

REFERENCE RELATING TO THE COMPLETED ACQUISITION BY ELECTRO RENT CORPORATION OF TEST EQUIPMENT ASSET MANAGEMENT LIMITED

Notice of possible remedies under Rule 12 of the Competition and Markets Authority Rules of Procedure¹

Introduction

1. On 19 October 2017, the Competition and Markets Authority (CMA), in exercise of its duty under [section 22\(1\)](#) of the Enterprise Act 2002 (the Act), referred the completed acquisition by Electro Rent Corporation (Electro Rent) of Microlease Inc. and Test Equipment Asset Management Limited (together Microlease) (the Merger), for further investigation and report by a group of CMA panel members (the Inquiry Group).
2. In its provisional findings on the reference notified to Electro Rent and Microlease (together the Parties) on 5 February 2018, the CMA, among other things, provisionally concluded that the Merger has resulted in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in the market for the rental supply of testing and measurement equipment (TME) in the UK.
3. The CMA's analysis provisionally indicates that this SLC may be expected to result in adverse effects, for example in the form of higher prices and/or lower service levels compared to what would otherwise have been the case absent the Merger.
4. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying the SLC or any resulting adverse effects identified in the Provisional Findings Report.²
5. The CMA invites comments on possible remedies by **4pm on Monday 19 February 2018**.³

¹ See [Rules of procedure for merger, market and special reference groups \(CMA 17\)](#).

² [CMA Electro Rent/Microlease merger case page](#)

³ Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of the Notice (and in any event, no less than seven days) so that they can be considered before response hearings ([Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA 2\)](#), paragraph 13.1).

Criteria

6. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.⁴ The CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective.
7. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.⁵

Possible remedies on which views are sought

8. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) structural remedies do not normally require monitoring and enforcement once implemented;⁶ and
 - (c) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes.
9. The CMA has provisionally identified structural remedy options involving the sale and transfer of certain of the Parties' operations in the markets in which an SLC has provisionally been found, with the aim of restoring the competitive constraint that will be lost as a result of the Merger.
10. The CMA's current view is that a behavioural remedy is unlikely to be an effective remedy to the SLC or any resulting adverse effect that it has provisionally identified. However, the CMA will consider any behavioural remedies that the Parties or any third party may propose in response to this Notice. Further the CMA will have regard to whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies.

⁴ Section 36(3) of the Act.

⁵ [Merger Remedies: Competition Commission Guidelines \(CC8\)](#), paragraph 1.7. This has been adopted by the CMA board.

⁶ [Merger Remedies: Competition Commission Guidelines \(CC8\)](#), paragraph 2.14. This has been adopted by the CMA board.

11. The CMA will also consider any other practicable remedies that the Parties, or any third parties, may propose in order to address the SLC and any resulting adverse effects. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that has been provisionally identified. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution, and will evaluate the cumulative impact of any such combination of measures on the SLC or any resulting adverse effects.
12. At the end of the phase 1 inquiry, Electro Rent offered undertakings in lieu of a reference to phase 2 (UILs); these can be found on our [case page](#) (see '[Proposed undertakings](#)'). In the UILs, Electro Rent offered to sell Electro Rent Europe NV's UK business and give various undertakings with respect to access to inventory. Expressions of interest were received from three potential purchasers. The CMA understands that discussions were progressed with two of these potential purchasers, and that Electro Rent finally selected Interlligent (UK) Limited (Interlligent) as its preferred purchaser but that ultimately, for reasons unconnected with the Merger, Interlligent withdrew from the process.

Structural remedy – Divestiture of operations

13. We would expect to require the divestiture of the whole of one or other party (ie Microlease Limited or Electro Rent Europe NV) unless we are satisfied that an alternative remedy would be fully effective. At this stage, the CMA has identified the following structural remedies as being likely to provide a comprehensive solution to the SLC and the resulting adverse effects it has provisionally found:
 - (a) requiring the divestiture of Microlease Limited and its subsidiaries; or
 - (b) requiring the divestiture of Electro Rent Europe NV and its subsidiaries (if any), ('Electro Rent Europe').
14. In the case of the remedy outlined in sub-paragraph 13(b), in the absence of agreed undertakings we would expect to address an enforcement order to Electro Rent Corporation as the owner of Electro Rent Europe. Based on the information currently available to us, we are of the view that Electro Rent

Corporation carries on business in the United Kingdom, and therefore we have jurisdiction to address an order to Electro Rent Corporation.⁷ [✂].⁸

15. It is also possible that the divestiture of a narrower part of the Parties' businesses, focused on the UK, may be capable of providing a comprehensive solution to the SLC and the resulting adverse effects, for example through the divestiture of Electro Rent Europe NV's UK business (Electro Rent UK).
16. In evaluating possible divestitures as a remedy to the provisional SLC it has found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the CMA will have regard to the following critical elements of the design of divestiture remedies.

The scope of the divestiture package

17. The CMA's current view is that, to be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as a competitor independent of the Parties.
18. The CMA's current view is that, for the option set out in paragraph 15 to have a chance of being effective in remedying the SLC or any resulting adverse effect, a divestiture package would need to include (but may not be limited to) the following:
 - (a) Freehold site, or (if leasehold) rights to the lease, for all sites relevant to the business to be divested.
 - (b) Physical facilities related to the operation of the business at the site. This would include office, warehousing, shelving and sorting, equipment testing, equipment calibration and logistics facilities.
 - (c) Transfer of existing staff.
 - (d) Transfer of existing supplier contracts, including Premier Rental Partnerships.
 - (e) Transfer of existing customer contracts and the rights to fulfil these.

⁷ [Intercontinental Exchange, Inc. and Trayport Merger Inquiry Order 2017, No 2](#). ICE/Trayport is an example of where the CMA has issued an Order to a non-UK registered company (a US registered company) where the CMA has found it to be carrying on business in the UK. *Akzo Nobel N.V. v Competition Commission & Ors* [2014] EWCA Civ 482 establishes the test for 'carrying on business in the UK'.

⁸ [✂]

- (f) Access to relevant historical customer data, including contact details, enquiry and order history.
 - (g) Transfer of stock/inventory of equipment sufficient to be able to fulfil (i) existing customer contracts and (ii) at the purchaser's option, any equipment which has been rented to a client in the UK during a period to be agreed (say 12 months) leading up to the divestiture.
 - (h) Rights to receive services and utilities currently being provided at the divested site(s), such as gas, electricity, building access and services etc.
- 19. For the options set out in paragraphs 13(a) and 13(b), we would expect the assets listed in sub-paragraphs (a) to (h) above to already be included in the package.
- 20. In addition, it may be necessary for the Parties to provide certain support services on a transitional basis, depending on the requirements of the purchaser. For example, in the case of the structural remedy outlined in paragraph 15 (divestiture of Electro Rent UK), additional behavioural remedies may be required as set out below.
- 21. Given the small size of Electro Rent UK, and the fact that all the equipment it leases to customers is supplied to it by Electro Rent Europe, which in turn is supported by Electro Rent Corporation, based in the United States, the CMA believes that a divestiture of this business, to have a chance of being effective in remedying the SLC or any resulting adverse effect, may need to be accompanied by additional behavioural remedies. These could include:
 - (a) providing the purchaser with the option, if it so wished, to have continued unfettered access to Electro Rent's global inventory for a period of time – likely to be at least 24 months – on terms to be agreed, but no worse than the terms on which other Electro Rent companies and subsidiaries have access to such inventory;
 - (b) providing the purchaser with the option to purchase from Electro Rent any such additional inventory which it has rented to customers during the period referred to in sub-paragraph (a), on a basis to be agreed; and
 - (c) the provision by the vendor of central support services such as finance, IT and procurement.
- 22. For the potential divestiture remedy set out in paragraph 13(b) (divestiture of Electro Rent Europe NV), the provision of central support services such as finance, IT and procurement may be required for a transitional period, as these services are currently provided [✂]. It may also be appropriate to

include a similar provision relating to access to equipment from Electro Rent's global inventory as described in paragraph 21(a) and 21(b)

23. The CMA invites views in relation to the specification of the proposed structural remedy, and any implementation issues that might arise, particularly on the following areas:
- (a) Would divestiture be an effective remedy to remedy the SLC provisionally found and any resulting adverse effects?
 - (b) Which of the three businesses, as set out in paragraphs 13 and 15, should be divested by the Parties to address the SLC provisionally found, and any resulting adverse effects?
 - (c) How effective would each of the options set out in paragraphs 13 and 15 be in remedying the SLC or any resulting adverse effects?
 - (d) If two or more of the remedy options set out in paragraphs 13 and 15 would be equally effective in remedying the SLC or any resulting adverse effects, should the Parties be allowed to choose which of the businesses should be divested?
 - (e) Are there any practical issues that may arise from any of the potential divestitures, and how could these issues be addressed?
 - (f) Is the composition of the divestiture package mentioned in paragraph 18 above sufficiently comprehensive? Should anything be added to or deleted from this list to enable the purchaser to operate the divested business as an effective competitor?
 - (g) What transitional arrangements (see paragraphs 20 to 22), if any, should be put in place, and what should be the duration of these arrangements?
 - (h) What additional measures, if any, would be required to make the divested businesses a viable sustainable business?
 - (i) Does the UILs process at phase 1 (described on the CMA's [case page](#))⁹ provide useful information about the likely effectiveness of a divestment of Electro Rent UK?

⁹ In particular, the '[Decision that undertakings might be accepted](#)' published on 7 July 2017, the '[Notice of consultation](#)' and '[Proposed undertakings](#)' published on 8 September 2017, and the '[Reference decision](#)' published on 30 October 2017.

Identification of a suitable purchaser

24. The CMA will wish to satisfy itself that a prospective purchaser:
- (a) is independent of the Parties;
 - (b) has the necessary experience, financial and reputational capability to compete; and
 - (c) is committed to competing in the UK TME rental market;

and that divestiture to the purchaser will not create further competition concerns.

25. If the package selected for divestiture is Electro Rent UK, then we would expect that a purchaser, in order to be considered suitable, would need to have a significant existing TME rental operation elsewhere in the world. Such a condition is necessary to ensure that any purchaser is able to become of sufficient scale, within a relatively short period, in order to be able to remedy, mitigate or prevent the SLC or any resulting adverse effect that the CMA has provisionally identified. The CMA is interested in receiving representations on what constitutes an acceptable minimum scale in this case.

Effective divestiture process

26. The CMA will consider the appropriate timescale for achieving a divestiture and what procedural safeguards may be required to minimise the risks associated with this remedy option.
27. At this stage, the CMA expects that it will be necessary to require that any divestiture is completed before further integration is allowed. This is because we believe that there is likely to be a limited pool of potential purchasers.
28. The CMA welcomes views on the appropriate timescale for achieving a divestiture and what, if any, further procedural safeguards would be needed to minimise the risk associated with this remedy option.

Cost of remedies and proportionality

29. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. In relation to completed mergers, the CMA will not normally

take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.¹⁰

30. The CMA invites views in relation to the proportionality of the proposed structural remedy, including on what costs are likely to arise in implementing each remedy option and (if required), monitoring the proposed structural remedy.

Relevant customer benefits

31. The CMA may have regard to the effects of remedial action on any relevant customer benefits (within the meaning of [section 30](#) of the Act) in relation to the creation of the relevant merger situation.¹¹ Such benefits might include lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services.
32. For the purposes of the Act, a benefit is only a relevant customer benefit if the CMA believes that:
 - (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and
 - (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
33. The CMA so far is not aware of any such relevant customer benefits arising from the Merger.
34. The CMA welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

The next steps

35. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider. These views should be received by the Project Manager on behalf of the Inquiry Group no later than **4pm on Monday 19 February 2018** (see Note (i)).
36. A copy of this notice will be posted on the CMA [website](#).

¹⁰ [Merger Remedies: Competition Commission Guidelines \(CC8\)](#), paragraph 1.10. This has been adopted by the CMA board.

¹¹ [Section 36\(4\)](#) of the Act.

(Signed) SIMON POLITO
Inquiry Group Chair
5 February 2018

Notes

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is given having regard to the Provisional Findings announced on 5 February 2018. The Parties and third parties have until 26 February to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.
- (ii) Comments should be made by email to electrorent/microlease@cma.gsi.gov.uk or in writing to:

Project Manager
Electro Rent / Microlease Merger Inquiry
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD