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CMA imposes penalty on Electro Rent for failure to comply with interim measures

The Competition and Markets Authority (CMA) has imposed a **penalty** on Electro Rent Corporation (Electro Rent) for failure to comply with interim measures in respect of its completed acquisition of Microlease Inc and Test Equipment Asset Management Limited (Microlease). Electro Rent breached the interim measures by giving notice to terminate the lease of its UK premises without the CMA's consent. Electro Rent must now pay a penalty of £100,000.

This is the first fine imposed by the CMA for a breach of an interim "standstill" order and reflects a growing enforcement trend by the CMA and other competition authorities around the world with respect to merger control procedural rules.

Background

Electro Rent and Microlease operate globally and are in the business of supplying and letting out equipment to test and measure the performance of electrical devices. The equipment is used in a variety of sectors such as defence, telecommunications and aerospace. Electro Rent completed its acquisition of Microlease in January 2017.

The parties did not notify the transaction to the CMA. The UK's merger regime is a voluntary one, so they were not obliged to notify, but in doing so ran the risk of the CMA initiating its own investigation. In February 2017 the CMA opened an investigation into the merger and in June 2017 concluded that the merger raised competition concerns. After an upfront buyer arrangement designed to resolve those concerns fell through, and following various extensions, in October 2017 the CMA referred the transaction for an in depth phase 2 investigation.

The interim order

In November 2017 the CMA issued an interim order to prevent the parties from taking action which could prejudice or impede the CMA's actions before the final phase 2 decision had been made (the Interim Order). The Interim Order required the parties to: (i) maintain and operate the enterprises separately; (ii) seek the consent of the CMA to do/not to do certain things affecting the enterprises; and

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(iii) notify the CMA promptly of any breach or suspected breach of the Interim Order.

The CMA also issued directions for Electro Rent to appoint a monitoring trustee (MT). The purpose of the MT was to monitor the parties' compliance with the Interim Order, and to support the CMA in taking any remedial action required to keep the parties' businesses viable.

In February 2018 the CMA published its provisional findings, setting out that the transaction could give rise to a substantial lessening of competition, and a notice of possible remedies. The potential remedies included divestment of Electro Rent's UK business including its premises and the physical facilities relating to business operations at the sites.

The breach and penalty

In March 2018 Electro Rent alerted the MT of its intention to give notice to terminate the lease of its UK premises. Electro Rent then gave notice to terminate (the Notice). The CMA became aware of the Notice on 13 April 2018.

On 17 May 2018 the CMA issued its final merger decision, clearing the transaction subject to a condition that Electro Rent divest its UK business.

On 21 May the CMA issued a notice of its intention to impose a penalty for breach of the Interim Order. Electro Rent argued that it had a reasonable excuse for not complying with the Interim Order, as Electro Rent had informed the MT that it intended to serve the Notice and the MT had confirmed orally that it could do so. Electro Rent had understood from the MT that the CMA would be kept informed of the matters relating to the lease and the MT had not said that CMA consent was required.

Electro Rent also submitted that the Notice had not caused any harm because Electro Rent had negotiated a new lease and had offered to sub-let the premises to a possible purchaser on terms no worse than the previous lease.

The CMA was not persuaded by Electro Rent's submissions and on 11 June 2018 issued a penalty to Electro Rent for breach of the Interim Order. The CMA found that Electro Rent had failed to comply with the Interim Order, and that it had no reasonable excuse for its failure. The CMA also noted that:

- the duty to obtain CMA consent was on Electro Rent rather than the MT and discussions with the MT about the Interim Order did not change that duty;
- the MT monitors compliance with interim orders but has no authority to give consent on behalf of the CMA;
- the CMA considered this to be a "flagrant breach" committed in large part by the senior management of Electro Rent; and
- Electro Rent had engaged legal advisers and had previously sought derogations from its obligations under the Interim Order – it was therefore aware of its obligation to do so.

The CMA did, however, recognise that there were mitigating factors which caused the fine to be well below the statutory maximum of 5 per cent of the parties' combined global turnover, including:

- the discussions that Electro Rent had engaged in with the MT;
- the actual effects of the breach would probably be limited;
- there was no effort to conceal the breach; and
- Electro Rent had not gained an advantage as a result of the breach.

Comment

This case should serve as a reminder to merging parties that the CMA has, and will use, powers to impose fines to ensure compliance with the UK's merger regime. Parties should be mindful of compliance with CMA interim orders, and if in any doubt should seek legal advice or engage in discussions with the CMA directly before engaging in any conduct which could breach such an order.

The CMA's approach will also be a factor in parties' decision making on whether or not to notify the CMA prior to completing an acquisition. In the case of mergers which are "called in" and which raise potential competition concerns, interim orders are likely to be imposed and the CMA will strictly enforce the terms of those orders.

Other developments

Merger control

New UK thresholds for review of mergers on national security grounds come into force

New thresholds have come into force increasing the government's jurisdiction to review, block or impose conditions on national security grounds on mergers in certain sectors. The reduced thresholds came into force on 11 June 2018 through amendments to the Enterprise Act 2002.

The new jurisdictional thresholds apply where the target has UK turnover exceeding £1 million, or a share of supply in the UK or a substantial part of the UK of at least 25 per cent. They apply irrespective of whether the share of supply is increased as a result of the transaction. The new rules apply to businesses developing military and dual-use technology, computing hardware and quantum technology – sectors in which the likelihood of a merger having national security implications is deemed to be highest. For more information, see our **briefing** of March 2018.

The changes are part of the government's national security regime and wider industrial policy's. Whilst the new thresholds will bring more cases within the CMA's jurisdiction, both the government and the CMA have **indicated** that they do not expect there to be a material change in the CMA's approach to the assessment of mergers in these sectors from a competition perspective. The Department for Business, Energy and Industrial Strategy has also stated in its **guidance** that it expects that the amendments will result in between 5 and 29 additional mergers and acquisitions per year being brought into scope; of which it expects between 1 and 6 to raise national security concerns requiring the Secretary of State to issue a Public Interest Intervention Notice.

Antitrust

CJ dismisses damages claim against itself in Ori Martin appeal

In a judgment of 7 June 2018 the European Court of Justice (CJ) dismissed an appeal brought by Italian steel company, Ori Martin, against a General Court (GC) order dismissing its action for damages from the CJ itself, for breaching its right to a fair trial.

The case began with a 2010 decision in which Ori Martin was held liable and fined by the European Commission for the participation of its subsidiary Siderurgica Latina Martin (SLM) in a pre-stressing steel cartel. Both Ori Martin and SLM appealed the decision to the GC, which reduced the fine imposed on Ori Martin. Following an appeal to the CJ, which was dismissed in September 2016, Ori Martin brought an action to the GC, arguing that the CJ had breached Article 47 of the Charter of Fundamental Rights which provides for the right to a fair trial within reasonable time. Ori Martin claimed damages on the basis that the CJ had breached its rights by failing to reply to specific points in stating reasons for upholding the presumption of parental liability. On 1 June 2017 the GC dismissed the appeal for manifestly lacking any foundation in law. Ori Martin appealed the Court's order before the CJ.

In its new judgment, the CJ held that the GC distorted the substance of Ori Martin's damages claim. It found that the action was based on a defect in the statement of reasons and therefore a breach of an essential procedural requirement. Despite this, the CJ held that the operative part of the GC's order was well founded for other reasons.

The CJ noted that the obligation to state reasons does not require it "*to provide an account which follows exhaustively and one by one all the arguments put forward*", but was met where sufficient reasons were given to enable the parties to understand why the judges did not uphold their arguments. It had been sufficient to invoke "legal principle" in finding that the presumption of decisive influence had not been rebutted, and consequently that Ori Martin was liable for the actions of its subsidiary.

Ori Martin had therefore failed to establish the alleged irregularity in the judgment, and its appeal was dismissed.

Shandong AIC fines 13 accounting firms for market sharing

China's Shandong Administration for Industry and Commerce (Shandong AIC) handed down a **penalty decision** on 7 May 2018 and imposed penalties totalling RMB 413,526 (approximately £48,410) on 13 accounting firms, representing 1 to 1.5 per cent of the firms' annual revenue in the year preceding the finding of the cartel, for entering into a revenue sharing arrangement that amounted effectively to market sharing. Another firm was also found to have participated in the arrangement, but was deregistered prior to the issuing of the decision and hence cannot be subject to a fine.

During its investigation in the nearby Linyi City in August 2014 into 25 accounting firms for anti-competitive conduct, the Shandong AIC found evidence of similar conduct in Rizhao City by the 14 firms at issue and began its investigation in September 2014. The Shandong AIC found that these firms entered into

"self-discipline" agreements in 2010 to divide up the market by aggregating all revenues of participating firms and allocating the amounts among themselves according to predetermined proportions. From May 2012 the firms further agreed to direct all business generated from Ju County (within Rizhao City) to three particular firms; if other members generated any revenue from Ju County, they would have to give 70 per cent to those three firms. As a result of these agreements, revenues of high-performing firms were used to compensate those that were less successful.

The Shandong AIC found that such conduct discouraged competition and undermined economic efficiency in the local accounting services market, in violation of Article 13 of the Anti-Monopoly Law (AML) which prohibits competitors from dividing up the market for sales. Article 46 of the AML provides that an undertaking that has concluded and implemented a monopoly agreement can be fined up to 10 per cent of its previous year's sales.

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