



September 2018

UK merger control: Electro Rent fined for non-compliance

In the latest of a series of procedural breaches that have been punished by the UK and EU merger control authorities, over the summer the UK Competition and Markets Authority (CMA) fined Electro Rent £100,000 for failure to comply with the requirements of an interim enforcement order (IEO). The case serves as an important reminder of the need for transaction parties to ensure tight compliance with procedural requirements during merger control investigations. It is also a useful reminder of the complexities of closing a transaction without obtaining merger control clearance from the CMA.

What is an IEO?

Post-closing IEOs (also commonly referred to as "hold separate orders") are a particular feature of the UK merger control regime; they exist because the merger control regime in the UK is a voluntary filing regime, with no prohibition on merger parties from closing transactions ahead of obtaining clearance.

The quid pro quo for a voluntary and non-suspensory system is that the CMA has the power to examine deals on a post-closing basis if they meet the UK's jurisdictional thresholds. In such post-closing cases, the CMA will routinely impose an IEO on the merger parties – the main purpose of which will be to prevent action which might prejudice the merger control investigation or impede the taking of appropriate remedial action.

What do IEOs require?

Amongst other things, IEOs require that the merging (or acquired/acquiring) businesses be run separately until the CMA has completed its review of the transaction or otherwise relaxes the requirements of the IEO, and that sufficient resources be made available to each business to continue to operate on the basis of their respective pre-merger business plans. Parties can seek (limited) derogations from the terms of an IEO, or seek the CMA's consent to take certain actions which may otherwise be prohibited.

Why was Electro Rent fined?

Electro Rent has been fined because it failed, without reasonable excuse, to comply with the requirements of the IEO imposed by the CMA

during its Phase II investigation of Electro Rent's acquisition of Microlease.

In particular, Electro Rent failed to seek the consent of the CMA before issuing a notice to terminate the lease over its only UK premises, despite being aware that the site may form part of a remedies package should the CMA ultimately find competition concerns. The IEO applied (as is routinely the case) to both the acquired Microlease business as well as Electro Rent's pre-existing UK business, hence even such actions in relation to the pre-existing Electro Rent business required consent from the CMA.

Electro Rent informed the Monitoring Trustee (MT) (who had been appointed by the CMA to monitor compliance with the IEO) that it intended to issue a notice to terminate the lease on the UK premises that day – but neither Electro Rent nor the MT informed or sought the consent of the CMA prior to the break notice being issued.

In its decision, the CMA noted that:

- The lease related to Electro Rent's only UK premises, and there was a "*clear understanding*" that the lease over it formed part of a potential remedies package.
- While Electro Rent had taken steps to remedy the breach by entering into a new lease, this was on worse commercial terms which, in the CMA's view, could "*impact on the remedy by increasing the risk that the landlord may not consent to a sub-lease on the previous terms as required by the CMA's remedy*".
- The termination of the lease impeded the ability of Electro Rent to compete independently by depriving the UK business of a UK site from which to operate beyond April 2019, and resulted in the UK business not having the resources for its development on the basis of pre-merger business plans.
- Electro Rent understood the requirement to seek prior consent from the CMA – indeed, it

had sought consent from the CMA before taking certain other actions.

- Electro Rent also had sufficient administrative and financial resources available to it to ensure compliance with the IEO, including external legal advisers.

The wider context

The CMA's fine on Electro Rent follows a series of procedural / regulatory breaches that have resulted in the imposition of fines by EU and UK merger control authorities.

OTHER RECENT EXAMPLES OF FINES FOR PROCEDURAL BREACHES INCLUDE:

- A €110 million fine imposed by the European Commission on Facebook in May 2017 for providing false or misleading information during the investigation of its acquisition of WhatsApp.
- A £20,000 fine imposed by the CMA on Hungry House in November 2017 for failing to comply with statutory information requests during the investigation of its acquisition by JustEat.

Electro Rent has now lodged an appeal of the CMA's fine to the Competition Appeal Tribunal on the basis that: (a) the CMA erred in finding that Electro Rent did not have a reasonable excuse for any breach by reason of service of the break notice; and (b) the penalty imposed was excessive and should be reduced to nil or a nominal sum.

However, regardless of the ultimate outcome of Electro Rent's appeal, in light of the context above it is clear that merger control authorities are increasingly focused on behaviour they view as concerning during the course of their investigations, and will not hesitate to impose fines in appropriate circumstances.

FOR FURTHER INFORMATION, PLEASE CONTACT

10 Snow Hill
London EC1A 2AL
T: +44 (0)20 7295 3000
F: +44 (0)20 7295 3500
www.traverssmith.com



Nigel Seay

Partner, Head of Competition

E: nigel.seay@traverssmith.com
T: +44 (0)20 7295 3416



Stephen Whitfield

Partner, Competition

E: stephen.whitfield@traverssmith.com
T: +44 (0)20 7295 3261