

A sign of things to come? CMA imposes first fine for breach of a 'hold separate' interim order

11 July 2018

On 11 June 2018 the Competition and Markets Authority fined Electro Rent £100,000 for breach of an interim order – the first such fine imposed by the CMA.

The CMA has increasingly been pursuing merging parties for procedural violations, using powers it acquired in 2014. For example, in November 2017 the CMA fined Hungryhouse £20,000 for failing to provide documents requested by the CMA during its review into Just Eat's acquisition of Hungryhouse.

Interim orders are a unique feature of the UK's voluntary merger control regime. After a brief explanation of when interim orders are used and the background to the penalty imposed on Electro Rent, we consider the key takeaways from this case, and what merging parties can learn from these going forward.

What is an interim order?

In the UK mergers can be completed without notification to the CMA. However, subject to its jurisdictional thresholds, the CMA has the power to 'call in' completed mergers for review.

Whilst it carries out its initial phase 1 review, the CMA will 'normally' put an initial enforcement order in place, which it will then replace with a slightly amended interim order if it refers the merger for a more in depth phase 2 review (referred to together as an "Order"). An Order prevents the parties from integrating their businesses or doing anything which might stop the CMA from 'unwinding' the merger should it find a competition problem. Where the parties want to do something which is restricted under the terms of the Order, they must seek a derogation from the CMA in advance.

Under the terms of an Order, parties must submit regular compliance statements to the CMA, confirming that they have complied with the Order and informing the CMA of any 'material developments' relating to the parties' businesses. This is in addition to the general obligation to actively keep the CMA informed of such material developments.

The CMA has the power to fine the parties up to five percent of their combined global turnover for breach of an Order.

Background

On 31 January 2017 Electro Rent acquired Microlease Inc. Electro Rent and Microlease both supply testing and measurement equipment across sectors such as telecommunications, aerospace and defence and IT. The CMA called the transaction in for review and imposed an Order on the parties on 1 February 2017.

Following its phase 1 review, on 19 October 2017 the CMA referred the merger for an in-depth phase 2 investigation. In November 2017, after being instructed to do so by the CMA, the parties appointed a monitoring trustee – an independent party appointed to monitor and report to the CMA on compliance with the Order.

On 5 February 2018 the CMA issued a notice of provisional findings, which stated that it had provisionally found that the merger had or may be expected to result in a substantial lessening of competition. It then discussed potential remedies with the parties, including the divestment of Electro Rent's UK branch.

Following the discussion about remedies, and whilst the Order was still in place, Electro Rent issued a Notice of Exercise Break Option (the "Notice") terminating the lease over its UK premises. The CMA became aware of the Notice 'independently' on 13 April 2018. On 20 April 2018 the CMA wrote to Electro Rent explaining that it considered this to be a breach of the Order and that it was considering imposing a penalty. On 21 May 2018 the CMA sent a provisional decision to Electro Rent and, after reviewing submissions made by Electro Rent in response, on 11 June 2018 it imposed a penalty of £100,000.

What are the key takeaways?

It is not sufficient to inform the monitoring trustee of planned changes to the business

Prior to issuing the Notice, Electro Rent informed the monitoring trustee of its plans, who advised Electro Rent that they may proceed to issue the Notice. The CMA found that this was not a reasonable excuse for Electro Rent failing to notify the CMA: CMA consent is required for any activity potentially in breach of the Order and the onus is on the parties to seek such consent.

The CMA did however take the monitoring trustee's actions into account when determining the level of the fine – this was a 'significant factor in substantially reducing the level of penalty'.

Informing the CMA of possible breaches

Electro Rent did not bring the breach to the CMA's attention – the CMA found out about it of its own initiative and 'more significant potential prejudice was prevented only by action taken by the CMA once it became aware of the failure to comply'. The CMA took this into account in determining the level of fine.

Notably, Electro Rent did not mention the Notice in its compliance statements – this was a key factor which led to a penalty being imposed.

The breach may be more serious where it could impact on remedies

A potential remedy under consideration was the sale of Electro Rent's UK business, including the lease over its UK premises. The breach was considered to be particularly serious because of the potential impact on a suggested remedy package.

Although Electro Rent took steps to try to remedy the breach by entering into a new lease over the same premises, the new lease was on worse terms and was therefore less attractive to a potential purchaser of its UK business.

It is not clear how it would choose to deal with a more 'technical' breach which does not impact on its substantive assessment of the transaction. However, companies which are subject to an Order should be aware that the CMA has the power to impose a penalty for any breach of an Order, regardless of its impact.

Conclusion

Interpretation of the requirements of an Order can be difficult and nuanced. This decision highlights the importance of regularly seeking legal advice and communicating with the CMA whilst an Order is in force. In our experience, the CMA is pragmatic and responsive in response to questions of interpretation of an Order: a good line of communication with the CMA is essential and it may be advisable to discuss any planned changes with the CMA upfront, even where consent may not eventually be required.

This decision also highlights the CMA's willingness to use its enforcement powers in merger cases. It emphasised the important deterrent effect of its fining decision on Electro Rent and other businesses more widely. Orders are the CMA's tool to ensure it 'has the full range of remedy options open to it if required by the findings of the investigation': the CMA has shown that it is willing to vigorously protect this.

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