

# TEMPLATE UNDERTAKINGS IN LIEU OF A REFERENCE

VERSION 2 JANUARY 2025

**Note 1:** If merger parties wish to offer an undertaking under section 73A(1) of the Enterprise Act 2002, they should provide the CMA with a version of this template showing the proposed changes.

**Note 2:** These template undertakings are for completed mergers. For anticipated mergers, please make the necessary (minor) amendments.

**Note 3:** These template undertakings have two alternative versions of paragraph 2, depending on whether an upfront buyer is offered.

**Note 4:** In this template X is the direct acquirer, Y is the target business. For upfront buyer cases, Z is the proposed purchaser.

# ACQUISITION BY X OF Y

## UNDERTAKINGS GIVEN BY X TO THE COMPETITION AND MARKETS AUTHORITY PURSUANT TO SECTION 73 OF THE ENTERPRISE ACT 2002

### Whereas:

- (a) X (**[define X]**) completed the acquisition of Y (**[define Y]**) on [date] by way of [details of transaction] (the **Transaction**) such that X and Y ceased to be distinct for the purposes of the Enterprise Act 2002 (the **Act**);
- (b) Under section 22(1) of the Act the Competition and Markets Authority (**CMA**) has a duty to refer a relevant merger situation for a Phase 2 investigation where it believes that it is or may be the case that the creation of that merger situation has resulted or may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services;
- (c) Under section 73 of the Act the CMA may, instead of making such a reference and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept undertakings to take such action as it considers appropriate, from such of the parties concerned as it considers appropriate. In particular, the CMA shall have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it;
- (d) As set out in the CMA's decision of [date] (the **Decision**), the CMA believes that, in the absence of appropriate undertakings, it would be under a duty to refer the Transaction for a Phase 2 investigation;
- (e) The CMA considers that the undertakings given below by X are appropriate to remedy, mitigate or prevent the substantial lessening of competition, or any adverse effect which has or may have resulted from the Transaction, or may be expected to result from it, as specified in the Decision;
- (f) **[in upfront buyer cases]** Prior to the acceptance of these undertakings by the CMA, X entered into a legally binding agreement of [date] to divest the Divestment Business as a going concern to a Proposed Purchaser on terms approved by the CMA. This agreement was conditional only on formal CMA approval of the Proposed Purchaser and acceptance by the CMA of these undertakings. This agreement includes a warranty that the Proposed Purchaser has the financial resources, expertise (including the managerial,

operational and technical capability), incentive and intention to maintain and operate the Divestment Business as part of a viable and active business in competition with X and other competitors in the [description of relevant market];] and

- (g) [The CMA made an Initial Enforcement Order applying to [list addressees of Order] on [date] in respect of the Transaction pursuant to section 72 of the Act for the purposes of preventing pre-emptive action. Pursuant to section 72(6)(b) of the Act, this Initial Enforcement Order ceases to be in force on the acceptance by the CMA of the undertakings given below by X].

NOW THEREFORE X hereby gives to the CMA the following undertakings for the purpose of remedying, mitigating or preventing the substantial lessening of competition, or any adverse effect which has or may have resulted from it or may be expected to result from it.

## **1. EFFECTIVE DATE OF THE UNDERTAKINGS**

- 1.1 These undertakings shall take effect from the date that, having been signed by X, they are accepted by the CMA.

**[Paragraph 2 if an upfront buyer is offered:]**

## **2. DIVESTMENT OF THE DIVESTMENT BUSINESS**

- 2.1 X shall ensure that the completion of the divestment of the Divestment Business to the Proposed Purchaser contemplated by the agreement referred to in recital [f] of these undertakings takes place within a period not exceeding [one month] from the date these undertakings take effect.
- 2.2 X shall use all reasonable endeavours to ensure the transfer of Key Staff with the divestment of the Divestment Business.
- 2.3 **[If applicable:]** Where X divests a Divestment Business over which it holds[, or Y held,] a freehold interest by way of the grant of a long lease on normal commercial terms of not less than 25 years duration to the Proposed Purchaser, it shall in addition sell the freehold interest in the Divestment Business to a person independent of and unconnected to X and the Group of Interconnected Bodies Corporate to which X belongs and any Associated Person or Affiliate of X or such Group of Interconnected Bodies Corporate, within a period not exceeding three months from the date of the commencement of the lease.
- 2.4 In the event that X fails to complete the divestment of the Divestment Business in accordance with paragraphs 2.1 [and] 2.2 [and 2.3] above, the CMA may, whether or not initiating the Trustee Functions as set out in paragraph 4 below, require X to

divest the Divestment Business as a going concern at no minimum price to a purchaser or purchasers approved by the CMA.

**[Paragraph 2 if no upfront buyer is offered:]**

### **3. DIVESTMENT OF THE DIVESTMENT BUSINESS**

- 3.1 X shall, using its best endeavours and acting in good faith, as soon as reasonably practicable, effect to the satisfaction of the CMA the divestment of the Divestment Business as a going concern by the end of the Divestment Period to a purchaser approved by the CMA in accordance with the provisions of these undertakings.
- 3.2 Without prejudice to the generality of paragraph 3.1 above, X shall use all reasonable endeavours to ensure the transfer of Key Staff with the divestment of the Divestment Business.
- 3.3 X shall be deemed to have complied with its obligations at paragraph 3.1 above if, as soon as reasonably practicable and in any event by the end of the Divestment Period, it has entered into a legally binding agreement (or agreements) with a purchaser (or purchasers) approved in advance by the CMA in writing pursuant to these undertakings (or a legally binding agreement (or agreements) conditional on such approval), provided that the completion of the divestment of the Divestment Business contemplated by such agreement (or agreements), if later than the end of the Divestment Period, takes place:
- (a) within a period not exceeding [one month] after the approval of the purchaser by the CMA (or within [one month] of the effective date of these undertakings, as set out in paragraph 1 above, whichever is later); or
  - (b) within a period not exceeding 10 Working Days after all the necessary approvals and consents from third parties have been obtained,
- whichever is later, provided that in any event, the completion of the divestment of the Divestment Businesses takes place within [] months of the effective date of these undertakings (defined in paragraph 1.1 above).
- 3.4 Without prejudice to the generality of paragraph 3.1 above, X shall take the following measures to the extent they may be necessary in the opinion of the CMA to effect the sale of the Divestment Business in accordance with the provisions of these undertakings:
- (a) the transfer or vesting of property, assets, rights, personnel, liabilities or obligations (including without prejudice any contracts, licences, authorisations, permits or consents);
  - (b) [any other transfer of interests that will take effect with the sale]

- (c) the adjustment of contracts, whether by discharge or reduction or assignment of any liability or obligation or otherwise;
- (d) the creation, allotment, transfer, surrender or cancellation of any shares, stock or securities; and
- (e) the formation or winding up of a company.

3.5 **[If applicable:]** Where X divests a Divestment Business over which it holds[, or Y held,] a freehold interest by way of the grant of a long lease on normal commercial terms of not less than 25 years duration to the purchaser, it shall in addition sell the freehold interest in the Divestment Business to a person independent of and unconnected to X and the Group of Interconnected Bodies Corporate to which X belongs and any Associated Person or Affiliate of X or such Group of Interconnected Bodies Corporate, within a period not exceeding three months from the date of the commencement of the lease.

3.6 X shall ensure that the sale and purchase agreement entered into for the purposes of paragraph 3.1 and 3.3 above includes a warranty that the purchaser has the financial resources, expertise (including the managerial, operational and technical capability), incentive and intention to maintain and operate the Divestment Business as part of a viable and active business in competition with X and other competitors in the [description of relevant market].

3.7 In the event that X fails to divest the Divestment Business in accordance with paragraphs 3.1, 3.2, 3.3[and 3.5] above, the CMA may, whether or not initiating the Trustee Functions as set out in paragraph 4 below, require X to divest the Divestment Business as a going concern at no minimum price to a purchaser approved by the CMA.

3.8 X shall notify the CMA in writing of the identity of each proposed purchaser that makes an offer for the Divestment Business together with the value and terms of such offers as soon as reasonably practicable following the receipt of such offers and in any event within 5 Working Days of receipt of such offers.

## **4. APPROVAL OF PURCHASER AND TERMS OF DIVESTMENT**

4.1 For the purposes of the CMA approving a Proposed Purchaser **[if an upfront buyer is offered:]** and the terms of the divestment] of the Divestment Business in accordance with these undertakings, X shall, save as required or permitted by the CMA, satisfy the CMA that:

- (a) the acquisition by the Proposed Purchaser of the Divestment Business, on the terms set out above, remedies, mitigates or prevents the substantial

lessening of competition concerned or any adverse effect which has or may have resulted from it, or may be expected to result from it, in particular having regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it;

- (b) the Proposed Purchaser is independent of and unconnected to X and the Group of Interconnected Bodies Corporate to which X belongs and any Associated Person or Affiliate of X or such Group of Interconnected Bodies Corporate;
- (c) the Proposed Purchaser has the financial resources, expertise (including the managerial, operational and technical capability), incentive and intention to maintain and operate the Divestment Business as a viable and active business in competition with X and other competitors in the [description of market] from the date of completion of the divestment of the Divestment Business;
- (d) the Proposed Purchaser is reasonably to be expected to obtain all necessary approvals, licences and consents from any regulatory or other authority, including (where applicable) landlord's consent to the transfer of any leasehold interest; and
- (e) the acquisition by the Proposed Purchaser of the Divestment Business does not create a realistic prospect of a substantial lessening of competition within any market or markets in the UK.

4.2 The CMA may require X to provide it with such information and documentation as it may reasonably require to satisfy the CMA that the Proposed Purchaser will fulfil the requirements in paragraph 4.1 above.

## **5. APPOINTMENT OF A TRUSTEE**

5.1 The provisions of paragraph 5.2 to paragraph 5.7 below shall apply only as long as X has not satisfied, or where the CMA has reasonable grounds for believing that X will not satisfy, all or any part of the obligation to divest the Divestment Business in accordance with paragraph 2 above.

5.2 Within 5 Working Days of the CMA notifying X in writing that it must do so, X shall propose to the CMA for approval:

- (a) the names of at least two individuals to exercise the Trustee Functions; and
- (b) the full terms of a mandate in accordance with which the Trustee shall carry out the Trustee Functions.

- 5.3 X and/or any individuals nominated pursuant to paragraph 5.2 shall satisfy the CMA that, save as required or permitted by the CMA:
- (a) such nominated individuals have the necessary qualifications to carry out their mandates, and are employees or partners of an investment bank, retail bank, commercial property agent, building society or law firm or accountancy firm with an established reputation either nationwide or in a substantial part of the UK or in another EU member state;
  - (b) such nominated individuals are each independent of X and of the Group of Interconnected Bodies Corporate to which X belongs and of any Associated Person or Affiliate of X or of such Group of Interconnected Bodies Corporate and of any Proposed Purchaser of the Divestment Business to be sold pursuant to these undertakings, and, in the reasonable opinion of X, are appropriate to be appointed as Trustee; and
  - (c) such nominated individuals neither are, nor are likely to become, exposed, either directly or indirectly, to a conflict of interest that impairs or may be likely to impair their objectivity or independence in discharging the Trustee Functions.

5.4 Within 2 Working Days of the CMA approving, at its discretion, one or more of the persons nominated by X and their proposed mandates pursuant to paragraph 5.2 above, and subject to any modifications the CMA deems necessary for the Trustee to carry out the Trustee Functions, X shall use its best endeavours to appoint from the persons so approved one person to carry out the Trustee Functions in accordance with the mandate approved by the CMA pursuant to paragraph 5.2 above.

5.5 In the event that:

- (a) X fails to propose any person or persons in accordance with paragraph 5.2 above; or
- (b) none of the persons proposed by X pursuant to paragraph 5.2 is approved by the CMA; or
- (c) X is unable for any reason to appoint within the time limit stipulated in paragraph 5.4 above any such person following approval by the CMA,

X shall use its best endeavours to appoint from persons nominated by the CMA one person to carry out the Trustee Functions on the terms of a mandate approved by the CMA. X shall use its best endeavours to make such appointment within 5 Working Days of receiving the nominations from the CMA.

- 5.6 The appointment of the Trustee pursuant to paragraph 5.4 or paragraph 5.5 above shall be irrevocable unless:
- (a) a conflict of interest that impairs or may be likely to impair the objectivity or independence of the Trustee in discharging the Trustee Functions arises;
  - (b) the Trustee ceases to perform the Trustee Functions; or
  - (c) the CMA is otherwise satisfied that there is good cause for the appointment to be terminated in advance of the satisfactory fulfilment of the Trustee Functions.
- 5.7 In the event that the appointment of the Trustee is terminated in accordance with paragraph 5.6 above, X shall, if requested to do so in writing by the CMA, use its best endeavours to appoint from persons nominated by the CMA one person to carry out the Trustee Functions in accordance with such mandate as is approved by the CMA. X shall use its best endeavours to make such appointment within seven Working Days of receiving the nominations from the CMA. Where required by the CMA, the outgoing Trustee shall continue as Trustee until a new Trustee is in place and a full handover of all relevant information has taken place.

## **6. THE MANDATE**

- 6.1 The terms of the mandate proposed by X pursuant to 5.2 above shall, as a minimum, contain all provisions necessary to enable the Trustee to carry out the Trustee Functions including, without limitation to the generality of this paragraph:
- (a) an exclusive, irrevocable mandate to sell the Divestment Business as required by paragraph 7.1 below to a purchaser as directed or approved in writing in advance by the CMA at no minimum price and on such reasonable terms and conditions as the Trustee considers appropriate to effect an expedient sale;
  - (b) a mandate to take any other steps necessary for, or incidental to, the Trustee's mandate under sub-paragraph (a) above;
  - (c) a comprehensive power of attorney to the Trustee (including the authority to grant sub-powers of attorney to the Trustee's officers, employees and agents) to enable it to take all steps necessary or appropriate to effect the sale of the Divestment Business;
  - (d) a mandate to comply with any orders and/or directions given by the CMA;  
and

- (e) a mandate to appoint at X's expense such advisers as the CMA and/or the Trustee reasonably considers necessary or appropriate in connection with the performance of the Trustee Functions.

## **7. FUNCTIONS OF TRUSTEE**

- 7.1 The Trustee shall seek to procure, within such period as may be specified in writing by the CMA, the completion of the sale of the Divestment Business at no minimum price, to a purchaser or purchasers approved by the CMA in accordance with paragraph 7.3 below.
- 7.2 Without prejudice to the generality of paragraph 7.1 above, the Trustee shall take the following measures in relation to the Divestment Business to the extent to which such measures may be necessary to effect the divestment of the Divestment Business in accordance with the provisions of these undertakings:
  - (a) the transfer or vesting of property, assets, rights, personnel, liabilities or obligations (including without prejudice any contracts, licences, authorisations, permits or consents);
  - (b) any other transfer of interests that will take effect with the sale;
  - (c) the adjustment of contracts, whether by discharge or reduction or assignment of any liability or obligation or otherwise;
  - (d) the creation, allotment, transfer, surrender or cancellation of any shares, stock or securities; and
  - (e) the formation or winding up of a company.
- 7.3 The Trustee shall not sell or permit the divestment of the Divestment Business to a Proposed Purchaser unless it has been directed to do so by the CMA or has obtained the CMA's prior written approval in respect of the identity of that Proposed Purchaser. The Trustee shall notify the CMA of the identity of a Proposed Purchaser as soon as reasonably practicable prior to the signing of a legally enforceable agreement and in any event at least 20 Working Days in advance of the proposed completion of the proposed sale and purchase agreement in question.
- 7.4 Pending the divestment of the Divestment Business pursuant to paragraph 7.1 above, the Trustee shall monitor X's compliance with its obligations under paragraph 8.1 and paragraph 8.2 below and shall promptly take such measures as it considers necessary to ensure such compliance, as well as reporting in writing to the CMA, if the Trustee concludes on reasonable grounds that X is failing or will fail to comply with such obligations.

- 7.5 The Trustee may give written directions to X to take such steps as may be specified or described in the directions for the purpose of securing X's compliance with its obligations under these undertakings or enabling the Trustee to carry out the Trustee Functions. The Trustee may not require X to:
- (a) offer any reverse premium or similar inducement to a purchaser; or
  - (b) accept any actual or contingent liability towards a purchaser or otherwise in connection with the divestment of the Divestment Business which would be unusual in scope, duration or financially, having regard to the price and usual market practice in relation to similar disposals.
- 7.6 The Trustee shall, as soon as reasonably practicable, comply at all times with any reasonable instructions or written directions made by the CMA for the purposes of carrying out or securing compliance with the undertakings (or any matter incidental thereto) and shall provide to the CMA such information and reports in relation to the carrying out of the Trustee Functions as the CMA may require. The Trustee shall promptly report in writing to the CMA if the Trustee concludes on reasonable grounds that X is failing or will fail to comply with any of its obligations under these undertakings.
- 7.7 For the purpose of fulfilling the Trustee Functions, the Trustee shall not be bound by instructions of X nor shall the Trustee Functions be extended or varied in any way by X save with the prior express written consent of the CMA.

## **8. OBLIGATIONS OF X FOLLOWING APPOINTMENT OF TRUSTEE**

- 8.1 X shall not give any instruction or request to the Trustee which conflicts with the Trustee Functions.
- 8.2 X shall take all such steps as are reasonably necessary to enable the Trustee to carry out the Trustee Functions, including but not limited to:
- (a) complying with such written directions as the Trustee may from time to time give pursuant to paragraph 7.6 above; and
  - (b) providing the Trustee with all such assistance and information as it may reasonably require in carrying out the Trustee Functions.

## **9. REMUNERATION OF TRUSTEE**

- 9.1 X shall pay the Trustee a reasonable remuneration for the services it provides in carrying out the Trustee Functions, and shall pay the Trustee in a way that does

not impede the independent and effective fulfilment of the Trustee Functions, which shall be set out in the Trustee's mandate referred to in paragraph 6 above.

## 10. INTERIM ACTION

10.1 Pending the completion of the divestment of the Divestment Business to the satisfaction of the CMA in accordance with the provisions of these undertakings, save as otherwise agreed in advance in writing by the CMA, X shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business and in particular ensure that: **[note: if an Initial Enforcement Order is in force, it may be appropriate for the CMA to grant derogations similar to those granted for that Order]**

- (a) the Divestment Business is carried on separately from the X Business and the Divestment Business's separate sales or brand identity is maintained;
- (b) the Divestment Business and the X Business are maintained as a going concern and sufficient resources are made available for the development of the Divestment Business and the X Business, on the basis of their respective pre-Transaction business plans;
- (c) except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within, the Divestment Business or the X Business;
- (d) the nature, description, range and quality of [goods and/or services] supplied in the UK by each of the Divestment Business and the X Business are maintained and preserved;
- (e) except in the ordinary course of business for the separate operation of the Divestment Business and the X Business:
  - (i) all of the assets of the Divestment Business and the X Business are maintained and preserved, including facilities and goodwill;
  - (ii) none of the assets of the Divestment Business or the X Business are disposed of; and
  - (iii) no interest in the assets of the Divestment Business or the X Business is created or disposed of;
- (f) there is no integration of the information technology of the Divestment Business or X Businesses, and the software and hardware platforms of the Divestment Business shall remain essentially unchanged, except for routine changes and maintenance;

- (g) the [customer and supplier] lists of the Divestment Business and the X Business shall be operated and updated separately and any negotiations with any existing or potential [customers and suppliers] in relation to the Divestment Business will be carried out by the Divestment Business alone and for the avoidance of doubt the X Business will not negotiate on behalf of the Divestment Business (and vice versa) or enter into any joint agreements with the Divestment Business (and vice versa);
- (h) all existing contracts of the Divestment Business and the X Business continue to be serviced by the business to which they were awarded;
- (i) no changes are made to Key Staff of the Divestment Business or X Business;
- (j) no Key Staff are transferred between the Divestment Business and the X Business;
- (k) all reasonable steps are taken to encourage all Key Staff to remain with the Divestment Business and the X Business; and
- (l) no Confidential Information relating to either of the Divestment Business or the X Business shall pass, directly or indirectly, from the Divestment Business (or any of its employees, directors, agents or affiliates) to the X Business (or any of its employees, directors, agents or affiliates), or vice versa, except where strictly necessary in the ordinary course of business (for example, where required for compliance with external regulatory and/or accounting obligations) or any steps necessary in order for X to comply with these undertakings, including the transfer of information necessary for the divestment process, provided that, upon divestment of the Divestment Business, any records or copies (electronic or otherwise) of Confidential Information held by X in relation to the Divestment Business (or vice versa) shall be returned to the relevant business and any copies destroyed (except as may be necessary for the purposes of compliance with the obligations above).

10.2 At all times, X will actively keep the CMA informed of any material developments relating to the Divestment Business, which includes, but is not limited to:

- (a) details of Key Staff who leave the X Business or the Divestment Business;
- (b) any interruption of the X Business or the Divestment Business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for more than 24 hours;
- (c) all substantial customer volumes lost by the Divestment Business; and

- (d) substantial changes in the X Business's or the Divestment Business's contractual arrangements or relationships with key suppliers.

## 11. CONTINUED SEPARATION

11.1 Except with the prior written consent of the CMA, for a period of 10 years following the divestment of the Divestment Business pursuant to these undertakings, X, or any member of the Group of Interconnected bodies Corporate to which X belongs:

- (a) shall not, directly or indirectly, hold, acquire, re-acquire or use:
  - (i) an Interest in the Divestment Business [other than (a) any freehold interest in the property associated with the Divestment Business pending divestment of that freehold proprietary interest pursuant to paragraph [3.3/3.5 above]; or
  - (ii) any Interest in any company carrying on or having Control of the Divestment Business (other than any investments made in the ordinary course of the operation of any of the employee benefit and pension schemes of X or of any members of the Group of Interconnected Bodies Corporate to which X belongs of not more than three per cent in aggregate of the issued equity share capital in any such company, whose shares are listed or dealt with on any recognised investment exchange, which carries no more than three per cent of the voting rights exercisable at meetings of such company); or
  - (iii) other than in the normal course of business, any of the assets of the Divestment Business;
- (b) shall procure that no employee or director of X or any member of the Group of Interconnected Bodies Corporate to which X belongs for as long as they are an employee or director of X or any member of the Group of Interconnected Bodies Corporate to which X belongs holds or is nominated to any directorship or managerial position in the Divestment Business or directorship or managerial position in any company or other undertaking carrying on or having control of the Divestment Business without the CMA's prior written consent;
- (c) shall not participate in the formulation of, or (other than in the ordinary course of business) influence or attempt to influence, the policy of the Divestment Business or any company or other undertaking carrying on or having control of that Divestment Business; and
- (d) shall not enter into or carry out any agreement or arrangement with any person, if the carrying out of the agreement or arrangement is intended to

result or will result in any Associated Person or Affiliate of X or of any member of the Group of Interconnected Bodies Corporate to which X belongs directly or indirectly acquiring the Divestment Business or doing any of the things listed in sub-paragraphs 11.1(a), 11.1(b) and 11.1(c) above.

- 11.2 **If applicable:** Where X (or any member of the Group of Interconnected Bodies Corporate to which X belongs) divests a Divestment Business by way of granting a sub-lease and remains the landlord of the purchaser of the Divestment Business, then for the duration of the sub-lease, X shall within 10 Working Days of being requested to do so (unless agreed otherwise by the CMA):
- (a) consent to any matter requiring landlord's approval under the terms of the lease between X and the purchaser of the Divestment Business (except where X is required to obtain such consent from another person); and/or
  - (b) pass on any request for consent to the freehold owner of the property or relevant third party, as appropriate.

## **12. IF APPLICABLE: NEW DIVESTMENT IF X OBTAINS POSSESSION OF A DIVESTMENT BUSINESS PROPERTY**

- 12.1 In the event that, following divestment of a Divestment Business in a manner that has involved X assigning an existing lease or granting a sub-lease to the purchaser of the Divestment Business, X benefits from or becomes subject to an Occupation Interest (so long as X so benefits or becomes so subject during the term of the lease assigned or sub-lease granted by X as part of such divestment), X shall:
- (a) within 10 Working Days of becoming aware that it is so benefitting or is so subject inform the CMA in writing of that fact; and
  - (b) using its best endeavours and acting in good faith comply with such written directions as the CMA may give to X to effect a new divestment of the Occupation Interest to a new purchaser approved by the CMA in accordance with the provisions of these undertakings, provided always that such written directions must be of a similar nature to those contained in these undertakings with regard to the original divestment of the Divestment Business.
- 12.2 In determining, for the purposes of sub-paragraph 12.1(b) above, whether to require X to effect a new divestment of the Occupation Interest to a new purchaser approved by the CMA in accordance with the provisions of these undertakings, the CMA may have regard to any change of circumstances since the Decision.

- 12.3 In the event that X fails to divest the Occupation Interest in accordance with paragraph 12.1 above, the CMA may, whether or not initiating the Trustee Functions set out in these undertakings, require X to divest the Occupation Interest at no minimum price to a purchaser approved by the CMA.
- 12.4 X shall notify the CMA in writing of the identity of each proposed purchaser that makes an offer for the Occupation Interest together with the value and terms of such offers as soon as reasonably practicable following the receipt of such offers and in any event within 10 Working Days of receipt of such offers.
- 12.5 In the event that the CMA gives written directions under paragraph 12.1 above for X to effect a new divestment of the Occupation Interest, paragraphs 3, 4, 5, 6, 7, 8 and 9 shall apply to the new divestment in the same way that they applied to the original divestment obligation save that references to 'Divestment Business' in those paragraphs shall be construed as references to 'Occupation Interest'.

## **13. COMPLIANCE**

- 13.1 X shall comply promptly with such written directions as the CMA may from time to time give:
- (a) to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with these undertakings; or
  - (b) to do or refrain from doing anything so specified or described which it might be required by these undertakings to do or to refrain from doing.
- 13.2 X shall co-operate fully with the CMA when the CMA is:
- (a) monitoring compliance with the provisions of these undertakings; and
  - (b) investigating potential breaches of the provisions of these undertakings.
- 13.3 X shall procure that any member of the same Group of Interconnected Bodies Corporate as X complies with these undertakings as if it had given them and actions and omissions of the members of the same Group of Interconnected Bodies Corporate as X shall be attributed to X for the purposes of these undertakings.
- 13.4 Where any Affiliate of X is not a member of the same Group of Interconnected Bodies Corporate as X, X shall use its best endeavours to procure that any such Affiliate shall comply with these undertakings as if it had given them.

## **14. PROVISION OF INFORMATION**

- 14.1 X shall furnish promptly to the CMA such information as the CMA considers necessary in relation to or in connection with the implementation and/or enforcement of and/or the compliance with these undertakings, including for the avoidance of doubt, any Confidential Information.

## **15. EXTENSION OF TIME LIMITS**

- 15.1 The CMA may, in response to a written request from X, or otherwise at its own discretion, grant an extension to any time period referred to in these undertakings.

## **16. SERVICE**

- 16.1 X hereby authorises [Organisation], whose address for service is [address], to accept service on its behalf of all documents connected with these undertakings (including any document of any kind which falls to be served on or sent to X, or any of its Subsidiaries in connection with any proceedings in Courts in the UK, orders, requests, notifications or other communications connected with these undertakings).
- 16.2 Unless X inform the CMA in writing that [Organisation] has ceased to have authority to accept and acknowledge service on its or any of its Subsidiaries' behalf, any document, order, request, notification or other communication shall be validly served on X if it is served on [Organisation]; and service shall be deemed to have been acknowledged by X if it is acknowledged by [Organisation] or such other nominee.
- 16.3 Paragraph 16.2 above has effect irrespective of whether, as between X and [Organisation] or other nominees, [Organisation] or other nominees has or continues to have any authority to accept and acknowledge service on X's or any of its respective Subsidiaries' behalf.
- 16.4 No failure or mistake by [Organisation] or other nominees (including a failure to notify X of the service of any document, order, request, notification or other communication) shall invalidate any action taken in respect of these undertakings including any proceedings or judgment.
- 16.5 Any communication from X to the CMA under these undertakings shall be addressed to Manager, Market and Mergers Remedies Monitoring, Competition and Markets Authority, The Cabot, 25 Cabot Square, London, E14 4QZ or such other person or address as the CMA may direct in writing.

## 17. EFFECT OF INVALIDITY

- 17.1 Should any provision of these undertakings be contrary to law or invalid for any reason, X undertake to continue to observe the remaining provisions.

## 18. GOVERNING LAW

- 18.1 X recognises and acknowledges that these undertakings shall be governed and construed in all respects in accordance with English law.
- 18.2 In the event that a dispute arises concerning these undertakings, X undertakes to submit to the courts of England and Wales.

## 19. TERMINATION

- 19.1 X recognises and acknowledges that these undertakings shall be in force until such time as they are varied, released or superseded under the Act.
- 19.2 X recognises and acknowledges that the variation, release or supersession of these undertakings shall not affect the validity and enforceability of any rights or obligations that arose prior to such variation, release or supersession.

## 20. ENFORCEMENT

- 20.1 X recognises and acknowledges that section 94 of the Act places a duty on any person to whom these undertakings relate to comply with them. Any person who suffers loss or damage due to a breach of this duty may bring an action. Section 94 of the Act also provides that the CMA can seek to enforce these undertakings by civil proceedings for an injunction or for any other appropriate relief or remedy. Under sections 94AA and 94AB of the Act, the CMA can impose financial penalties in respect of a failure to comply with these undertakings without reasonable excuse as set out in Annex 1 and the [Administrative penalties: Statement of Policy on the CMA's approach \(CMA4\)](#).
- 20.2 X recognises and acknowledges that it is a criminal offence under section 117 of the Enterprise Act 2002 for a person recklessly or knowingly to supply to the CMA information which is false or misleading in any material respect. Breach of this provision can result in fines, imprisonment for a term not exceeding two years, or both (Section 117 of the Enterprise Act 2002) or the imposition of financial penalties under section 110(1A), as described in Annex 1 and the [Administrative penalties: Statement of Policy on the CMA's approach \(CMA4\)](#).

## 21. INTERPRETATION

- 21.1 The Interpretation Act 1978 shall apply to these undertakings as it does to Acts of Parliament.
- 21.2 References in these undertakings to any English law term for any legal status, interest, concept or thing shall in respect of any jurisdiction other than England and Wales be deemed to include what most nearly approximates in that jurisdiction to the English law term.
- 21.3 In these undertakings the word "including" shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word and the word "include" and its derivatives shall be construed accordingly.
- 21.4 For the purposes of these undertakings:

**“the Act”** means the Enterprise Act 2002;

**“Affiliate”** a person is an affiliate of another person if they or their respective enterprises would be regarded as being under common control for the purposes of section 26 of the Act;

**“Associated Person”** means a person or persons associated with X within the meaning of section 127(4) of the Act and includes any Subsidiary of such a person or persons;

**“business”** has the meaning given by section 129(1) and (3) of the Act;

**“CMA”** means the Competition and Markets Authority or any successor body;

**“Confidential Information”** means any business secrets, know-how, commercially sensitive information, intellectual property or any other information of a confidential or proprietary nature;

**“Control”** shall be construed in accordance with section 26 of the Act, and in the case of a body corporate, a person shall be deemed to Control it if he holds, or has an interest in, shares of that body corporate amounting to 10 per cent or more of its issued share capital or carrying an entitlement to vote at meetings of that body corporate of 10 per cent or more of the total number of votes which may be cast at such meetings;

**“Decision”** means the CMA’s decision under section 22 of the Act dated [date] in connection with the Transaction;

**“Divestment Business”** means [details of the divestment business];

[if applicable – see paragraph 11 and the definition of “Occupational Interest” below:] **“Divestment Business Property”** means the relevant property associated with the Divestment Business as at the date of these undertakings;

[if no upfront buyer is offered:] **“Divestment Period”** means the period of time determined by the CMA and notified in writing to X by the CMA;

**“enterprise”** has the meaning given in section 129(1) of the Act;

**“Group of Interconnected Bodies Corporate”** has the meaning given in section 129(2) of the Act; references to a Group of Interconnected Bodies Corporate shall be to the Group of Interconnected Bodies Corporate as constituted from time to time;

**“Interest”** includes shares, an interest in shares and any other interest carrying an entitlement to vote at shareholders’ meetings but does not include a contract to acquire shares in the future; and for this purpose “an interest in shares” includes an entitlement by a person other than the registered holder, to exercise any right conferred by the holding of these shares or an entitlement to Control the exercise of such right;

**“Key Staff”** means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the Divestment Business or the X Business, as the case may be;

[if applicable – see paragraph 11:] **“Occupation Interest”** means an interest in the Divestment Business Property by virtue of which X enjoys an unconditional right or is under an unconditional obligation to occupy the Divestment Business Property provided always that: (i) the original purchaser (or its successor) is not in occupation of the Divestment Business Property; and/or (ii) before such interest in the Divestment Business Property arose, the most recent use to which the Divestment Business Property had been put was that of carrying on [nature of the business];

**“Proposed Purchaser”** means [if an upfront buyer is offered: Z or such other proposed purchaser] [if no upfront buyer is offered: any proposed purchaser] for the Divestment Business;

**“Subsidiary”** shall be construed in accordance with section 1159 of the Companies Act 2006 (as amended), unless otherwise stated;

**“the Transaction”** means the [details of the transaction];

**“Trustee”** means the person appointed pursuant to paragraph 4.4, paragraph 4.5 or paragraph 4.7 to carry out the Trustee Functions;

**“Trustee Functions”** means the functions set out in paragraph 6;

“**UK**” means the United Kingdom of Great Britain and Northern Ireland;

“**Working Day**” means any day of the week other than a Saturday or a Sunday or any day that is a public holiday in any part of the United Kingdom under the Banking and Financial Dealings Act 1971;

“**X**” means [full registered name and company number of acquirer];

“**X Business**” means the business of X and its Group of Interconnected Bodies Corporate carried on as at [date of Transaction or date of Initial Enforcement Order if later];

“**Y**” means [full registered name and company number (or, in asset transaction, description of business) of target of Transaction];

[if an upfront buyer is offered:] “**Z**” means [full registered name of the proposed purchaser]; and

unless the context requires otherwise, the singular shall include the plural and vice versa.

## **FOR AND ON BEHALF OF X**

Signature

Name

Title

Date

**DATE ACCEPTED BY THE CMA:**

# ANNEX 1

## PART A - ENFORCEMENT OF UNDERTAKINGS GIVEN UNDER SECTION 73 – IMPOSITION OF CIVIL PENALTIES

### Imposition of civil penalties

1. Under section 94AA(1), the CMA may impose a penalty on a person—
  - (a) from whom the CMA has accepted an enforcement undertaking, or
  - (b) to whom an enforcement order is addressed,
2. where the CMA considers that the person has, without reasonable excuse, failed to comply with the undertaking or order.
3. In deciding whether and, if so, how to proceed under section 94AA(1) the CMA must have regard to the statement of policy which was most recently published under section 94B at the time of the failure to comply.

### Amount of penalty

4. A penalty under section 94AA(1) is to be such amount as the CMA considers appropriate.
5. The amount must be—
  - (a) a fixed amount,
  - (b) an amount calculated by reference to a daily rate, or
  - (c) a combination of a fixed amount and an amount calculated by reference to a daily rate.
6. A penalty imposed under section 94AA(1) on a person who does not own or control an enterprise must not—
  - (a) in the case of a fixed amount, exceed £30,000;
  - (b) in the case of an amount calculated by reference to a daily rate, exceed £15,000 per day;
  - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed such fixed amount and such amount per day.
7. A penalty imposed under section 94AA(1) on any other person must not—

- (a) in the case of a fixed amount, 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;
  - (b) in the case of an amount calculated by reference to a daily rate, for each day exceed 5% of the total value of the daily turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom it is imposed;
  - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed such fixed amount and such amount per day.
8. In imposing a penalty by reference to a daily rate—
- (a) no account is to be taken of any days before the service on the person concerned of the provisional penalty notice under section 112(A1), and
  - (b) unless the CMA determines an earlier date (whether before or after the penalty is imposed), the amount payable ceases to accumulate at the beginning of the day on which the person complies with the enforcement undertaking or enforcement order.

## **PART B - PENALTIES FOR THE PROVISION OF FALSE OR MISLEADING INFORMATION**

### **Imposition of civil penalties**

1. Under section 110(1A) of the Act, the CMA may impose a penalty on a person in accordance with section 111 of the Act where the CMA considers that
  - (a) The person has, without reasonable excuse, supplied information that is false or misleading in a material respect to the CMA in connection of any of the CMA's functions under Part 3 of the Act;
  - (b) The person has without reasonable excuse, supplied information that is false or misleading in a material respect to another person knowing that the information was to be used for the purpose of supplying information to the CMA in connection with any function of the CMA under part 3 of the Act.
2. Under section 110(1C) of the Act, the CMA may not impose such a penalty in relation to an act or omission which constitutes an offence under section 117 of the Act if the person has, by reason of the act or omission, been found guilty of that offence.

## **Amount of penalty**

3. Under section 111(4), a penalty imposed under section 110(1A) shall be of such amount as the CMA considers appropriate.
4. A penalty imposed under section 110(1A) on a person who does not own or control an enterprise shall be a fixed amount that must not exceed £30,000.
5. Under section 111(4A) a penalty imposed under section 110(1A) on any other person shall be a fixed amount must not exceed 1% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person.
6. In deciding whether and, if so, how to proceed under section 110(1A), the CMA must have regard to the statement of policy which was most recently published under section 116 at the time when the act of omission occurred.