certified **('period between [x] to [y]')**	**Entities on behalf of which compliance with the IEO was certified**	**Certification of compliance – signature of person and date**
2 to 16 April 2020	ION Group and subsidiaries[85] ION Trading and subsidiaries[86]	[Mr I] (CEO, ION) 16 April 2020
	Broadway and subsidiaries[87]	[Mr B] (CEO, Broadway) 16 April 2020
17 to 30 April 2020	ION Group and subsidiaries[88] ION Trading and subsidiaries[89]	[Mr I] (CEO, ION) 30 April 2020
	Broadway and subsidiaries[90]	[Mr B] (CEO, Broadway) 30 April 2020
1 to 14 May 2020	ION Group and subsidiaries[91] ION Trading and subsidiaries[92]	[Mr I] (CEO, ION) 14 May 2020
	Broadway and subsidiaries[93]	[Mr B] (CEO, Broadway) 14 May 2020

54. The content of each of the Compliance Statements listed above followed the form set out in the IEO and for present purposes was materially the same,

[85] Letter dated 16 April 2020 from ION Group to the CMA, headed 'Compliance statement for ION'.
[86] Letter dated 16 April 2020 from ION Trading to the CMA, headed 'Compliance statement for ION Trading'.
[87] Letter dated 16 April 2020 from Broadway to the CMA, headed 'Compliance statement for Broadway'.
[88] Letter dated 30 April 2020 from ION Group to the CMA, headed 'Compliance statement for ION'.
[89] Letter dated 30 April 2020 from ION Trading to the CMA, headed 'Compliance statement for ION Trading'.
[90] Letter dated 30 April 2020 from Broadway to the CMA, headed 'Compliance statement for Broadway'.
[91] Letter dated 14 May 2020 from ION Group to the CMA, headed 'Compliance statement for ION'.
[92] Letter dated 14 May 2020 from ION Trading to the CMA, headed 'Compliance statement for ION Trading'.
[93] Letter dated 14 May 2020 from Broadway to the CMA, headed 'Compliance statement for Broadway'.

except (i) where stating the name of the entity on behalf of which the Compliance Statement was provided – this is shown as '[Entity]' in the extracts below – and (ii) in relation to paragraph 3 of a Compliance Statement, as set out below. The Compliance Statements certified compliance with, among other matters, the following:

a) Paragraph 1:

- '**[Entity] has complied with the Order made by the CMA** in relation to the transaction on 2 April 2020 (the Order)' (paragraph 1(a), emphasis added).
- '**[Entity]'s subsidiaries have also complied with this Order**' (paragraph 1(b), emphasis added).

b) Paragraph 2: '… except with the prior written consent of the CMA':

- '… **no action has been taken** by [Entity] that might prejudice a reference of the transaction under section 22 of the Act or impede the taking of action by the CMA which may be justified by its decision on such a reference, including action **which might** … **impair the ability of the Broadway business or the ION business to compete independently** in any of the markets affected by the transaction' (paragraph 2(a)(iii), emphasis added).
- '**The Broadway business has been carried on separately** from the ION business **and the Broadway business's separate sales or brand identity has been maintained**' (paragraph 2(b), emphasis added).

c) Paragraph 3:

- ION Group and ION Trading: '**[Entity] and its subsidiaries remain in full compliance with the Order** and will, or will procure that Broadway, continue [sic] actively to keep the CMA informed of any material developments relating to the Broadway business or the [ION Entity] business in accordance with paragraph 8 of the Order' (paragraph 3, emphasis added).
- Broadway: '**Broadway remains in full compliance with the Order** and will continue actively to keep the CMA informed of any material developments relating to the Broadway business in accordance with paragraph 8 of the Order' (paragraph 3, emphasis added).

55. At no point did any of the Compliance Statements make reference to the events relating to the response to the [Q] RFP.

Conclusion

56. In conclusion, the evidence set out above demonstrates, among other matters, that:

a) ION Group had to be prompted several times (in April and May 2020) before it identified (on 14 May 2020) the [Q] RFP or the response to the [Q] RFP. It had previously inaccurately maintained that 'no joint customer interactions' had taken place since 2 April 2020, even when requested by the CMA to confirm certain matters in relation to 'joint approaches' that the CMA understood had been made to some customers.

b) As regards various requirements to produce relevant documents –

(i) Despite prompting by the CMA (on 6 May 2020), including through specific references to [ION division] (ION) and [Broadway division] (Broadway) in respect of business opportunities tendered for 'from 6 February 2020 onwards', ION Group's response (on 14 May 2020) omitted correspondence relating to the [Q] RFP.

(ii) On further prompting by the CMA (on 15 May 2020), including by reference to the '[Q] bid' as identified in ION Group's response (on 14 May 2020), ION produced (on 18 May 2020) communications between ION and [Consultant] (which should have been produced in response to the 6 May 2020 requirement), but did not produce any communications between [Broadway division]/Broadway and [Consultant]. That was so notwithstanding the fact that search terms for Broadway documents were said to have been conducted by reference to (among other matters) '[Q]'.

(iii) Further documents that should have been produced in response to the CMA's requirement of 6 May 2020 (for example, emails from Broadway to [Consultant] on 4 May 2020, at 11:40 and 19:45, both of which had been copied to ION) were eventually produced (on 7 December 2020) in response to a further targeted requirement from the CMA.

c) The Compliance Statements signed by [Mr I] (CEO, ION) for each of ION Group and ION Trading, and by [Mr B] (CEO, Broadway) for Broadway, certified compliance with the IEO by those entities and their subsidiaries for each two-week period from 2 April 2020 to 14 May 2020. In addition, the Compliance Statements expressly certified compliance with, among

other matters, the IEO requirements that, except with the CMA's prior written consent: (i) no action had been taken which might impair the ability of the Broadway business or the ION business to compete independently; and (ii) the Broadway business had been carried on separately from the ION business and the Broadway business's separate sales or brand identity had been maintained. At no point did any of the Compliance Statements make reference to the events relating to the response to the [Q] RFP.

The CMA's provisional decision on administrative penalty

57. On 18 May 2021, the CMA issued to ION a provisional decision to impose a penalty under section 94A of the EA02 (the Provisional Decision).[94] On 24 May 2021, ION stated that it would not be making oral representations. ION provided written representations on the Provisional Decision on 1 June 2021 (ION's Representations).

58. The CMA has considered ION's Representations and has reviewed the Provisional Decision accordingly. The key submissions in ION's Representations are addressed in sections D and E below.

C. Legal Framework

Relevant legislation

59. 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.

60. 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'.

61. Section 72(3C) of the EA02 provides that a person may, with the CMA's consent, take action (or action of a particular description) that would otherwise contravene an initial enforcement order. In practice, where the CMA grants such consent, it does so by making a derogation in respect of specific provisions of an initial enforcement order.

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[94] The CMA had sent ION a letter dated 18 August 2020 setting out its initial concerns in relation to the response to the [Q] RFP and stating that it was considering imposing a penalty. ION responded to that letter on 27 August 2020. The Provisional Decision was issued following the CMA's consideration of ION's representations and of additional documents that were produced by ION in December 2020 in response to a further CMA request.

62. 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.

63. 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'.

64. 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'.[95]

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

66. There is no statutory time limit within which the CMA must impose a penalty under section 94A(1) of the EA02.

67. Section 94B(1) and (2) of the EA02 requires the CMA to prepare and publish a statement of policy on the use of its powers to impose a financial penalty under section 94A and the considerations relevant to the determination of the amount of any penalty imposed.[96]

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

Relevant case law

69. The meaning of 'pre-emptive action' and the role of interim and initial enforcement orders in merger control has been considered by the Competition Appeal Tribunal (CAT) on a number of occasions.

70. In *ICE/Trayport*,[97] the CAT observed that 'pre-emptive action' is a broad concept. It concerns conduct which might prejudice the reference or which

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[95] The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 makes provision for when an enterprise is to be treated as controlled by a person and the turnover of an enterprise.
[96] In January 2014, the CMA published its statement of policy, Administrative penalties: Statement of Policy on the CMA's approach (CMA4).
[97] *Intercontinental Exchange v CMA* [2017] CAT 6 (*ICE/Trayport*).

might impede action justified by the CMA's ultimate decision'.[98] In *Facebook*, the CAT (subsequently upheld by the Court of Appeal) added that pre-emptive action includes 'action that has the potential to affect the competitive structure of the market during the CMA's investigation'.[99]

71. In *Stericycle*,[100] the CAT considered the meaning of pre-emptive action in section 80(1) of the EA02,[101] and held that 'the word "might" implies a relatively low threshold of expectation that the outcome of a reference might be impeded'.[102] The CAT added that at the time of considering whether to exercise the statutory powers to make an interim order (for the purpose of preventing pre-emptive action), the CMA necessarily cannot be sure whether any action being taken (or proposed to be taken) by the merging parties 'will ultimately' impede any action being taken by the CMA as a result of the reference.[103]

72. In *ICE/Trayport*, the CAT 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' (emphasis as in the original).[104] 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…'[105]

73. More generally, in *Electro Rent*,[106] 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.[107]

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[98] *Ibid* at [220].
[99] *Facebook v CMA* [2020] CAT 23 (*Facebook*), at [124]; see also at [21]. The CAT's judgment was upheld by the Court of Appeal (*Facebook v CMA* [2021] EWCA Civ 701, at paragraph 56).
[100] *Stericycle International LLC v Competition Commission* [2006] CAT 21 (*Stericycle*).
[101] 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.
[102] *Stericycle* at [129].
[103] *Stericycle* at [129]. Affirmed in *Facebook*, at [124].
[104] *ICE/Trayport* at [220].
[105] *Ibid*. at [223].
[106] *Electro Rent Corporation v CMA* [2019] CAT 4 (*Electro Rent*).
[107] *Ibid* at [120].

The purpose of an IEO

74. 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'.[108] 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.

75. The purpose of an initial enforcement order 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.[109] The broad nature of pre-emptive action is reflected in the similarly broad wording of an initial enforcement order which the CAT held in *ICE/Trayport* 'should be interpreted to give full effect to its legitimate precautionary purpose'.[110] In *Facebook*, the CAT (subsequently upheld by the Court of Appeal) added that the role of interim measures also includes preventing anti-competitive harm from the merger impacting the position of other undertakings on any affected markets, which may be irremediably detrimental.[111]

76. An initial enforcement order contains positive obligations on the addressees to do certain things as well as obligations to refrain from taking certain actions. As noted in paragraph 72 above, the onus is on the addressees to seek consent if their conduct creates the possibility of prejudice or impediment.[112]

77. Where a merger has been completed, it is critical that the acquired business continues to compete independently with, including maintaining its sales or brand identity separate from, the purchaser's business and is maintained as a going concern. If the acquired business were to be integrated more than is necessary or its viability undermined pending the outcome of the merger investigation, this would risk impeding any action the CMA might need to undertake should it find the merger had resulted in a substantial lessening of competition.

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[108] *Société Coopérative de Production SeaFrance SA v CMA and another* [2015] UKSC 75, at paragraph 4; see also paragraph 35.
[109] Section 72(8) of the EA02. In *Facebook*, the CAT stated that interim measures play a vital role in allowing the CMA to ensure that, other than certain steps taken in the ordinary course of business, a merger and the actions of merging parties do not impact the pre-merger competitive structure of the market during the period of the CMA's investigation (at [21], upheld by the Court of Appeal in *Facebook v CMA* [2021] EWCA Civ 701, at paragraph 59).
[110] *ICE/Trayport* at [220].
[111] *Facebook* at [21], upheld by the Court of Appeal in *Facebook v CMA* [2021] EWCA Civ 701, at paragraph 59.
[112] *ICE/Trayport* at [220].

Relevant provisions of the IEO

78. The relevant provisions of the IEO in this case are as follows:

a) '4. Except with the prior written consent of the CMA, ION and ION Trading shall not … take any action which might prejudice a reference of [the Merger] under section 22 of the [EA02] or impede the taking of any [remedial] action … under the [EA02], including any action which might:

…

(c) … impair the ability of the Broadway business or the ION business to compete independently in any of the markets affected by [the Merger]' (paragraph 4 and 4(c) of the IEO).

b) '5. Further and without prejudice to the generality of paragraph 4 … ION and ION Trading shall at all times … procure that, except with the prior written consent of the CMA:

(a) the Broadway business is carried on separately from the ION business and the Broadway business's separate sales or brand identity is maintained' (paragraph 5(a) of the IEO).

c) '6. ION and ION Trading shall procure that each of their subsidiaries complies with [the IEO] as if the [IEO] had been issued to each of them' (paragraph 6 of the IEO).

d) '7. ION and ION Trading shall provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by ION and ION Trading and their subsidiaries with [the IEO]. In particular, on 16 April 2020 and subsequently every two weeks … thereafter … the [CEO] of ION and ION Trading … shall … provide a statement to the CMA in the form set out in [Annexes to the IEO] confirming compliance with [the IEO]' (paragraph 7 of the IEO).

D. Failures to comply with an interim measure

79. On the basis of the evidence provided to the CMA, and following careful assessment of ION's Representations, for the reasons set out below the CMA has decided that ION has failed to comply with the IEO in the following respects:

a) Breach 1 – presentation of the Broadway and [ION division] (ION) offers collectively to [Consultant] (failure to comply with paragraphs 4, 5(a) and 6 of the IEO);

b) Breach 2 – failure to provide to the CMA the requisite information for compliance-monitoring purposes (failure to comply with paragraph 7 of the IEO).

80. ION submitted that it had complied with the IEO and that, even on the basis of the CMA's own interpretation of the facts (which ION disputed), 'there was no breach of the IEO either as a result of the actions in respect of the [Q] RFP or ION's actions to procure compliance and provide information to the CMA'.[113]

81. A recurring point made throughout ION's Representations was that the CMA had accepted (or admitted, or it was common ground) that there was no 'joint bid'[114] (and / or no 'joint bid contrary to paragraph 5(g) of the IEO')[115] and that this meant that there was no breach by ION of the IEO. As this point, and variations of it, were made in numerous submissions in respect of different paragraphs of the IEO and it formed a key plank of ION's defence, the CMA sets out its response at the outset as follows:

a) The fact that a provisional decision does not allege a breach of one provision of the IEO (in this case, paragraph 5(g) of the IEO),[116] does not mean that the CMA has accepted that there was no breach of that provision of the IEO, or indeed of any other provision of the IEO. Nor does it constitute a defence in respect of an alleged breach of other provisions of the IEO that are engaged by the conduct in question.

b) The CMA has not accepted that the conduct in question did not involve a joint bid. Moreover, the CMA's finding of a breach of paragraphs 4 (and in particular 4(c)), 5(a) and 6 of the IEO does not require such a prior finding (see paragraphs 83 to 89 and 94 to 96 below). The reality, as demonstrated by the evidence and the analysis below, is that the

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[113] ION's Representations, paragraph 1.7 (see also paragraphs 3.5, 3.11 and 8.1).
[114] ION's Representations, paragraphs 4.3, 6.9, 7.3(f), 7.5(a) and 8.3 (see also paragraph 3.17 which makes a point to the same effect).
[115] ION's Representations, paragraphs 2.3, 3.12, 6.3, 6.4, 6.6 and 7.3(a). ION's submission (at paragraph 2.2) that the CMA's letter dated 18 August 2020 'exclusively focussed' on potential breaches of paragraphs 5(g) and 5(l) of the IEO is incorrect. The CMA's letter referred expressly to paragraphs 4(c) and 5(a) of the IEO, among other paragraphs of the IEO, in the section of the letter which set out a non-exhaustive list of obligations imposed by the IEO (section A, at pages 1 and 2 of the letter); and it invited ION to comment on the letter more generally, before referring to specific points ('In order to assist us, we invite your comments on the issues raised in this letter. Furthermore, we would like you to indicate …[listing specific points which included a question in respect of the [Q] RFP by reference to paragraph 5 of the IEO]' (section C, at page 4 of the letter)).
[116] In summary, paragraph 5(g) of the IEO provides that ION shall procure that, among other matters and except with the prior written consent of the CMA, negotiations with existing or potential customers in relation to the Broadway business will be carried out by the Broadway business alone and that the ION and Broadway businesses will not negotiate on behalf of each other or enter into any joint agreements with each other.

response to the [Q] RFP presented the Broadway and [ION division] (ION) offers collectively to [Consultant] and subsequent communications (later in April 2020 and in May 2020) between two or more of [Consultant], Broadway and ION continued on that basis, with Broadway seeking to gain a competitive advantage (over rival bids) as a result of the Merger by referring to the complementary capabilities of ION subsidiaries and Broadway and the complete and proven solution that those complementary capabilities allowed Broadway to offer.

c) In any event, the 'joint' nature of the response to the [Q] RFP was expressly referred to in those (or similar) terms in various communications: for example, on 3 April 2020, in response to [Consultant]'s question 'Is your submission on behalf of [Broadway division]/Broadway and [ION division] too?', Broadway responded 'Yes, we are submitting one joint response' (emails dated 3 April 2020 at 12:46 and 12:48, see Table 1 above); and on 4 May 2020, Broadway responded to a further request from [Consultant] and stated that the [✂] proposed was 'a joint endeavour', which it later clarified 'to say that our [✂] solution is interchangeable (i.e. optional across [✂] Bway and [ION division] [✂])' (emails dated 4 May 2020 at 11:40 and 19:45 from Broadway to [Consultant], copied to ION, see Table 1 above).[117]

82. The CMA has addressed the remainder of ION's key submissions in the analysis below.

Breach 1 – presentation of the Broadway and [ION division] (ION) offers collectively to [Consultant]

83. The IEO was communicated to ION on 2 April 2020 at 14:26 and came at a time when ION and Broadway were, as demonstrated by the evidence, continuing to collaborate very closely on the draft response to the [Q] RFP. However, despite the imposition of the IEO, the collaboration continued: there were extensive and detailed exchanges after the IEO came into force between ION and Broadway in relation to the draft response, including contributions from ION on its content; and on numerous occasions the emails exchanged referred to discussions that had taken place after the IEO came into force between ION and Broadway and in particular that [Mr E] ([✂] COO,

[117] Other examples include an internal Broadway email dated 1 May 2020 which referred to Broadway and [ION division] and noted that 'In our RFP response for the [✂] section we provided a combined response' (email dated 1 May 2020, from [Mr X] (Broadway) to colleagues within Broadway); and the response provided on 11 May 2020 by Broadway to [Consultant], copied to ION, stating 'Please find attached our answers to your additional questions' (email dated 11 May 2020 from Broadway to [Consultant], copied to ION, responding to the email dated 5 May 2020 from [Consultant] addressed both to Broadway and ION).

ION) had agreed with the approach being taken (see paragraphs 27 to 30 above).

84. For present purposes, the key elements of the response to the [Q] RFP, as submitted on 3 April 2020 (and referred to in paragraph [21] above), were as follows:

a) Albeit being Broadway-led and with a focus on Broadway's offering, it presented the respondents in various parts as comprising collectively Broadway and [ION division]/ION. The following are examples of various statements that were made: 'Please find attached Broadway Technology (incorporating Broadway, [Broadway division] and [ION division]) response to [Q] [✂] RFP' (email dated 3 April 2020 at 17:24 from Broadway to [Consultant], see Table 1 above); 'Broadway and [ION division], as part of the ION Group are pleased to respond to [Q]'s RFP …' (Executive Summary); and '… ION Financial Group represented in this project by Broadway Technology, [Broadway division] [✂] (A Broadway Technology Company) and [ION division]' (RFP Vendor Response Form).

b) [ION division] was expressly presented as a supplier of part of the proposal, including listing its CEO as a key contact for the project, together with several Broadway services / products and several Broadway staff at CEO, COO and managerial levels. Moreover, it was expressly stated that the use of any subcontractors was not anticipated. [ION division] was, therefore, presented as an integral part of the proposal and together with Broadway as part of the ION Group.

c) More generally, Broadway sought to gain a competitive advantage (over rival bids) as a result of the Merger, noting that 'As part of ION Group, Broadway provides a wide range of [✂] capabilities through partners, including [ION division]' and that 'Broadway, as a member of the ION Group is the only vendor that can offer a complete and proven [✂] solution'.

85. The communications that took place later in April 2020 and in May 2020 between two or more of [Consultant], Broadway and ION continued on the basis of the response that was submitted (see Table 1, paragraphs 31 to 32 and the summary at paragraph 33(e) above).

86. As explained below, ION's conduct (including its failure to take all necessary corrective steps) after the IEO came into force constituted a failure to comply with the IEO as follows:

a) the failure by ION to comply with paragraphs 4 and 5(a) of the IEO; and

b) the failure by ION to procure the compliance by subsidiaries (notably, Broadway) of the IEO (as required by paragraph 6 of the IEO).

Failure to comply with paragraphs 4 and 5(a) of the IEO

87. As noted above, after the IEO came into force, ION continued its very close collaboration with Broadway in relation to the draft response to the [Q] RFP, including contributing to its content. ION also failed to take all necessary corrective steps to comply with its new obligations under the IEO: for example, to ensure that references to [ION division]/ION and relevant individuals (including those that were legitimately included in drafts of the response before the IEO came into force), either no longer formed part of the response that was submitted, or were modified so as to ensure compliance with the IEO.

88. ION thereby failed to comply with the IEO after it came into force, in particular as follows:

a) ION's conduct (including its failure to take all necessary corrective steps) after the IEO came into force constituted action[118] which might impair the ability of the Broadway business or the ION business to compete independently, since both Broadway services / products and ION services / products, as well as named key senior individuals in Broadway and ION, were included in the response to the [Q] RFP. At no time did ION obtain the prior written consent of the CMA, as required by the IEO. ION therefore failed to comply with paragraph 4 (and in particular paragraph 4(c)) of the IEO.

b) ION's conduct (including its failure to take all necessary corrective steps) after the IEO came into force also constituted a failure to procure that the Broadway business was carried on separately from the ION business and the Broadway business's separate sales or brand identity was maintained. That was because the response to the [Q] RFP included ION services / products (alongside Broadway services / products), as well as naming the [ION division] CEO as a key contact (alongside several Broadway staff at CEO, COO and managerial levels). The response thereby conveyed to [Consultant] that Broadway and ION formed part of the same proposal. In addition, in the Executive Summary (to which ION had contributed), reference was made to Broadway as part of the ION Group and emphasis

[118] Action includes both positive action as well as an omission, such as a failure to act. The IEO itself recognises that an omission can constitute a breach (see the reference to an 'omission' in paragraph 3 of the IEO). Moreover, ensuring compliance with the IEO may require taking specific steps, as well as refraining from specific action (see paragraph 11 of the IEO).

was placed on the competitive advantage (over rival bids) that resulted from the Merger ('As part of ION Group, Broadway provides a wide range of [✂] capabilities through partners, including [ION division]' and 'Broadway, as a member of the ION Group is the only vendor that can offer a complete and proven [✂] solution' (see paragraph [21](b)(ii) above)). At no time did ION obtain the prior written consent of the CMA, as required by the IEO. ION therefore failed to comply with paragraph 5(a) of the IEO.

89. The above failures by ION to comply with the IEO continued beyond the events of 2 April 2020 (after the IEO came into force) and 3 April 2020:

a) As regards ION's contribution: on 4 May 2020, there were various email exchanges between ION and Broadway in respect of a request from [Consultant] (addressed to both of them) for additional information in relation to the response to the [Q] RFP. In those exchanges, ION was pushing for the [✂] to be fully provided by [ION division] (ION), and as was eventually agreed Broadway then clarified to [Consultant] that the [✂] solution was interchangeable across [✂] Broadway and [ION division] [✂] (see Table 1 and paragraph 31 above).

b) As regards ION's failure to take all necessary corrective steps: ION failed to distance itself from communications it had received from [Consultant] on 21 and 22 April 2020 (as a recipient to emails sent by way of 'blind copy' to all interested vendors (see Table 1 above)), on 1 May 2020 (in which [Consultant] stated its understanding that the response included Broadway and [ION division] [✂] (see Table 1 above)), and on 5 May 2020 (in which [Consultant] addressed additional questions directly both to Broadway and ION (see Table 1 above)). In addition, ION failed to distance itself from the response submitted by Broadway on 11 May 2020, copied to ION, providing 'our answers' to [Consultant]'s questions of 5 May 2020 which were directed both to [Mr X] (Broadway) and [Mr Y] (ION) (see Table 1 and paragraph 32 above). On these occasions, ION's failure to take all necessary corrective steps perpetuated the continuation of the situation in which ION and Broadway were being presented collectively to, and treated collectively by, [Consultant] for the purposes of the response to the [Q] RFP.

90. In relation to paragraph 4 of the IEO, ION made four submissions, the key elements of which were as follows:

a) ION's first two submissions were premised on the basis that the outcome of the CMA's investigation was relevant in assessing whether prior action falls within the meaning of pre-emptive action. Firstly, ION submitted that

any reference was not or might not have been prejudiced by any ION action, because the CMA's finding of a substantial lessening of competition in the phase 1 investigation and potential reference was in respect of FI (that is, the fixed income business), whereas the response to the [Q] RFP related to [✂] (that is, the [✂] business).[119] Secondly, ION submitted that the CMA's discretion in accepting the divestment of Broadway's FI business at phase 1 was not prejudiced as a result of the response to the [Q] RFP.[120] However, the CMA's view is that ION misapplies the legal test of when the concept of pre-emptive action is to be assessed, which applies at the time of the events in question; it does not apply by reference to the outcome of the CMA's merger investigation. If ION's view were correct (which it is not), that would deprive the IEO of its purpose because it would mean that the CMA would have to wait for the substantive outcome of the CMA's investigation before it could take enforcement action for breach of an initial enforcement order, which would undermine the precautionary and preventative purpose of the IEO.

b) Thirdly, ION submitted that any risk of prejudice to a reference was precluded by the fact that the response to the [Q] RFP was voluntarily re-submitted by Broadway clarifying that the revised proposal was for Broadway without [ION division]. ION added since that re-submission was made on 3 June 2020, that meant that for the last month of the CMA's phase 1 investigation it was clear that there was no risk of prejudice to a reference. However, in the CMA's view, ION's submissions do not impact the assessment of whether there has been a failure to comply with the IEO for the following reasons:

(i) The action taken by Broadway was taken 2 months after (1) the IEO came into force (on 2 April 2020), and (2) the response to the [Q] RFP was submitted (on 3 April 2020). Thus, a significant period had elapsed in which there had been a failure to comply with the IEO. Moreover, Broadway's action followed requests for information relevant to, and concerns raised by the CMA in relation to, the [Q] RFP (see paragraphs 22 and 23 above). This was, therefore, far from a case in which ION or Broadway had identified of their own initiative and very early on a failure to comply with the IEO and acted immediately and without prompting by the CMA. Had they done so, that would have been relevant to the imposition of a penalty, rather than whether there had been a failure to comply with the IEO.

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[119] ION's Representations, paragraph 3.6.
[120] ION's Representations, paragraph 3.7. ION also noted that, being a divestment remedy at phase 1, it was on a more conservative basis than would otherwise have been the case at phase 2.

(ii) Similarly, even if it were the case that for the last month of the CMA's phase 1 investigation there was no risk that the response to the [Q] RFP might prejudice a reference, then for the same reasons given in relation to sub-paragraph (a) above, that would not have affected the risk of prejudice to a reference or of impediment to remedial action at the time of the events pre-dating 3 June 2020. Nor would it have affected the competitive advantage that might have flowed to Broadway prior to 3 June 2020 as a result of having held itself out to [Consultant] as being a stronger supplier as part of the ION Group.

c) Fourthly, ION submitted that, after the IEO came into force, there was no commercially sensitive information shared between Broadway and ION (which was accepted by the CMA) and since there was no breach of paragraph 5(l) of the IEO, the response to the [Q] RFP did not constitute action that might prejudice a reference.[121] However, these points are not relevant, for the following reasons. Firstly, the fact that the CMA has not alleged in a provisional decision a breach of one provision of the IEO (in this case, paragraph 5(l) of the IEO),[122] is not a defence in respect of an alleged breach of such other provisions of the IEO that are engaged by the conduct in question; nor does it mean that the CMA has accepted that there was no breach of that provision of the IEO, or indeed of any other provision of the IEO. Secondly, the CMA has not in fact accepted that no commercially sensitive information was shared between Broadway and ION (see, for example, paragraphs 29 and 30 above which show that on numerous occasions after the IEO was issued a draft of the response to the [Q] RFP was disclosed by Broadway to ION and ION provided its comments to Broadway; see also paragraph 32 above which refers to the answers provided on 11 May 2020 by Broadway to [Consultant], copied to ION).[123]

91. In relation to paragraph 4(c) of the IEO, ION made seven submissions, the key elements of which were as follows:

a) Firstly, ION submitted that it was 'inconceivable that ION 'impaired' the ability of Broadway in any way', since the CMA had not alleged a breach of paragraph 5(g) of the IEO and there was no joint bid.[124] The CMA

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[121] ION's Representations, paragraph 3.9.
[122] In summary, paragraph 5(l) of the IEO provides that ION shall procure that, except with the prior written consent of the CMA, no confidential or proprietary information of various specified categories shall pass between the Broadway and ION businesses except where strictly necessary in the ordinary course of business and subject to additional specified requirements.
[123] The email dated 11 May 2020 from Broadway to [Consultant], copied to ION, attached a detailed spreadsheet which contained commercially sensitive information on various matters in tabs entitled '[✂]' and '[✂]' among others.
[124] ION's Representations, paragraph 3.12.

considers that the absence of an alleged failure to comply with paragraph 5(g) is not a defence to a failure to comply with paragraph 4(c) for the reasons set out at paragraph 81(a) above.

b) Secondly, ION submitted that [ION division] was a supplier to Broadway and nothing in the facts showed that the mere inclusion of a third party as a supplier impaired Broadway.[125] The CMA disagrees with these points for the following reasons:

(i) ION's characterisation of [ION division] as a supplier to Broadway is not supported by the evidence, which demonstrates that Broadway and [ION division] were presented collectively to [Consultant] as prospective suppliers to [Q]. For example, the RFP Vendor Response Form listed [✂] Broadway products followed by [ION division] as the supplier of '[✂]'; it named '[Mr M] – [ION division] CEO', alongside several Broadway staff at CEO, COO and managerial levels, as a member of the 'management contacts that will be assigned to our account and this engagement'; and it stated expressly that 'Broadway does not anticipate the use of any subcontractors' (see paragraph [21] above). Moreover, in various communications after the IEO had come into force, Broadway confirmed that the parties were submitting 'one joint response' (email dated 3 April 2020 at 12:48 from Broadway to [Consultant], see Table 1 above) and that the [✂] was 'a joint endeavour', which was later clarified 'to say that our [✂] solution is interchangeable (i.e. optional across [✂] Bway and [ION division] [✂])' (emails dated 4 May 2020 at 11:40 and 19:45 from Broadway to [Consultant], copied to ION, see Table 1 above).

(ii) Even if it were the case (which it was not) that [ION division] was a supplier to Broadway, Broadway had nonetheless submitted a proposal that included [ION division], which (given that it was part of ION) was a company with which Broadway should have been competing independently in accordance with the IEO (absent a prior derogation from the CMA). The situation was, therefore, one which risked the [Q] contract being awarded on the basis of Broadway's capabilities combined with those of [ION division]. This situation was not consistent with independent competition for the purposes of paragraph 4(c) of the IEO.

c) Thirdly, ION submitted that the fact that key [ION division] contact information was provided in the bid by Broadway was not enough to show

[125] ION's Representations, paragraph 3.13.

that Broadway was impaired in its ability to compete independently for the work. ION further submitted that purchasers would often request this information and expect interaction with suppliers (as shown in the evidence when [Consultant] contacted both Broadway and [ION division]).[126] However, ION's submissions do not engage with the full evidence base showing a failure to comply with paragraph 4(c) of the IEO in that the conduct in question risked impairing the ability of the Broadway business or the ION business to compete independently: see paragraphs 83 to 89 above which refer back to the evidence base on which the CMA relies. It includes, for example, the extensive and detailed exchanges (after the IEO came into force) between ION and Broadway in relation to the draft response, including contributions from ION on its content; the presentation (in the response submitted) of the Broadway and [ION division] (ION) offers collectively to [Consultant], in addition to naming [ION division] contact information; the competitive advantage that Broadway sought to gain as part of ION Group as a result of the Merger; and the ensuing communications that took place between two or more of [Consultant], Broadway and ION later in April 2020 and in May 2020 on the basis of the response to the [Q] RFP. Moreover, the evidence does not show (as contended by ION) that [Consultant] had contacted [ION division] as a supplier to Broadway; rather it shows [Consultant] treating [ION division] on the same basis as other interested vendors (see, for example, the emails sent by [Consultant] on 21 and 22 April 2020 to all interested vendors, in Table 1 above).

d) Fourthly, ION submitted that there was no impairment of Broadway, since having [ION division] as a supplier enhanced its ability to compete independently. ION added that there was nothing in the IEO stating that Broadway was precluded from using ION as (in ION's words) Broadway's 'preferred supplier' to increase its competitiveness. If the IEO operated to prohibit Broadway from ever selecting [ION division] as a supplier that would inevitably weaken Broadway because it would be prohibited from using [ION division], whilst its competitors would be able to use it. That was particularly significant in the present case because [Q] was already using [ION division] [✂].[127] The CMA disagrees with these points for the following reasons:

(i) Although the CMA agrees that including [ION division] as a supplier enhanced Broadway's ability to compete against rival bids (in the present case increasing its chance to win the [Q] contract), this is not

[126] ION's Representations, paragraph 3.14.
[127] ION's Representations, paragraph 3.15.

consistent with the Broadway business competing independently of the ION business for the purposes of paragraph 4(c) of the IEO, particularly in circumstances where: (1) prior to the imposition of the IEO, Broadway and [ION division] were originally approached independently to participate in the [Q] RFP and each responded separately to express its interest (see the communications on 17 to 24 February 2020 in Table 1 above), and Broadway and [ION division]/ION subsequently presented jointly to [Consultant] (see the communications to [Consultant] on 16 and 26 March 2020 in Table 1 above); and (2) after the IEO came into force, Broadway confirmed to [Consultant] that the parties would be submitting '*one joint response*' (see the communication on 3 April 2020 at 12:48 in Table 1 above) and the response to the [Q] RFP expressly stated that Broadway did not anticipate 'the use of any subcontractors' (see paragraph [21](c)(iii) above).

(ii) It follows that including [ION division] in the response to the [Q] RFP in the manner in which Broadway did is not consistent with paragraph 4(c) of the IEO which prohibited any action that might impair the ability of the Broadway business to compete independently of the ION business. This would also have been the case, even if [ION division] had been included in Broadway's response as a 'preferred supplier' (which is not what the evidence shows – see paragraph 91(b)(i) above).

(iii) Moreover, it does not follow from the IEO that Broadway could never have selected [ION division] as a supplier. The IEO prohibited certain action 'except with the prior written consent of the CMA' (see the opening text of paragraphs 4 and 5 of the IEO). ION was well aware of the need to seek a derogation from the CMA to permit certain actions, as it submitted a request for six derogations to the CMA on 21 April 2020 for consent in respect of a range of matters across various provisions of the IEO (including those provisions that are the subject of this final decision).[128] In contrast, no derogation request was submitted in respect of the [Q] RFP.[129] Broadway has also evidenced that it was aware of the need for CMA consent, since its email of 3 June 2020 to [Consultant] noted 'Should [Q] decide it wants to use [ION division] or any other ION [✂], we would not be able to

[128] Email dated 21 April 2020 from ION.BroadwayCMA outbox (Baker McKenzie mailbox) to the CMA. The derogations covered paragraphs 4, 5 and 6 of the IEO.
[129] ION submitted that as the [Q] RFP was neither an ION opportunity nor a joint bid, it did not need to request a derogation in respect of it (ION's Representations, paragraph 6.9). However, the CMA disagrees with ION's submission for the reasons given at paragraph 103(a) (as regards the [Q] RFP being an opportunity for ION, through its ownership of [ION division]) and paragraph 81 (as regards the question whether it was a joint bid).

discuss in any detail or agree to that without first having formally asked the CMA for permission to do so (which we can do)' (see paragraph 23 above).

e) Fifthly, ION submitted that Broadway's ability to compete independently could not have been impaired, as it voluntarily and unilaterally amended its proposal to [Q] on 3 June 2020.[130] The CMA disagrees with this submission. ION misses the point that until such time as the response to the [Q] RFP was amended to exclude [ION division]/ION, Broadway was seeking to enhance its prospects of winning the [Q] contract by maintaining (for two months after the IEO came into force) a bid that contained [ION division] as part of its supply arrangements (a sequence of events that was inconsistent with independent competition, particularly given no relationships within the bid were identified as involving subcontracting), and which therefore involved conduct that was inconsistent with the ION and Broadway businesses competing independently. The purported amendment of the proposal by Broadway on 3 June 2020 did not retrospectively cure the failure to comply with paragraph 4(c) of the IEO. Moreover, by 3 June 2020, ION would have been well out of time for submitting an independent competing bid, had it wanted to do so at that point.

f) Sixthly, ION submitted that there was no evidence to show that either [Consultant] or [Q] considered Broadway as anything other than independent and submitting its own bid 'without impairment'.[131] The CMA disagrees with these points for the following reasons:

(i) ION's submission as to the perceived independence of Broadway is not supported by the evidence. At various times, Broadway and ION were presented collectively to [Consultant] and [Consultant] communicated with Broadway and ION on that basis. For example, (1) on 3 April 2020, Broadway confirmed to [Consultant] that the parties were submitting 'one joint response' (email dated 3 April 2020 at 12:48, see Table 1 above); (2) the emails sent by [Consultant] on 21 and 22 April 2020 were sent by way of blind copy to all interested vendors, including Broadway and ION as separate blind copy recipients (emails dated 21 April 2020 and 22 April 2020 at 09:30, see Table 1 above); (3) the emails sent by [Consultant] on 1 and 5 May 2020 addressed Broadway and ION as primary recipients on an equal footing, as did the opening to each of those emails ('Hello [first name

[130] ION's Representations, paragraph 3.16.
[131] ION's Representations, paragraph 3.17.

of Mr X] and [first name of Mr Y]' - emails dated 1 and 5 May 2020, see Table 1 above); (4) that situation was corroborated by Broadway's emails dated 4 May 2020 to [Consultant], which were copied to ION (for example, confirming that the [✂] was 'a joint endeavour' and 'interchangeable (i.e. optional across [✂] Bway and [ION division] [✂])' - emails dated 4 May 2020 at 11:40 and 19:45, see Table 1 above); and (5) it was also corroborated by Broadway's email dated 11 May 2020 to [Consultant], copied to ION, in which it provided 'our answers' to additional questions (see Table 1 above). At no time did ION distance itself from any of those communications. Thus, the evidence demonstrates that [Consultant] did not in fact treat Broadway as being independent of ION.

(ii) ION's submission that there is no evidence that [Consultant]/[Q] considered Broadway as anything other than submitting its own bid 'without impairment' is not relevant to whether ION has failed to comply with paragraph 4(c) of the IEO.

g) Seventhly, ION submitted that 'these positions are confirmed by the Monitoring Trustee … as he at no point in the evidence presented statements that Broadway was not acting independently'.[132] However, the Monitoring Trustee made no such confirmation; he only reported to the CMA the matters which ION and Broadway had themselves confirmed to the Monitoring Trustee team (see paragraph 34 above). In those circumstances, it is not surprising that the Monitoring Trustee did not present statements that Broadway was not acting independently. The CMA therefore disagrees with ION's submission that the absence of evidence from the Monitoring Trustee is probative of the question of whether there has been a failure to comply with the IEO.

92. In relation to paragraph 5(a) of the IEO, ION repeated its submissions on paragraph 4(c) of the IEO and added a number of further points:

a) Firstly, ION submitted that at all times it had procured that Broadway's separate sales or brand identity was maintained. ION repeated its submission that the CMA had accepted that the proposal was not a joint bid and that the facts showed that it was a Broadway-only bid, using its own brand. ION further submitted that no facts presented by the CMA contradicted this.[133] The CMA disagrees with ION's submissions for the following reasons. Firstly, as regards the submission of there being no joint bid, the CMA refers to its response in paragraph 81 above. Secondly,

[132] ION's Representations, paragraph 3.18.
[133] ION's Representations, paragraph 4.3.

the CMA's view is that Broadway's separate sales or brand identity was not maintained: for example, (1) as noted in paragraph 88(b) above, the response to the [Q] RFP included ION services / products (alongside Broadway services / products), as well as naming the [ION division] CEO as a key contact (alongside several Broadway staff at CEO, COO and managerial levels), and thereby conveyed to [Consultant] that Broadway and ION formed part of the same proposal; (2) in the Executive Summary (to which ION had contributed), reference was made to Broadway being part of the ION Group and Broadway sought to gain a competitive advantage (over rival bids) as a result of the Merger, stating that 'as a member of the ION Group [it was] the only vendor that [could offer a complete and proven [✂] solution' (see paragraph [21](b)(ii) above)); and (3) as noted in paragraph 89 above, the failure to comply with paragraph 5(a) of the IEO in this way continued in various communications in April and May 2020. None of the above was consistent with maintaining Broadway's separate sales or brand identity.

b) Secondly, ION submitted that the CMA's concern in relation to this alleged breach was very limited, as it was in relation to a single customer, at a single point in time. ION added that this could not be considered akin to a more widespread breach such as that in PayPal/iZettle, which concerned a number of customers. ION further submitted that any confusion on the part of a single customer as to branding was quickly dispelled 'very early on' through the re-submission of Broadway's response to the [Q] RFP on 3 June 2020.[134] The CMA considers that ION's submission on a single customer is not relevant to the question whether there was a failure to comply with paragraph 5(a) of the IEO, which is not determined by whether a single or multiple customers were involved. The CMA also disagrees with ION's submissions that the breach occurred at a single point in time and that any confusion was quickly dispelled 'very early on' by Broadway re-submitting the response to the [Q] RFP. As noted in sub-paragraph (a) above, the conduct in question comprised not only the presentation collectively of Broadway and [ION division]/ION in the response to the [Q] RFP submitted on 3 April 2020, but also the conduct (including the failure to take all necessary corrective steps in relation to the response) in the ensuing communications in April and May 2020. Therefore, the failure to comply with the IEO did not occur only at a single point in time. Broadway's action on 3 June 2020 was very far from being 'very early on', as it was taken 2 months after the response to the [Q] RFP was submitted (on 3 April 2020). Moreover, the action followed various

[134] ION's Representations, paragraph 4.4.

prompts (through requests for information and expressions of concern) by the CMA, and in any event the action did not retrospectively cure the failure to comply with paragraph 5(a) of the IEO.

c) Thirdly, ION submitted that [ION division]'s inclusion in the response to the [Q] RFP was 'to highlight' that the Broadway solution [✂] the [ION division] [✂] which was already being used by [Q]. ION added that the CMA could not ignore the fact that [Q] was already a customer of [ION division] as [✂].[135] In support of these submissions, ION added that: in the eyes of the customer ([Q]), it would have been clear that the response to the [Q] RFP was a Broadway proposal and Broadway had confirmed (in ION's initial representations on 27 August 2020) that [✂] depending on whether [ION division] was referred to or not;[136] ION added that the CMA could not rely on the fact that a third-party representative, [Consultant], unfamiliar with both the intricacies of the [Q] [✂] and also the Broadway and [ION division] offerings, 'expressly sought clarification' on the nature of the response to the [Q] RFP; such clarification and statements made to a third-party go-between did not in any way indicate that the actions taken would reduce the separation perceived by the customer ([Q]).[137] The CMA has addressed ION's submissions as follows:

(i) Firstly, the CMA has taken into account the fact that [Q] was already a customer of [ION division], in for example: the email dated 4 May 2020 at 19:45 from Broadway to [Consultant], copied to ION, which stated: 'I know [Q] already use [ION division] [✂] and so of course if Bway were successful and [Q] preferred to keep all [ION division] [✂] then that is entirely possible' (see Table 1 above); and the email dated 4 May 2020 at 12:43 from ION to Broadway, stating 'The [✂] should be fully done by [ION division] since we are already currently providing them [that is, [Q]] [✂] … ' (see paragraph 31(a) above).

(ii) Secondly, the CMA does not accept that [ION division]'s inclusion in response to the [Q] RFP was 'to highlight' that the Broadway solution [✂] the [ION division] [✂]. The evidence demonstrates that the presentation of [ION division]/ION went significantly further (see the CMA's response at paragraph 91(b)(i) above), and undermined the separate sales or brand identity of the Broadway business (contrary to paragraph 5(a) of the IEO).

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[135] ION's Representations, paragraph 4.5.
[136] ION's Representations, paragraph 4.5(a).
[137] ION's Representations, paragraph 4.5(b).

(iii) Thirdly, the CMA has considered whether it would have been clear to the customer that the proposal was a Broadway proposal (or a 'joint bid') in paragraphs 81 and 91(f)(i) above.

(iv) Fourthly, ION's submission that [✂] depending on whether [ION division] was referred to, does not undermine any finding that there was a failure to procure that the separate sales or brand identity of the Broadway business was maintained. In contrast, to the extent the inclusion of [ION division] in Broadway's proposal did not affect [✂] (but [✂]), the proposal risked enhancing Broadway's competitive position over the position it would have been in had its approach to sales been maintained separately from ION's (as required under the IEO).

(v) Fifthly, the CMA does not consider it appropriate to give no (or even limited) weight to the correspondence between [Consultant] and Broadway which, amongst other things, confirmed that Broadway's response to the [Q] RFP was a 'joint response' (3 April 2020). Even if the CMA was to accept (which it does not) that there was a reduced perception on the part of [Q] (as compared to [Consultant]) in relation to the extent of the separation of the services that would be provided by Broadway and [ION division], this does not undermine a finding that Broadway included [ION division] in its response to the [Q] RFP without the prior written consent of the CMA, and that doing so did not maintain the separate sales or brand identity of Broadway and ION. Moreover, whilst the CMA does not accept ION's characterisation of [Consultant]'s role (given it was acting on behalf of [Q], and was an experienced business and technology consultancy firm specialising in the financial services sector), Broadway's responses to [Consultant]'s queries at the very least heightened the risk that its bid would be considered favourably so as to increase the prospects of the [Q] contract being awarded on the basis of Broadway's capabilities combined with those of [ION division] (and this is a factor the CMA has given weight to in considering the appropriateness of imposing a penalty).

93. In view of the above, the CMA has decided that ION failed to comply with paragraphs 4 (and in particular 4(c)) and 5(a) of the IEO.

Failure to comply with paragraph 6 of the IEO in relation to paragraphs 4 and 5(a) of the IEO

94. ION's conduct (including its failure to take all necessary corrective steps) after the IEO came into force, as summarised above, also constituted a failure by

ION to procure compliance with the IEO by Broadway as if it had been issued to Broadway,[138] in particular as follows:

a) By including ION services / products alongside Broadway services / products, and by listing the [ION division] CEO as a key contact alongside several Broadway staff at CEO, COO and managerial levels, as part of the response to the [Q] RFP, Broadway's conduct constituted action which might impair the ability of the Broadway business or the ION business to compete independently. At no time did ION (for itself or on behalf of Broadway) obtain the prior written consent of the CMA, as required by the IEO. Since Broadway's conduct was contrary to paragraph 4 (and in particular paragraph 4(c)) of the IEO, ION failed to procure compliance with the IEO by Broadway as if it had been issued to Broadway as required under paragraph 6 of the IEO.

b) The above conduct by Broadway also constituted a failure by Broadway to carry on its business separately from the ION business and to maintain the Broadway business's separate sales or brand identity. Not only did the response to the [Q] RFP present Broadway and ION as part of the same proposal, but also (and more generally) Broadway sought to gain a competitive advantage (over rival bids) as a result of the Merger, noting that 'As part of ION Group, Broadway provides a wide range of [✂] capabilities through partners, including [ION division]' and that 'Broadway, as a member of the ION Group is the only vendor that can offer a complete and proven [✂] solution' (see paragraph [21](b)(ii) above). At no time did ION (for itself or on behalf of Broadway) obtain the prior written consent of the CMA, as required by the IEO. Since Broadway's conduct was contrary to paragraph 5(a) of the IEO, ION failed to procure compliance with the IEO by Broadway as if it had been issued to Broadway as required under paragraph 6 of the IEO.

c) The above failures to comply, and to procure compliance, with the IEO continued in May 2020 in the various communications between Broadway and [Consultant]. In those communications, Broadway included ION as a copy recipient and referred to the [✂] as a 'joint endeavour', clarifying later that it was 'interchangeable (i.e. optional across [✂] Bway and [ION division] [✂])' (4 May 2020), and subsequently providing 'our answers' (11 May 2020) to additional questions which had been sent by

[138] To the extent that certain individuals within the ION business were acting in their capacity as employees or officers of ION subsidiaries in addition to, or instead of, presenting themselves as representatives of ION, ION's conduct (including its failure to take all necessary corrective steps) after the IEO came into force, as summarised above, also constituted a failure by ION to procure compliance with the IEO by the relevant ION subsidiaries as if the IEO had been issued to each of them.

[Consultant] to Broadway and ION (in the email of 5 May 2020 addressed to both of them) (see Table 1 and paragraphs 31 and 32 above).

d) For the avoidance of doubt, in respect of each of sub-paragraphs (a) to (c) above, the CMA also finds that ION contributed to the failure to comply with the IEO (for example, to the response to the [Q] RFP and to the subject matter of some of Broadway's responses to [Consultant]) and failed to take all necessary corrective steps (for example, to exclude references to [ION division]/ION from the response that was submitted, and to have distanced itself from communications it had received from [Consultant] or to which it was copied by Broadway) (see paragraphs 87 to 89 above).

95. ION also failed to comply with paragraph 6 of the IEO because it failed to communicate the IEO effectively within the ION business; and it also failed to procure the effective communication of the IEO within the Broadway business.[139] The CMA's guidance on interim measures in merger investigations (the Interim Measures Guidance)[140] provides that if interim measures (which include an initial enforcement order) are imposed in respect of a completed merger, the merging parties should 'immediately' consider whether the arrangements they have in place meet the requirements for arm's length separation of the target business; and in addition the 'merging parties should ensure that **all affected staff** understand the Interim Measures and what they individually are required to do to ensure compliance'[141] (emphasis added). In the present case, the CMA's view is that the manner in which ION chose to disseminate to staff the IEO and the need to comply with the IEO, heightened the risk of pre-emptive action. Specifically, the use of verbal communications entailed avoidable delays, which risked being exacerbated by the Easter holiday period and the impact of the Coronavirus (COVID-19) pandemic. Moreover, in some respects, the initial communications did not appear to capture some key staff who were involved in the collaboration between ION and Broadway on the response to the [Q] RFP. The key events comprised the following:

a) Although the IEO was communicated to ION on 2 April 2020 at 14:26, initial verbal communications about it (both within ION and from Broadway to ION) did not commence until the evening of 2 April 2020. Some communications within ION were not completed until the end of the

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[139] To the extent that certain individuals within the ION business were acting in their capacity as employees or officers of ION subsidiaries in addition to, or instead of, presenting themselves as representatives of ION, ION's failure to communicate the IEO effectively within the ION business also constituted a failure by ION to procure compliance with the IEO by the relevant ION subsidiaries as if the IEO had been issued to each of them.
[140] Interim measures in merger investigations, 28 June 2019 (CMA108).
[141] *Ibid*., paragraph 2.14.

following week, due to absences and scheduling conflicts related to the Easter holiday period; and communications to the Broadway management team took place in calls held during 3 April 2020 and over that weekend. That team was instructed to inform their teams 'as required' (see paragraphs 38 and 39 above). The CMA's view is that this manner of communication was not effective in reaching quickly 'all affected staff' (as noted in the Interim Measures Guidance). The use of verbal communications in this way entailed avoidable delays, which risked being exacerbated by the Easter holiday period and the impact of the Coronavirus (COVID-19) pandemic.

b) As regards communications within ION specifically, it is notable that the MT team had been advised by ION's General Counsel that verbal communications about the IEO were issued to relevant ION staff, being those that were initially involved, or due to be involved, in integration planning (see paragraph 34(a) and footnote 50 above). The CMA's view is that such a category of staff is too narrow. ION should have included those staff engaged with client-facing matters, as that would have also captured ION and Broadway staff who were collaborating on the response to the [Q] RFP. It is also notable that, although ION's General Counsel had contacted 'the senior key managers' of the ION Markets Team and explained the terms of the IEO and how to comply with it, the list of named individuals who were said to comprise that group did not include the CEO or COO of [ION division] (see paragraph 38(c)(ii) and footnote 57 above). Both of those individuals were involved in a number of the communications relating to the response to the [Q] RFP (see paragraphs 29 to 32 above).

96. In the CMA's view, had appropriate steps been taken by ION, the failures to comply with the IEO could have been avoided. ION should, therefore, have taken action to ensure that the necessary communications were made more quickly and deeper to those engaged with client-facing matters, both within the ION business and the Broadway business.

97. In relation to paragraph 6 of the IEO, ION made two preliminary points. Firstly, it submitted that ION could not have failed to procure compliance with the IEO where there was no breach of the IEO; and since there was no IEO breach, ION had met its obligations.[142] However, the CMA has found that there has been a failure to comply with paragraphs 4 (and in particular 4(c)) and 5(a) of the IEO, and since ION failed to procure compliance by its subsidiaries, there was also a failure to comply with paragraph 6 of the IEO. Secondly, ION

[142] ION's Representations, paragraph 5.2(a).

submitted that the CMA had incorrectly addressed the IEO in that the IEO was not addressed to Broadway. ION noted that the CMA had since developed its practice to address initial enforcement orders to both the acquiring party and the target and that meant that the only obligation on ION was to procure compliance by its subsidiaries.[143] The CMA disagrees with ION's submissions for the following reasons:

a) Firstly, paragraph 6 of the IEO expressly states that the obligation on ION is to 'procure' compliance by its subsidiaries, which ION has recognised. Throughout the application of the IEO, Broadway was one of ION's subsidiaries,[144] and this has not been disputed by ION. Accordingly, the obligations on ION under the IEO included to procure compliance with the IEO by Broadway.

b) Secondly, whilst the CMA has since developed its practice to address initial enforcement orders to both the acquiring party and the target company, this does not inform the extent of any obligation on ION under the terms of the IEO that applied in relation to its acquisition of Broadway.

98. ION made two further submissions to support its view that ION did procure compliance with the IEO obligations with its subsidiaries and could not be held to be in breach of its obligations where its subsidiaries did not comply:[145]

a) Firstly, ION submitted that it contacted key managers and explained the terms of the IEO and how to comply with it. ION added that, at that time, the CMA's guidance on IEO compliance (set out in CMA108)[146] provided no methodology on how to procure compliance. ION noted also that there were no requirements in CMA108 for written instructions from parties subject to an IEO to subsidiaries (a point which may be included in updating the guidance) and submitted that ION could not therefore be held to a standard that the CMA itself was not subjecting parties to through its guidance at that time.[147] As regards the points of principle made by ION, the CMA's view is that ION is wrong to imply that the boundaries of compliance are determined by, or need to be specified in, CMA guidance. The guidance in question, the Interim Measures Guidance, does not purport to provide guidance on how to comply with initial enforcement orders. Rather, it explains, among other matters, the purpose of interim measures, the importance of complying with them, the

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[143] ION's Representations, paragraph 5.2(b).
[144] Paragraph 14 of the IEO provides that, for the purposes of the IEO, a subsidiary has the meaning given by section 1159 of the Companies Act 2006.
[145] ION's Representations, paragraph 5.3.
[146] This is the same guidance that is referred to as the Interim Measures Guidance in this decision.
[147] ION's Representations, paragraph 5.4.

role of compliance statements and the potential consequences of failing to comply. It notes in particular that '[i]t is … of the utmost importance that merging parties take steps to understand fully their compliance obligations (including seeking legal advice as needed) and consider carefully the consequences of any action which may be in breach of Interim Measures'[148] and that 'it is for the merging parties to decide how to achieve compliance'.[149]

b) Secondly, ION submitted that the CMA had ignored the evidence that calls were completed over a weekend and the following week due to absences and the Easter holiday period; and that it was unreasonable for the CMA to expect ION employees to join calls when on holiday. In ION's view, those circumstances, at the very least, provided ION with a reasonable excuse against the CMA's allegations.[150] The CMA disagrees with ION's submissions for the following reasons:

(i) Firstly, as demonstrated by the summary of the evidence in paragraph 95(a) above, the CMA has not ignored the evidence in relation to the time periods over which calls were made. The CMA's view is that the manner in which ION chose to disseminate to staff the IEO and the need to comply with the IEO, heightened the risk of pre-emptive action. ION failed to communicate the IEO and its requirements effectively within the ION business; and it also failed to procure the effective communication of the IEO and its requirements within the Broadway business. Since Broadway's conduct was contrary to paragraphs 4 (and in particular 4(c)) and 5(a) of the IEO, ION failed to procure compliance with the IEO by Broadway as if it had been issued to Broadway as required under paragraph 6 of the IEO.

(ii) Secondly, ION's submission does not establish a reasonable excuse. Where parties knowingly complete a merger and become subject to an initial enforcement order, they must act promptly and take account of the relevant circumstances. The CMA's view is that, in the present case, ION failed to do so. Had appropriate steps been taken by ION, the failures to comply with the IEO could have been avoided. ION should, therefore, have taken action to ensure that the necessary communications were made more quickly and deeper to those

[148] Interim Measures Guidance, paragraph 1.11.
[149] Interim Measures Guidance, paragraph 2.14.
[150] ION's Representations, paragraph 5.5.

engaged with client-facing matters, both within the ION business and the Broadway business.

99. In view of the above, the CMA has decided that ION failed to comply with paragraph 6 of the IEO in relation to paragraphs 4 and 5(a) of the IEO.

Breach 2 – failure to provide to the CMA the requisite information for compliance-monitoring purposes

100. As stated in the Interim Measures Guidance, the CMA takes merging parties' compliance with their obligations under interim measures very seriously.[151] For the purposes of monitoring compliance, the CMA may require a monitoring trustee to be appointed (as was done in the present case) and it may also make requests for information. Paragraph 7 of the IEO imposed a duty on ION to 'provide to the CMA such information … as it may from time to time require' for compliance-monitoring purposes. In particular, the IEO required periodic Compliance Statements to be submitted by the CEO of ION on 16 April 2020 and subsequently every two weeks thereafter, confirming compliance with the IEO on behalf of ION (IEO, paragraph 7).

101. In the course of its investigation of this matter, the CMA made various requests for information and documents in relation to (among other matters) the response to the [Q] RFP for the purposes of monitoring compliance with the IEO. However, in various responses provided to the CMA by ION (in some cases by ION Group only) and in the Compliance Statements covering the time periods of key events which are the subject of this decision, there were material inaccuracies and / or omissions as regards the [Q] RFP and the response to it. The key instances are summarised in the ensuing paragraphs, which also respond to ION's key submissions to the effect that ION had at all times provided the CMA with the requisite information[152] and relevant documents.[153]

102. Firstly, ION did not disclose the existence of the [Q] RFP or the response to the [Q] RFP in several of its responses to the CMA which contained material inaccuracies and / or omissions. By way of background, ION Group's response dated 9 April 2020 to the Integration Questionnaire, referred to the situation before the IEO came into force in which 'customer engagement [had] been conducted on a combined basis …, with the parties preparing and presenting joint [✂] proposals to [category of customers]'.[154] It listed, by way

[151] Interim Measures Guidance, paragraphs 1.10 and 7.5.
[152] ION's Representations, paragraph 6.1.
[153] ION's Representations, paragraph 6.5.
[154] ION Group's response of 9 April 2020 to the Integration Questionnaire of 2 April 2020 (via Baker McKenzie), paragraph 10. See also paragraph 42 above.

of example, a number of projects which were still at the 'Proposal' stage with a 'Target Due Date' well after the IEO came into force.[155] However, no reference was made to the response to the [Q] RFP. That was despite the fact that (i) in common with other ongoing 'Customer initiatives' that were disclosed, it was (for example) a proposal that had been submitted (in fact well before the 9 April 2020 date of ION's response), and (ii) it was at a more advanced stage than some of the other initiatives disclosed. The responses to the CMA's subsequent correspondence and requests for information contained material inaccuracies and / or omissions. For example:

a) In its response of 22 April 2020 to the CMA's email of 17 April 2020, inviting ION to provide its proposals for voluntary measures that could be put in place to restore pre-emptive action, ION stated that '**No joint customer interactions have occurred since April 2nd**. **Broadway is dealing with its customers** in the ordinary course **without ION involvement**' (emphasis added). It added that '[t]he ION and Broadway businesses are being managed in accordance with the IEO …'[156] No reference was made to the [Q] RFP or to ION's involvement in the response to the [Q] RFP – that was a material omission. Moreover, the statement that Broadway was dealing with its customers without ION involvement was a material inaccuracy given the extensive and detailed exchanges between ION and Broadway on the content of the draft response to the [Q] RFP that took place after the imposition of the IEO.[157]

b) On 22 April 2020, the CMA stated its understanding that 'joint approaches' had been made to some customers and asked ION Group to confirm certain matters.[158] ION Group responded on 26 April 2020 re-stating: 'As set out in correspondence to the CMA dated 22 April 2020, **no joint customer interactions have taken place since 2 April 2020**' (emphasis added).[159] Again, no reference was made to the [Q] RFP or to ION's involvement in the response to the [Q] RFP, meaning that ION's response contained a material inaccuracy or omission. ION submitted that the CMA had accepted that there was no joint bid contrary to paragraph 5(g) of the IEO and therefore ION's responses were not evidence of a

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[155] *Ibid*, Annex 1. See also paragraphs 43 and 44 above.
[156] Email dated 22 April 2020 at 16:54 from Baker McKenzie (for ION) to the CMA. See also paragraph 45 above.
[157] It is noteworthy that in its response dated 9 April 2020, ION had referred to 'customer engagement' and provided details of [category of customers] to which approaches had been made (ie at that point they were potential customers in relation to the proposals in question). Therefore, there was no basis for ION to have treated the [Q] RFP differently from other customers and hence to have omitted to refer to the [Q] RFP in the response it provided to the CMA on 22 April 2020.
[158] Section 109 EA02 notice dated 22 April 2020 from the CMA to ION Group: 'The CMA understands that joint approaches to some customers have taken place, [✂]. Confirm whether this is correct' (question 9(d)).
[159] ION Group's response dated 26 April 2020 to the CMA's section 109 EA02 notice dated 22 April 2020 (paragraph 34 of the response). See also paragraph 47 above.

material inaccuracy or omission.[160] However, for the reasons set out in paragraph 81 above, the CMA has not accepted that there was no joint bid and as noted in sub-paragraph (c) below ION itself characterised the response to the [Q] RFP as involving a '*joint bid*'. ION also submitted that the CMA had not adduced any evidence of improper joint customer interaction.[161] However, it is not necessary to establish whether ION's involvement in the response to the [Q] RFP was improper or not[162] in order to establish that ION failed to provide the required information.

c) It was not until 14 May 2020, when ION Group responded to a further communication from the CMA (on 6 May 2020), that ION Group identified for the first time 'a joint bid for [Q]'.[163] ION Group added 'For the avoidance of doubt, **since 2 April** in respect of this opportunity, **[ION division] has had no interaction with [Q]** there have been no joint calls and **the opportunity has been managed solely by Broadway**, as it is Broadway's proposal' (emphasis added).[164] However, it was disingenuous for ION to have stated that [ION division] had had no interaction with '[Q]', since the fact that the [Q] RFP was being managed by [Consultant] on behalf of [Q] necessarily meant that [Consultant] (rather than [Q]) would have been the contact point for all participants in the procurement process. Moreover, the evidence uncovered by the CMA shows that [ION division] had in fact received emails from [Consultant] on 21 and 22 April 2020 and also on 1 and 5 May 2020 (the latter two including Broadway) in relation to the [Q] RFP (see Table 1 above). Furthermore, in a series of email exchanges on 4 May 2020, [ION division] had agreed with Broadway a clarification which Broadway subsequently provided to [Consultant] (see Table 1 and paragraph 31 above). Given the nature of the communications in question, ION's reference to 'no interaction' was a material inaccuracy and / or omission. ION submitted that it was disingenuous for the CMA to characterise the receipt of those emails from [Consultant] (sent unilaterally as part of a generic mailing list) as a material inaccuracy or omission on ION's part, specifically in light of it being common ground that there was no joint bid contrary to paragraph 5(g) of the IEO.[165] The CMA has addressed the characterisation of a joint bid in paragraph 81, and further disagrees with ION's submission for the

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[160] ION's Representations, paragraph 6.3.
[161] ION's Representations, paragraph 6.3.
[162] In any event, the CMA has found at paragraphs [83] to 99 that ION failed to comply with paragraphs 4 (and in particular 4(c)), 5(a) and 6 of the IEO as regards its and Broadway's involvement in the response to the [Q] RFP and the ensuing communications with [Consultant] in April and May 2020.
[163] ION Group's response dated 14 May 2020 to the CMA's section 109 EA02 notice dated 6 May 2020 (paragraph 4 and Annex 002). See also paragraph 48 above.
[164] *Ibid*.
[165] ION's Representations, paragraph 6.4.

following reasons. Firstly, the CMA relies on those emails to show that ION's statement on 14 May 2020 that there had been 'no interaction' since 2 April 2020 as described by ION was a material inaccuracy and / or omission. Secondly, the emails of 21 and 22 April 2020 show that [Consultant] was interacting with [ION division] and treating it on a par with other vendors (since although those emails were part of a generic mailing list, [ION division] was a blind copy recipient in common with all interested vendors (see Table 1 above). Thirdly, the subsequent emails of 1 and 5 May 2020 from [Consultant] were not part of a generic mailing list - the primary addressees in each case were [Mr X] (Broadway) and [Mr Y] (ION) (see Table 1 above).[166]

103. Secondly, ION failed to provide relevant documents relating to the response to the [Q] RFP in several of its responses to the CMA:

a) On 6 May 2020, the CMA required documents in respect of business opportunities tendered for 'from 6 February 2020 onwards'.[167] ION Group's response (on 14 May 2020) omitted correspondence relating to the [Q] RFP.[168] In ION's Representations, ION submitted that the lack of reference to correspondence about the [Q] RFP was consistent with the fact that the [Q] RFP was not an opportunity for ION but for Broadway. ION added that this, in turn, was consistent with the fact that the response to the [Q] RFP was a Broadway proposal, and that there was no joint bid contrary to paragraph 5(g) of the IEO.[169] As explained, the CMA has addressed the characterisation of a joint bid in paragraph 81, and further disagrees with ION's submission for the following reasons. Firstly, ION mischaracterises the [Q] RFP as an opportunity for Broadway, not ION – since [ION division] was included as a supplier of one part of the proposal (and there were also numerous references to ION) in the response to the [Q] RFP, it was an opportunity for ION as well as for Broadway. Secondly, the CMA's request of 6 May 2020 for documents was very clear that it covered 'all email correspondence between each Party and the tendering customer' from 6 February 2020 onwards and for these purposes a 'Party' was defined to include 'all subsidiaries and brands of each of the Parties,

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[166] In addition, ION submitted that the receipt of the emails from [Consultant] on 21 and 22 April 2020 and also on 1 and 5 May 2020 was, as set out in ION's initial representations dated 27 August 2020, the only contact between [ION division] and [Consultant] (ION's Representations, paragraph 6.4). That submission is also incorrect, because ION's initial representations were expressly limited (by ION) to the period from 26 March 2020 to 22 April 2020 – they did not cover the period in May 2020.
[167] Section 109 EA02 notice dated 6 May 2020 from the CMA to ION Group. This required the following to be produced to the CMA: 'Copies of all email correspondence between each Party and the tendering customer, in relation to the specific tender(s) identified in response to this question, dated from 6 February 2020 onwards' (question1 i.).
[168] ION Group's response dated 14 May 2020 to the CMA's section 109 EA02 notice dated 6 May 2020. See also paragraphs 49 and 56 above.
[169] ION's Representations, paragraph 6.6.

e.g. [✂], [ION division], [✂], [Broadway division]' (see paragraph 49 and footnote 73).

b) On 15 May 2020, the CMA referred to missing correspondence between Broadway/[ION division] and [Consultant]/[Q] and requested ION to provide all responsive emails, including in connection with the '[Q] bid'.[170] On 18 May 2020, ION produced communications between ION and [Consultant] (which should have been produced in response to the 6 May 2020 requirement), but did not produce any communications between Broadway and [Consultant].[171] That was so notwithstanding the fact that search terms for Broadway documents were said to have been conducted by reference to (among other matters) '[Q]'.[172] In ION's Representations, ION submitted that the search methodology applied by Broadway was given in the ION compliance statement dated 18 May 2020. That statement had stated that 'For [Q], all emails to/from [Broadway division] and [Q] were included (less meeting invite emails), as Broadway had no email communications with [Q] since Feb 6' (see paragraph 50(a) above). ION added that the CMA had expressed no concern as to that search methodology and that its concern now appeared to stem from the fact that certain emails from Broadway to [Consultant] were subsequently identified by a different search methodology.[173] The CMA disagrees with ION's submissions. ION incorrectly implies that the absence of any expressed concern by the CMA at the time as to ION's search methodology is an exonerating factor. It is for the recipient of the CMA's request to determine whether its proposed methodology is sufficiently robust to elicit the responsive material. In the present case, the CMA had requested all responsive emails, including in connection with the '[Q] bid', yet the search terms applied were incorrectly limited to 'all emails to/from [Broadway division] and [Q]' thereby failing to pick up communications between Broadway and [Consultant].

c) Further documents that should have been produced in response to the CMA's requirement of 6 May 2020 (for example, emails from Broadway to [Consultant] on 4 May 2020, at 11:40 and 19:45, both of which had been copied to ION) were eventually produced (on 7 December 2020) in

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[170] Email dated 15 May 2020 at 17:41 from the CMA to Baker McKenzie (for ION), copied to ION.
[171] Email dated 18 May 2020 from ION to the CMA. See also paragraphs 50 and 56 above.
[172] Letter dated 18 May 2020 from ION to the CMA. The letter was headed 'COMPLIANCE STATEMENT ON BEHALF OF ION GROUP ("ION")' and set out the steps ION had taken to comply with the document production requirements of the section 109 EA02 notice dated 6 May 2020. This compliance statement was submitted in addition to the periodic Compliance Statements required by paragraph 7 of the IEO.
[173] ION's Representations, paragraph 6.7.

response to a further targeted requirement (on 30 November 2020) from the CMA.[174]

104. Thirdly, the Compliance Statements signed by [Mr I] (CEO, ION) for each of ION Group and ION Trading certified compliance with the IEO by those entities and their subsidiaries for each two-week period from 2 April 2020 to 14 May 2020. In addition, the Compliance Statements expressly certified compliance with, among other matters, the IEO requirements that, except with the CMA's prior written consent: (i) no action had been taken which might impair the ability of the Broadway business or the ION business to compete independently; and (ii) the Broadway business had been carried on separately from the ION business and the Broadway business's separate sales or brand identity had been maintained. At no point did any of the Compliance Statements make reference to the events relating to the response to the [Q] RFP (see paragraphs 52 to 56 above). In ION's Representations, ION submitted that an absence of reference to the [Q] RFP from those Compliance Statements cannot be held against ION in circumstances in which ION was not, in fact, in breach of either paragraph 4 or 5(a) of the IEO, nor did it consider itself to have been in breach of the IEO at that time.[175] The CMA disagrees with ION's submission, since it has found that there were failures to comply with paragraph 4 (and in particular 4(c)) and 5(a) of the IEO.

105. In view of the above, the CMA has decided that ION failed to comply with paragraph 7 of the IEO.

Risk of prejudice to a reference or of impeding remedial action

106. The above failures to comply with the IEO risked prejudicing a possible reference for a phase 2 merger investigation (for example, by potentially affecting the competitive structure of the market and / or by failing to provide the requisite information to the CMA) or impeding potential remedial action (which could have included divestment of the Broadway business) following such a reference.

Failure to comply without reasonable excuse

107. Section 94A(1) of the EA02 provides that penalties can be imposed if a failure to comply is 'without reasonable excuse'. This is not further defined in the EA02.

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[174] Section 109 EA02 notice dated 30 November 2020 from the CMA to ION. See also paragraphs 51 and 56 above.
[175] ION's Representations, paragraph 6.8.

108. 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.[176]

109. The CMA's statement of policy regarding its powers to impose administrative penalties (the Penalties Guidance)[177] 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).[178] There is nothing to suggest that any such event has occurred in this case as regards Breach 1 or Breach 2.

110. The CMA has also considered ION's Representations to determine whether any points put forward amount to a reasonable excuse on the facts of this case. However, in the CMA's view, ION has not provided any reasonable excuse for failing to comply with the IEO as regards Breach 1 or Breach 2.

111. Accordingly, the CMA has concluded that ION had no reasonable excuse for failing to comply with the requirements of the IEO which have been identified above. Accordingly, the CMA has considered imposing a penalty of such fixed amount as it considers appropriate (section 94A of the EA02).

E. Appropriateness of imposing a penalty and of the amount of the penalty imposed

Appropriateness of imposing a penalty

112. ION submitted that since there was no breach of the IEO, no financial penalty should be imposed.[179] However, in the present case, the CMA has decided that there were various failures to comply with the IEO without reasonable excuse, as set out in the preceding sections of this decision.

113. Having had regard to its statutory duties and the Penalties Guidance, and having considered all relevant facts, the CMA has decided that the imposition of a penalty is appropriate. In reaching this view, the CMA has had regard to

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[176] *Electro Rent* at [69] and [112].
[177] Administrative penalties: Statement of Policy on the CMA's approach (CMA4).
[178] The Penalties Guidance, paragraph 4.4.
[179] ION's Representations, paragraph 7.1.

the need to achieve general deterrence, as well as the serious and flagrant nature of the failures to comply in this case.[180]

General deterrence

114. 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 measures (including initial enforcement orders) serve a particularly important function where, as in this case, the merger was completed. Their function is to prevent conduct that might prejudice a reference or impede action justified by the CMA's final decision. The purpose of an initial enforcement order, as noted by the CAT, is precautionary, guarding against the possibility of pre-emptive action.[181]

115. Interim measures (including initial enforcement orders) are particularly important in the context of completed mergers for a number of reasons. These include that it is more difficult in practice to hold separate businesses that are already under common ownership. This in turn makes integration more likely, which may need to be reversed or unwound in order to maintain the independence of the separate businesses. In addition, there is a higher risk that customers, competitors and suppliers perceive businesses under common ownership to be a single entity, rather than two separate entities that have not yet merged.

116. It is important that parties take such obligations seriously, recognise the importance of conducting their business within the parameters of any initial enforcement order, 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. It is also incumbent on parties to provide full and accurate information to the CMA and any appointed monitoring trustee throughout the investigation particularly if they identify risks as to their activities pursuant to the initial enforcement order and any related derogations.

117. The CMA notes that in Electro Rent, the CAT held that 'it was appropriate to set the penalty at a level that would bring home to Electro Rent, and to other parties involved in a merger investigation, that it is of the utmost importance that interim orders be scrupulously complied with, and that a party should not itself form judgments or reach decisions that are properly for the CMA. This is

[180] In accordance with paragraphs 5.2 and 5.9 of the Penalties Guidance, the CMA's General Counsel has been consulted on the reasons for, the proposed approach to and level of the penalty.
[181] *ICE/Trayport* at [220].

so, whatever the intentions or incentives of the party involved.'[182] The CMA subsequently issued revised guidance on interim measures, stating that 'given the importance of Interim Measures to the functioning of the regime, the CMA will not hesitate to make full use of its fining powers. The CMA will therefore impose proportionately larger penalties in future cases should this prove necessary in the interests of deterrence'.[183]

Serious and flagrant nature of the failures to comply with the IEO

Breach 1 (presentation of the Broadway and [ION division] (ION) offers collectively to [Consultant])

118. ION made a number of submissions in relation to penalty for Breach 1. The key submissions are addressed by reference to the points to which they apply most directly. The majority of ION's submissions concerned the amount of the penalty and accordingly they are addressed in the separate section below.

119. The IEO provisions with which (in the CMA's view) ION has failed to comply (as set out in paragraphs 79 to 105 above), reflect core objectives of interim measures, namely to maintain the ION and Broadway businesses separately, including maintaining separate Broadway's sales or brand identity, and not to take action which might impair the ability of those businesses to compete independently.

120. ION's conduct (including its failure to take all necessary corrective steps) and / or its failure relating to the effective communication of the IEO within the ION business and the Broadway business, resulted in the presentation of the Broadway and [ION division] (ION) offers collectively to [Consultant]. That was not only in the response to the [Q] RFP submitted on 3 April 2020, but also in the ensuing communications that took place later in April 2020 and in May 2020 between two or more of [Consultant], Broadway and ION. Those communications continued on the basis of the response that was submitted and thereby perpetuated the continuation of the situation in which ION and Broadway were being presented collectively to, and treated collectively by, [Consultant] for the purposes of the response to the [Q] RFP.[184] This also

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[182] *Electro Rent*, at [202]. In doing so, it rejected Electro Rent's submission that setting the penalty at such a level was not appropriate because the breach was inadvertent and because Electro Rent had approached the monitoring trustee in advance and had taken steps to rectify the breach.
[183] Interim Measures Guidance, at paragraph 7.6.
[184] For example, [Consultant] expressly sought clarification (on 3 April 2020 and on 1 May 2020) of the nature of the response, to confirm its understanding that it comprised collectively Broadway and [ION division]. The answer provided to [Consultant] by Broadway, on 3 April 2020, noted that the response was a 'joint response'; and the answer provided by Broadway, copied to ION, on 4 May 2020 at 19:45 (following an exchange between ION and

entailed the potential consequence of the [Q] contract being awarded on the basis of Broadway's capabilities combined with those of [ION division]/ION if the bid were to have been successful, resulting either in a joint contract being awarded to Broadway and [ION division]/ION (since the response to the [Q] RFP had expressly stated that the use of any subcontractors was not anticipated)[185] or a single contract being awarded to Broadway with [ION division] supplying a part of the requirement. This situation (that is, the presentation of the ION and Broadway offers collectively to [Consultant], in and of itself or in combination with a potential contract with [Q]) risked prejudicing a possible phase 2 reference or impeding potential remedial action following such a reference. Therefore, it constituted a fundamental breach of the obligations imposed by the IEO in accordance with section 72 of the EA02.

121. On this basis the CMA considers ION's failures to comply with the IEO (Breach 1) to be particularly serious.

122. The CMA also considers that those failures to comply with the IEO were flagrant in nature,[186] for the reasons set out below.

123. Firstly, ION Group was aware that, in order to comply with the IEO, there needed to be full independence between the Broadway and ION businesses in relation to (among other matters) customers. Indeed, one of the CMA's questions in the Integration Questionnaire, which was sent to ION Group on 2 April 2020 at the same time as the IEO,[187] was as to whether customers (and others) continued to be serviced by Broadway fully independently of the ION business.[188] Despite this, Breach 1 occurred as a result of the events (after the IEO came into force) on 2 April 2020 and leading to the submission of the response to the [Q] RFP on 3 April 2020, and also subsequently in April and May 2020 (as summarised in paragraphs 89 and 94).

124. Secondly, as described in further detail below (see paragraphs 141 to 143), a significant number of individuals in senior management positions were involved in communications about the response to the [Q] RFP. Many of the individuals in question ought to have known at the relevant times of the need to comply with the IEO, or at least if they only found out about the

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Broadway), stated that 'our [✂] solution is interchangeable (i.e. optional across [✂] Bway and [ION division] [✂]) …' (see Table 1 and paragraph 31 above).

[185] See paragraph [21](c)(iii) above for the statement to that effect that was made in the RFP Vendor Response Form.

[186] The Penalties Guidance, paragraph 4.2.

[187] Email dated 2 April 2020 at 14:26 from the CMA to Baker McKenzie, copied to ION Group. This attached the IEO and an 'Integration Questionnaire' which was required to be completed pursuant to section 109 of the EA02.

[188] The question asked: 'Confirm whether the customers, supplier lists and other contracts of the Broadway Technology business continue to be serviced by the Broadway Technology business fully independently of the ION business' (question 10).

IEO sometime later they ought to have taken prompt corrective action to ensure compliance.

125. Thirdly, there was a flagrant failure to communicate effectively the IEO and the need for compliance within the ION business (and to procure its communication within the Broadway business). As described in paragraph 95 above, the manner in which ION chose to disseminate to staff the IEO and the need to comply with the IEO, heightened the risk of pre-emptive action. Specifically, the use of verbal communications entailed avoidable delays, which risked being exacerbated by the Easter holiday period and the impact of the Coronavirus (COVID-19) pandemic. ION should have taken action to ensure that the necessary communications were made more quickly and deeper to those engaged with client-facing matters, both within the ION business and the Broadway business.

126. ION submitted that the measures it took at the time were appropriate and proportionate and that there must be some room for merging parties to assess and implement the most appropriate method of communications.[189] ION also submitted that the CMA had neglected to give due consideration to the difficult circumstances of information dissemination that was being experienced by the parties at that time due to the Covid-19 pandemic.[190] The CMA acknowledges, as stated in the Interim Measures Guidance, that 'it is for the merging parties to decide how to achieve compliance'.[191] Moreover, the CMA has given due consideration to the circumstances, including the challenges of disseminating information around that time in that, for the purposes of demonstrating the failures to comply with the IEO, it has relied only on communications occurring several hours after the IEO was communicated to ION (see paragraphs 29 above and 148 below).

127. However, where parties knowingly complete a merger and become subject to an initial enforcement order, they must act promptly and take account of the relevant circumstances. The CMA's view is that the manner in which ION chose to disseminate to its staff the IEO and the need to comply with the IEO, heightened the risk of pre-emptive action. Had appropriate steps been taken by ION, the failures to comply with the IEO could have been avoided. In particular, given the challenges posed by the Coronavirus (COVID-19) pandemic, ION should not have limited itself to the communications that were carried out at the time.

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[189] ION's Representations, paragraph 7.3(e) and see also paragraph 7.4.
[190] ION's Representations, paragraph 7.3(d) and see also paragraph 7.4.
[191] Interim Measures Guidance, paragraph 2.14.

128. In particular, the CMA has had regard to the challenges posed by the Coronavirus (COVID-19) pandemic (in particular, remote working affecting staff), and considers that those challenges increased the care with which ION should have taken all necessary steps to ensure compliance by its subsidiaries with the IEO, and accordingly it should not have limited itself to the communications that were carried out at the time. Moreover, it is relevant to note that the failures to comply with the IEO also occurred in the various communications between two or more of [Consultant], Broadway and ION later in April 2020 and also in early May 2020. Those communications took place well after the Easter holiday period (which was the period in which ION stated it was experiencing difficulties contacting certain individuals) and for that reason also the CMA's view is that the failure to communicate effectively the IEO and the need for compliance was serious and flagrant.

Breach 2 (failure to provide to the CMA the requisite information for compliance-monitoring purposes)

129. ION submitted that there should be no financial penalty for Breach 2.[192] In support of this, it repeated its submissions that there was no joint bid[193] and that the absence of a breach of the IEO could not have been expected to be reported in the Compliance Statements.[194] ION made a number of further points, most notably:

a) Firstly, ION submitted that, contrary to the prohibition on double jeopardy (the principle of ne bis in idem), the CMA was seeking to punish ION in respect of Breach 1, and then also seeking to use the same facts to penalise it a second time in respect of the compliance reporting. ION added that in a scenario in which ION genuinely believed it was in compliance, the second fine for Breach 2 was clearly inequitable.[195] The CMA disagrees with that submission. As is evident from its assessment of the failures to comply with the IEO (see section D above), the CMA is not relying on the same facts for Breach 1 as the facts relied on for Breach 2. Indeed, if ION's conduct under Breach 2 was not the subject of a penalty, that would undermine the need for deterrence - addressees of an initial enforcement order would effectively be incentivised not to comply fully, or

[192] ION's Representations, paragraph 7.5.
[193] ION's Representations, paragraph 7.5(a). The CMA refers to the reasons set out at paragraph 81 above in respect of whether there was a joint bid. Moreover, the CMA's requests for information and documents were not premised on the response to the [Q] RFP being a joint bid (see paragraphs 42 to 47 and 49 to 51 above).
[194] ION's Representations, paragraph 7.5(b). As noted in paragraph 104 above, the CMA disagrees with ION's submission, since it has found that there were failures to comply with paragraphs 4 (and in particular 4(c)) and 5(a) of the IEO. Moreover, despite several requests for information relevant to, and concerns raised by the CMA in relation to, the [Q] RFP (see paragraphs 22, 23, 47 and 48 above), ION continued to submit Compliance Statements that confirmed that ION was complying with the IEO (see paragraphs 52 to 54 above).
[195] ION's Representations, paragraph 7.5(c).

at all, with requests for information for compliance-monitoring purposes which in turn would risk making it more difficult to detect a failure to comply.

b) Secondly, ION submitted that the CMA's allegations as to the Compliance Statements had not been previously raised with ION and therefore it was disingenuous to impose a penalty upon ION after the passage of 12 months that it had taken the CMA to deduce that there were relevant omissions or material inaccuracies.[196] The CMA disagrees with ION's submission for the following reasons. Firstly, the CMA had made several requests for information relevant to, and raised concerns in relation to, the [Q] RFP (see paragraphs 22, 23, 47 and 48 above), which should have prompted ION to assess (and re-assess) its compliance and to report the information in question in the Compliance Statements. Secondly, the time taken by the CMA to investigate and assess the matter (which is not the 12 months assumed by ION), does not make it disingenuous or otherwise inappropriate to impose a penalty for conduct which is now judged objectively to constitute a failure to comply with the IEO. That is so particularly in the present case, in which the material inaccuracies and / or omissions (as regards the [Q] RFP and the response to it) in various responses provided to the CMA for compliance-monitoring purposes made the investigation and assessment of the matter all the more difficult and time-consuming.

130. The existence of material inaccuracies and / or omissions (as regards the [Q] RFP and the response to it) in various responses to CMA requests for the purposes of monitoring compliance with the IEO and in the Compliance Statements covering the time periods of key events which are the subject of this decision, was a serious failure to comply with an important provision of the IEO. As such it merits the imposition of a separate financial penalty. As noted in paragraph 116 above, it is incumbent on parties to provide full and accurate information to the CMA throughout the investigation, particularly if they identify risks as to their activities pursuant to the initial enforcement order and any related derogations.

131. In the present case, the repeated number of failures (in terms of material inaccuracies and / or omissions) in the various responses and in the Compliance Statements in question (see paragraphs 102 to 104 above), resulted in the CMA devoting material resources over a significant period of time to uncover and investigate the suspected Breach 1. ION Group had to be prompted several times by the CMA, in April and May 2020, before it

[196] ION's Representations, paragraph 7.5(d).

disclosed for the first time (on 14 May 2020) the fact of 'a joint bid for [Q]';[197] and the production of relevant documents also took several iterations.[198]

132. The CMA, therefore, considers ION's failure to comply with the IEO (Breach 2) to be particularly serious.

133. The CMA also considers that Breach 2 was flagrant, given the nature of the material inaccuracies and / or omissions in the various responses and Compliance Statements provided to the CMA and the repeated frequency of those instances (see paragraphs 102 to 104 above). In particular, had the CMA not proactively required the provision of further evidence, the documents provided in December 2020 and which contained material evidence of the nature and extent of the continued collaboration between ION and Broadway on the response to the [Q] RFP after the IEO came into force may never have come to the attention of the CMA.

134. In addition, as described in detail below at paragraphs 146 and 147, key components of Breach 2 were committed at the highest level of seniority within ION (by the CEO of ION).

Appropriateness of the amount of the penalty imposed

135. Consistent with its statutory duties and the Penalties Guidance,[199] the CMA has assessed all relevant circumstances in the round to determine an appropriate level of penalty. It has also taken account of the following aggravating and mitigating factors in line with the Penalties Guidance.

Aggravating factors

136. The CMA has considered the following aggravating factors, which support the imposition of a higher penalty.

[197] ION Group's response dated 14 May 2020 to the CMA's section 109 EA02 notice dated 6 May 2020 (paragraph 4 and Annex 002). As shown in paragraph 102, it took some six weeks from the IEO coming into force (on 2 April 2020) and 4 iterations of requests from the CMA for ION Group to disclose the fact of the response to the [Q] RFP.
[198] See paragraph 103 above.
[199] The Penalties Guidance, paragraph 4.11.

Continuation of the failure to comply (Breach 1) after ION became aware of the CMA's concern

137. The continuation of the failure to comply after a company becomes aware of the CMA's concern that there might have been a failure is another factor that the CMA may take into account.[200]

138. On 22 April 2020, the CMA stated its understanding that '*joint approaches*' had been made to some customers and required ION Group to confirm certain matters;[201] and on 6 May 2020 the CMA informed ION that it was concerned about (among other matters) ION's understanding of, and compliance with, its obligations pursuant to the IEO.[202]

139. However, despite the above, it is notable that the close collaboration between ION and Broadway in relation to the response to the [Q] RFP continued, as did their combined presentation to [Consultant]. On 4 and 11 May 2020, responses to [Consultant] from [Mr X] (Broadway) included [Mr Y] (ION) as a copy recipient. The first response of 4 May 2020 stated that 'the [✂] proposed in the RFP is **a joint endeavour**' (emphasis added). Following various email exchanges that [Mr X] then had with [Mr Y] (who was pushing for the [✂] to be fully provided by [ION division] (ION)), the second response clarified that '**our [✂] solution is interchangeable** (i.e. optional across [✂] Bway and [ION division] [✂]). … **[Q] have choice** and control and **we can / will discuss this with them** at any potential future solution design meeting' (emphasis added).[203] The response of 11 May 2020 stated 'Please find attached **our answers** to your additional questions' (emphasis added).[204] Those additional questions were contained in the email dated 5 May 2020 from [Consultant] which was addressed both to [Mr X] (Broadway) and to [Mr Y] (ION). No evidence has been provided of [Mr Y] (ION) having taken any corrective steps to ensure compliance with the IEO (for example, to notify [Consultant] that as a result of the IEO, ION should not be treated as part of the Broadway bid proposal). The CMA therefore infers that, in those circumstances, the reference to 'our answers' should be taken to mean that the answers were both from Broadway and ION.

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[200] The Penalties Guidance, paragraph 4.11.
[201] Section 109 EA02 notice dated 22 April 2020 from the CMA to ION Group: 'The CMA understands that joint approaches to some customers have taken place, [✂]. Confirm whether this is correct' (question 9(d)).
[202] Letter dated 6 May 2020 from the CMA to Baker McKenzie (for ION). In particular, the CMA stated that information provided to the CMA by market participants indicated that ION's response of 26 April 2020 (that 'no joint customer interactions have taken place since 2 April 2020') was not accurate.
[203] See paragraph 33(e)(ii) above.
[204] *Ibid*..

140. In view of the above events, which amount to a continuation of the failure to comply after a company becomes aware of the CMA's concern, the CMA has decided that an uplift to the penalty to be imposed is warranted.

The involvement of senior management or officers in relation to Breach 1

141. The IEO was issued and communicated to ION by email on 2 April at 14:26.[205] However, the very close collaboration between ION and Broadway in the preparation of the response to the [Q] RFP continued on 2 April 2020 after the IEO was issued[206] and through to 3 April 2020,[207] and involved several individuals, some at senior and others at very senior management levels. Some individuals were also officers. For example:

a) For ION:

(i) [Mr C] (ION Group General Counsel)[208] – emails dated 3 April 2020 at 13:22 and 13:36.

It is significant to note that [Mr C] was directly copied into the CMA's email of 2 April 2020 issuing the IEO and that he led the communications about it (in the evening of 2 April 2020) within ION and also initially to Broadway.

(ii) [Mr K] (ION) and [Mr L] (ION) - email dated 2 April 2020 at 22:06.

[Mr K] and [Mr L] were stated by ION to be among the 'senior key managers'[209] directly contacted by [Mr C] to inform them of the IEO and the need to comply with it.

(iii) [Mr E] ([✂] COO, ION) - for example, emails dated 2 April 2020 at 22:06; and 3 April 2020 at 07:58, 15:22 and 15:34.

(iv) [Mr M] (CEO, [ION division]) - for example, emails dated 2 April 2020 at 20:09 and 21:26; and 3 April 2020 at 13:22 and 13:36.

(v) [Mr Y] (COO, [ION division]) - for example, emails dated 2 April 2020 at 20:09 and 21:26.

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[205] Email dated 2 April 2020 at 14:26 from the CMA to Baker McKenzie, copied to ION Group.
[206] See paragraph 29 above.
[207] See paragraph 30 above.
[208] [Mr C] is also a Director of ION Group and ION Trading.
[209] ION's response (via Simmons & Simmons) of 7 December 2020 to the CMA's section 109 EA02 notice dated 30 November 2020.

b) For Broadway:

(i) [Mr B] (CEO, Broadway)[210] – email dated 2 April 2020 at 18:45.

[Mr B] was briefed about the IEO by [Mr C] in the evening of 2 April 2020 and [Mr B] subsequently disseminated that information to the Broadway management team.

(ii) [Mr A] (CEO, [Broadway division] [✂]) – for example, emails dated 2 April 2020 at 19:14 and 20:09; and 3 April 2020 at 07:58, 15:22 and 15:34.

(iii) [Mr X] (Head of Sales, [Broadway division] [✂]) - for example, emails dated 2 April 2020 at 20:09 and 21:26; and 3 April 2020 at 13:22, 13:36, 15:22 and 15:34.

142. It is striking that some of those individuals (namely, [Mr K] (ION), [Mr L] (ION) and [Mr B] (Broadway)) were among the first very senior individuals to be informed of the IEO; and that [Mr B] (Broadway) was the person who then disseminated that information to the Broadway management team. It is even more striking that [Mr C] (ION Group General Counsel) was included in two emails on 3 April 2020,[211] some 23 hours after the IEO was issued and a few hours before the response to the [Q] RFP was submitted – [Mr C] was directly copied into the CMA's email of 2 April 2020 issuing the IEO and he led the communications about it within ION and also initially to Broadway.

143. The involvement of a significant number of individuals in such senior management positions in communications about the response to the [Q] RFP (in some instances including detailed drafts of its proposed content) is a particularly serious aggravating factor. Many of the individuals in question ought to have known at the relevant times of the need to comply with the IEO, or at least if they only found out about the IEO some time later they ought to have taken prompt corrective action to ensure compliance; and two of them (namely, [Mr C] (ION) and [Mr B] (Broadway)) were in the lead on communications about the IEO to their respective businesses, so should have identified the risks of the conduct in question in terms of the IEO very quickly and taken immediate corrective action to ensure compliance.[212]

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[210] [Mr B] is also a Director of Broadway Technology LLC.
[211] See paragraph 30 above.
[212] ION submitted that the CMA had overplayed the significance of the involvement of senior management in the alleged breaches; it added that the fact that a lawyer ([Mr C]) was copied in to certain emails in relation to the [Q] RFP could not simply be read as being complicit in the commercial actions taken by Broadway (ION's Representations, paragraph 7.3(g). However, as noted in the above paragraphs, the significant point is that, having been copied in on relevant correspondence, [Mr C], who was the ION lead on communications about the

144. In view of the above matters, the CMA has decided that a considerable uplift to the penalty to be imposed is warranted.

The involvement of senior management or officers in relation to Breach 2

145. ION submitted that the CMA could not use the involvement of senior management as an aggravating factor for Breach 2, since given that paragraph 7 of the IEO (including the CMA's template) specifically required the Chief Executive Officer to provide the Compliance Statements, there could not be a situation in which a breach the IEO as regards Compliance Statements did not involve senior management.[213]

146. The CMA has treated as an aggravating factor, the omission of relevant documents among various documents that were provided to the CMA directly by [Mr I] (CEO of ION) and which were not part of a Compliance Statement. On 18 May 2020, [Mr I] purported to provide 'all email correspondence in connection with the [Q] bid between Broadway/[ION division] and [Consultant]/[Q] in the period from 26 March 2020 to 22 April 2020'.[214] However, the documents produced did not contain any communications between Broadway and [Consultant]. It is relevant to note, for present purposes, that [Mr I] was responding to an email dated 15 May 2020 from the CMA and which had been addressed to ION's external legal advisers at the time (Baker & McKenzie), copied to [Mr I] among others at ION.[215] The relevant question in the CMA's email (prefaced by the introduction 'Missing correspondence') did not call for a response directly from [Mr I] or any senior manager in ION.[216] However, the response to that question was provided personally by [Mr I], as summarised above.

147. This component of Breach 2 was committed at the highest level of seniority within ION. Therefore, the CMA has decided that an uplift to the penalty to be imposed is warranted.

Mitigating factors

148. The CMA notes that the very close collaboration between ION and Broadway that took place before the IEO was communicated to ION (on 2 April 2020 at

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IEO and who was also ION's General Counsel, failed to spot the need to check (and ensure) compliance with the IEO.

[213] ION's Representations, paragraph 7.5(e).

[214] Email dated 18 May 2020 from ION to the CMA. See also paragraph 50(b) above.

[215] Email dated 15 May 2020 at 17:41 from the CMA to Baker McKenzie (for ION), copied to ION.

[216] In relation to this matter, the CMA referred to question 1(i) of the CMA's section 109 EA02 notice dated 6 May 2020, which was also addressed to Baker & McKenzie (for ION Group). Question 1(i) did not call for a response directly from [Mr I] or any senior manager in ION; and ION Group's response, dated 14 May 2020, was provided by Baker & McKenzie.

14:26) was not in contravention of the IEO.[217] However, despite the imposition of the IEO, the collaboration continued, including for example, at 15:29 the same day (when [Mr M] (ION) sent an email to various individuals at Broadway and ION in relation to the review of the draft response to the [Q] RFP).[218] Although it is not in general a mitigating factor that on-going conduct did not cease immediately following the communication by the CMA of an initial enforcement order, in the present case the CMA has relied only on communications occurring several hours after the IEO was communicated.[219]

149. ION submitted that it was a mitigating factor that 'within the hours following the imposition of the IEO', ION's General Counsel was disseminating the necessary messages to the appropriate personnel.[220] However, the CMA's view is that this is not a mitigating factor, since the evidence demonstrates that despite certain messages having been disseminated to certain individuals (see paragraph 38 above), conduct in breach of the IEO continued over 2 and 3 April 2020 and subsequently in April and May 2020 (see Table 1 and paragraphs [21] and 29 to 32 above).

150. The CMA has also considered whether ION's offer to make certain voluntary arrangements may constitute a mitigating factor. In the MT's Initial Report (dated 13 May 2020) on compliance with the IEO,[221] the MT identified a number of instances of non-compliance with the IEO. As regards communications about the IEO, both within ION and Broadway, the MT stated: ' … on provision of some relevant correspondence by the CMA, the Trustee Team observes that **ION has stated its intention to implement** a number of "voluntary" arrangements, including … **communications to staff explicitly instructing the separation of operations and go-to-market approaches and strategies**' (paragraph 4.89, emphasis added).[222] However, given: (i) the tardiness of such an offer (as the IEO was communicated on 2 April 2020); and (ii) the fact that the offer was only made after the MT had raised the issue of ION's potential non-compliance with the IEO, the CMA has concluded that this does not constitute a mitigating factor.

151. ION also submitted that it was a mitigating factor that any potential breach was voluntarily corrected or clarified on 3 June 2020 by Broadway very soon

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[217] This is also recognised in the IEO itself which provides that 'no act or omission shall constitute a breach of this Order, and nothing in this Order shall oblige ION or ION Trading to reverse any act or omission, in each case to the extent that it occurred or was completed prior to the commencement date' (IEO, paragraph 3).
[218] Email dated 2 April 2020 at 15:29 from ION to Broadway. [Mr M] (ION) sent the email to [Mr X] (Broadway), copied to various individuals at both Broadway (including [Mr A]) and [Mr Y] (ION) asking 'Hey guys, what time are we reviewing? I can walk you thru the analysis which may be easier. Happy to discuss'.'
[219] See paragraph 29 above.
[220] ION's Representations, paragraph 7.3(c).
[221] ION Investment Group Limited / Broadway Technology Holdings LLC - Monitoring Trustee Appointment dated 23 April 2020 – Initial Report – 13 May 2020.
[222] See also paragraph 34(c) above.

after the CMA's interpretation of the facts became clear to the parties; ION added that the result of what it described as 'a fleeting occurrence' was that there could not have been any impact on the customer, the market, or the CMA's ability to refer or require remedies.[223] The CMA disagrees with ION's submission as to the impact of the action taken by Broadway on 3 June 2020, for the reasons given in paragraph 90(b) above. In particular, ION misses the point that the purported amendment of the proposal by Broadway on 3 June 2020 did not retrospectively cure the failure to comply with the IEO. Moreover, ION's description of the breach as 'a fleeting occurrence' grossly underplays the seriousness and repeated nature (over April and in May 2020) of the failures to comply with the IEO.

152. ION repeated its submission that the response to the [Q] RFP was a Broadway proposal (not a joint bid) that was submitted by Broadway; and added that the CMA should take that into account as a mitigating factor.[224] The CMA disagrees with that submission for the following reasons. Firstly, the CMA refers to the reasons set out at paragraph 81 above in respect of ION's characterisation of the response as a Broadway proposal and not a joint bid. Secondly, and in any event, the distinction that ION seeks to draw between a Broadway proposal and a joint bid does not constitute a basis for a potential mitigation of the penalty for the failures to comply with paragraphs 4 (and in particular 4(c)), 5(a) and 6 of the IEO as found by the CMA.

Additional points raised by ION

153. ION submitted that the proposed penalty for Breach 1 should be significantly reduced because it would be the highest to date for a single breach, which was incompatible with the fact that there was no joint bid in breach of paragraph 5(g) of the IEO; and also because it would be inconsistent with the level of penalties for more serious breaches in past CMA decisions.[225]

154. The CMA disagrees with these submissions for the following reasons:

a) Firstly, the fact that a given penalty would be the highest to date is not a reason for imposing a lower penalty. As noted in the Penalties Guidance, the CMA 'will assess all the relevant circumstances of the case in the round in order to determine a penalty that is reasonable, appropriate and thus proportionate in the circumstances'.[226] Moreover, as noted in the Interim Measures Guidance, 'given the importance of Interim Measures to

[223] ION's Representations, paragraph 7.3(c).
[224] ION's Representations, paragraph 7.3(f).
[225] ION's Representations, paragraph 7.3(a) and (b).
[226] The Penalties Guidance, paragraph 4.11.

the functioning of the regime, the CMA will … impose proportionately larger penalties in future cases should this prove necessary in the interests of deterrence'.[227] Despite previous penalty cases, breaches of initial enforcement orders have continued to occur, so it is important to reinforce the need for deterrence through higher penalties in appropriate cases. The CMA has decided that given the serious and flagrant nature of the breaches and the aggravating factors in the present case, it is necessary in the interests of deterrence to impose a proportionately larger penalty than those imposed in previous cases.

b) Secondly, and for the reasons given in sub-paragraph (a) above, the CMA is not bound by previous decisions; ION's submission on the alleged inconsistency with past CMA cases is therefore rejected.

c) Thirdly, as regards ION's submission that there was no joint bid in breach of paragraph 5(g) of the IEO, the CMA refers to its response in paragraph 81 above.

Financial resources available to ION

155. The CMA has also had regard to the financial resources available to ION Investment Group Limited and ION Trading Technologies Limited.[228]

156. In determining the appropriate level of penalty, the CMA has considered the last fully audited financial statements for each of ION Investment Group Limited and ION Trading Technologies Limited. These statements show that:

a) ION Investment Group Limited's 2019 group turnover was €1,487,643,000, its operating profit was €311,419,000, and it made a loss after tax of €281,279,000;[229] and

b) ION Trading Technologies Limited's 2019 turnover was €730,306,000, its operating profit was €192,399,000, and its profit after tax was €15,041,000.[230]

157. The above information indicates that each of ION Investment Group Limited and ION Trading Technologies Limited had sufficient financial resources available to it to ensure compliance with the IEO. Moreover, each has significant financial resources available such that it would not be materially

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[227] Interim Measures Guidance, paragraph 7.6.
[228] The Penalties Guidance, paragraph 4.11.
[229] ION Investment Group Limited, Directors' report and consolidated financial statements for the financial year ended 31 December 2019.
[230] ION Trading Technologies Limited, Directors' report and consolidated financial statements for the financial year ended 31 December 2019.

affected by a penalty of the amount imposed in this decision – specifically, although ION Investment Group Limited made a significant loss after tax in 2019, the penalty imposed would represent less than 0.1% of that loss.

158. The CMA has also had regard to the impact of the Coronavirus (COVID-19) pandemic on each of ION Investment Group Limited and ION Trading Technologies Limited. It has not identified any particular impact, given the size of the financial resources of each of them, that would be sufficiently material such as to affect the level of penalty imposed in this case.

Conclusion on the amount of the penalty imposed

159. 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 €74 million for ION Investment Group Limited and approximately €36.5 million for ION Trading Technologies Limited (on the basis of 2019 figures)), the CMA does not consider that the failures to comply with the IEO in this case are so serious as to warrant a penalty at the upper end of the scale.

160. In all the circumstances, the CMA has decided that the imposition of a penalty of £300,000 for Breach 1 (presentation of the Broadway and [ION division] (ION) offers collectively to [Consultant]) and £25,000 for Breach 2 (failure to provide to the CMA the requisite information for compliance-monitoring purposes), resulting in a total penalty of £325,000 is appropriate on the basis that: (i) it would reflect the seriousness of the failures to comply with the IEO, (ii) it would reflect the existence of the aggravating factors set out above, (iii) it would act as a general deterrent to companies subject to an initial enforcement order, (iv) it is substantially below the statutory maximum of 5% of ION Investment Group Limited's global turnover (at approximately 0.03% of turnover and 0.1% of operating profit)[231] and of ION Trading Technologies Limited's global turnover (at approximately 0.05% of turnover, 0.2% of operating profit and 2.5% of profit after tax)[232] and (v) it is not disproportionate in this case.

F. Next steps

161. ION Investment Group Limited and ION Trading Technologies Limited have the following rights and obligations in relation to the final penalty which the CMA has imposed:

[231] At an exchange rate of 0.85615 GBP to Euro at closing date (31 December 2019), FAME.
[232] At an exchange rate of 0.85615 GBP to Euro at closing date (31 December 2019), FAME.

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

b) They may pay the penalty or different portions of it earlier than the date by which it is required to be paid.

c) Pursuant to section 112(3) of the EA02, they have the right to apply to the CMA within 14 days of the date on which this notice is served on them for the CMA to specify different date(s) by which the penalty or different portions of it are to be paid.

d) Pursuant to section 114 of the EA02, they have the right to apply to the CAT against any decision the CMA reaches in response to an application under section 112(3) of the EA02, within the period of 28 days starting with the day on which they are notified of the CMA's decision.

e) Pursuant to section 114 of the EA02, they have the right to apply to the CAT within the period of 28 days starting with the day on which this notice is served on them in relation to:

(i) the imposition or nature of the penalty;

(ii) the amount or amounts of the penalty; or

(iii) the date by which the penalty is required to be paid or (as the case may be) the different dates by which portions of the penalty are required to be paid.

f) If they apply 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 (e)(iii) above shall start with the day on which they are notified of the CMA's decision on the section 112(3) application.

g) 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 any of 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 due to the CMA.[233]

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[233] Section 115 of the EA02. Section 113 of the EA02 covers (among other matters) the interest payable if the whole or any portion of a penalty is not paid by the date by which it is required to be paid.

[signed]

Joel Bamford
Senior Director, Mergers
7 August 2021
Competition and Markets Authority

Appendix: List of non-public documents relied on in evidence

A. Evidence contained in the document provided by [Consultant] to the CMA on 4 May 2020

B. Other documents

Correction: in this published version of the decision, cross-references to paragraph '[21]', and one cross-reference to paragraph '[83]', denote corrections of changes that were made (automatically by software) to the visual representation of those cross-references (as '0' and '8383' respectively) in the electronic version of the decision prior to that decision being served on ION.