

## RESPONSE TO THE NOTICE OF POSSIBLE REMEDIES

### 1. OVERVIEW

1. This submission relates to the acquisition by Electro Rent Corporation (“**Electro Rent**”) of Microlease Inc. and Test Equipment Asset Management Limited (together, “**Microlease**”, and together with Electro Rent, the “**Parties**”) (the “**Merger**”), and sets out the Parties’ response to the CMA’s notice of possible remedies issued on 5 February 2018 (the “**Notice**”). This submission is without prejudice to the Parties’ views on the existence of any substantial lessening of competition (“**SLC**”) that may arise from the Merger, which the Parties intend to address in their response to the CMA’s provisional findings.
2. In the light of its provisional finding that the Merger has resulted in an SLC in the market for the rental supply of test and measurement equipment (“**TME**”) in the UK, the Notice sets out the following distinct structural remedies, each of which the CMA has identified as capable of providing a comprehensive solution to the SLC and any resulting adverse effects that it has provisionally found:
  - (a) the divestment of Microlease Limited and its subsidiaries (the “**First Remedial Option**”); or
  - (b) the divestment of Electro Rent Europe NV and its subsidiaries (if any) (“**Electro Rent Europe**”) (the “**Second Remedial Option**”).
3. The Notice has also identified the divestment of Electro Rent Europe’s UK business (“**Electro Rent UK**”) as a possible remedy that may be capable of providing a comprehensive solution, if it were to include:
  - (a) the freehold site, physical facilities relating to the operation of the business, the transfer of existing staff, the transfer of existing supplier and customer contracts, access to historical customer data, *etc.*<sup>1</sup>
  - (b) additional behavioural remedies, including providing the purchaser with the option to access Electro Rent’s global inventory pool, an option to purchase any additional inventory from Electro Rent, and the provision of central support services;<sup>2</sup> and
  - (c) a purchaser, in order to be considered suitable, would need to have a significant existing TME rental operation elsewhere in the world (the “**Third Remedial Option**”).
4. In the Parties’ view, the First and Second Remedial Options are entirely disproportionate to the SLC that the CMA has provisionally identified. The CMA has provisionally identified an SLC in relation to *TME rental in the UK* in which it is worth recalling that the total incremental TME rental revenue resulting from the Merger, generated by Electro Rent UK, is £∞. Moreover,

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<sup>1</sup> See paragraph 18 of the Notice for a complete list.

<sup>2</sup> See paragraph 21 of the Notice.

the First and Second Remedial Options identified by the CMA involve the sale of businesses outside TME rental as well as the sale of businesses outside the UK. In this regard:

- (a) The First Remedial Option would involve the sale of an integrated European and Asian business that generated total revenues of £~~20~~ in 2017 and held rental TME assets worth £~~20~~ as at 31 December 2017. Microlease Limited generated revenues in 66 countries outside the UK, none of which is relevant to the SLC provisionally identified by the CMA.
  - (b) Similarly, the Second Remedial Option would involve the sale of an integrated European business that generated total revenues of £~~20~~ in 67 countries outside the UK and held rental TME assets worth £~~20~~ as at 31 December 2017.
  - (c) The First and Second Remedial Options would also ~~include~~ (including, importantly, the integrated Electro Rent/Microlease businesses that have been derogated from the Interim Order dated 7 November 2017 and the preceding Initial Enforcement Order).
5. The First and Second Remedial Options are unnecessary as the Third Remedial Option provides a comprehensive solution that is reasonable and practicable to remedy the SLC provisionally identified by the CMA and any adverse effects resulting from it. Indeed, the CMA's provisional finding that Electro Rent is Microlease's closest TME rental competitor, highlight the effectiveness of the Third Remedial Option. Conversely, to conclude that the Third Remedial Option is ineffective would call into question the CMA's provisional SLC finding.
  6. The sale of Electro Rent UK, with input from the CMA's remedies unit, has previously been considered by the CMA at Phase I as being a suitable remedy to the requisite legal standard. Whilst the Parties recognise that decisions taken at Phase I are not binding on an inquiry group at Phase II, it is incongruous, to say the least, for the CMA at different stages in its investigation to be considering radically different remedial packages when the relevant legal test is the same.<sup>3</sup> At no point in the Phase I inquiry was there a suggestion that a sale of either Microlease Limited or Electro Rent Europe would be required to resolve the SLC identified by the CMA at that stage (which was the same as the SLC provisionally identified in Phase II).
  7. In the Parties' view, it is unnecessary for Electro Rent UK to be sold to a purchaser with significant existing TME rental operations elsewhere in the world. The Third Remedial Option would include everything to which Electro Rent UK currently has access in order to compete in the UK. A purchaser does not need a significant pre-existing TME rental business to operate this business in a meaningful way in competition with Microlease and other UK TME rental providers. In this regard, the ultimate outcome of the Phase I remedy process with Interlligent (which unilaterally withdrew from the process for extraneous reasons) has no bearing on the choice of remedy at Phase II.
  8. Finally, the Parties propose a fourth remedial option (a behavioural remedy consisting of a TME rental rate freeze for telecommunications customers in the UK, followed by a period of

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<sup>3</sup> Sections 41(4) and 73(3) of the Enterprise Act 2002 both refer 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*”.

restrictions on TME rental rate increases for telecommunications customers in the UK), which is not only comprehensive, reasonable and practicable, but also significantly quicker, easier and less intrusive than a structural remedy.

**2. THE FIRST AND SECOND REMEDIAL OPTIONS ARE MANIFESTLY DISPROPORTIONATE**

9. The CMA has provisionally identified an SLC in relation to TME rental in the UK. However, the CMA suggests that the competition concerns it has provisionally identified relate more specifically to the narrower ~~segment~~ in the UK.<sup>4</sup> Even if an SLC arose from the Merger (which is not accepted), the Parties' view is that the CMA's evidence is not capable of supporting any SLC finding outside the ~~segment~~. In this regard, even when considering the wider TME rental segment in the UK, the total incremental TME rental revenue resulting from the Merger is ~~£~~, generated by Electro Rent UK. To be reasonable and proportionate to the SLC that the CMA has provisionally identified, the Parties submit that a structural remedy should replicate Electro Rent UK's TME rental business (*i.e.*, the overlap giving rise to the SLC that the CMA has provisionally identified).
10. The First and Second Remedial Options go far beyond removing the overlap giving rise to the SLC that the CMA has provisionally identified in several important respects and are therefore manifestly disproportionate:
- (a) The First and Second Remedial Options would involve the sale of businesses outside TME rental. Microlease Limited and its subsidiaries are also active in the sale of new and used TME, TME leasing and asset management services, activities which generated ~~£~~ in 2017. Electro Rent Europe is also active in the sale of new and used TME, activities which generated ~~£~~ in 2017.
  - (b) The First and Second Remedial Options would involve the sale of businesses outside the UK, none of which is relevant to the SLC provisionally identified by the CMA. Microlease Limited and its subsidiaries (11 of which are incorporated outside the UK, including four which were derogated from the Interim Order dated 7 November 2017 and the preceding Initial Enforcement Order) are active in 66 countries outside the UK, and generated ~~£~~ outside the UK in 2017. Electro Rent Europe is active in 67 countries outside the UK and generated ~~£~~ outside the UK in 2017.
  - (c) The First and Second Remedial Options would involve the sale of businesses holding significant rental TME inventories, which are not only used to serve UK customers. As at 31 December 2017, Microlease Limited held rental TME worth ~~£~~ and Electro Rent Europe held rental TME worth ~~£~~.
  - (d) The First and Second Remedial Options would involve the sale of integrated European businesses, including their European hubs (which for Electro Rent Europe is located outside the UK, in Mechelen, Belgium). These European hubs serve customers across Europe and are integrated operationally such that it would be inefficient and costly to

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<sup>4</sup> See, *e.g.*, paragraph 6.2 of the CMA's provisional findings report.

separate any UK-specific elements of each European hub (*e.g.*, functions such as IT, credit control and finance support, and customer support located at these European hubs are fully integrated and cover Europe as a whole).

- (e) The First and Second Remedial Options would ✂.

Importantly, this would affect the integrated Electro Rent/Microlease businesses that have been derogated from the Interim Order dated 7 November 2017 and the preceding Initial Enforcement Order (in recognition of the fact that these businesses cannot have any relevance to any SLC identified by the CMA).

**Table 1:** ✂

**Table 2:** ✂

**Table 3:** ✂

11. In view of the disproportionate negative effects that the First or Second Remedial Options would have on the Parties, the Parties would be left with no choice but to challenge any order that the CMA may make implementing the First or Second Remedial Option before the Competition Appeal Tribunal.<sup>5</sup>

**3. THE THIRD REMEDIAL OPTION IS COMPREHENSIVE, REASONABLE AND PRACTICABLE**

12. In taking remedial action, the Enterprise Act 2002 provides that the CMA “*shall, in particular, 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*”.<sup>6</sup> In its provisional findings report, the CMA provisionally found that Electro Rent is not only a competitor in TME rental in the UK (where the SLC is provisionally identified), but the “*closest competitor*” of “*the leading supplier of TME rental in the UK*”<sup>7</sup>. The CMA’s provisional findings provide that Electro Rent is the second TME rental supplier in the UK, highlight the effectiveness of the Third Remedial Option. Conversely, to conclude that the Third Remedial Option is ineffective would seriously call into question the CMA’s provisional SLC finding.
13. The CMA also highlights in its provisional findings report the importance of having a UK presence.<sup>8</sup> The Parties consider that this is another factor pointing towards the most obvious starting point for consideration of remedies: the incremental business located in the UK, the divestment of which has already been considered by the CMA at Phase I as being a suitable remedy. The relevant legal test is the same, as sections 41(4) and 73(3) of the Enterprise Act 2002 both refer 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*

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<sup>5</sup> In this regard, the Parties specifically reserve their right to challenge the CMA’s view that “*Electro Rent Corporation carries on business in the United Kingdom*” (paragraph 14 of the Notice).

<sup>6</sup> Section 41(4), Enterprise Act 2002.

<sup>7</sup> See, for example, paragraph 6.1 of the provisional findings report notified on 5 February 2018.

<sup>8</sup> See, for example, paragraph 5.7 of the provisional findings report notified on 5 February 2018.

*it*". At no point in the Phase I inquiry was there a suggestion that a sale of either Microlease Limited or Electro Rent Europe would be required to resolve the SLC identified by the CMA at that stage, which was the same as the SLC provisionally identified in Phase II.

14. Furthermore, a purchaser does not need a significant pre-existing TME rental business to operate Electro Rent UK in a meaningful way in competition with Microlease and other UK TME rental providers. The Third Remedial Option would provide a purchaser with a stand-alone business that would be fully operational from day one.
15. In addition, in the CMA's view, Electro Rent UK has potential for expansion<sup>9</sup>, which can be undertaken by a purchaser without a significant pre-existing TME rental business. The Parties note that, in the light of the CMA's provisional conclusion that "*the appropriate counterfactual is the conditions of competition prevailing at the time of the Merger*"<sup>10</sup>, a structural remedy should replicate Electro Rent UK's TME rental business at the time of the Merger (and not as if the paused expansion plans had been carried through, which would be a speculative and uncertain exercise<sup>11</sup>). The Third Remedial Option would achieve precisely that: replicating Electro Rent UK's TME rental business as it currently stands.
16. The additional behavioural remedies listed in paragraph 21 of the Notice exceed the remedy which at Phase I was: (i) considered suitable by the CMA, with input from the CMA's remedies unit, and (ii) attracted three potential purchasers. For example:
  - (a) the Phase I remedy provided contractual access to Electro Rent's European inventory for a period of 12 months, whilst the additional behavioural remedy proposed in the Notice would provide access to Electro Rent's global inventory for a period of 24 months; and
  - (b) the Phase I remedy did not include any provision of central support services.

Whilst the Parties do not oppose the inclusion of additional behavioural remedies in the Third Remedial Option in principle, the starting point for any such remedies should be the Phase I remedy.

#### **4. PROPOSED BEHAVIOURAL REMEDY**

- 4.1 In the light of the Parties' contention that, even if an SLC arose from the Merger (which is not accepted), the CMA's evidence cannot support any SLC finding outside the ~~☒~~ segment noted above, the Parties propose the following behavioural remedy targeted at ~~☒~~ customers in the UK:
  - (a) a TME rental rate freeze for telecommunications customers in the UK for a period of time to be agreed with the CMA; and

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<sup>9</sup> As noted in the provisional findings report notified on 5 February 2018 (*e.g.*, at paragraph 9), the expansion of Electro Rent UK was paused.

<sup>10</sup> Paragraph 4.7 of the provisional findings report notified on 5 February 2018.

<sup>11</sup> See paragraphs 4.5-4.6 of the provisional findings report notified on 5 February 2018.

- (b) a subsequent period of time to be agreed with the CMA when TME rental rate increases for ☒ customers in the UK are restricted by reference to a consumer price index, (together, the “**Fourth Remedial Option**”).

4.2 The Fourth Remedial Option would be:

- (a) comprehensive, as it would remedy the only SLC that the CMA may conceivably find on the basis of the evidence in its provisional findings (*i.e.*, in the ☒ sector in the UK) by ensuring that the Parties cannot increase prices in this sector for a considerable period of time; and
- (b) reasonable and practicable, as it would be quick and easy to implement and monitor, and the least intrusive to the Parties’ business and their customers, both in absolute terms and in comparison to a structural remedy.

## 5. CONCLUSION

- 17. For the reasons set out above, the First and Second Remedial Options are manifestly disproportionate to the SLC provisionally identified by the CMA. The Third Remedial Option is comprehensive, reasonable and practicable, and has already been considered a suitable remedy by the CMA applying the same legal test at Phase I. The Fourth Remedial Option is not only comprehensive, reasonable and practicable, but also significantly quicker, easier and less intrusive than a structural remedy.

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19 February 2018