

RESPONSE TO PROVISIONAL FINDINGS REPORT

1. OVERVIEW

1. This submission relates to the acquisition by Electro Rent Corporation (“**Electro Rent**”) of Microlease Inc. and Test Equipment Asset Management Limited (“**Microlease**”, and together with Electro Rent, the “**Parties**”) (the “**Merger**”), and responds to the CMA’s Provisional Findings Report (“**PFs**”) issued on 5 February 2018.
2. The PFs state that the acquisition by Microlease of Electro Rent is likely to give rise to a substantial lessening of competition (“**SLC**”) in relation to the rental supply of test and measurement equipment (“**TME**”) in the UK. The PFs argue, in particular, that Microlease is the leading supplier of TME rental in the UK and that Electro Rent, although smaller in the UK, is its closest competitor.¹ By contrast, the PFs conclude that other rental suppliers and non-rental options (such as TME purchase, leasing and in-house supply) are effective alternatives in only a limited number of situations.² On this basis, the CMA is seeking a structural divestment to restore competition across the whole TME rental segment in the UK.³
3. The Parties submit that the Merger does not result in an SLC and that the PFs are vitiated by a number of serious errors. These include errors of assessment relating to the evidence, facts and economic analysis, as well as errors of law. They include, but are not limited to:
 - (a) ignoring or wrongly dismissing economic evidence, for example, RBB’s Lost Opportunities Analysis and the diversion ratio evidence resulting from the CMA’s own online customer survey, which both support the view that Microlease is constrained by purchased TME and in-house supply, as well as the view that Electro Rent is not a close competitor to Microlease;⁴
 - (b) failure to calculate and to consider appropriately the market shares of TME rental suppliers in the UK;
 - (c) failure to provide adequate reasoning for the provisional findings that the constraints from purchase and in-house supply, either separately or in combination, only constrain the Parties in limited circumstances;

¹ Provisional Findings Report, paragraph 12.

² Provisional Findings Report, paragraph 6.2–6.3.

³ See [CMA Notice of Possible Remedies](#).

⁴ For more detail, the Parties refer to their Response to the CMA’s “Evidence from Customers” Working Paper/Slide Deck of 8 January 2018 and their Submission on the Competitive Constraint from In-House Supply of 15 January 2018, which highlight that the CMA’s *own online customer survey* indicated that the proportion of customers choosing Electro Rent as their next best alternative to Microlease was materially smaller than the proportion that chose either TME purchase or already owned TME as their next best alternatives.

- (d) attaching undue weight to the responses of Original Equipment Manufacturers (“OEMs”) and rental suppliers with vested interests; and
 - (e) misconstruing evidence in concluding that barriers to entry and expansion are high due to the agreements between the Parties and certain OEMs, when similar agreements can be entered into by any of the Parties’ competitors and while numerous competing OEMs are active in the upstream supply of TME rental.⁵
4. The Parties have previously addressed the shortcomings of the CMA’s economic assessment of the Merger in their responses to the CMA’s working papers. These are not repeated here. This response focuses on the following key facts which, in the Parties’ view, renders an SLC finding unlikely in this case:
- (a) the Merger results in the acquisition of the [X] largest supplier of TME rental in the UK and is unproblematic on the basis of the CMA’s *own* market definition;
 - (b) the CMA’s evidence cannot support an SLC finding outside the telecommunications segment; and
 - (c) there are significant evidentiary gaps in the PFs which serve to undermine the conclusions that the CMA has drawn.
5. *First*, the CMA has defined the relevant frame of reference to be the rental supply of *all* TME in the UK and has ruled out narrower markets (*e.g.*, by product category or customer segment) on the basis that competitive conditions are the same across the TME rental segment.⁶ However, on the basis of the CMA’s market definition as set out in the PFs, the evidence clearly confirms that Electro Rent is a small TME rental supplier and there exist at least 4 or 5 other TME rental suppliers with similar or larger TME revenues in the UK. **If the CMA considers that the conditions of competition apply equally across the TME rental segment then it follows that the existence of 4 or 5 significant players in TME rental eliminates the likelihood of the merger giving rise to an SLC.**
6. *Secondly*, in direct contrast to its own market definition assessment, the CMA’s provisional SLC finding is premised on the claim that rival TME rental suppliers are focused on “niche” product areas/sectors, and that they do not provide an effective constraint to Electro Rent and Microlease across the entire TME rental segment. The CMA’s contention is that Microlease

⁵ See Response to the CMA’s RFI of 9 November 2017 (16 November 2017).

⁶ Provisional Findings Report, paragraph 5.90. For the purposes of this response, we focus on a potential delineation by product category as this most neatly fits with the CMA’s analysis of the scope of competitors activities. The categories considered are RF test equipment; General Purpose; Industrial, Environmental, Electrical; and Telecommunications, *see* Response to the Market Questionnaire (15 November 2017), Table 1.

will be able to price discriminate and raise prices in areas where competition will be reduced as a result of the Merger.⁷ The following conclusions flow from the CMA's contention:

- (a) A clear implication of a price discrimination theory of harm is that any (alleged) price increases will be (at worst) narrow in scope and targeted on particular segments of the market or types of rental (*i.e.*, those where the Merger significantly reduces customers' competitive alternatives). Given the narrowness of the SLC finding, the Parties submit that it would be disproportionate to require a remedy that extends beyond Electro Rent's UK rental operations.
- (b) An equally important implication of having 'narrowly focused' competitors is that, all else being equal, they should provide a more effective competitive constraint in those market sectors where they are currently focused.⁸ If the CMA continues to maintain that TME rental suppliers do not act as an effective constraint across the board due to their sectoral focus, then the CMA must update its SLC assessment accordingly. **The Parties submit that competitors with a sectoral focus are likely to be more effective alternatives in those sectors where they are focused. The PFs do not identify sufficient evidence to define an SLC covering all sectors.**

7. *Finally*, the Parties submit that **there are significant evidentiary gaps in the PFs which serve to undermine the conclusions that the CMA has drawn.** The CMA has not asked competitors important questions that are crucial to assessing their competitive constraint and, in the Parties' view, has overstated the degree of concern amongst customers.

8. Accordingly, the Parties believe that the CMA has failed to demonstrate that, on the balance of probabilities, the Merger gives rise to an SLC.

2. THE TRANSACTION IS UNPROBLEMATIC ON THE BASIS OF THE CMA'S OWN MARKET DEFINITION

9. The CMA has provisionally concluded that the appropriate relevant market is the supply of *all* TME rental in the UK and that no further delineation by sector is necessary. The CMA's basis for this conclusion, as set out in the PFs, is that "*the important competitive dynamics that are relevant to the TME sector apply across all end-user segments and that therefore a further delineation of the market by product type is unnecessary.*"⁹ The Parties agree with this conclusion. This also mirrors the CMA's view in its Phase 1 Decision.¹⁰ This provisional conclusion then provides a framework for the CMA's remedy proposals, which provide that

⁷ Provisional Findings Report, paragraph 6.6.

⁸ The CMA has not collated evidence on the size of the sub-segments: however, given the size of the rental revenues of the Parties and their competitors, this seems to be an appropriate inference.

⁹ Provisional Findings Report, paragraph 5.90.

¹⁰ CMA Phase 1 Reference Decision, paragraph 29.

structural remedies are necessary to restore competition across the TME rental sector *as a whole*.¹¹

10. However, if the CMA does indeed consider that the conditions of competition apply equally across the TME rental segment, then it also follows that analysing the competitive position and market shares of all material TME rivals on that market is a necessary exercise: those shares should provide information on the constraint imposed by those rivals as it applies across the segment as a whole. The CMA has however failed to calculate such shares in its PFs.¹²

11. Table 1 below presents market shares based on the CMA’s market definition. It demonstrates that:

- there exist a number of TME rental suppliers with TME rental revenues similar to *or larger* than those of Electro Rent in the UK. These include Inlec ([X]%), First Rental ([X]%), Instruments4Hire ([X]%), and MCS ([X]%),
- the increment arising from the Merger is low (*i.e.*, around 5%); and
- to the extent that the CMA were to dismiss the relevance of market shares based on the sectoral focus of a particular TME supplier of similar size to Electro Rent, such a rival would necessarily be larger than Electro Rent in that segment (a critical point which is discussed in the next section).

Table 1: Market shares calculated on the basis of a market for all TME rental¹³

Rental suppliers	[X]	[X]
Microlease	[X]	[X]
Electro Rent	[X]	[X]
EMC Hire	[X]	[X]
First Rental	[X]	[X]
Inlec	[X]	[X]

¹¹ The CMA’s Remedies Notice states “*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*”. In this case, the market defined by the CMA is the supply of all TME rental in the UK.

¹² Provisional Findings Report, paragraph 6.114.

¹³ Regarding the revenues of the Parties’ competitors, the CMA dismisses the revenue figures before it *i.a.*, because they “*give a misleadingly high indication of their activities in the context of our assessment of the competition lost as a result of the Merger, as explained in the ‘comments’ column of the table*” (Provisional Findings Report, paragraph 6.114). [X]. It is for the CMA to request information from the third parties to confirm the Parties’ estimates if it has doubts about their accuracy. As such, there is no evidence that the Parties’ estimates would be misleading.

Rental suppliers	[X]	[X]
Instruments4Hire	[X]	[X]
MCS	[X]	[X]
Other	[X]	[X]
[X]	[X]	[X]

Source: CMA PFs (Table 10).

12. The Parties are also aware that OEMs remain active in the UK TME rental market. These OEMs include for example Anite¹⁴ (comparatively small), Ixia¹⁵ and Spirent (both major suppliers).¹⁶ [X]. The Parties are not aware of the exact revenues of these players, but are confident that their revenues will dwarf those of Electro Rent’s limited UK rental earnings in the relevant telecoms segments. All of these OEMs should have been approached by the CMA to establish their UK TME rental earnings. The CMA also appear to have failed to ask the OEMs what income they have derived from time-based software licences. These licences should be taken into account as part of the rental market as they make measurement functionality available to end-customers on a temporary basis. The OEMs active in this part of the TME Rental market include: Keysight, Rohde & Schwarz, Viavi, EXFO, Ixia, Spirent and Ascom.
13. On the basis of the CMA’s market definition, the Merger:
- is an acquisition by the largest TME rental supplier of the [X] largest TME rental supplier in the UK;
 - results in a reduction of material TME rental suppliers (*i.e.*, those with a share exceeding [X]%) of 5 to 4; and
 - gives rise to a limited increment of only approximately [X]%.
14. These facts are an insufficient basis for an SLC finding on the basis of horizontal unilateral effects.

3. THE CMA’S REMEDIES ARE UNSUPPORTED AND DISPROPORTIONATE

15. Despite concluding that the dynamics of competition are the same across the TME rental market as a whole, the PFs place little or no weight on the above market share evidence on the basis that “*other rental suppliers either do not supply the same product/customer segments as the Parties or focus on particular niches of the market with only a partial overlap with the Parties.*”¹⁷ The CMA’s contention is that the merged entity will be able to price discriminate

¹⁴ <https://www.keysight.com/main/editorial.jsp?cc=GB&lc=eng&ckey=2650171&id=2650171>

¹⁵ <https://www.ixiacom.com>

¹⁶ <https://www.spirent.com/>

¹⁷ Provisional Findings Report, paragraph 6.6.

and raise prices in areas where these suppliers are not focused and where (absent an ability to substitute to non-rental alternatives) competition will be substantially lessened by the merger.

16. The Parties profoundly disagree with this view. In particular, the Parties consider that objective evidence (including the details of product segments provided on rivals' websites) suggests that these rivals do in fact offer products that are similar to those offered by Microlease and Electro Rent (and this is information that the CMA can easily obtain).¹⁸ For example, according to their website, Inlec supplies optical test equipment for telecoms installation work¹⁹ and MCS competes in telecoms sub-segments.²⁰
17. Even if they do not, the Parties consider that TME rental suppliers can easily supply side substitute across sectors if the merged entity sought to implement targeted price increases and that this acts as a constraint on its pricing even if these competitors do not service every customer segment today. This applies all the more within a particular segment. The notion that a rival does not constrain the Parties in a given segment due to only a partial overlap is untenable given the ease of expanding within that same segment.
18. In addition, there exists the constraint from TME purchase, leasing and in-house supply which the CMA appears to accept is effective in many situations.²¹
19. A clear implication of a price discrimination theory of harm is that any (alleged) price increases will be (at worst) narrow in scope and targeted on particular segments of the market or types of rental (*i.e.*, those where the Merger significantly reduces the competitive alternatives of customers).²² **Given the narrowness of the SLC finding, the Parties submit that it would**

¹⁸ See paragraphs 20–21 for further information on the overlap of these competitors' product offering (as specified on their websites) and those of Microlease.

¹⁹ Inlec's website offers for example the following products in the "Fusion Splicer, Network Analyser, Network Tester" section (<https://www.inlec.com/electronic-test-equipment/fusion-splicer-network-analyser-network-tester?page=1>): Fluke DTX-1800 Cable Network Analyser Base Unit & Compact OTDR; Fitel S178A V2 Hand-Held Core-Alignment Fusion Splicer; Netscout AirCheck G2 Wireless Network Tester; and Exfo FiberBasix ELS-50-12C Single Mode Light Source & EPM-53 Power Meter.

²⁰ MCS's website, <https://mcs-testequipment.com/>, offers for example the following telecoms products: Comm-Connect 3013 SWR True Antenna Tester; Rohde & Schwarz ZVH4 Cable & Antenna Analyser; Cobham / Aeroflex 3550R Touch-screen Radio Test System; Rohde & Schwarz CMW500 Radio Communication Tester; LitePoint; IQramp Data Analysis; and Agilent 86142B High Performance Optical Spectrum Analyser.

²¹ The Provisional Findings Report states that "[X]% of Microlease's rental revenue is derived from contracts with an initial duration of less than 12 months and X of Microlease's rental revenue is derived from contracts with an actual duration of less than 12 months" and that this analysis of rental duration "supports our view that purchase is not a close alternative for a significant proportion of rental transactions". This analysis therefore suggests that for a significant proportion of TME rentals cases (*i.e.* the remaining [X] of rentals by revenue) such price effects may be less likely. Or, to put this another way, even on its own terms, the CMA's PFs would appear to indicate that purchase is a constraint for a large proportion of rentals by revenue.

²² The Provisional Findings Report does not explicitly state the proportion of the TME rental segment that the CMA considers is at risk of such price effects. However, the Parties believe that the evidence before the CMA clearly suggests that no SLC is likely in the vast majority of sub-segments. Moreover, the

be disproportionate to require a remedy that extends beyond Electro Rent’s UK rental operations.

20. An equally important implication of having competitors that are focused on particular product or customer segments is that they will – all else being equal – provide a *more* effective competitive constraint in those segments where they are active. If the CMA maintains that TME rental suppliers do not act as an effective constraint generally due to their sectoral focus, the Parties submit that it cannot ignore the implication that those competitors are an effective alternative in those sectors where they are focused. The Parties submit that the PFs do not provide sufficient evidence to establish an SLC covering all sectors in this scenario. In turn, the CMA’s remedy proposals 1 and 2 – which extend far beyond UK TME rental – are not justified by the evidence and are clearly not linked to the CMA’s provisional SLC finding.²³
21. Table 2 summarises the information presented by the CMA on the sectors and customer types supplied by each of the main competitors in the TME rental segment. It demonstrates that in all sub-segments other than telecommunications there clearly exist competitors that are significantly larger than Electro Rent: this points against any SLC finding in these areas.²⁴ In particular:
- **RF test equipment:** the CMA accepts that there are at least 4 material competitors with a focus on this sub-segment: First Rental²⁵; Interlligent (revenue £[>]); and EMC (rental revenue £[>]).²⁶ This is in addition to MCS (revenue £[>]) which is found to have a broad range of equipment with a specialisation in “*R&D phase of the development of wireless products*” (much of which falls within RF test equipment). This compares to Electro Rent revenues of £[>] in this segment. In short, the loss of Electro Rent from this competitor set is clearly not material.
 - **Scopes and infotech:** Electro Rent generates negligible revenues in this sub-segment – only £[>]. First Rental is specifically identified as a competitor in this segment and

CMA’s own assessment of rental durations as set out in footnote 18 would indicate that competition concerns will not arise in relation to a significant share of rentals – *i.e.*, those that are long term in nature.

²³ For the purposes of this response, the Parties assume that the CMA agrees with its delineation of broad TME rental sectors. These sectors therefore include: telecommunications, RF test equipment, General purpose and Industrial, and Electrical and Environmental.

²⁴ For the avoidance of doubt, the Parties dispute that an SLC will arise in relation to telecommunications. The implications of the CMA’s market definition analysis are that TME rental suppliers are capable of supply side substituting across sectors in response to price increases, resulting in competitive conditions being consistent across sectors. As such, an increase in prices to telecommunications customers would result in supply side substitution into this sub-segment. This would in turn act as a constraint on the merged entity’s pricing. This is in addition to the constraint from TME purchase and in-house supply.

²⁵ As noted above, the CMA states [>]. It is for the CMA to request information from the third parties to confirm the Parties’ estimates if it has doubts about their accuracy. As such, there is no evidence that the Parties’ estimates would be misleading.

²⁶ The Parties note that EMC falls within the RF test equipment sub-segment.

MCS also covers this sub-segment with its broader product range,²⁷ as does Interlligent. It seems highly likely that the increment in this sub-segment is not material. To the extent that the sub-segment size is not known, this reflects the fact that CMA has not requested this information. As explained above, the CMA cannot: (i) define the market widely; (ii) dismiss rivals in that market due to their sectoral focus; (iii) conclude that there is an SLC in all sub-segments but at the same time *not analyse* each sub-segment individually.

- **Industrial, Electrical and Environmental:** the CMA explicitly highlights two significant competitors with a focus on this sub-segment: Inlec (revenue £[<]) and Instruments4Hire (revenue £[<]). By contrast, both Microlease and Electro Rent generate negligible revenues in this sub-segment (only £[<] and £[<], respectively). [<] and the Merger does not result in a material increment in this sub-segment.
- **General purpose TME:** the CMA highlights the fact that First Rental focuses on supplying these products.²⁸ MCS (rental revenues of £[<]) has a broad range of equipment, which also covers this sub-segment.²⁹ Furthermore, Instruments4Hire³⁰ and Inlec³¹ also have general purpose test equipment. Electro Rent’s revenues in this sector by contrast amount to a mere £[<]. Therefore, it seems highly unlikely that the Merger results in a material increment in this sub-segment.

Table 2: Focus of rivals’ activities according to CMA assessment in PFs

	TME rental revenue	RF test	Scopes and Infotech	General purpose	Industrial, Electrical, Environmental	Telecoms
ML revenue attributable to segment		[<]	[<]	[<]	[<]	[<]

²⁷ The MCS’s website <https://mcs-testequipment.com/category/all/?filter=rental> product area covering Oscilloscopes has the following categories listed, each with example products: in 50Mhz–350Mhz example Tektronix TDS5032B Digital Phosphor Oscilloscope; in 400Mhz–3.5Ghz example: Rohde & Schwarz RTO2034 Digital Oscilloscope; in 4Ghz–40Ghz example: Rohde & Schwarz RTO2064 Digital Oscilloscope; Handheld Scopes example: Rohde & Schwarz RTH1002 Scope Rider Handheld Digital Oscilloscope; Mixed Signal example: Rohde & Schwarz HMO1002 Mixed Signal Oscilloscope; Oscilloscope Accessories & Probes example product: Tektronix TAP2500 Active FET Probe.

²⁸ See footnote 25 above.

²⁹ See MCS website <https://mcs-testequipment.com/category/all/?filter=rental>, and the following product areas: Meters; Power Supplies/Electronic Loads; Amplifiers and Generators; Arbitrary/Function Generators for numerous product examples.

³⁰ See Instruments4Hire’s website <https://www.instruments4hire.co.uk/> and the product area for Electrical Test Equipment, which includes the following sub-categories: Variable DC power supplies, for example the product Kikusui PCR500M Power Supply; and Micro ohm-meters, for example the product Megger DLRO-10X.

³¹ See Inlec’s website <https://www.inlec.com/> and the product area for Electrical Test Equipment, which includes the following sub-categories: Multimeter 16th, 17th Edition Tester, for example product Fluke 175 Digital Multimeter; Electrical Maintenance, for example product Megger Programma Torkel 860 Battery Loading Unit + Laptop; Power Supply, for example product Thurlby Thandar Instruments PL330P Power Supply; and Milliohmmeters, for example product: Megger DLRO200 Digital Microhmmeter.

	TME rental revenue	RF test	Scopes and Infotech	General purpose	Industrial, Electrical, Environmental	Telecoms
Electro Rent revenues attributable to segment		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
EMC ³²	£[REDACTED]	X				
First Rental ³³	£[REDACTED] ³⁴	X	X	X		
Interlligent ³⁵	£[REDACTED]	X	X			
MCS ³⁶	£[REDACTED]	X	X	X	X	
Inlec ³⁷	£[REDACTED]			X	X	X (fibre optic)
Instruments4Hire ³⁸	£[REDACTED]			X	X	

Source: CMA PFs

22. Notwithstanding the evidence above, the PFs present a number of arguments, which attempt to diminish the strength of competition from these suppliers. The CMA suggests that these are “niche” players that “do not supply the same product/customer segments”.³⁹ This is simply incorrect. In particular:

³² Provisional Findings Report, Appendix D, paragraph 7.

³³ Provisional Findings Report Appendix D, paragraph 11 states that “In relation to testing equipment, First Rental focuses on general purpose equipment such as mains analysers, oscilloscopes, signal generators and spectrum analysers, which belong to the ‘RF Test and Scopes’ product segment. It does not supply any telecom test equipment, given their greater cost.”

³⁴ The CMA suggests [REDACTED]. No evidence has been put forward to show that the Parties’ estimates are inaccurate.

³⁵ Provisional Findings Report, Appendix D, paragraph 14 states that “Interlligent specialises in RF and microwave TME, which is usually used in benchtop applications in manufacturing and R&D. Interlligent does not currently supply telecommunications testing equipment and is less familiar with the types of equipment used in this area.”

³⁶ Provisional Findings Report, Appendix D, paragraph 16 states that “MCS is a UK-based company that supplies a fairly wide range of equipment, although it specialises in TME used in the R&D phase of the development of wireless products. MCS does not supply TME used by network operators or by companies involved in the installation and maintenance of mobile.”

³⁷ Provisional Findings Report, Appendix D, paragraph 33 states that “Inlec is a UK based rental company specialising in the industrial sector.....Inlec’s customers operate mainly in the water, gas, electricity and construction markets.”

³⁸ Provisional Findings Report, Appendix D, paragraph 36 states that “Instruments4Hire supplies TME with a focus on IT infrastructure and higher-end electrical testing equipment. Its customers are mainly electrical contractors and companies working in facility and infrastructure maintenance. Its annual rental revenue is approximately £[REDACTED].”

³⁹ Provisional Findings Report, paragraph 6.2.

- **EMC** is dismissed as a competitor because it focuses only on EMC equipment, which the CMA describes as a “*relatively small segment of the total TME market*”.⁴⁰ However, Microlease estimates that EMC equipment accounted for around [X]% of its total revenues and around [X]% of its revenues in the RF test equipment sub-segment for 2016. EMC cannot be classified as a niche player in this sub-segment.
- **MCS** is argued to compete in some niches where competition from Microlease is less intense.⁴¹ The Parties question this conclusion given that Microlease supplies 12 of the 13 categories of product listed on MCS’ website.⁴² Notwithstanding this, it is hardly surprising that competitors seeks to differentiate themselves. However, if the merged entity were to increase its prices, there is no reason why a competitor such as MCS with a broad product focus could not expand its range in order to switch customers away from the merged entity. In the same way that a rival can supply side substitute across sub-segments, it is clearly easier to expand the range of product *within* a particular sub-segment. The CMA does not appear to have considered this possibility.
- **Inlec** is said to focus on the “industrial sector” and that Microlease’s stock would at most overlap with [X]% of its own stock.⁴³ The Parties question this conclusion given that Microlease rents six of the nine categories of product listed on Inlec’s website.⁴⁴ Leaving aside the question of why the CMA has not checked this, this would imply that around £[X] of Inlec’s revenues that are generated in the industrial sector would overlap with Microlease. This dwarfs the (no more than) £[X] of Electro Rent’s revenues generated in this sector.
- **Instruments4Hire** is said to focus on IT infrastructure and higher-end electrical testing equipment and on customers that are mainly electrical contractors and companies working in facility and infrastructure maintenance.⁴⁵ These are all types of customers that Microlease supplies.⁴⁶ Furthermore, Microlease rents seven of the eight categories of product listed on its website.⁴⁷

⁴⁰ Provisional Findings Report, Appendix D, paragraph 6.

⁴¹ Provisional Findings Report, Appendix D, paragraph 18.

⁴² See <https://mcs-testequipment.com/category/all/?filter=rental>. Microlease rents: Amplifiers; Analysers - Antenna / PIM; Analysers – Network; Analysers - Signal / Spectrum; Attenuators & RF Switches; EMC; Generators; Meters; Oscilloscopes; Power supplies/electronic loads; Shielded boxes/TEM Cells; Wireless / Radio Test Sets.

⁴³ Provisional Findings Report, Appendix D, paragraph 34.

⁴⁴ <https://www.inlec.com/>. Microlease rents: Electrical test equipment, Electronic testing equipment; Environmental test equipment; Process calibration equipment; Temperature measurement equipment and Visual inspection equipment.

⁴⁵ Provisional Findings Report, Appendix D, paragraph 16.

⁴⁶ Examples of Microlease customers in this category: [X].

⁴⁷ <https://www.instruments4hire.co.uk/test-equipment/>. Microlease rents: Power analysis equipment; Electrical test equipment; Cable testing equipment; Test and calibration equipment; Temperature test equipment; Environmental monitoring; Pressure Test Equipment; Flow measuring equipment.

- **First Rental** is said to focus on general purpose equipment such as mains analysers, oscilloscopes, signal generators and spectrum analysers, which belong to the ‘RF Test Equipment’ product segment.⁴⁸ The PFs state that First Rental does not supply any telecom test equipment, given their greater cost. These types of general purpose TME are all supplied by Microlease . Indeed, Microlease rents all 7 of the categories of product listed on First Rental’s website.⁴⁹

23. In summary, the CMA has defined an SLC which (even on its own terms) is based on a theory of price discrimination that is limited in scope. Furthermore, the Parties do not consider that the CMA can reasonably claim to have evidence that an SLC is likely across all TME sectors: indeed it has not undertaken the requisite analysis to determine the appropriate scope of a remedy. In turn, the CMA’s remedies proposals 1 and 2 – which extend far beyond UK TME rental – are not justified by the evidence and clearly not linked in any way to the CMA’s provisional SLC finding.

4. **THERE ARE SIGNIFICANT GAPS AND CONTRADICTIONS IN THE CMA’S EVIDENCE WHICH SERVE TO UNDERMINE ITS CONCLUSIONS**

24. The Parties submit that there are significant evidentiary gaps in the PFs which serve to undermine the CMA’s provisional conclusions.

25. First, when focusing on the evidence from competitors, the CMA seeks to dismiss the relevance of significant TME rental competitors in the segments in which they operate on the basis that they are specialist or niche suppliers that may seek to avoid, where possible, competing with Microlease. However, the CMA has in some cases failed to obtain crucial data on rental revenues generally (in particular in the case of First Rental) or in the product/customer segments where they overlap with the Parties. This is a major omission and means the CMA cannot reasonably suggest these competitors do not act as a strong constraint (relative to Electro Rent) in the segments where they are focused.

26. Secondly, in relation to the evidence from customers, the CMA acknowledges that it has two sources of information: one covering 29 large customers (the “**Customer Calls Evidence**”) and one covering 55 customers that were generally smaller in size (the “**Online Survey Evidence**”). The Customer Calls Evidence tends to identify concerns with the Merger, albeit the Parties consider these to be overstated as explained below. The Online Survey Evidence is plainly in line with the Parties’ previous submissions.⁵⁰

27. *The Customer Calls Evidence May Suffer from Confirmation Bias.* The CMA seeks to explain the inconsistency between these two data sets by arguing that it is the result of

⁴⁸ Provisional Findings Report, Appendix D, paragraph 11.

⁴⁹ <https://www.firstrental.co.uk/test-equipment>.

⁵⁰ See Response to the CMA’s “Evidence from Customers” Working Paper/Slide Deck of 8 January 2018.

differences between the two groups of customers that it has contacted.⁵¹ However, an alternative and equally plausible explanation is that these two sets of customers were asked different questions: smaller customers that responded to the CMA were asked a set of questions that had been reviewed by the Parties with the intention of avoiding framing bias and which included the standard questions used to assess unilateral effects.⁵² By contrast, the Parties have not been provided with the questions that were asked to larger customers or whether they were framed in such a way to elicit certain responses.⁵³ Certainly, as far as the Parties can observe, the CMA has not asked these customers standard questions that are typically used to assess unilateral effects: namely what alternatives these customers would have switched to in the event that they did not use Microlease/Electro Rent pre-Merger. Rather, the discussions appear to have been of a more general nature.

28. In addition, the Parties note that the CMA’s summaries of its telephone conversations with 29 larger customers do not include any suggestion that the CMA has discussed all relevant alternatives with these customers. There is no suggestion that customers were asked systematically what they would do if rental prices were to increase. No customer seems to have been asked about switching to in-house supply. This is despite the CMA Online Survey Evidence (and evidence from the Parties) that demonstrates this *is* a substitute to TME rental.⁵⁴
29. ***The Online Survey Evidence Results Support the Parties’ Case for Clearance.*** Given that the CMA’s online survey asks objectively unbiased questions that are critical to understanding unilateral effects and provides information on competitive alternatives that is consistent with other information sources (including in particular RBB’s analysis of Lost Opportunities), the Parties consider that equal weight should be placed on these answers which clearly shows:
- **A lack of competition between Microlease and Electro Rent relative to other alternatives.** In particular, of the 55 customers that responded to the CMA’s questionnaire, Electro Rent was mentioned by only **two** respondents as their next best alternative to Microlease.⁵⁵ This is a stark finding that the CMA has clearly underemphasised in its assessment.
 - **That TME purchase and in-house supply are more significant competitive alternatives to Microlease than Electro Rent is.** In particular, the evidence shows that of the 55 customers contacted:

⁵¹ Provisional Findings Report, paragraph 6.53. The CMA further states that differences in levels of awareness are “*This is consistent with Electro Rent’s description of its UK strategy which has involved targeting telecommunications customers and customers with the largest rental expenditures.*” If this is the case, the CMA should focus its SLC finding and remedy requirements on telecommunications customers.

⁵² Specifically these customers were asked what their “next best alternatives” would have been if Microlease could not supply the product they required.

⁵³ The questions posed by the CMA do not appear in its summaries, although the Parties have asked for the nature and order of questions posed to be provided by the CMA.

⁵⁴ See Response to the CMA’s “Evidence from Customers” Working Paper/Slide Deck of 8 January 2018

⁵⁵ PFs Appendix E paragraph 56.

- **Seven** indicated that had their rental supplier (Microlease or Electro Rent) not been able to supply the item(s) they required, their next best option would have been using equipment already owned. Therefore, the CMA’s own quantitative evidence shows that in-house supply is a more significant competitive alternative to Microlease than is Electro Rent.⁵⁶
 - A further **seven** indicated that purchasing was their next best alternative to renting from the Parties. This finding is all the more powerful given that the CMA has accepted that “*respondents to the online questionnaire were generally renting for shorter periods and, all else equal, purchase is less likely to be an alternative to rental for shorter compared to longer rentals.*”⁵⁷ Had the survey been representative of customers’ actual rentals then it can be inferred that a greater proportion of customers would have chosen this competitive alternative.
30. ***Smaller Customers are Aware of Alternatives – But Not of Electro Rent.*** Furthermore, the Parties question the CMA’s view that smaller customers are not aware of rental alternatives, a fact which is used to downplay the value of this evidence.⁵⁸ In particular, whilst it is true that 16 of the 34 customers that chose “another rental supplier” as their next best alternative to Microlease indicated that they did not know who they would switch to, the remaining 18 did provide a response, and actively identified other TME rental suppliers. Indeed 16 of these identified other TME rental suppliers, including EMC (3 responses) Inlec (1 response) Interlligent (1 response) MCS (3 responses); and TES (3 responses).⁵⁹ By comparison, only two identified Electro Rent as their next best alternative. Therefore, it would appear that there *is* a reasonable amount of awareness of other rental suppliers among these customers and that Electro Rent is not the closest alternative to Microlease for many customers. The CMA appears to have ignored (or significantly downplayed) this important evidence.
31. ***The Evidence on Concerns Regarding the Merger is Mixed.*** Finally, there are some clear contradictions in the customer responses regarding their concerns which call into question the strong conclusions that the CMA has drawn on the basis of this evidence. This is in addition to the six customers that are not concerned about the merger at all and the two customers that consider that competition concerns may be partially or fully offset by merger specific benefits.⁶⁰ Given that a number of customers provided positive or contradictory responses the Parties do not agree that (even on its own terms) this evidence supports an SLC finding. Such

⁵⁶ PFs Appendix E paragraph 33.

⁵⁷ PFs Appendix E paragraph 28.

⁵⁸ Provisional Findings Report, Appendix E, paragraph 57.

⁵⁹ CMA customer questionnaire raw data.

⁶⁰ The Parties understand that the following customers are not concerned about the transaction: [X]. The customers that identify merger specific benefits as a factor offsetting concerns are [X] and [X].

contradictions may reflect framing effects in relation to how the questions were posed to customers. In particular.⁶¹

- **8point8** claims to be concerned about the Merger whilst at the same time noting that it has [X].
- **AltioStar** is said to be concerned about the Merger whilst at the same time noting that it [X].
- **Intelligent Communications Solutions** has not stated whether it is concerned or not, but it is noted that [X].
- **Killarney Telecommunications** indicates that it is concerned about the Merger but also indicates that it was for these reasons that it was [X]⁶² [X]
- **Radio Design** is said to be concerned with the Merger but also notes that it has [X]. [X]
- **Thales is said to be concerned but it noted that it** “[X]. [X].

* * *

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⁶¹ All quotes are taken from the CMA’s summaries of its calls with customers.

⁶² A similar story is presented by Savills (although it notes that it would still need to rent a significant proportion of its equipment).