CMA
Competition & Markets Authority

Anticipated acquisition by Theramex HQ UK Limited of European Rights to Viatris Inc's Femoston and Duphaston products

Decision to impose a penalty on Viatris Inc under section 94A of the Enterprise Act 2002

Decision to impose a penalty

1. The Competition and Markets Authority (the **CMA**) hereby gives notice to Viatris Inc (**Viatris**) that it has decided to impose a penalty on Viatris under section 94A of the Enterprise Act 2002 (the **Act**)[1] because it considers that Viatris 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(2) of the Act on 20 November 2023 to CEP V Investment 25 S.à.r.l, CIM Europe S.à.r.l., Galaxy Acquisitions S.à.r.l., PAI Partners S.à.r.l., Theramex HQ UK Limited (the **Acquirer Group**) and Viatris (the **IEO**).[2]

2. The proposed cumulative amount of the penalties imposed on Viatris in respect of the breaches identified in this penalty notice is £1.5 million comprising the following:

   a. £500,000 for implementing changes to key staff associated with the assets subject to the merger without the CMA's prior written consent (**Breach 1**); and

   b. £1,000,000 for failing to notify the CMA immediately of the changes to key staff, which it should have known or suspected might amount to a breach of the IEO (**Breach 2**).

Procedural history and Viatris' submissions

3. On 7 May 2024, the CMA sent Viatris a notice pursuant to section 109 of the Act requesting relevant documentary evidence and seeking to clarify the facts and circumstances relating to changes to key staff (the **Notice**). On 14 May 2024, Viatris responded to the Notice (the **Response**). This was accompanied by written submissions (the **Cover Submissions**).

4. On 13 June 2024, the CMA sent a letter to Viatris outlining its initial concerns in relation to the suspected failures to comply with the terms of the IEO (the **IEO**

[1] Notice is given pursuant to section 112 of the Act and in accordance with Chapter 5 of Administrative penalties: Statement of Policy on the CMA's Approach (CMA4).
[2] The IEO defines '**specified period**' as 'the period beginning on the commencement date and terminating in accordance with section 72(6) of the Act'. The IEO commencement date is defined as: 'ROW (rest of world) closing' (that date being 8 December 2023). The IEO ceased to be in force upon the CMA's acceptance of undertakings in lieu on 12 August 2024.

Preliminary Letter). The CMA stated that it was considering imposing a penalty on Viatris. Viatris provided written representations in response to the IEO Preliminary Letter by letter dated 20 June 2024 (the **IEO Preliminary Response**).

5. On 30 August 2024, the CMA issued to Viatris a provisional notice to impose a penalty under section 94A of the Act (the I**EO Provisional Penalty Decision**). Viatris provided written representations on the IEO Provisional Penalty Notice on 13 September 2024 (the **IEO Provisional Decision Response**) in which it disputed that its conduct amounted to breaches of the IEO and objected to the imposition, and the level, of the penalty proposed in the IEO Provisional Penalty Decision.

6. In arriving at this final decision the CMA has carefully considered the available contemporaneous evidence and all of Viatris' representations, including the Response and Cover Submissions, the IEO Preliminary Response and the IEO Provisional Penalty Response. Viatris' representations are addressed in sections D and E below.

Structure of this document

7. This document is structured as follows:

    a. **Section A** sets out an executive summary.

    b. **Section B** sets out the legal framework.

    c. **Section C** sets out the factual background.

    d. **Section D** sets out the failures to comply without reasonable excuse.

    e. **Section E** sets out the CMA's reasons for finding that a penalty of £1.5 million is appropriate and proportionate in this case.

    f. **Section F** sets out next steps including Viatris' opportunity to appeal this decision.

A. Executive Summary

Failure to comply with the IEO

8. On 20 August 2023, Theramex HQ UK Limited (**Theramex**) entered into an asset purchase agreement (**APA**) with Viatris to acquire certain rights in the UK, the European Economic Area, Switzerland and certain other European countries to Viatris' Femoston and Duphaston products (the **Assets** or the **Rights**) (the **Merger**). The CMA's mergers intelligence function identified the transaction as warranting an investigation and on 23 October 2023 the CMA notified the Acquirer Group and Viatris of its intention to impose an initial enforcement order. On 20 November 2023

the CMA imposed the IEO.[3]

9. Having carefully considered the available evidence and Viatris' various written submissions, the CMA finds that Viatris has, without reasonable excuse, failed to comply with the IEO during the specified period by reason of its conduct in relation to changes to key staff relating to the Assets in breach of paragraph 6.i. of the IEO and its failure to notify the CMA of the breach pursuant to paragraph 10 of the IEO.

10. As explained more fully in this document, the CMA has decided that Viatris failed to comply with the IEO in the following respects (together the **Breaches**):

    a. **Breach 1** – Viatris has failed to comply with paragraph 6.i. of the IEO by implementing changes to key staff associated with the Assets without the CMA's prior written consent; and

    b. **Breach 2** – Viatris should have known or suspected that the changes to key staff associated with the Assets might amount to a breach of the IEO but failed to notify the CMA immediately in compliance with paragraph 10 of the IEO.

Risk of pre-emptive action

11. Interim measures are of vital importance to the functioning of the UK's voluntary merger control regime. They play a critical role in preventing pre-emptive action, which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action. Breaches of an initial enforcement order undermine the CMA's ability to prevent, monitor and ultimately remedy any pre-emptive action taken by merger parties.

12. In accordance with their precautionary purpose, initial enforcement orders seek to protect against the *possibility or risk* of prejudice to the reference or potential remedies. It was incumbent on Viatris to comply with all of its obligations under the IEO. When assessing whether there has been a failure to comply with interim measures, the CMA does not need to demonstrate that the conduct of a merging party has caused actual prejudice to the outcome of a reference or impeded the taking of any appropriate remedial action. A failure to comply with the obligations set out in an initial enforcement order is sufficient to engage the penalty provisions under section 94A of the Act.

No reasonable excuse

13. Having carefully considered the evidence available to the CMA and Viatris' representations in the IEO Preliminary Response, the CMA has found that Viatris has no reasonable excuse for its failures to comply with the IEO.

[3] The IEO imposed on 20 November 2023 was largely in the CMA's standard template form, although amended to make clear that the IEO did not prohibit completion of the transaction subject to compliance by the parties with the restrictions contained in the IEO.

14. The CMA considers that the Breaches were not caused by a significant and genuinely unforeseeable or unusual event, nor were they caused by any event(s) beyond the control of Viatris.[4]

Decision to impose a penalty

15. The CMA has decided, having had regard to its statutory duties and the guidance set out in Administrative penalties: Statement of Policy on the CMA's Approach (CMA4) (referred to as **CMA4** in this final penalty decision), and to all the relevant circumstances of this case, that it is appropriate to impose a penalty in connection with each of the Breaches in the amounts particularised at paragraph 2 above in consideration of the following factors:

    a. These failures could have had an adverse impact on the CMA's investigation, as they might have prejudiced the reference or impeded the taking of any necessary remedial action.

    b. These failures to comply were significant and flagrant (whether committed intentionally or negligently).

    c. The evidence available to the CMA shows that Breach 2 took place with the knowledge and/or involvement of Viatris' senior management.

    d. By asserting that the key staff changes that are the subject of Breach 1 were prospective at the same time as seeking a derogation from the IEO for those changes, Viatris sought to obtain an advantage or derive benefit from its failure to notify the CMA candidly of the suspected breach.

    e. It is appropriate to impose a penalty in connection with Breach 2 that is larger than the penalty for Breach 1, as Viatris' conduct in relation to Breach 2 involved a troubling lack of candour.

    f. It is appropriate and proportionate in the round to achieve the CMA's policy objectives of incentivising compliance with interim measures and deterring future failures to comply by Viatris, and other persons who may consider future non-compliance with interim measures, to impose the penalty as specified for each of the Breaches.

    g. In view of Viatris' size and financial position, the seriousness of the Breaches, the aggravating factors, and the absence of mitigating factors, the CMA considers that penalties cumulatively totalling £1.5 million (which individually and cumulatively are substantially below the statutory maximum of 5% of Viatris' global turnover) constitute appropriate and proportionate penalties for Viatris' failures to comply with the IEO.

[4] CMA4, paragraph 4.4.

B. Legal Framework

Relevant legislation

16. Section 72 of the Act 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.

17. Section 72(8) of the Act 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'.

18. Section 72(3C) of the Act provides that a person may, with the consent of the CMA, take action (or action of a particular description) that would otherwise constitute a contravention of an order made under section 72. Pursuant to this provision, the CMA may (on application by the merging parties) grant a derogation, giving consent to the merging parties to undertake certain actions that would otherwise be prohibited by an initial enforcement order.

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

20. Section 94A(1) of the Act provides that '[w]here 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'.

21. Section 94A(2) of the Act 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'.[5]

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

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

24. Section 94B(1) and (2) of the Act requires the CMA to prepare and publish a statement of policy on how it uses its powers to impose a financial penalty under

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

section 94A of the Act and how it will determine the level of the penalty imposed.[6]

25. Section 114 of the Act provides an appeal mechanism for a person on whom a penalty is imposed. By reason of section 94A(7), section 114 applies in relation to a penalty imposed under subsection 94A(1), as it applies in relation to a penalty of a fixed amount imposed under section 110(1).

Relevant guidance

23. In December 2021, the CMA published guidance for merging parties and legal advisers advising on a transaction where interim measures may be relevant: *Interim measures in merger investigations*,[7] referred to as **CMA108** in this final penalty decision.

24. Paragraph 1.3 of CMA108 explains that:

> "When the CMA is investigating a merger, the [Act] enables it to take steps to prevent or unwind pre-emptive action. Pre-emptive action is action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action. Pre-emptive action is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. The word 'might' means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited."

25. Paragraphs 1.6 to 1.7 of CMA108 note that:

> "If the CMA decides that a merger does require scrutiny, it is essential to the functioning of the UK's voluntary, non-suspensory merger regime that Interim Measures to preserve the pre-merger competitive structure of markets should be effective. The CMA's ability to impose Interim Measures on merging parties, and to impose penalties where these have not been complied with, are the necessary corollary of having a voluntary regime.
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> "If the CMA has decided to investigate a merger, it is critical that any business which has been acquired continues, during the CMA's investigation, to compete independently with the acquiring business and is maintained as a going concern."

26. Chapter 3 of CMA108 sets out the procedure that should be followed for derogation requests.

[6] On 10 January 2014, the CMA published its statement of policy regarding its powers under section 94A of the Act amongst other provisions (being CMA4).
[7] Interim measures in merger investigations dated December 2021, CMA108, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1042670/CMA108_interim_measures_in_merger_cases.pdf.

28. Chapter 7 of CMA108 explains the importance of periodic compliance statements for businesses subject to interim measures and the administrative rationale for requiring such statements:

> “The provision of periodic compliance statements is an important obligation in the Interim Measures to ensure that businesses take seriously their compliance obligations and put in place appropriate mechanisms to monitor and report on their compliance to the CMA. This transparency also ensures the CMA becomes aware of and understands any material developments within businesses subject to Interim Measures and can then investigate in the event of potential failures to comply, decide whether it is appropriate to impose a penalty for any instance of non-compliance, and take action swiftly to address and seek to resolve any concerns it may identify as regards pre-emptive action.”

29. Paragraphs 1.10 to 1.11 of CMA108 warn that:

> “The CMA’s role in regulating merger activity, and its ability to do so effectively, is a matter of public importance and the CMA takes merging parties’ compliance with their obligations under Interim Measures very seriously. Where the CMA considers that a person has, without reasonable excuse, failed to comply with Interim Measures, it may impose a penalty of such fixed amount as it considers appropriate, which shall not exceed 5% of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled by the person on whom the penalty is imposed. The CMA will make full use of this power to deter activity which undermines the effectiveness of Interim Measures.
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> “It is therefore 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.”

30. As explained in CMA4, the CMA considers that penalties imposed for breaches should achieve the policy objectives of incentivising compliance with its interim measures powers and deterring future failures to comply, while not being disproportionate or excessive in all the circumstances of the case.[8] CMA4 states that the CMA will consider whether to impose a penalty on a case-by-case basis, taking into account all relevant circumstances. It identifies a number of factors the presence of which may make it more likely that a penalty will be imposed.[9] These include, amongst other factors, (i) whether the failure to comply is significant and/or flagrant (whether committed intentionally or negligently)[10] and (ii) whether a party sought to

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[8] CMA4, paragraph 4.1.
[9] CMA4, paragraph 4.2.
[10] Footnote 36 of CMA4 explains that: ‘For the purposes of this guidance, a failure is 'intentional' if [the relevant party] must have been aware, or could not have been unaware, that its conduct was of such a nature as to lead to a failure to comply and a failure is ‘negligent’ if [the relevant party] ought to have known that its conduct would result in a failure to comply with [an interim measure].’

obtain an advantage or derive benefit from the failure. The CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. As part of this, it 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).[11]

31. As regards the level of penalty imposed, paragraph 4.11 of CMA4 provides that the CMA will assess all the relevant circumstances in the round in order to determine a penalty that is reasonable, appropriate and thus proportionate in the circumstances. It states that the CMA is likely to set penalties towards the upper end of the relevant statutory maxima for the most serious failures to comply and/or where it is necessary to do so having regard to the relevant person's size and financial position. Paragraph 4.11 explains that the assessment may include the factors influencing the decision to impose a penalty (including those noted above). The assessment may also consider various non-exhaustive factors on a case-by-case basis, including:

    a. any prejudice failure to comply with the interim measures might cause to the CMA's ability to take remedial action if that would be deemed necessary following the merger investigation;

    b. the nature and gravity of the failure, including whether the failure was intentional, the extent of any negligence involved in the failure, whether there was any attempt to conceal the failure from the CMA and the extent, if any, to which the relevant party complied with other aspects of the interim measures;

    c. the reasons given by the relevant party for the failure to comply with interim measures;

    d. whether the relevant party derived any advantage from its failure or might reasonably be expected to do so;

    e. any steps taken in mitigation by the relevant party to avoid the failure and/or ensure that failures do not occur in the future, or to discipline responsible individuals;

    f. continuation or cessation of the failure after the relevant party became aware of the contravention or failure, or of the CMA's concern that there might have been a contravention or failure;

    g. whether the involvement of senior management or officers contributed to any failure, including whether such individuals made arrangements for suitable resources to be made available to comply with the interim measures;

    h. the size of, and administrative and financial resources available to, the relevant party; and

[11] CMA4, paragraph 4.4.

i. whether the relevant party has ever failed to comply with an investigatory requirement, interim measure or CMA decision, either in the current investigation or previously (that is, whether there is an element of 'recidivism'). The seriousness of any past failure(s), the time that has elapsed since the failure(s) occurred, and any other relevant factors may be taken into account.

32. Paragraph 7.8 of CMA108 warns that:

> "To date the penalties imposed have been significantly less than the 5% cap. However, 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."

Relevant case law

The concept of pre-emptive action

33. In *Stericycle*,[12] the Competition Appeal Tribunal (the **CAT**) considered the meaning of pre-emptive action in section 80(10) of the Act,[13] and held that 'the word 'might'… implies a relatively low threshold of expectation that the outcome of a reference might be impeded'.[14]

34. In *ICE/Trayport*,[15] the CAT observed that 'pre-emptive action' is a broad concept, which concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. It held that '[t]he word "might" means that it is the <u>possibility</u> 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'.[16]

35. In *Facebook v CMA,* the CAT (subsequently upheld by the Court of Appeal) confirmed that pre-emptive action includes 'action that has the potential to affect the competitive structure of the market during the CMA's investigation'.[17] The CAT held that 'the CMA is not required to have formed a view that it is likely that prejudice to the Phase 2 reference (such as harm to the competitive structure of the market) will materialise or that there will in fact be an impediment to the CMA's remedial options.

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[12] Stericycle International LLC v Competition Commission [2006] CAT 21 (**Stericycle**).
[13] Section 72 of the Act relates to initial enforcement orders made during a Phase 1 merger investigation. Interim orders made during a Phase 2 merger investigation are made under section 81 of the Act. 'Pre-emptive action' for the purposes of section 81 of the Act is defined in section 80(10) of the Act and in identical terms to the definition in section 72(8) of the Act.
[14] Stericycle, paragraph 129.
[15] Intercontinental Exchange v CMA [2017] CAT 6 (**ICE/Trayport**).
[16] ICE/Trayport, paragraph 220.
[17] Facebook v CMA [2020] CAT 23 (**Facebook v CMA**), paragraph 124; see also paragraph 21. The CAT's judgment was upheld by the Court of Appeal (Facebook v CMA (CoA) [2021] EWCA Civ 701 (**Facebook v CMA (CoA)**), paragraph 56.

A risk or a possibility is enough.'[18]

36. The breadth of the CMA's statutory powers to prevent pre-emptive action was emphasised by the Court of Appeal in *Facebook v CMA*. The Court of Appeal confirmed that those powers include the ability to regulate any activity which the merging parties might take in connection with or as a result of the merger that has the potential to affect the competitive structure of the market in question during the merger investigation.[19]

37. More generally, in *Electro Rent*,[20] 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'.[21]

The purpose of an initial enforcement order

38. The Supreme Court has held that '[t]he purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets.'[22] It is of central importance to the UK's voluntary, non-suspensory merger regime that interim measures should be effective.

39. 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.[23] 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'.[24] Given the statute's precautionary purpose, the CAT in *Facebook v CMA* confirmed that the CMA has a wide margin of appreciation in imposing an initial enforcement order under section 72 of the Act.[25]

40. It is critical that the acquired business continues to compete independently and is maintained as a going concern. Any failure to preserve its viability pending the outcome of the merger investigation risks impeding any action the CMA might need to take should it find the merger had resulted in an adverse effect on competition.

41. An initial enforcement order contains positive obligations on its addressees to do certain things as well as obligations to refrain from taking certain actions. The CAT in *Facebook v CMA* noted that 'it is of the utmost importance that interim measures are scrupulously complied with when the CMA is considering a derogation request and merging parties should not themselves form judgements or reach decisions that are properly for the CMA'.[26] Since the terms of an initial enforcement order are intended

[18] Facebook v CMA, paragraph 126.
[19] Facebook v CMA (CoA), paragraph 56.
[20] Electro Rent Corporation v CMA [2019] CAT 4 (**Electro Rent**).
[21] Electro Rent, paragraph 120.
[22] Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants) [2015] UKSC 75, paragraph 4; see also paragraph 35.
[23] Section 72(8) of the Act.
[24] ICE/Trayport, paragraph 220.
[25] Facebook v CMA, paragraph 21, upheld in Facebook v CMA (CoA), paragraph 59.
[26] Facebook v CMA, paragraph 158; see also Electro Rent, paragraph 206.

to catch more than just actual prejudice or impediments, the onus is on the addressees to seek the CMA's consent if their conduct creates even the possibility of prejudice or impediment,[27] and engage with the CMA by submitting a derogation request which is 'fully specified, reasoned and supported by relevant evidence'.[28]

42. Within that context, the provision of periodic compliance statements is an important obligation in an initial enforcement order to ensure that businesses take seriously their compliance obligations and put in place appropriate mechanisms to monitor and report on their compliance with the initial enforcement order to the CMA.

43. The importance of compliance statements is reflected in the requirement set out at paragraph 7 of the template initial enforcement order that a senior individual of the business, e.g. the Chief Executive Officer (CEO), or other persons as agreed with the CMA, must sign the statements to confirm compliance. The requirement of seniority reflects the need for an individual with sufficient knowledge of a business's operations, and sufficient authority to take steps to prevent breaches of the initial enforcement order, to take responsibility for monitoring and reporting on compliance with the initial enforcement / interim order.[29]

44. This transparency also ensures the CMA becomes aware of and understands any material developments within businesses subject to an initial enforcement order on a timely basis. This, in turn, enables the CMA to ensure that interim measures are fully complied with, to investigate in the event of potential failures to comply, to decide whether it is appropriate to impose a penalty for any instance of non-compliance, and to take action swiftly to address and seek to resolve any concerns it may identify as regards pre-emptive action.[30]

Relevant provisions of the Initial Enforcement Order

45. A copy of the IEO is included at Annex 1 to this final penalty decision.

46. On 20 November 2023, the CMA imposed the IEO on the Acquiring Group and Viatris under section 72(2) of the Enterprise Act 2002 to prevent pre-emptive action in the context of the CMA's investigation into the anticipated acquisition by Theramex of the European rights to Viatris' Duphaston and Femoston products. The IEO includes, *inter alia*, the following provisions:

    '5 – Except with the prior written consent of the CMA, the Acquirer Group and Viatris shall not, during the specified period[31], take any action which might prejudice a

[27] ICE/Trayport, paragraph 220.
[28] Facebook v CMA, paragraph 156.
[29] This is addressed in Chapter 7 of CMA108.
[30] See paragraphs 79 to 81 of Notice of penalty addressed to Electro Rent Corporation dated 12 February 2019, Penalty Notice (publishing.service.gov.uk) and paragraphs 115 to 116 of Notice of penalty addressed to PayPal Holdings, Inc. dated 18 September 2019, Penalty notice (publishing.service.gov.uk).
[31] As outlined in footnote 2 above, in accordance with paragraph 14 of the IEO 'specified period' in this context means the period commencing on 'ROW (rest of world) closing' (that date being 8 December 2023) and terminating in accordance with s.72 (6) of the Act (i.e. on such date as the CMA makes a reference or accepts undertakings in lieu). The CMA accepted undertakings in lieu on 12 August 2024.

reference of the transaction under section 22 or 23 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference […]'

'6 – Further and without prejudice to the generality of paragraph 5 and subject to paragraph 3 and 4, the Acquirer Group and Viatris shall at all times during the specified period take all necessary steps to ensure that, except with the prior written consent of the CMA: […]

'i - no changes are made to key staff associated with the Assets or of the Theramex business;'

'8 – The Acquirer Group and Viatris 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 the Acquirer Group and Viatris and their subsidiaries […] with this Order. In particular, two weeks from the commencement date and subsequently every two weeks, […] the relevant Director(s) of each of the addressees of the Order that form part of the Acquirer Group and Viatris or other persons of the Acquirer Group and Viatris as agreed with the CMA shall, on behalf of the Acquirer Group and Viatris, provide a statement to the CMA in the form set out to this Order confirming compliance with this Order.'

'10 – If the Acquirer Group or Viatris has any reason to suspect that this Order might have been breached it shall immediately notify the CMA and any monitoring trustee that any member of the Acquirer Group may be directed to appoint under paragraph 11;'

47. The definitions in the IEO applicable to the provisions set out above are:

    a. '**Assets**' means certain rights, assets and title to commercialise the pharmaceutical products Femoston and Duphaston in the UK, EEA, Switzerland, [and certain other European countries][…]

    b. '**key staff**' means staff in positions of (i) senior executive or managerial responsibility or (ii) whose performance affects the viability of the business;

48. The template compliance statement for Viatris appended to the IEO included the following wording:

    '2 – Subject to paragraph 3 and 4 of the Order, and except with the prior written consent of the CMA:

    'j – No changes have been made to key staff associated with the Assets or of the Theramex business.'

49. The CMA also issued directions regarding compliance in the IEO that: (i) the Acquirer Group and Viatris shall take all necessary steps to ensure that each of their subsidiaries complies with the Order as if the Order had been issued to each of

them[32] (ii) The Acquirer Group and Viatris 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 the Acquirer Group and Viatris and their 3 subsidiaries[33] (iii) At all times, the Acquirer Group and Viatris shall actively keep the CMA informed of any material developments relating to the Assets or the Theramex business, which includes but is not limited to: a. details of key staff associated with the Assets or of the Theramex business who leave or join Viatris or the Theramex business.[34]

C. Factual Background

The Merger

50. Viatris is a global healthcare company formed through the merger of Mylan N.V. and Upjohn, a division of Pfizer, in November 2020. Viatris aims to provide access to medicines, sustainable operations, and innovative solutions. The company's extensive portfolio includes over 1,400 approved molecules across various therapeutic areas.

51. Theramex is a pharmaceutical company specializing in women's health. It was established to provide innovative healthcare solutions and support to women at various stages of their lives. The company's product portfolio includes treatments for contraception, fertility, menopause, and osteoporosis. Theramex has a significant presence in the global market, delivering products to over 80 countries.

52. On 20 August 2023, Theramex entered into the APA with Viatris to acquire the Assets. The anticipated acquisition was announced on 10 October 2023.

Background / reasons behind imposing the IEO

53. The CMA imposed the IEO on 20 November 2023. On the same day, the CMA granted a derogation that excluded the non-UK Assets from the scope of the IEO (the **November Derogation**).

54. The IEO was designed to maintain the current market conditions until the CMA completed its assessment. This helped ensure that the competitive landscape remained unchanged, preventing any actions that could prejudice the inquiry.

55. The IEO prevented both parties from integrating their operations or altering their business structures in ways that might be difficult or impossible to reverse. This was crucial to ensure that any potential remedies or decisions made by the CMA can be effectively implemented.

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[32] Paragraph 7 of the IEO dated 20 November 2023.
[33] Paragraph 8 of the IEO dated 20 November 2023.
[34] Paragraph 9 of the IEO dated 20 November 2023.

56. By imposing the IEO, the CMA aimed to protect competition in the UK HRT market. This is particularly important given the potential for the merger to reduce competition, which could lead to higher prices and reduced availability of HRT products.

57. The IEO allowed the CMA to monitor the activities of both the Acquirer Group and Viatris during the inquiry period. This helped ensure that both parties complied with competition laws and did not engage in practices that could harm competition or consumers.

The Merger Inquiry

58. The CMA initiated a detailed inquiry into the merger on 6 February 2024 to assess its potential impact on competition within the HRT market (the **Merger Inquiry**). The CMA's findings at phase 1 suggest that the merger may significantly reduce competition in the market, potentially leading to higher prices and reduced availability of HRT products for customers.

59. In its phase 1 decision, issued on 4 April 2024 under section 33 (1) of the Act, the CMA decided that on the information currently available to it, that it was or may have been the case that this merger may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom. The CMA had a duty to refer the merger for a phase 2 investigation unless the parties offered acceptable undertakings to address the competition concerns that the CMA had identified.

60. On 11 April 2024, Theramex and Viatris offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act). Section 73(2) of the Act provides the CMA with the ability to accept undertakings in lieu (**UILs**) 'for the purpose of remedying, mitigating or preventing' the SLC concerned or any adverse effect which has or may be expected to result from it.

61. On 18 April 2024, the CMA decided under section 73(A)(2) of the Act that there were reasonable grounds for believing that the proposed UILs, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.

62. On 24 June 2024, the CMA announced that it was consulting on proposed UILs offered by the parties in lieu of a reference to a Phase 2 investigation. The consultation closed on 8 July 2024.

63. On 12 August 2024, the CMA accepted the undertakings offered by the parties in lieu of a reference to a Phase 2 investigation.

How the CMA become aware of the potential non-compliance with the IEO

64. From 22 December 2023 onwards, the CMA received fortnightly compliance statements from Viatris covering the period 8 December 2023 onwards. Each compliance statement stated that no changes had been made to key staff associated with the Assets.

65. Throughout the Merger Inquiry, the CMA has communicated with Viatris via its solicitors, Slaughter and May, which Viatris had appointed as its authorised representative in connection with the Merger Inquiry.[35]

66. On **15 March 2024** the CMA received an email from Slaughter and May attaching a compliance statement dated 15 March 2024 for the period 1 March 2024 to 14 March 2024. Under the heading 'Proposed internal promotions', the email said:

    'the following changes are proposed to take place internally:

    - *Manager A* will be moving from the role of UK Country Manager into the role of Western Europe Manager (*Manager A*'s new role will relate to certain European markets, excluding the UK); and

    - *Manager B* will be moving from the role of Ireland Country Manager into the role of UK Country Manager.'

    It was further explained that 'the proposed effective date for the change of roles would be 1 April 2024' (the **Staff Change**).

67. In its compliance statement dated 15 March 2024, which covered the period 1 to 14 March 2024, Viatris confirmed at paragraph j that "…No changes have been made to key staff associated with the Assets or of the Theramex business." The compliance statement was signed on behalf of Viatris by its Deputy Global General Counsel, [✂].

68. On **19 March 2024**, the CMA sent an email to Slaughter and May with a number of questions about the Staff Change seeking to understand better the role and responsibilities of the UK Country Manager and Ireland Country Manager and whether they constituted key staff associated with the Assets.

69. By email **20 March 2024**, in response to the CMA's questions, Slaughter and May on behalf of Viatris stated that:

    a. 'The Viatris UK and Ireland Country Managers oversee the commercial, sales and marketing functions for all products within their respective territories (while this includes the Rights in the UK*, this responsibility encompasses a broader portfolio of Viatris' UK products – of which the Rights are a part)'.[36]

    b. 'The UK Country Manager is a director of the commercial legal entity "Viatris Healthcare Ltd" and has ultimate responsibility for strategy and commercial decisions relating to the UK Rights. The UK Country Manager has a team of

[35] Confirmed in an email from Viatris' chief business development officer to the CMA dated 13 October 2023.
[36] Viatris stated that: '* In practice, the UK Country Manager's role does not involve oversight of commercial, sales and/or marketing decisions in relation to Duphaston because Duphaston has not had a marketing authorisation in the UK since 2008.'

colleagues reporting to them – i.e., a team of people with a responsibility for day-to-day operations relating to the UK Rights sit below the UK Country Manager'.

c. 'While the Country Manager has managerial responsibility with respect to the relevant territory, they are not a senior executive and nor do they have managerial responsibility with respect to Viatris more broadly.'

70. Slaughter and May also indicated that Viatris was prepared to submit a derogation request in respect of paragraph 6.i. of the IEO for the 'proposed change' and asked the CMA to confirm whether this would be required, stating again that the Staff Change 'is due to take place on 1 April 2024'.

71. On **22 March 2024** the CMA received an email from Slaughter and May asking whether the CMA was in a position to provide feedback and noting that 'this is becoming urgent from Viatris' perspective due to the proposed date for the change of roles. By email the same day in response, and having regard to Viatris' statements in Slaughter and May's email of 20 March 2024, the CMA informed Slaughter and May that it considered that:

a. 'the affected roles involve managerial responsibilities and may be relevant to the viability of the business associated with the Assets';

b. 'the proposed changes constitute key staff changes';

c. 'effecting the proposed staffing changes would need a derogation'; and

d. if a derogation request were to be made, the CMA would consider whether to consent to it, having taken into account '(i) the relevant experience of *Manager B* (in particular by reference to how transferable it is to a UK-specific context)' and '(ii) the strict necessity of effecting those staff changes by 1 April 2024.'

72. Following the exchanges above, by email on 22 March 2024 Slaughter and May submitted on behalf of Viatris a draft consent letter and reasoned request for a derogation from paragraph 6.i. of the IEO for the Staff Change (the **Derogation Request**). The Derogation Request:

a. Contained a description of *Manager A* and *Manager B's* responsibilities in line with Viatris' submission of 20 March 2024;

b. Explained that the Staff Change would not impact the ability of the Assets to compete because *Manager B* had the requisite experience to perform the UK Country Manager role, *Manager B* would be supported by a team that reported to the UK Country Manager, and *Manager A* would remain working within Viatris Europe and therefore be available to support *Manager B* in her role as UK Country Manager;[37] and

[37] Derogation Request, paragraph 1.4.

c. In relation to timing, stated that 'The proposed effective date for the change of roles is 1 April 2024 (and it is important from a continuity perspective that *Manager B* is able to take up the post of UK Country Manager, within the context of the wider internal reorganisation).'[38]

73. By email on **27 March 2024**, the CMA sent Slaughter and May a number of follow-up questions arising from the Derogation Request, including a request for Viatris to set out the steps that had been or would be taken to ensure that the handover from *Manager A* to *Manager B* would not impact the competitiveness of the Assets.

74. On **28 March 2024**, Slaughter and May responded by email to the CMA's questions of 27 March 2024 stating that 'Viatris confirms that a fulsome handover process has been conducted to prepare *Manager B* for transitioning into the role of UK Country Manager'.

75. By email on **10 April 2024**, the CMA informed Slaughter and May that it was minded to grant the requested derogation subject to certain conditions. As regards potential remedies, the CMA explained that the conditions were necessary because 'the CMA has not yet reached a view on what would be necessary to the continuance of the business associated with the UK Assets (in third party hands or otherwise). The CMA has not at this stage ruled out that the continuance of the business associated with the UK Assets may require that certain Viatris or Theramex staff transfer over to a potential purchaser of a remedy package.' The CMA attached a revised draft consent letter and invited Viatris to provide comments. However, in the same email, the CMA noted that the LinkedIn pages for *Manager A* and *Manager B* stated that these promotions had already taken place and asked Viatris to confirm the date on which they had moved to their new roles.

76. On **12 April 2024**, Slaughter and May responded by email on behalf of Viatris to the CMA's question of 10 April 2024 as follows:[39]

    'As noted in the derogation request dated 22 March 2024 (the "**Derogation Request**"), a fulsome handover process is currently being conducted to prepare *Manager B* for transitioning into the role of UK Country Manager (this is with a view both to ensuring that Viatris is compliant with its obligations under the IEO and is a normal part of preparing for an internal reorganisation of roles within a business). As such, *Manager B* has been assisting with the UK Country Manager role as part of the transition process designed to ensure that she is fully equipped to operate this role on her own at the end of the transition period. *Manager A* remains involved in the Viatris UK business and *Manager B* remains involved in the Viatris Ireland business, while they prepare to fully take over their new roles once the transition period is complete. There is currently no formal date for the end of the period of transition.'

[38] Derogation Request, paragraph 1.2.
[39] The CMA notes that there is no reference to a handover or transition process in the Derogation Request, despite Viatris' email of 12 April 2024 stating that the handover process was 'noted in the derogation request dated 22 March 2024'. Viatris first informed the CMA that there had been a handover process on 28 March 2024, in response to a question from the CMA about this.

‘As part of the transition process, *Manager A* and *Manager B*’s job titles have been updated. However, as explained above, the transition process remains ongoing (and *Manager A* will remain involved in the Viatris UK business throughout this transition period and in advance of agreeing the derogation wording).’

77. By email on **23 April 2024**, the CMA sent Slaughter and May a number of follow-up questions about the ‘handover process’ / ‘transition period’ to better understand the extent to which the Staff Change had been implemented:

    a. ‘Provide details of any changes that have been made to *Manager A* and *Manager B*’s terms of employment and confirm whether they are contracted to perform their original roles of UK Country Manager and Ireland Country Manager respectively.’

    b. ‘Provide an estimate of the proportion of their working hours per week that *Manager A* and *Manager B* are currently allocating to their original and new roles.’

    c. ‘Confirm the office locations at which *Manager A* and *Manager B* are currently based and explain whether this has changed in connection with their new roles.’

78. On **24 April 2024**, the CMA held a call with Slaughter and May to discuss the draft consent letter and consented orally to certain amendments. Slaughter and May agreed to follow up with an email recording this discussion.

79. On **25 April 2024**, the CMA received an email from Slaughter and May summarising the discussion of 24 April 2024 and requesting that the CMA formally issue the derogation reflecting the agreed amendment. Later the same day, Slaughter and May responded to the CMA’s questions of 23 April 2024 stating on behalf of Viatris, that:

    a. ‘*Manager A* and *Manager B’s* contracts for their new roles were formally executed on 1 March 2024.’

    b. ‘[…] the effective date for the change of role was intended to be 1 April 2024 (per Viatris’ derogation request dated 22 March 2024). While the Viatris team had understood that the transition would be delayed, on further checks (in particular following questions about social media updates), Viatris now understands that the internal role/title changes took place 1 March 2024.’

    c. ‘*Manager A* and *Manager B* are still in a handover period whereby they are allocating time to both roles in order to give effect to a smooth transition.’

    d. ‘As of today, *Manager A* estimates that he dedicates approximately 20% of his time to his UK Country Manager role, while *Manager B* covers the remaining 80%. However, Viatris notes that these percentages are fluid […]’.

The CMA's section 109 notice and Viatris' response

80. On **7 May 2024**, the CMA sent Viatris the Notice pursuant to section 109 of the Act requesting relevant documentary evidence and seeking to clarify the facts and circumstances relating to the Staff Change. This was accompanied by a letter highlighting the CMA's preliminary concerns in relation to Viatris' compliance with the IEO, which noted that:

    a. After receiving the Derogation Request, the CMA had discovered that *Manager A's* and *Manager B*'s LinkedIn profiles had already been changed to reflect their new roles;

    b. Viatris had informed the CMA in the email of 25 April 2024 that *Manager A* and *Manager B*'s new employment contracts were executed on 1 March 2024 and that the role changes had been announced internally on the same day; and

    c. The CMA had checked Companies House records, which showed that *Manager B* had replaced *Manager A* as a director of two Viatris group companies on 8 March 2024 (Viatris UK Healthcare Limited and Mylan Products Limited).[40]

81. On **14 May 2024**, Slaughter and May on behalf of Viatris provided the Response together with the Cover Submissions, providing further context in relation to the Staff Change and Viatris' efforts to comply with the IEO more generally. The Cover Submissions stated that:

    a. The Staff Change had been necessitated by the voluntary resignation of a member of the European management team (the Western Europe Manager).[41]

    b. Whilst the key deal team[42] was aware that CMA consent may be required, other parts of the organisation, conscious of their obligations under the IEO (and more broadly) to ensure continuity of business, started to take steps to implement the Staff Change, not recognising that a purely internal reorganisation was within scope of the IEO. This was a genuine misunderstanding and all individuals involved had been reminded of Viatris' obligations under the IEO.

    c. Internal communications and employment documents referred to a commencement date for the new role of 1 March 2024 for HR purposes. However, in reality and from a practical perspective, the transition of *Manager B* into her new role remained ongoing.[43]

[40] Viatris had not previously disclosed *Manager A's* directorships in these two companies. In the email of 20 March 2024, Viatris had informed the CMA that the UK Country Manager was director of 'Viatris Healthcare Ltd', however the CMA has been unable to identify an entity by that name.
[41] Cover Submissions paragraph 6.
[42] Viatris has not identified who the individual members of the "key deal team" are, but based on Viatris' submissions, the CMA assumes that they are also the relevant individuals tasked with ensuring compliance with the IEO.
[43] Cover Submissions paragraph 6.

d. The transition process had not impacted Viatris' UK business generally or the Assets specifically, in any way. Viatris is fully incentivised to ensure that the UK Country Manager is sufficiently experienced and supported.[44]

82. The Cover Submissions were accompanied by the Response. The Response and appended contemporaneous documents showed that:

a. *Manager B*'s and *Manager A's* existing employment contracts were amended to reflect their new roles and salaries by letters dated 15 February 2024 and 20 February 2024 (respectively), which each stated that the changes to their respective roles and annual compensation were to take effect on 1 March 2024.[45]

b. *Manager B* replaced *Manager A* as a director of Viatris UK Healthcare Limited and Mylan Products Limited on 8 March 2024, following the resignation of *Manager A* by letter dated 5 March 2024, board resolutions passed on 5 March 2024, and shareholder resolutions passed on 5 and 6 March 2024.[46]

c. The Staff Change was announced to Viatris' European team internally by email on 23 January 2024. This email stated that 'as of March 1st' *Manager B* will become the new UK Country Manager and 'Over the next few months, [*Manager A*, *Manager B* and others] will be onboarding one another to ensure smooth leadership transitions'.[47]

d. A 'comms plan' was developed to introduce *Manager B* as the new UK Country Manager within Viatris and events were scheduled to take place in February, March and April 2024. This included a town hall meeting with the UK Viatris team held on 28 February 2024, welcome videos published on 14 February 2024 and 1 March 2024, a LinkedIn announcement on 1 March 2024, and a session and 'Welcome Lunch / Coffee' on 6 March 2024.[48]

e. Plans were made in January and February 2024 to introduce *Manager B* to the British Chamber Business Council and other UK Trade Associations and partners.[49]

f. *Manager A* informed Viatris' Deputy Global General Counsel on 29 February 2024 that 'We should transition responsibilities to @*Manager B* by the 1st April 2024'.[50]

g. The 'Role Detail Form' for the UK Country Manager states that 'The Country Manager is responsible for creating and delivering an agile commercial strategy and P&L for the countries. This individual will work with the support of the Cluster lead to implement the strategy. This individual reports to the Cluster Lead, and

[44] Cover Submissions paragraph 7 (d).
[45] Response paragraphs 1.3 and 1.7 and Annexes 3 and 7.
[46] Response paragraphs 1.10-1.11 and 1.15 and Annexes 8,9,10,11 and 14.
[47] Response paragraph 1.28 and Annexes 12 and 13.
[48] Response, Annexes 15-17.
[49] Response, Annex 23.
[50] Response, Annex 5.

will lead a high performing team.' The document further states that 'extensive' commercial experience is required, and the UK Country Manager is expected to be 'Recognized as expert in own field throughout the organisation by applying highly developed knowledge.'[51]

h. *Manager A* continued to provide some support to *Manager B* in her role as UK Country Manager after 1 March 2024 – for example, on 11 April 2024, *Manager B* and *Manager A* exchanged emails about the development of an individual in the UK team, and on 23 April 2024, *Manager A* approved a purchase requisition. *Manager A* estimated that, by 23 April 2024, he was still dedicating approximately 20% of his time to his UK Country Manager role, whilst *Manager B* covered the remaining 80%.[52]

D. Failures to comply with the IEO, without reasonable excuse

Assessment

83. Having considered the information available to it, together with Viatris' representations in the Cover Submissions, the IEO Preliminary Response and the IEO Provisional Decision Response, the CMA's assessment is as follows:

<u>Breach 1</u>

84. Paragraph 6.i. of the IEO imposes an obligation on Viatris not to make any changes to key staff associated with the Assets without the prior written consent of the CMA.

85. The CMA considers the UK Country Manager to be 'key staff' as defined by the IEO. The UK Country Manager is in a position of 'senior executive or managerial responsibility' and their 'performance affects the viability of the business'. This is supported by the fact that:

    a. the UK Country Manager has ultimate responsibility for the strategy and commercial decisions relating to the Assets in the UK;[53]

    b. the UK Country Manager has senior managerial responsibilities, including 'creating and delivering an agile commercial strategy and P&L' and leading a 'high performing team';[54]

    c. the UK Country Manager is an experienced individual requiring a high level of expertise – they are expected to be an 'expert in own field', apply 'highly developed knowledge' and have 'extensive' commercial experience;[55] and

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[51] Response, Annex 18.
[52] Response, paragraphs 4.4 and 5.2, and Annexes 20-22.
[53] Derogation Request, paragraph 1.4(i).
[54] Response, Annex 18.
[55] Response, Annex 18.

d. the UK Country Manager is a statutory director of two legal entities in the Viatris group (Viatris UK Healthcare Limited and Mylan Products Limited).[56] Although the CMA understands from Viatris that these were non-executive directorships, these appointments are indicative of the role's managerial responsibility and seniority.[57]

86. The CMA considers that the UK Country Manager to be 'associated with the Assets' because this individual is responsible for the strategy and the day-to-day management of the Viatris UK business, which includes the Assets in the UK.[58]

87. The CMA notes that Viatris chose not to challenge the CMA's decision, communicated in its email dated 22 March 2024, that the IEO was engaged on the basis that *Manager A* was a key individual 'associated with the Assets' and that a derogation from the IEO was required. Indeed, as noted above, Viatris proceeded to make a derogation request on this basis. Nevertheless, in the IEO Preliminary Response, Viatris submitted that it was not clear cut that the UK Country Manager was 'associated with the Assets' and therefore within the scope of the IEO. While Viatris accepted that the UK Country Manager has managerial responsibility with respect to Viatris' UK business, Viatris submitted that it was not clear that that responsibility was associated with the Assets. Viatris no longer held the rights to commercialise Femoston in Europe and had never supplied Duphaston in the UK. Any alleged breach could therefore only apply to Femoston, which was one of more than [✂] products within Viatris' UK business and which accounted for only [✂] of the revenues generated by the UK business. It was therefore not immediately clear that the UK country manager was associated with the Assets.[59]

88. The CMA considers this argument flawed. Viatris informed the CMA that Viatris UK and Ireland Country Managers oversee the commercial, sales and marketing functions for <u>all</u> products within their respective territories.[60] There is not a de minimis threshold to be applied in determining 'association'. Indeed, the logical consequence of an argument of this nature is that there are no 'key staff' (or possibly any staff) associated with the Femoston assets, and this cannot be correct.

89. The CMA considers Breach 1 to have occurred at the time the Staff Change came into effect, i.e. 1 March 2024. Letters addressed to *Manager B* and *Manager A* in February 2024 state: 'I am very pleased to confirm changes to your role and annual compensation <u>effective from March 1st, 2024</u>'.[61] This effective date was also referenced in other internal communications as early as January 2024.[62]

90. The CMA has considered Viatris' Cover Submissions that, despite the contractual changes, *Manager A* and *Manager B* remained in a lengthy transition period after 1

[56] Both companies are 'Asset Selling Entities' under the Asset Purchase Agreement dated 20 August 2023. This means that they hold associated Assets.
[57] CMA's letter of 7 May 2024, paragraphs 9 and 10.
[58] Viatris' email of 20 March 2024, and Response, paragraph 2.2(iii).
[59] IEO Preliminary Response paragraphs 2.2(A)-(C)
[60] Email Slaughter and May to CMA dated 20 March 2024.
[61] Response, Annexes 3 and 7.
[62] Response, Annexes 12, 16 and 17.

March 2024.[63] However, based on the evidence presented to the CMA by Viatris in the Response, it appeared to the CMA that only a limited proportion of *Manager A*'s time continued to be allocated to the role of UK Country Manager after 1 March 2024.[64] In the IEO Preliminary Response, Viatris asserted that it is not correct for the CMA to reach this conclusion as the only evidence to support it is *Manager A's* estimate of the application of his time as at 23 April 2024, rather than as at 1 March 2024.[65] Further, Viatris asserts that the transition process was still ongoing from a practical perspective. There was therefore ambiguity as to when the Staff Change took effect.[66]

91. The CMA considers that on the evidence, and in particular the contemporaneous documentary evidence, there is no ambiguity as to when the Staff Change came into effect. Changes to the contractual terms of employment of key staff, as specified in the letters to *Manager B* and *Manager A* dated 15 and 20 February 2024[67], will necessarily amount to 'changes' to key staff within paragraph 6.i. of the IEO, as such changes create a commitment that is difficult or costly to reverse.

92. In circumstances in which it is clear that the Staff Change had taken effect from a contractual perspective by 1 March 2024, the CMA does not consider there to be room for a reasonable belief on Viatris' part that paragraph 6.i. of the IEO required only that Viatris obtain the CMA's prior written consent to the Staff Change at any time prior to completion of a "transition period" reflecting a full de facto handover of tasks.

93. In the IEO Preliminary Response, Viatris further submitted that since *Manager A* and *Manager B* both remained employed by Viatris and because neither were included in the proposed undertakings in lieu of a reference to a Phase 2 merger investigation, the Staff Change was not capable of prejudicing the reference or the outcome of the CMA's merger investigation. Viatris' conduct did not therefore amount to a pre-emptive action capable of being a breach of the IEO.[68]

94. The CMA does not accept this argument. The Staff Change constituted a breach of paragraph 6i of the IEO and pre-emptive active action (within the meaning of section 72(8) of the Act), whether or not it is shown (on a post event analysis) to have caused actual harm and whether or not the CMA would have been prepared to grant a derogation from the IEO had the derogation been sought in a timely manner.

[63] Viatris' email of 25 April 2024 and Viatris' Cover Submissions paragraphs 6 and 7(iii)(c).
[64] Response, paragraphs 4.4 and 5.2. *Manager A* estimated that, by 23 April 2024, he was dedicating approximately 20% of his time to his UK Country Manager role, whilst *Manager B* covered the remaining 80%.
[65] IEO Preliminary Response paragraph 2.11.
[66] IEO Preliminary Response paragraphs 1.2, 2.13. The CMA notes that the evidence Viatris has provided of ongoing involvement by *Manager A* in supporting *Manager B* in her role as UK Country Manager after 1 March 2024 was limited to just two emails (see Response, Annexes 20-21). The CMA considers that there is insufficient evidence to support a suggestion that *Manager A* remained in the UK Country Manager role after 1 March 2024 in a *de facto* capacity (notwithstanding the *de jure* position).
[67] Response, Annexes 3 and 7.
[68] IEO Preliminary Response paragraph 3.4

95. In the IEO Provisional Decision Response, Viatris' submitted that the IEO Provisional Decision had failed to recognise the unusual nature of the facts of the case, being that:

a. The Staff Change was a purely internal reorganisation preserving the role of the UK Country Manager within Viatris with no external consequences;

b. The Staff Change did not result in or cause any integration of the UK Assets with Theramex or transfer ownership or control of the UK Assets;

c. No staff were included in the original UK nor ROW Acquisition[69]; and

d. The Staff Change did not actually cause any prejudice to the CMA's reference and did not impede any CMA action.[70]

96. Further, in relation to Breach 1, Viatris submitted that:

a. the CMA's finding that Viatris had breached paragraph 6.i. of the IEO was incorrectly premised on a literal reading of the language of paragraph 6.i. without regard to whether the Staff Change constituted or might constitute pre-emptive action.[71]

b. the CMA had failed to meet the threshold test in section 72(8) of the Act for a finding that pre-emptive action had occurred that showed the possibility or risk that conduct would prejudice the outcome of a reference or impede the taking of any remedial action. The CMA must demonstrate that this threshold test was met at the relevant time when the alleged breach is said to have occurred as it is clear on a *post hoc* analysis that the CMA accepts that there were no actual adverse effects as a result of the breach and that with the benefit of hindsight it appears that the breach has not prejudiced the CMA's ability to take remedial action.[72]

c. in any event, the Staff Change did not constitute a pre-emptive action as defined in the authorities referred to in the Provisional Penalty Decision, which were inapposite because:

i. the cases referred to concerned completed mergers rather than anticipated mergers (the UK acquisition being an anticipated merger).

[69] In the IEO Provisional Decision Response, Viatris states that 'the proposed acquisition of the Assets was structured as two separate transactions: (i) the transaction concerning the UK Assets (the "**UK Acquisition**"); and (ii) the transaction concerning the Assets in the rest of the world (the "**ROW Acquisition**")' (paragraph 2.3). However, as set out in the CMA's phase 1 decision, the UK Acquisition and ROW Acquisition (as defined by Viatris) were interrelated, and the CMA found that the arrangements contemplated by the APA gave rise to a single relevant merger situation (paragraph 33).
[70] IEO Provisional Decision Response paragraph 1.4
[71] IEO Provisional Decision Response paragraph 3.4
[72] IEO Provisional Decision Response paragraph 3.4.

ii. With the exception of *Electro Rent* none of the cases relied upon related to the breach of an IEO.

iii. Unlike other cases, the Staff Change did not risk or entail the possibility of impeding any remedial action that the CMA could have taken.

iv. Paragraph 6.i of the IEO specifically requires some degree of association between key staff and the UK assets. It is not clear that this requirement is met here. Staff should only be regarded as key and associated with the Assets in light of the purpose for which the IEO was issued by the CMA.[73]

97. The assessment of whether there has been a breach of paragraph 6.i of the IEO is a straightforward question to be answered in light of the IEO's express terms and the available evidence. The evidence clearly shows that Staff Change took place on 1 March 2024 (see paragraphs 79 to 82 above)[74] in the absence of prior written consent from the CMA, and concerned 'key staff associated with the Assets' (see paragraphs 85 to 86). The CMA accordingly concludes that Viatris failed to comply with paragraph 6.i of the IEO. Contrary to Viatris' submissions,[75] the CMA does not consider that Viatris' points in relation to the circumstances of the Staff Change as set out in paragraph 95 are relevant to the question of whether there has been a <u>breach</u> of the IEO, although they have been taken into account by the CMA (to the extent relevant) as part of the later stages of its assessment as to whether to impose a penalty under section 94A of the Act.

98. Under section 72(2) of the Act, the CMA has the power to impose an IEO for the purpose of preventing pre-emptive action. This was the CMA's rationale for the IEO in this case. Viatris did not challenge the imposition of the IEO by the CMA. Once the IEO was in place, Viatris was under an obligation to comply with its terms[76] (subject to any derogations granted by the CMA under section 72(3C) of the Act). Viatris' submissions are misconceived to the extent it is suggested that the CMA cannot find that Viatris has breached the IEO unless it can also show that the action in question constituted 'pre-emptive action' within the meaning of section 72(8) of the Act at the time it took place. The corollary of such a submission is that Viatris was entitled to contravene the express terms of the IEO as it saw fit provided it could later show that the course of action so taken did not constitute 'pre-emptive action' within the meaning of section 72(8) of the Act. Such an interpretation of the statutory framework would undermine the purpose of the IEO itself. It is also inconsistent with the mechanism under section 72(3C) of the Act that enabled Viatris to obtain derogations from the IEO from CMA in advance by consent, thus reserving to the CMA the judgment call as to whether Viatris should be permitted to proceed with the proposed action and, if so, under what conditions (and as the CAT said in Facebook v CMA,

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[73] IEO Provisional Decision Response paragraph 3.8.

[74] The CMA has considered Viatris' submissions in the IEO Provisional Decision Response at paragraphs 4.12 (i) in which it continues to dispute the timing of the Staff Change. However, the CMA considers that these submissions do not advance the arguments made in the IEO Provisional Response and the submissions introduce no new evidence that would persuade the CMA to change its provisional findings.

[75] IEO Provisional Decision Response paragraphs 3.2-3.7.

[76] See section 94(2) of the Act.

'merging parties should not themselves form judgements or reach decisions that are properly for the CMA'[77]). Finally, Viatris' position is unsustainable as it would introduce intolerable uncertainty into the operation of the UK's voluntary regime. The CMA accordingly rejects Viatris' submissions in this regard.

99. The CMA also rejects Viatris' submission that there was no possibility, at the relevant times, that the Staff Change might risk prejudice to the reference or impede the taking of remedial action by the CMA. As evidenced by the exchange of correspondence between the CMA and Slaughter and May between 15 March 2024 and 10 April 2024 set out in paragraphs 66 to 75 above, the CMA was concerned that *Manager A's* replacement by *Manager B* as UK Country Manager could potentially have an impact on the ability of the Assets to compete. More specifically, as noted above at paragraph 75, even as late as 10 April 2024, the CMA raised a number of concerns about the Staff Change and, in particular, its potential impact on any remedies package. It follows that the CMA would have had similar concerns at an earlier point in the process (or indeed wider concerns) had Viatris sought its consent for a derogation at the appropriate time (i.e. before 1 March 2024).

100. As is apparent from the contemporaneous correspondence, the CMA was concerned about a possibility that *Manager A* would need to be part of a remedies package to ensure its effectiveness, including to attract a suitable purchaser, in the event that the CMA found an SLC and required the divestiture of the UK Assets to a third party. Once *Manager A* transferred out of Viatris' UK business pursuant to the Staff Change, it may have been more difficult or impossible. By the November Derogation, the CMA had excluded the ROW Assets from the scope of the IEO. As a consequence, once *Manager A* had been promoted to Western Europe Manager, Viatris may no longer have been obliged to take reasonable steps to retain him under paragraph 6.k. of the IEO. *Manager A* may also subsequently have been being recruited by a third party or Theramex itself, as the November Derogation released the parties from their obligations to hold Theramex's business and Viatris' ex-UK business separate.

101. The CMA therefore considers that, at the time it occurred, the Staff Change might have prejudiced the reference or impeded the taking of remedial action by the CMA and, as such, constituted pre-emptive action within the meaning of section 72(8) of the Act. The fact that the CMA subsequently and with the benefit of hindsight concluded that there were no actual adverse effects and no actual prejudice to the CMA's ability to take remedial action is not relevant to that assessment.

102. The CMA also does not consider the authorities cited in the IEO Provisional Decision (see Section B Legal Framework paragraphs 33 to 37 above) to be inapposite or distinguishable because of a different factual context. The cases are relied upon for their rulings on the meaning of "pre-emptive action" as it appears in the Act. The CMA notes that notwithstanding the differing factual context in the cases, the authorities are closely aligned on this point.

[77] See paragraph 41 above.

103. As to Viatris' submissions that there was no risk the Staff Change could possibly impede any remedial action that the CMA could have taken[78]:

a. The fact that no staff were included in the Merger does not prevent the CMA from finding at remedies stage that staff may be required to achieve an effective remedy. It is well established that an effective and proportionate remedies package may go beyond the acquired assets.[79]

b. The fact that the CMA approved the Parties' UILs in principle without requiring the inclusion of staff in the remedy package is not determinative. The CMA's decision to accept the UILs in principle was made on 18 April 2024. At the time of Viatris' breach, the CMA had not yet made its Phase 1 decision (which was made on 4 April) and, even with the passage of time, the UILs remained subject to consultation and amendment until 12 August 2024.

c. As explained at paragraph 100 above, owing to the November Derogation, it may have become difficult or impossible for the CMA to require the inclusion of *Manager A* in a remedy package after he transferred out of Viatris' UK business.

104. Viatris' submits that it is not clear that there is sufficient association between *Manager A* and *Manager B* and the Assets for them to be key staff associated with the Assets within the meaning of paragraph 6.i. of the IEO. Similar submissions were also made in the IEO Preliminary Response, which are discussed at paragraphs 85 to 88 above. In the IEO Provisional Decision Response Viatris additionally submits that 'the CMA's conclusion that *Manager A* and *Manager B* were key staff is based on their job descriptions and undue reliance on their statutory appointments'[80] and further, 'the CMA claims that 'the UK Country Manager is a statutory director of two legal entities in the Viatris Group (Viatris UK Healthcare Limited and Mylan Products Limited). Although the CMA understands from Viatris that these were non-executive directorships, these appointments are indicative of the role's managerial responsibility and seniority. Neither entity is directly related to the Assets.

105. The CMA considers that an individual's job description is generally good evidence of their responsibilities and level of seniority and did take *Manager A*'s and *Manager B*'s job descriptions into account, together with the other evidence provided to is by Viatris in its Response to the Notice, as discussed at paragraphs 85 to 86 above. The CMA did not place undue weight on the fact that there were a number of statutory directorships associated with the role of UK Country Manager in assessing whether this was a role with senior management responsibilities. These may have been non-executive directorships, but all statutory directors owe important duties to the companies of which they are directors under Chapter 2 of the Companies Act 2006.[81] The assertion that neither Viatris UK Healthcare Limited nor Mylan Products Limited is directly related to the Assets is not sustainable: (i) both companies are

[78] IEO Provisional Decision Response paragraph 3.8(iii).

[79] For example, in Meta/Giphy the CMA required Meta to include a revenue function and cash funding of at least USD75 million within the divestiture package even though these assets were not acquired as part of the original merger (CMA Final Report dated 18 October 2022 in the completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc., paragraphs 11.101-11.116 and 11.117-11.129).

[80] IEO Provisional Decision Response paragraph 3.8(iv)(a).

[81] The duties are set out at sections 171 to 177 of the Companies Act 2006 and include the duty to exercise independent judgment and the duty to exercise reasonable skill, care and diligence.

listed in Annex E of the APA as being Asset Selling Entities; (ii) Mylan Products Limited is the marketing authorisation holder for Femoston in the UK;[82] and (iii) Viatris UK Healthcare Limited is the parent company of Mylan Products Limited.

Breach 2

106. Paragraph 10 of the IEO imposes an obligation on Viatris to notify the CMA immediately of any suspected breach of the IEO.

107. The CMA considers that the changes on 1 March 2024 ought to have caused Viatris to suspect a potential breach of the IEO. The Staff Change was widely broadcast within Viatris in the lead up to and on 1 March 2024.

108. The Staff Change was announced to the Viatris European team by email on 23 January 2024;[83]

   a. *Manager B* was introduced to the Viatris UK team in a town hall meeting held on 28 February 2024, and welcome videos were published on 14 February 2024 and 1 March 2024;[84]

   b. *Manager A*'s and *Manager B's* LinkedIn profiles were updated on 1 March 2024;[85] and

   c. *Manager A* informed Viatris' Deputy Global General Counsel (who is responsible for signing Viatris' IEO compliance statements) on 29 February 2024 that 'We should transition responsibilities to @*Manager B* by the 1st April 2024'.[86]

109. In its Cover Submission and the IEO Preliminary Response Viatris stated that the key deal team had not expected the Staff Change to conclude fully until 1 April 2024 at the earliest, citing the email of 29 February 2024.[87] However, the CMA considers that it should have been apparent from a plain reading of the IEO that steps to implement the Staff Change may engage paragraph 6.i., even if there was a transition period which had not fully concluded. In light of the other announcements referred to in paragraph 82 above, individuals involved in IEO compliance should have known or suspected that the Staff Change had taken effect or at least been substantially implemented prior to 1 April 2024. If they were unaware of the Staff Change before *Manager A's* email to [Viatris' Deputy Global General Counsel] of 29 February 2024 as suggested, this indicates that Viatris' systems for ensuring compliance with the IEO were inadequate.

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[82] Femoston 1/10 mg Film-coated Tablets - Summary of Product Characteristics (SmPC) - (emc) (medicines.org.uk)
[83] Response, Annex 12.
[84] Response, Annex 16.
[85] Response, Annex 16.
[86] Response, Annex 5.
[87] Cover Submissions paragraph 6 and Response Annex 5; IEO Preliminary Response paragraphs 2.4 (B) and 5.5.

110. Viatris did not make the CMA aware of the Staff Change immediately, but only on 15 March 2024 and described this change to the CMA as a future event.[88] In the IEO Preliminary Response Viatris rejected any suggestion that it had deliberately reported the Staff Change as a future event. Viatris submitted that, on the basis of the email from *Manager A* to [Viatris' Deputy Global General Counsel] dated 29 February 2024, the key individuals responsible for IEO compliance understood that the full transition of responsibilities from *Manager A* to *Manager B* would not take place before 1 April 2024 and that this would be the date that the CMA would be concerned about. Viatris has suggested that, following the CMA's confirmation that it would not be able to agree a derogation by 1 April 2024, the period of transition was extended and remained ongoing.[89]

111. While the inaccurate statements in the email of 15 March 2024 may have been made in error rather than deliberately, Viatris continued to describe the Staff Change as a future event in its communications of 20 March 2024 and 22 March 2024,[90] including in the Derogation Request.[91] Viatris first referred to a transition process only on 28 March 2024,[92] but remained unclear in that email as to whether any changes had, in practice, been made to *Manager A*'s and *Manager B*'s roles. The CMA was only informed that *Manager A* and *Manager B* were spending time in their new roles on 12 April 2024,[93] and was only informed on 25 April 2024 that the contractual changes had, in fact, taken effect on 1 March 2024.[94]

112. Furthermore, this information was provided only in response to questions from the CMA rather than Viatris taking prompt steps to investigate the position and report to the CMA voluntarily. The CMA is deeply concerned about the distinct lack of candour on the part of Viatris throughout its communications with the CMA regarding the Staff Change. This lack of candour continued for over two weeks after 10 April 2024 when the CMA asked explicitly for confirmation of the date on which the Staff Change took effect,[95] during which period Viatris continued to press for a derogation from the IEO for the Staff Change. Even if this was the result of a failure on the part of those responsible for compliance with the IEO to investigate the position promptly, rather than by design, this again merely indicates that Viatris' arrangements for ensuring compliance with the IEO were insufficient.

113. Viatris also submitted in the IEO Preliminary Response that given the uncertainty in identifying the point in time at which the Staff Change occurred as a result of the transition period, it cannot be said that Viatris should have been aware of the suspected breach such that it was in breach of the obligation to report it.[96] The CMA does not accept this proposition. All the facts about the Staff Change were known to

[88] Email Slaughter and May to CMA dated 15 March 2024.
[89] IEO Preliminary Response paragraphs 2.7, 2.8 and 5.5.
[90] Emails Slaughter and May to CMA 20 and 24 March 2024.
[91] Derogation Request paragraph 1.1.
[92] Email Slaughter and May to CMA dated 28 March 2024.
[93] Email Slaughter and May to CMA dated 12 April 2024.
[94] Email Slaughter and May to CMA dated 25 April 2024.
[95] Email CMA to Slaughter and May dated 10 April 2024.
[96] IEO Preliminary Response paragraph 2.14.

Viatris. If effective systems and controls had been in place these should have been known to those responsible for IEO compliance.

114. In the IEO Provisional Decision Response, Viatris submitted that in relation to Breach 2, the CMA had provisionally made a very serious finding of lack of candour with no proper evidential basis and was incorrect. There was, in particular, no evidence to support findings that Viatris sought to obtain an advantage or derive a benefit from its failure to notify the CMA candidly of the suspected breach or that Viatris demonstrated a troubling lack of candour. Public findings of this nature are serious, could cause irreparable reputational damage to Viatris and should not be made lightly. Further:

   a. When reporting the Staff Change on 15 March 2024 to the CMA, the Viatris deal team involved in the CMA process (the **Deal Team**) (i) did not have any actual suspicion that there had been any possible breach of the IEO; and (ii) had understood the Staff Change to be a future event, to be effective from 1 April 2024. The Deal Team did not know that steps had been taken to effect the change of roles prior to this date.

   b. Viatris engaged with the CMA candidly and provided the CMA with full and accurate explanation of all the facts relevant to the Staff Change in response to the CMA' questions and once those facts became known to the Deal Team. The information which was uncovered as to the details of the transition and changes to the roles of *Manager B* and *Manager A*, either by the CMA or by the Deal Team in response to questions by the CMA were not known to the Deal Team until later in April or May 2024 when enquiries were undertaken to respond to the CMA's questions of 23 April 2024.

   c. Even if the CMA is correct to find a technical breach of paragraph 10 of the IEO on the basis that the Deal Team ought to have been more pro-active in its internal investigations and engagement with the CMA, there is simply no basis for any suggestion that anyone at Viatris behaved in a deliberately dishonest manner, absent which, any allegation of lack of candour or transparency simply cannot and should not be maintained.[97]

115. In addressing Viatris' submissions on Breach 2, it is necessary first to address its submissions on findings of dishonesty and the CMA's remarks that the evidence on Breach 2 displayed a troubling lack of candour. Viatris submits in the IEO Provisional Decision Response that if the CMA is to conclude that Viatris has demonstrated a lack of candour, it will need to show on the evidence that Viatris, through those individuals acting on its behalf, has acted dishonestly or with an intent to mislead in its dealings with the CMA. This is misconceived. The CMA has made no findings concerning the state of mind of any individuals, nor is it required to do so. In determining whether to impose a penalty for breach of an IEO under section 94A of the Act, the CMA considers whether there has been a breach of the IEO and, if so, the factors that go to the imposition of and size of a fine, having regard to its published guidance. The CMA's remarks as to Viatris' troubling lack of candour are part of the CMA's narrative assessment of the facts, and reflect the CMA's view that

[97] IEO Provisional Decision Response paragraph 1.5(ii).

Viatris (at a corporate level) bears culpability for failure to provide the CMA with complete and accurate information about the circumstances of the Staff Change, whether proactively or promptly in response to the CMA's requests. The CMA has reached this view having had regard to the chronology of events set out above at paragraphs 50 to 82 and the evidence available to it (including the evidence that suggests that the true circumstances of the Staff Change were widely known within Viatris).

116. As to the initial notification of the Staff Change to the CMA on 15 March 2024, Viatris submits that the Deal Team had no actual knowledge of the Staff Change prior to 29 February 2024 and at the time had no reason to think it was not prospective.[98] Viatris relies on an email from *Manager A* to Viatris' Deputy Global General Counsel dated 29 February 2024 as evidence of the first communication of the Staff Change to the Deal Team,[99] before which it could not have suspected a breach of paragraph 10 of the IEO.[100] However, the actual knowledge of a select group of individuals is not the correct test for determining whether Viatris as a corporate organisation had any reason to suspect a breach of the IEO. The Staff Change had been widely publicised within Viatris from 23 January 2024 onwards.

117. Furthermore, *Manager A's* email on which Viatris relies simply states: 'We should transition responsibilities to @*Manager B* by the 1st April 2024.' The content of the email to *Manager A* to which he was responding, dated 27 February 2024 and entitled "Project Lilac: UK IEO Sixth Compliance Statement - RESPONSE REQUIRED" has not been provided so the CMA has not been able to assess that response in light of the question.[101] It is, however, possible to infer from its header that this was an email to personnel within the wider Viatris organisation sent with the purpose of checking on compliance with the terms of the IEO. While *Manager A* may not have been a member of the Deal Team, it appears that he was in direct communication with it. At the time he sent his email on 29 February 2024, *Manager A* was evidently aware that his change of role was due to take effect on 1 March 2024, given the letter that had been sent to him by Viatris on 20 February 2024 confirming his new role.[102] If those responsible within Viatris for ensuring compliance with the IEO and the completeness and accuracy of Viatris' communications with the CMA did not elicit this information from him, this indicates a failure on Viatris' part to monitor compliance with the IEO adequately and to gather essential facts underpinning the compliance statement and associated communications to the CMA with sufficient diligence as to ensure they were complete and accurate.

[98] IEO Provisional Penalty Response paragraph 4.8.
[99] The CMA notes that nowhere in its representations does Viatris specify precisely which individuals are said to constitute the "Deal Team". For the reasons given at paragraph 116, the CMA does not consider the precise constitution of the Deal Team to be a relevant issue. However, to the extent Viatris' position is that the Deal Team comprised those individuals in receipt of the email from *Manager A* dated 29 February 2024, the CMA observes that some recipients of this email were also party to the broad distribution of the email dated 23 January 2024, announcing that the Staff Change would be effective 'as of March 1st'.
[100] IEO Provisional Decision Response paragraph 4.8 (ii).
[101] The content of the original email has been redacted from the copy of the email chain provided to the CMA. The CMA notes that the original email was copied to members of Viatris' legal advisers at Slaughter and May. In the Response, Viatris stated that the redaction has been made for reasons of legal professional privilege.
[102] Response paragraph 1.7 and Annexes 7.

118. The CMA further considers that its email, dated 22 March 2024, in which it communicated its view to Viatris that a derogation would be required in respect of the Staff Change (based on its misapprehension at the time that the Staff Change remained prospective in nature) should have caused Viatris' representatives to verify the true circumstances of the Staff Change before proceeding to submit the derogation request to the CMA. This is particularly so in circumstances in which the CMA's 22 March 2024 email was explicit that one of the key factors that would be taken into account in considering the derogation request would be 'the strict necessity of effecting those staff changes by 1 April 2024'. However, the derogation request submitted by Slaughter and May on Viatris' behalf maintained (inaccurately) that 'the proposed effective date for the change of roles is 1 April 2024 (and it is important from a continuity perspective that *Manager B* is able to take up the post of UK Country Manager, within the context of the wider internal reorganisation)'. Similar concerns apply to the inaccurate responses provided by Slaughter and May on behalf of Viatris on 28 March 2024 in relation to the CMA's follow-up questions on 27 March 2024.

119. The CMA's concerns in connection with Viatris' candour are, however, particularly acute as regards the period following 10 April 2024 at which point Viatris had been put on notice of the CMA's concern that there might have been a contravention of the IEO[103] (the CMA having, on that date, drawn to Viatris' attention the fact that the LinkedIn pages for *Manager B* and *Manager A* stated that their promotions had already taken effect and the CMA had explicitly asked for confirmation of the date on which *Manager A* and *Manager B* moved to their new roles). Rather than immediately reporting on the pertinent facts candidly to the CMA, and withdrawing its derogation request (in line with its obligations under paragraph 10 of the IEO), Slaughter and May responded to the CMA on Viatris' behalf of 12 April 2024 in the following terms:

> 'As noted in the derogation request dated 22 March 2024 (the "**Derogation Request**"), a fulsome handover process is currently being conducted to prepare *Manager B* for transitioning into the role of UK Country Manager (this is with a view both to ensuring that Viatris is compliant with its obligations under the IEO and is a normal part of preparing for an internal reorganisation of roles within a business). As such, *Manager B* has been assisting with the UK Country Manager role as part of the transition process designed to ensure that she is fully equipped to operate this role on her own at the end of the transition period. *Manager A* remains involved in the Viatris UK business and *Manager B* remains involved in the Viatris Ireland business, while they prepare to fully take over their new roles once the transition period is complete. There is currently no formal date for the end of the period of transition.'
>
> 'As part of the transition process, *Manager A* and *Manager B's* job titles have been updated. However, as explained above, the transition process remains ongoing (and *Manager A* will remain involved in the Viatris UK business

[103] Email CMA to Slaughter and May dated 10 April 2024.

throughout this transition period and in advance of agreeing the derogation wording).' [emphasis added]

120. The information in Slaughter and May's email was incomplete and, in the context, lacked candour. Furthermore, Slaughter and May's emphasis remained on pursuing a derogation from the IEO for Viatris (in circumstances in which, had complete and accurate facts been disclosed to the CMA, no derogation could properly be sought or granted).[104] As explained at paragraph 65 above, Slaughter and May was Viatris' authorised representative throughout the Merger enquiry.

121. In addition, while it is suggested in the email of 12 April 2024 that *Manager B*'s 'transition period' was itself driven, in part, by a need to ensure that 'Viatris is compliant with its obligations under the IEO', by contrast, Viatris has more recently submitted that 'there was a genuine misunderstanding on the part of certain individuals outside the key deal team as to the scope of the IEO'.[105] These two positions are difficult to reconcile, and further indicate the lack of candour in Viatris' and Slaughter and May's communications with the CMA.

122. It was not until 25 April 2024 (and only then in response to further direct questioning from the CMA on the matter contained in its further email dated 23 April 2024) that Viatris confirmed that the Staff Change had, in fact, taken contractual effect on 1 March 2024.

123. It was particularly in light of this exchange that the CMA reached a view that there had been a troubling lack of candour in Viatris' engagement with the CMA. Viatris' assertion that the Deal Team were not aware of the position until late April after the CMA had renewed its questions regarding the timing of the Staff Change that does not assist it. Viatris' failure to offer any explanation in the IEO Provisional Decision Response for the content of the email 12 April 2024 email is also concerning.

Decision on failure to comply

124. On the basis of the evidence set out in the preceding sections of this final penalty decision and having considered Viatris' various submissions the CMA finds that Viatris has:

   a. breached paragraph 6.i. of the IEO by implementing the Staff Change, which was a change to key staff associated with the Assets, with effect from 1 March 2024, without obtaining the CMA's prior written consent; and

[104] As noted above at paragraph 92, in circumstances in which it was clear that the Staff Change had taken effect from a contractual perspective by 1 March 2024, the CMA considers there to be no room for a reasonable belief on Viatris' part that paragraph 6.i. of the IEO required only that Viatris obtain the CMA's prior written consent to the Staff Change at any time prior to completion of a "transition period" reflecting a full de facto handover of tasks.

[105] See IEO Preliminary Response, paragraph 2.4(A).

b. breached paragraph 10 of the IEO by failing to notify the CMA immediately of the Staff Change, which it should have known or suspected might amount to a breach of the IEO.

Without reasonable excuse

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

126. Once a breach of an initial order 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.[106]

127. CMA4 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).[107] The CMA accepts that it may be possible to establish other objectively reasonable excuses for breaching an initial enforcement order.

128. Based on the evidence available to the CMA, there is nothing to suggest that any such event has occurred in this case. Viatris submitted in its IEO Preliminary Response that there was a genuine misunderstanding on the part of certain individuals outside of the key deal team in respect of the relevance of an internal re-organisation to the IEO and this caused delay in updating the key deal team of the proposed plans. Once aware, the key deal team promptly updated the CMA with their understanding of the position, that there would be a handover of responsibilities that was due fully to take effect from 1 April 2024.[108]

129. Viatris further submitted that the CMA itself appeared to accept that there was some flexibility or uncertainty as to the matter of determining when the Staff Change actually occurred or will have started to occur, citing the CMA's IEO Preliminary Letter where it stated that '[the CMA] considers the breach to have occurred at the time the Staff Change came into effect contractually, or in practice, whichever was earlier.'[109]

130. A misunderstanding on the part of individuals outside the key deal team as to the scope of the IEO is not a significant and unforeseeable event beyond Viatris' control. Neither is the fact that the key deal team were originally informed that the Staff Change would be effective from 1 April 2024. These facts demonstrate rather that Viatris' systems for ensuring compliance with the IEO were inadequate.

131. The submission that the statement in the CMA's IEO Preliminary Letter cited by Viatris suggests that there was flexibility or uncertainty in determining the date of the

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[106] Electro Rent, paragraphs 69 and 112.
[107] CMA4, paragraph 4.4.
[108] IEO Preliminary Response paragraph 4.2(A).
[109] IEO Preliminary Response paragraph 4.2 (B).

Staff Change is misplaced. The CMA's statement cited by Viatris clearly indicates that where there are two possible options, the earlier date will be preferred, and, as noted above, in circumstances in which it was clear that the Staff Change had taken effect from a contractual perspective by 1 March 2024, the CMA does not consider there to be room for a reasonable belief on Viatris' part that paragraph 6.i. of the IEO required only that Viatris obtain the CMA's prior written consent to the Staff Change at any time prior to completion of a "transition period" reflecting a full de facto handover of tasks.

132. In its IEO Provisional Penalty Decision Response, Viatris submits that, in respect of Breach 1, it has a reasonable excuse, given the unique facts of the case.[110] Viatris further submits that the facts of the case are unusual: (i) the IEO itself was unusual, being in place as a result of the completion of the ROW Acquisition while the UK Assets remained with Viatris; (ii) *Manager A* remained a Viatris employee and *Manager B* was an experienced and capable replacement; and (iii) and the CMA was clear in the Provisional Decision that there were no actual adverse effects on the case as a result of the alleged breach.

133. The CMA does not accept that the above factors are objectively reasonable excuses for Breach 1. Viatris breached an express requirement of the IEO in circumstances that (for the reasons given above at paragraphs 99 to 103) risked prejudicing the reference or impeding the taking of remedial action by the CMA.

134. In relation to Breach 2, Viatris submits that there are strong grounds for concluding that it had a reasonable excuse for the breach: (i) a reasonable person would likely consider that the position is by no means clear cut in respect of the timing of the Staff Change; and (ii) the Viatris team has taken IEO compliance seriously and the CMA itself accepts that Viatris has been cooperative and compliant more generally.[111]

135. For the reasons set out at paragraph 131 above, the CMA does not agree that there is any ambiguity about when the Staff Change took effect. As to Viatris' wider compliance, this is a factor to be taken into account when assessing the level of penalty (which the CMA has done), not a reasonable excuse for Breach 2.

136. The CMA therefore concludes that Viatris had no reasonable excuse for the failures to comply with the requirements of the IEO which have been identified above. The statutory requirements for imposing a penalty under section 94A of the Act are met.

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

Appropriateness of imposing a penalty

137. Having regard to its statutory duties, CMA4 and all the relevant circumstances, the CMA considers that the imposition of a penalty is appropriate, having regard to (i) the

[110] IEO Provisional Decision Response paragraph 3.9.
[111] IEO Provisional Decision Response paragraph 4.12.

need to achieve general deterrence, (ii) the seriousness of the Breaches; (iii) other relevant factors (as set out below).

General deterrence

138. The CMA considers that it is of utmost importance to the UK's voluntary, non-suspensory merger control regime that interim measures should be effective. Their function is to prevent conduct that might prejudice a reference or impede action justified by the CMA's final decision. The purpose of an IEO, as noted by the CAT, is precautionary, guarding against the possibility of pre-emptive action.[112]

139. It is important that parties take such obligations seriously and recognise the importance of conducting their business within the parameters of any IEO, to ensure they do not engage in a breach, whether inadvertently or otherwise.

Seriousness of the breaches

140. The failures to comply were significant and serious:

a. Breach 1 may have been inadvertent, but a breach can be caused by negligence and still be significant and flagrant. The evidence available indicates that the breach was caused by a failure on Viatris' part to take its obligation to comply with the IEO sufficiently conscientiously and institute the necessary controls within the organisation to ensure compliance.

b. Breach 2 may have been inadvertent initially. However, the CMA is deeply troubled by Viatris' subsequent lack of transparency when challenged about the effective date of the Staff Change in circumstances when it was simultaneously seeking a derogation to cover the Staff Change. That derogation could only be granted if the Staff Change had not taken place.[113]

c. Breach 2 also involved senior management. Viatris' Deputy Global General Counsel was responsible for signing the fortnightly compliance statement and thus signed the statement dated 15 March 2024, which was materially incorrect since it asserted at paragraph 2.j. that 'No changes have been made to key staff associated with the Assets or of the Theramex business.'

141. In its IEO Preliminary Response, Viatris submitted that in light of its submissions that the Breaches were not clear cut, the CMA (i) ought not pursue an investigation of the alleged breaches; nor should it (ii) issue a provisional penalty decision in respect of the alleged breaches, as either would be disproportionate in the circumstances and should not be prioritised.[114]

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[112] ICE/Trayport, paragraph 220.
[113] Under s 72 (3C) of the Act, "A person may, with the consent of the CMA, take action or action of a particular description where the action would otherwise constitute a contravention of an order under this section". It is clear therefore that the CMA's consent is required before an action is taken. The CMA is unable to give consent retrospectively.
[114] IEO Preliminary Response paragraph 5.2.

142. The CMA does not accept these submissions. For the reasons given above the CMA considers that the Breaches were clear cut. The CMA also considers that these failures to comply with the IEO were serious and it is not disproportionate to impose penalties on Viatris.

143. In its IEO Provisional Decision Response Viatris maintained that it would not be appropriate for the CMA to impose a penalty on the basis that certain factors referred to at paragraph 4.2 of CMA4 were absent in this case, namely (i) there had been no actual adverse effects on the CMA's reference or subsequent remedies; (ii) that the CMA considered that Breach 1 was not deliberate and therefore it could not be deemed "serious or flagrant"; (iii) there was no pattern of recidivism; (iv) the CMA was not seeking to ensure swift compliance by Viatris; (v) the CMA had accepted there was no obvious benefit to Viatris with respect to Breach 1 and an 'attempt to co-operate with the CMA and engage the derogations process cannot possibly be considered evidence of a benefit to Breach 2'; and (iv) the signing of a compliance statement by Deputy Global General Counsel should not be taken into account as that fact pattern would always be the case.[115]

144. The CMA does not accept these further submissions. The factors set out in paragraph 4.2 of CMA4 are indicators of where the CMA may be more likely to impose a penalty. As stated at the beginning of paragraph 4.2, the CMA will consider whether to impose an administrative penalty on a case-by-case basis, taking into account all relevant circumstances. Not all of the factors listed need to be present for a penalty to be appropriate. Given the evidence set out above, the CMA rejects the submission that the breaches were not significant and flagrant, notwithstanding that Breach 1 may have been a matter of error. Further the CMA considers that there was an obvious benefit to Viatris in relation to Breach 2 (see discussion at paragraphs 119 to 120 above and 151(c) below). Finally, the involvement of senior management is a factor that the CMA takes into account when determining level of penalty, not in deciding whether to impose one. While it is usual for senior management to sign the required compliance statements, it is not typically the case that a compliance statement is inaccurate, or that there has a been a lack of care in ensuring that it is correct.

Conclusion of the appropriateness of imposing a penalty

145. In light of the above circumstances the CMA concludes that it is appropriate to impose penalties on Viatris for both Breaches.

146. IEOs should be complied with irrespective of a merger party's own assessment of actual risk of prejudice to an investigation. Whether or not to grant a derogation from the IEO is a judgement for the CMA, and the factors that the CMA will consider in determining whether to grant a derogation will be dynamic depending on the point in time at which a derogation is sought, and the status of the investigation at that time. Harm sustained to the investigation as a result of a breach of an IEO might only be capable of assessment with the benefit of hindsight. Further, the CMA expects parties under investigation to comply with the IEO in full, instituting appropriate

[115] IEO Provisional Decision Response paragraph 5.3.

internal controls to ensure compliance, and, in the event a breach occurs, be straightforward and candid in their dealings with the CMA in respect of it.

Appropriateness of the amount of the penalty for each breach

147. Any penalty needs to be sufficiently high to deter Viatris from breaching any CMA interim measures in future investigations. It is also necessary to impose a sufficiently high penalty to deter others – a penalty should not be perceived as a mere ‘cost of doing business’. The CMA considers that it is important to send a strong message that the CMA will not tolerate an opportunistic approach to compliance with initial enforcement orders.

148. Consistent with its statutory duties and CMA4,[116] the CMA has assessed all relevant circumstances to determine an appropriate level of penalty. It has also taken account of the following aggravating and mitigating factors in line with CMA4.

Breach 1

149. The CMA provisionally considers the following matters to be aggravating factors, as listed in paragraph 4.11 of CMA4 that support, on balance, the imposition of a higher penalty in relation to Breach 1:

a. The reasons given for the breach indicate that Viatris failed to put in place adequate systems and controls to monitor and ensure compliance with the IEO.

b. Viatris is a large and sophisticated organisation with considerable resources at its disposal, which included the retention of experienced external legal advisers in relation to the Merger Inquiry. Breach 1 may have been inadvertent, but in such circumstances, it is not excusable.

150. The CMA provisionally considers the following matters to be mitigation factors as listed in paragraph 4.11 of CMA4 that support, on balance, the imposition of a lower penalty in relation to Breach 1:

a. There may have been no actual adverse effects on the case as a result of the breach.

b. With the benefit of hindsight, it appears that the breach has not prejudiced the CMA’s ability to take remedial action.

c. There is no evidence that the breach was deliberate.

d. Viatris has otherwise complied with other aspects of the CMA’s investigation.

e. There has been no obvious benefit to Viatris arising from the breach.

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[116] CMA4, paragraph 4.11.

Breach 2

151. The CMA considers the following matters to be aggravating factors as listed in paragraph 4.11 of CMA4 that support, on balance, the imposition of a higher penalty in relation to Breach 2:

    a. The reasons given for Viatris' statement in its initial notification to the CMA of the Staff Change being a future event[117] demonstrate that Viatris failed to put in place adequate systems and controls to comply with the IEO, including failing to apprise itself of the true position properly.

    b. Viatris is a large and sophisticated organisation with considerable resources, including the retention of experienced external legal advisers. Even if that initial email was inadvertently incorrect, it is not excusable.

    c. Viatris' lack of transparency in its communications with the CMA overall is deeply troubling. In particular, the continuation of its representations that the Staff Change was prospective (or not correcting its assertion) at the same time as seeking to negotiate a derogation with the CMA. As set out in the CMA's guidance, the CMA does not retrospectively grant derogations; had the CMA granted the derogation under false pretences, this would have benefited Viatris as they would obtained a derogation that should not have been available to them.[118]

    d. The involvement of senior Viatris officials in the conduct including the Deputy Global General Counsel who was responsible for signing the fortnightly compliance statements (and ultimately responsible for submitting an incorrect compliance statement on 15 March 2024).

152. The CMA considers the following matters to be mitigating factors as listed in paragraph 4.11 of CMA4 that support, on balance, the imposition of a lower penalty in relation to Breach 2:

    a. There may have been no actual adverse effects on the case as a result of the breach.

    b. With the benefit of hindsight it does not appear that the breach has prejudiced the CMA's ability to take remedial action.

    c. Viatris has otherwise complied with other aspects of the CMA's investigation.

The size of and financial resources available to Viatris

153. In determining the appropriate level of penalties, the CMA has considered the published consolidated financial statements for Viatris for the year ended 31

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[117] Email Slaughter and May to CMA dated 15 March 2024.
[118] Interim Measures in Merger Investigations, CMA 108 paragraph 3.1.

December 2022.[119] According to these statements,[120] the total worldwide turnover for Viatris in the year ended 2022 was approximately £13,155.4 million.[121] In the same period, the net earnings after tax (i.e. post-tax profit) for Viatris was approximately £1,681.4 million and its total assets were £40,464.5 million.[122]

154. It is apparent that Viatris has significant financial resources available to it.

Viatris' submissions on level of penalty

155. In the Viatris' IEO Provisional Penalty Response, Viatris submits that

  a. A penalty of £500,000 for Breach 1 is disproportionate and excessive, and is higher or equal in amount to penalties previously imposed by the CMA for conduct which is objectively egregious;[123]

  b. In imposing a standalone penalty of £1,000,000 for Breach 2 the CMA relies on the incorrect findings made against Viatris regarding an alleged lack of candour and transparency;[124]

  c. By imposing a separate penalty for Breach 2, the CMA is effectively penalising Viatris twice; this approach is punitive and not supported by the CMA's past decisional practice.[125]

156. The CMA does not accept these submissions for a number of reasons:

  a. Each case turns on its own facts and the CMA's decisions in previous cases are not binding precedents.

  b. The penalty for Breach 1 is not disproportionate or excessive compared with fines in other previous cases. Viatris' submissions focus on the behaviour involved in those other cases and not the turnover of the businesses, which were generally much lower than Viatris'.

157. It does not follow from the fact that in previous decisions the CMA may have imposed a single penalty across more than one breach (one of which was a failure to notify) that identifying a separate penalty for Viatris' breach of paragraph 10 for the IEO in this case means that the penalty is duplicative. While Breach 1 and Breach 2 are distinct, the CMA could have chosen to impose a single overall

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[119] Being the accounting period immediately preceding the date on which the relevant interim measure (in this case the IEO dated 20 November 2023), as specified in Article 3 of the Interim Measures Order. Further, for the purposes of imposing a penalty, section 94A(2) of the Act provides that turnover is the turnover both in and outside the UK of the enterprises owned or controlled by the person on whom it is imposed. In this case, the relevant turnover for the purpose of imposing a penalty is the turnover of Viatris Inc.
[120] Source: Form 101-K Annual Report for the fiscal year ending 31 December 2023 filed by Viatris Inc. with the United States Securities and Exchange Commission.
[121] Being US$16,262.7 million at an average exchange rate for the year ended 31 December 2022 of £:US$ 1.2362 (Source, Office of National Statistics).
[122] As per Form 10-K above, being US$2,078.6 million and US$50,022.2 million respectively at the average exchange rate for the year ended 31 December 2022(£1: US$1.2362).
[123] IEO Provisional Decision Response paragraphs 1.6, 5.6 and 5.7.
[124] IEO Provisional Decision Response paragraphs 1.6, 5.18.
[125] IEO Provisional Decision Response paragraphs 1.6, 5.19-5.22.

penalty (of equivalent aggregate size) in this case, but considered that in the circumstances of this case it was more appropriate to delineate separate penalties and the reasoning behind each of them. On the facts of this case, and having regard to its policy aim of general deterrence, separate delineation of the more significant penalty for Breach 2 underscores the importance to the CMA's voluntary regime of merger parties immediately notifying the CMA, with full transparency, of all pertinent facts where they have reason to suspect that they have breached an initial enforcement order.

Conclusion on the imposition of a penalty

158. 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 £658 million), the CMA does not consider that the Breaches in this case warrant a penalty at that level.

159. In view of the relevant factors set out in this section, including: (i) the seriousness of the breaches (whether committed intentionally or negligently); (ii) the knowledge and/or involvement of Viatris' senior management; (iii) the fact that Viatris appears to have sought an advantage from its lack of candour in relation to Breach 2; (iv) that taken together, the Breaches reveal a lack of effective systems to ensure compliance with the IEO; (v) the need to deter future failures to comply by Viatris and other persons who may consider future non-compliance with interim measures; and (vi) Viatris' size and financial position, the CMA considers that the imposition of penalties cumulatively totalling £1.5 million is appropriate and proportionate, comprising:

   a. £500,000 for Breach 1; and

   b. £1,000,000 for Breach 2.

160. These penalties individually and cumulatively fall substantially below the statutory maximum of 5% of Viatris' global turnover (at approximately 0.01% of turnover and 0.09% of profits after tax). Neither the individual penalties nor the cumulative amount is disproportionate in this case.

F. Viatris' rights and next steps

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

162. Viatris has the following rights in relation to the final penalty which the CMA has imposed:

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

b. Pursuant to section 112(3) of the Act[126] the right to apply to the CMA within 14 days of the date on which the notice is served on Viatris for the CMA to specify different dates by which the penalty or different portions of it, are to be paid.

c. Pursuant to section 114 of the Act, Viatris has the right to apply to the CAT against any decision the CMA reaches in response to an application as described in the preceding paragraph, within the period of 28 days starting with the day on which Viatris is notified of the CMA's decision.

d. Pursuant to section 114 of the Act, Viatris has the right to apply to the CAT within the period of 28 days starting with the day on which the final notice is served on Viatris in relation to:

    i. the imposition or nature of the penalty;

    ii. the amount of the penalty; or

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

e. If Viatris applies to the CMA pursuant to section 112(3) of the Act 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 d.iii. above shall start with the day on which it is notified of the CMA's decision on the section 112(3) application.

f. Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal under section 114 of the Act, the CMA may recover 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.[127]

Sorcha O'Carroll
Senior Director, Mergers

12 November 2024
Competition and Markets Authority

Annexes:

1. Initial Enforcement Order

[126] Section 94A(7) of the Act provides that sections 112-115 of the Act apply in this situation.
[127] Section 115 of the Act. Section 113 of the Act covers (among other matters) the interest payable if the whole or any portion of a penalty is not paid by the day by which it is required to be paid.