

Notice of penalty pursuant to section 94A of the Enterprise Act 2002 – addressed to Electro Rent Corporation

**Completed acquisition by Electro Rent
Corporation of Test Equipment Asset
Management Limited and Microlease, Inc.**

Case ME/6676-17

11 June 2018

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Confidential information and the names of individuals in the original version of this notice have been redacted from the published version. Redacted information in the text of the published version of the notice is denoted by [✂]. Non-sensitive wording is indicated in square brackets.

Notice of a Penalty

1. Pursuant to sections [94A](#) and [112](#) of the Enterprise Act 2002 ('**EA02**'), the Competition and Markets Authority (the '**CMA**') hereby gives notice of the following:
 - (a) The CMA has imposed a penalty on Electro Rent Corporation ('**Electro Rent**') under [section 94A](#) EA02 (the '**penalty**') because Electro Rent has, without reasonable excuse, failed to comply with the requirements imposed on Electro Rent by the [Interim Order](#) issued by the CMA under [section 81](#) EA02 on 7 November 2017 (the '**Interim Order**').
 - (b) The penalty is a fixed amount of £100,000.
 - (c) Electro Rent is required to pay this penalty in a single payment, by cheque or bank transfer to an account specified to Electro Rent by the CMA, by close of banking business on the date which is 28 days from the date of service of this notice on Electro Rent.
 - (d) Electro Rent may pay the penalty earlier than the date by which it is required to be paid.
 - (e) Pursuant to [section 112\(3\)](#) EA02, Electro Rent has a right to apply to the CMA within 14 days of the date on which this notice is served on Electro Rent for the CMA to specify a different date by which the penalty is to be paid.
 - (f) Pursuant to [section 114](#) EA02, Electro Rent has the right to apply to the Competition Appeal Tribunal (the '**CAT**') against any decision the CMA reaches in response to an application under [section 112\(3\)](#) EA02, within the period of 28 days starting with the day on which Electro Rent is notified of the CMA's decision.
 - (g) Pursuant to [section 114](#) EA02, Electro Rent has the right to apply to the CAT within the period of 28 days starting with the day on which this notice is served on Electro Rent in relation to:
 - (i) the imposition or nature of the penalty;
 - (ii) the amount of the penalty; or
 - (iii) the date by which the penalty is required to be paid.
 - (h) Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal under [section 114](#) EA02, the CMA may recover the penalty and any

interest which has not been paid; in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.

Structure of this document

2. This notice is structured as follows:

- **Section A** sets out an executive summary of this notice.
- **Section B** sets out the factual background to this notice. The facts in Section B are relevant to both elements of the legal assessment, which follows in Section C.
- **Section C** sets out the legal assessment:
 - First, it considers the statutory requirements for imposing a penalty under [section 94A EA02](#), and sets out the reasons for the CMA’s finding that Electro Rent has failed to comply with the Interim Order without reasonable excuse.
 - Secondly, it sets out the CMA’s reasons for finding that a penalty of £100,000 is appropriate and proportionate in this case.

A. Executive Summary¹

3. Electro Rent failed to comply with the Interim Order made on 7 November 2017 by failing to first seek the consent of the CMA, as required by the Interim Order, before issuing on [REDACTED] a Notice of Exercise Break Option (the ‘**Notice**’) terminating the lease over the only premises Electro Rent and its subsidiary, Electro Rent Europe NV (‘**Electro Rent Europe**’) had in the UK (the ‘**UK premises**’).
4. Electro Rent has no reasonable excuse for its failure to comply with the Interim Order:
- (a) The CMA considers that alerting the Monitoring Trustee (the ‘**MT**’) to the intention to issue the Notice does not amount to a reasonable excuse as

¹ An executive summary is provided in order to assist the reader. However, for the CMA’s complete reasoning, this notice should be read in full. Capitalised terms in this executive summary are defined in the paragraphs above and below.

the onus is on the addressee of the Interim Order to seek the consent of the CMA.

- (b) The MT, although under an obligation to monitor compliance with the Interim Order and report to the CMA, has no authority, delegated or implied, from the CMA to give consent on behalf of the CMA.
 - (c) The reasons given by Electro Rent for issuing the Notice relate to the decision to terminate the lease and do not amount to a reasonable excuse for failing to comply with the Interim Order.
 - (d) The reason given by Electro Rent for not seeking consent from the CMA prior to issuing the Notice, namely that the MT had been informed and had not indicated such action would be in breach of the Interim Order, does not amount to a reasonable excuse for failing to comply with the Interim Order but has been taken into account in determining the level of penalty.
5. It is appropriate to impose a penalty and a penalty of £100,000 is appropriate and proportionate in this case because:
- (a) The failure to comply was significant as the lease was over the only premises Electro Rent and Electro Rent Europe had in the UK and from where Electro Rent Europe's UK branch operated, and the remainder of the lease was part of a potential remedy package on which Electro Rent had made representations;
 - (b) Although Electro Rent has taken steps to remedy the breach by entering into a new lease, this is on worse terms;
 - (c) This was a flagrant breach and was committed in large part by the senior management of Electro Rent, [REDACTED];
 - (d) Electro Rent did not bring the breach to the CMA's attention and more significant potential prejudice was prevented only by action taken by the CMA once it discovered the breach;
 - (e) Electro Rent has sufficient administrative and financial resources available to ensure compliance, had engaged external legal advisers and had previously sought derogations from its obligations under the Interim Order and was therefore aware of its obligation to do so;
 - (f) The imposition of an administrative penalty reflects the seriousness of a failure to comply with an Interim Order without reasonable excuse;

- (g) The imposition of an administrative penalty is necessary to deter Electro Rent from further breaches in this case;
- (h) The imposition of an administrative penalty is necessary to ensure businesses to whom the UK's merger regime applies comply with interim measures and prevent the possible prejudice to the UK's merger regime arising from non-compliance;
- (i) A penalty of £100,000 is substantially below the statutory maximum of 5% of the Parties' combined global turnover;
- (j) A penalty of £100,000 is proportionate in all the circumstances, including those of Electro Rent's significant financial resources;

and taking into account the following mitigating factors:

- (k) The CMA has had careful regard to the actions of the MT in this case, which has been a significant factor in substantially reducing the level of penalty;
- (l) The scale of actual adverse effect of the failure to comply is likely to be limited (in part due to the CMA itself taking action as well as remedial steps taken promptly by Electro Rent);
- (m) There was no indication of any attempt by Electro Rent to conceal the failure to comply; and
- (n) Electro Rent gained no advantage from the failure to comply.

6. The CMA therefore considers that a penalty of £100,000:

- (a) Reflects the seriousness of the failure to comply and the adverse effect on the inquiry;
- (b) Acts as a future deterrent; and
- (c) Is appropriate, reasonable and proportionate in all the circumstances having regard to, amongst other things, the nature of the failure, the submissions put forward by Electro Rent and the financial position of Electro Rent.

B. Factual Background

7. On 19 October 2017, the CMA made a reference to its chair for the constitution of a Group of CMA Panel Members (the '**Inquiry Group**') under [Schedule 4](#) of the Enterprise and Regulatory Reform Act 2013 in accordance

with [section 22\(1\) EA02](#), to investigate and report on the completed acquisition by Electro Rent of Microlease, Inc. and Test Equipment Asset Management Limited (known as Microlease) (the '**Merger**').

8. On 7 November 2017 the CMA made the Interim Order² applying to Electro Rent, Electro Rent Europe (including its UK branch) and Test Equipment Asset Management Limited (the '**Parties**').³
9. The Interim Order requires, amongst other things, the Parties to maintain and operate the enterprises separately (paragraph 4), to seek the consent of the CMA to do or not to do certain things affecting the enterprises (paragraph 5), to ensure compliance with the Interim Order (paragraph 6) and to notify the CMA promptly of any breach or suspected breach of the Interim Order (paragraph 9).
10. On 7 November 2017, the CMA issued directions under the Interim Order for the Parties to appoint a MT (the '**Directions**'). On 15 November 2017 the CMA approved the appointment of [REDACTED] as named MT.
11. On 5 February 2018 the CMA issued a [Notice of provisional findings](#) which noted that the CMA had provisionally found the Merger has resulted, or may be expected to result, in a substantial lessening of competition ('**SLC**') in the market for the rental supply of test and measurement equipment in the UK. On the same day the CMA issued a [Notice of possible remedies](#) which included as a potential remedy the divestment of Electro Rent's UK branch including:
 - (a) the freehold site, or (if leasehold) rights to the lease, for all sites relevant to the business to be divested; and
 - (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.

The response hearing and remedies working papers

12. On 1 March 2018, Electro Rent attended a hearing on the possible remedies with the Inquiry Group. Electro Rent's [REDACTED] attended the hearing along with

² The Interim Order replaced the [Initial Enforcement Order](#) (the '**IEO**') made by the CMA on 1 February 2017 at phase 1.

³ The CMA addresses this decision to Electro Rent Corporation, rather than Electro Rent Europe, as it is the parent company of the corporate group and the relevant conduct was primarily carried out by its officers. Nothing in this decision should be taken to mean that Electro Rent Europe did not also breach the Interim Order.

other employees of Electro Rent, professional advisers and employees of Electro Rent's ultimate owner, Platinum Equity.

13. The divestment package for the UK business was discussed in this hearing. The [X] showed a clear understanding that the remainder of the lease over the UK premises was a part of the proposed package, for example discussing that a purchaser [X] might not want it, but that circumstances might be different for another purchaser.⁴ The "*transfer of Electro Rent's lease over its registered place of business in the UK*" was also included in the Parties' summary of the remedy proposal dated 7 March 2018.
14. The CMA made it clear in the remedies working paper dated 13 March 2018 (paragraph 66) that the UK premises remained part of the proposed divestment package, and this requirement was also included in the remedies supplementary working paper dated 5 April 2018.

The Notice

15. On [X] the Electro Rent [X] advised the MT that Electro Rent intended that day to issue a notice to terminate the lease on the UK premises in [X]. The lease had a term of [X] years commencing in 2016 and terminating in [X]. The lease provided for early termination provided not less than six months' notice was given prior to any of the two 'break dates' set out in the lease – the first being on the three-year anniversary of signing being [X].⁵
16. The Notice was signed by [X] Electro Rent and Electro Rent Europe and was served on [X] on the landlord. The Notice contained the following:

'The Lease also requires that this notice be given at least six months prior to the Break Date. This letter is given with 13 months prior notice.'
17. Neither Electro Rent nor the MT informed or sought the consent of the CMA prior to the Notice being issued or at any time prior to the CMA raising the issue with the MT on 13 April 2018.
18. Electro Rent is obliged by paragraph 7 of the Interim Order to sign fortnightly statements confirming it is in compliance with the Interim Order. Electro Rent's compliance statement dated 28 March 2018 (signed by [X]) for the

⁴ [X]

⁵ The copy we have been provided with does not set out what those dates are but [X] 14 April 2018 email to [X] MT states the lease was signed [X] signed by the Parties.

period 15 March 2018 to 28 March 2018 did not mention the Notice. [X] was also not informed of the Notice at the time it was served.⁶

Subsequent interaction between the CMA, Electro Rent and the MT⁷

19. On 13 April 2018 the CMA became aware that the Notice had been served and sent an email to the MT expressing concern that Electro Rent's action could constitute pre-emptive action which may impede the taking of remedial action and that it may represent a breach of the Interim Order and asking for further information.
20. On 16 April 2018, the MT responded setting out inquiries undertaken and providing further information as requested by the CMA, including that the Notice had been accepted and could not, according to the landlord, be reversed.⁸ The CMA responded asking the MT for details of previous discussions with Electro Rent involving the MT regarding the intention to terminate the lease and whether in the MT's view, any part of the Interim Order had been breached.
21. On 17 April 2018 the MT responded acknowledging that he had discussed the intention to issue the Notice with Electro Rent's [X] on 15 March 2018 and was *"under the impression that Electro Rent UK and the CMA if needed (directly or through the advisers) would be informed"* and that *"this did not raise a concern with me at the time"*. The MT also forwarded to the CMA an email dated 14 April 2018 from Electro Rent's [X] setting out the reasons for issuing the Notice.
22. On 20 April 2018 the CMA wrote to Electro Rent⁹ advising that the CMA considered the action of serving the Notice without the CMA's prior consent constituted a breach of the Interim Order and that the CMA was considering imposing a penalty. On 25 April 2018 Electro Rent submitted a compliance statement for the period which noted as a 'material development' that the Notice had been issued.
23. Electro Rent responded to the CMA on 26 April 2018 (the '**Response Letter**')¹⁰ noting the circumstances of the issuing of the Notice, communications with the MT, and summarising new Heads of Terms agreed between Electro Rent and the landlord in respect of the same UK premises.

⁶ Email dated 16 April 2018 from [X] MT to CMA.

⁷ The emails are attached at Appendix B.

⁸ Email dated 16 April 2018 from [X] MT to CMA.

⁹ Attached at Appendix B.

¹⁰ Attached at Appendix B.

The Response Letter used the phrase '*alleged breach*' but did not otherwise dispute that there had been a breach of the Interim Order.

24. Electro Rent had not sought the prior consent of the CMA to agree the Heads of Terms for a new lease to April 2026 at a higher rent.
25. On 2 May 2018 the CMA wrote to Electro Rent directing it to refrain from concluding any further agreement with the landlord regarding the lease over the UK premises without its express prior consent.¹¹
26. On 10 May 2018, the CMA gave its consent to Electro Rent to enter into a new lease over the UK premises.¹²

The Final Report

27. On 17 May 2018 the Inquiry Group published its final report on the Merger which concluded that the Merger has resulted or was expected to result in a SLC in the market for supply of testing and measurement equipment for rental in the UK. In order to remedy the SLC and any adverse effects arising from it, Electro Rent was required to divest its UK business to a suitable purchaser.

The CMA's provisional decision on administrative penalty

28. Following careful consideration of the relevant circumstances of the case and having regard to *Administrative penalties: Statement of Policy on the CMA's Approach* (CMA4, the '**Guidance**'), the Inquiry Group provisionally concluded that Electro Rent had, without reasonable excuse, failed to comply with the Interim Order and it was appropriate in this case to impose a penalty on Electro Rent. In accordance with paragraph 5.2 of the Guidance, on 21 May 2018, the CMA gave Electro Rent notice of its intention to impose a penalty under [section 94A](#) EA02 including the reasons, proposed approach and the nature and the level of the proposed penalty (the '**Provisional Decision**').
29. The Inquiry Group informed Electro Rent that should it want to make representations, those should be submitted by 5pm on Tuesday 29 May 2018. The Inquiry Group also invited Electro Rent to make oral representations if it wished to do so.

¹¹ Attached at Appendix B.

¹² Attached at Appendix B.

Electro Rent's Representations

30. On 29 May 2018 Electro Rent sent a letter to the CMA setting out its representations on the Provisional Decision (the '**Written Representations**'). On 31 May 2018 Electro Rent made oral representations to the Inquiry Group on the Provisional Decision (the '**Oral Representations**').
31. Electro Rent's Written Representations were that a penalty was inappropriate and unreasonable, for reasons including the following:
- (a) The MT acts on behalf of the CMA and paragraph 13 of the CMA's Directions "*makes it clear that if the Parties are in any doubt as to whether any action would infringe the Interim Order, they are required to contact the Monitoring Trustee for clarification*". In addition, "*following interaction with the CMA, [Electro Rent was] informed that they should direct queries and questions regarding the application of the Interim Order to the Monitoring Trustee*";¹³
 - (b) Electro Rent had complied with the Directions by pro-actively informing the MT of its intention to serve the Notice and had received oral confirmation from the MT that it may proceed to serve;¹⁴
 - (c) Electro Rent "*understood from the Monitoring Trustee that the CMA would be kept informed of developments relating to*" Electro Rent's UK premises and "*the Monitoring Trustee had not indicated that the CMA's consent was needed to be sought or that the issuing of the Notice might breach the Interim Order*";¹⁵
 - (d) It was unfair and unreasonable for Electro Rent to be held responsible for the non-performance by the MT of its obligations under the Directions;¹⁶ and
 - (e) A penalty was inappropriate as no harm had occurred as a result of the Notice being served because "*Electro Rent promptly negotiated a new lease*" and "*offered to sub-lease the UK premises to a prospective purchaser of Electro Rent UK on no worse terms than the previous lease*".¹⁷
32. Broadly speaking, Electro Rent's Oral Representations repeated the Written Representations regarding the role of the MT and that Electro Rent had been

¹³ Paragraph 4 of the Written Representations.

¹⁴ Paragraphs 5 and 6 of the Written Representations.

¹⁵ Paragraph 7 of the Written Representations.

¹⁶ Paragraph 9 of the Written Representations.

¹⁷ Paragraph 10 of the Written Representations.

told by the CMA to direct questions regarding compliance with the Interim Order to the MT.

33. Following the Provisional Decision and the Written Representations and Oral Representations, the Inquiry Group has re-considered whether the imposition of an administrative penalty is appropriate, and whether £100,000 is an appropriate level of penalty, and sets out its reasoning below.
34. In accordance with paragraphs 5.2 and 5.9 of the Guidance, the Inquiry Group has consulted with the CMA's General Counsel on the proposed approach to and level of the penalty.

C. Legal Assessment

35. [Section 94A\(1\)](#) EA02 provides that where the appropriate authority considers that a person has, without reasonable excuse, failed to comply with an interim measure, it may impose a penalty of such fixed amount as it considers appropriate.
36. [Section 94A\(8\)](#) EA02 provides that an interim measure means an order made pursuant to [section 81](#) EA02 and in the case of failure to comply with an interim order, the appropriate authority is the CMA. [Section 86\(6\)](#) EA02 provides that an order made pursuant to [section 81](#) EA02 is an enforcement order. Sections [94\(1\)](#) and [\(2\)](#) EA02 provides that any person to whom such an order relates has a duty to comply with it.
37. [Section 81](#) EA02 provides that the purpose of an interim measure is to prevent pre-emptive action, which is action that might prejudice the reference concerned or impede the taking of any action which may be justified by the CMA's decisions on the reference.¹⁸
38. The CMA concludes that the statutory requirements for imposing a penalty under [section 94A](#) EA02 are met and that the imposition of a penalty of £100,000 is appropriate and proportionate in this case.

Statutory requirements for imposing a penalty under section 94A EA02

Failure to comply with an Interim Order made pursuant to section 81 EA02

39. The CMA finds that Electro Rent is a person within the meaning of [section 94\(2\)](#) EA02 and [Schedule 1](#) of the Interpretation Act 1978 and has

¹⁸ [Section 80\(10\)](#) EA02.

failed to comply with the Interim Order made pursuant to [section 81 EA02](#) on 7 November 2017.

40. The CMA finds Electro Rent failed to comply with the Interim Order by failing to seek the consent of the CMA before issuing the Notice. The Interim Order requires Electro Rent to seek the CMA's consent before taking any action which might prejudice a reference of the merger or impede the taking of any action under EA02 by the CMA.
41. The CMA finds Electro Rent failed to seek the consent of the CMA prior to issuing the Notice and by doing so has failed to comply with the Interim Order, in particular:
 - (a) paragraph 4 which requires Electro Rent to seek the CMA's consent before taking any action which might prejudice a reference of the Merger or impede the taking of any action by the CMA which may be justified by the CMA's decisions on such a reference, including (at paragraph 4(c)) any action which might otherwise impair the ability of the Electro Rent Corporation business¹⁹ to compete independently in any of the markets affected by the transaction;
 - (b) paragraph 5(b) which requires that the Electro Rent Corporation business is maintained as a going concern and that sufficient resources are made available for the development of the Electro Rent Corporation business on the basis of its pre-merger plans;
 - (c) paragraphs 5(e)(i) and (ii) which require that, except in the ordinary course of business, for the separate operation of the two businesses, all of the assets of the Electro Rent Corporation businesses are maintained and preserved, including facilities and goodwill (5(e)(i)) and none of the assets of the Electro Rent Corporation business are disposed of (5(e)(ii)); and
 - (d) paragraph 9 which requires Electro Rent to notify the CMA and the MT if it has any reason to suspect that the Interim Order might have been breached.
42. In respect of paragraph 4(c) of the Interim Order, the failure to comply by terminating the lease early potentially impeded the ability of Electro Rent to compete independently by depriving Electro Rent Europe's UK branch of premises from which to operate beyond April 2019.

¹⁹ Defined in the Interim Order as the business of Electro Rent Corporation and its subsidiaries (including Electro Rent Europe).

43. In respect of paragraph 5(b) of the Interim Order, the failure to comply by terminating the lease early resulted in Electro Rent's UK branch not having the resources for development of the business in the UK on the basis of its pre-merger plans which included having premises in the UK from which to operate.
44. In respect of paragraph 5(e)(i) and (ii) of the Interim Order, the failure to comply by irrevocably (in the landlord's view) terminating the lease early resulted in the disposal of an asset (the lease over the UK premises)²⁰ and a facility (the warehouse and offices). This disposal was not in the ordinary course of business or for the separate operation of the businesses as there was no urgency or commercial imperative to issue the Notice on [X] and it was a significant operational change.
45. In respect of paragraph 9, the early termination of the lease over the UK premises which was the subject of a potential remedy, ought to have given rise to a suspicion that the Interim Order might have been breached and that both the CMA and MT should be notified.
46. The CMA therefore concludes that Electro Rent has failed to comply with the requirements of the Interim Order specifically in relation to paragraphs 4(c), 5(b), 5(e)(i) and (ii) and 9.
47. The CMA notes that the Response Letter set out various reasons for Electro Rent's decision to issue the Notice. The Written Representations and Oral Representations set out reasons why Electro Rent considered the imposition of a penalty was inappropriate and unfair because it had complied with the Directions and no harm resulted from the issuance of the Notice.
48. Having reviewed these submissions, the CMA considers the reasons put forward are not submissions as to whether Electro Rent had failed to comply with the Interim Order but rather are either submissions as to why Electro Rent considers it had a reasonable excuse for failing to comply with the Interim Order or submissions as to why any discretion exercised should militate against the imposition of a penalty. The CMA has reached this view because the Response Letter acknowledges Electro Rent "*did not expressly seek the CMA's consent prior to serving the Notice*" and this is repeated in the Written Representations. The CMA has therefore considered these submissions below.

²⁰ The recently updated accounting standard (IFRS-16) requires operating leases for a period longer than 12 months to be recognised on the balance sheet. Companies are required to recognise both the asset they have access to and the corresponding liability associated with the lease.

Without reasonable excuse

49. [Section 94A\(1\)](#) EA02 provides that a penalty can only be imposed if a failure to comply is ‘*without reasonable excuse*’.
50. Although not directly on point, the CAT considered compliance with an Interim Order in *ICE/Trayport*:²¹

[220] Nevertheless we think it appropriate to observe that “pre-emptive action” is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA’s ultimate decision. The [Interim Order] in these proceedings is phrased in similarly broad language and should be interpreted to give full effect to its legitimate precautionary purpose. The word “might” means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The [Interim Order] catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the [Interim Order] to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment.

...

*[223] We recognise that it must obviously be the case that not every agreement between merging parties will in all cases require the CMA’s prior consent. However, where an IEO has been issued, it is incumbent on parties to take a carefully considered view as to whether their conduct might arouse the reasonable concern of the CMA that the agreements that they reach are significant enough that they might prejudice the reference or impede justified action if the agreement is non-arm’s length.”²²
[emphasis added]*

51. The Response Letter, the Written Representations and Oral Representations give the following reasons why Electro Rent considered it had a reasonable excuse should the CMA find it failed to comply with the Interim Order:
- (a) [✂];
- (b) On 15 March 2018 Electro Rent, prior to serving the Notice and in accordance with paragraph 13 of the Directions and the way in which Electro Rent had been told to act by the CMA, informed the MT of its

²¹ [InterContinental Exchange, Inc. v CMA and NASDAQ Stockholm AB \[2017\] CAT 6](#) (‘ICE/Trayport’).

²² [ICE/Trayport CAT judgment](#), paragraphs 220 and 223.

intention to do so and received oral confirmation from the MT that Electro Rent may proceed to serve the Notice;

- (c) Electro Rent had no reason to believe that it should inform the CMA or discuss the issue with its legal advisers because the MT did not indicate to Electro Rent that the proposed issuing of the Notice might be in breach of the Interim Order or that Electro Rent should either inform the CMA or discuss the issue with its legal advisers;
- (d) Electro Rent's conduct by informing the MT was consistent with the Directions and what it was told to do by the CMA;
- (e) Electro Rent understood from the MT that the CMA would be kept informed of developments relating to the premises;
- (f) Drafts of the Compliance reports dated 28 March 2018 and 11 April 2018 were shared with the MT prior to execution and submission to the CMA and no feedback was received from the MT that it was necessary to include a reference to serving the Notice;
- (g) Electro Rent was led to believe that its conduct in relation to the lease was brought to the CMA's prompt attention; and
- (h) Electro Rent's actions were at all times motivated by a desire to further the commercial interests of Electro Rent's UK business.

52. The CMA has considered the Response Letter, the Written Representations and the Oral Representations. The CMA does not accept that Electro Rent has a reasonable excuse for failing to comply with the Interim Order for the following reasons:

- (a) Addressees of an Interim Order have a statutory duty to comply with it;²³
- (b) The Interim Order required Electro Rent, and not the MT, to seek the prior consent of the CMA before issuing the Notice;
- (c) Whilst merging parties may discuss queries and questions concerning the Interim Order with the MT, the CMA has never told Electro Rent that its obligations under the Interim Order are affected by such discussions, and there is nothing in the Interim Order that suggests they are;

²³ [Section 94\(2\) EA02](#).

- (d) The MT is required to act in accordance with instructions from the CMA, to monitor compliance with the Interim Order, and to report to the CMA. The MT has no delegated authority (express or implied) to give consent to any action not in compliance with the Interim Order on behalf of the CMA and there is nothing in the Interim Order, the Directions or the MT's Mandate that suggests there is;
- (e) Electro Rent raised the proposed issuing of the Notice with the MT, which suggests that it had formed the view that it was a matter which might have roused the concern of the CMA. Accordingly, Electro Rent ought to have known that the onus was on it to seek the consent of the CMA and/or to seek legal advice;
- (f) Electro Rent understood the requirement to seek prior consent from the CMA. It had previously sought consent direct from the CMA before engaging in activities which were potentially in breach of the Interim Order.²⁴ On those occasions Electro Rent had not notified the MT about its intended course of action and then relied on the MT to notify the CMA. Electro Rent ought to have suspected that by not seeking the CMA's consent before issuing the Notice, it was failing to comply with the Interim Order. Although Electro Rent contacted the MT prior to issuing the Notice, this does not amount to a reasonable excuse for non-compliance with the Interim Order;
- (g) Arguments as to whether Electro Rent has complied with the Directions are not relevant because the CMA has not alleged that Electro Rent has failed to comply with the Directions;
- (h) Arguments as to whether Electro Rent had a reasonable commercial rationale for wanting to issue the Notice are not relevant to whether it had a reasonable excuse for failing to comply with the Interim Order; and
- (i) The Guidance states that the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond the company's control has caused the failure to comply (and the failure would not otherwise have taken place).²⁵ There is nothing to suggest that any such event has occurred here, which would have prevented

²⁴ For example, the fully reasoned derogation requests submitted by Electro Rent's legal advisors dated 2 November 2017 (which was before the MT was appointed) and 27 November 2017 (which was after the MT was appointed). Electro Rent had also previously sought derogations from the IEO where there was no MT appointed.

²⁵ [CMA 4](#), paragraph 4.4.

Electro Rent from being able to comply with its own obligations under the Interim Order.

53. The CMA concludes that Electro Rent has no reasonable excuse under [section 94A EA02](#) for failing to comply with the Interim Order. However, the CMA recognises that the MT was under an obligation to report on Electro Rent's compliance with the Interim Order and failed to do so before Electro Rent issued the Notice. The CMA will therefore consider the role of the MT in determining the appropriate level of penalty.

Appropriateness of imposing a penalty at the level proposed

54. Having had regard to its statutory duties and the Guidance, and having carefully considered all relevant facts, the CMA finds that the imposition of a penalty of £100,000 (which is substantially below the statutory maximum of 5% of the Parties' combined global turnover), is appropriate in this case.
55. Electro Rent's failure to comply with the Interim Order was significant and had a potentially adverse effect on the merger investigation because Electro Rent's failure to comply impacts on the remedial divestment package. The purpose of the Interim Order as noted by the CAT is precautionary, ie to guard against the possibility of prejudice to the reference or impediment to any remedial action.²⁶ Electro Rent was aware when it issued the Notice that the premises were part of a possible divestment package. Issuing the Notice risked impediment to the remedies package because the premises in question are Electro Rent Europe's only UK premises and were included in a potential divestment package.
56. Electro Rent did not bring the failure to comply to the CMA's attention and more significant potential prejudice was prevented only by action taken by the CMA once it became aware of the failure to comply.
57. Electro Rent submitted that no harm occurred as a result of the Notice being served as a new lease was promptly negotiated and it offered to sub-lease the premises to a new owner of Electro Rent UK on terms no worse than the previous lease.
58. Although Electro Rent has sought to remedy its failure by negotiating a new lease over the UK premises it did not initially seek the CMA's consent to do so (the CMA did consent subsequently) and this new lease is not on equivalent terms. This may impact on the remedy by increasing the risk the landlord may

²⁶ [ICE/Trayport CAT judgment](#), paragraph 220.

not consent to a sub-lease on the previous terms as required by the CMA's remedy.

59. Electro Rent submitted that, even if a new lease was not negotiated, no harm would have resulted as it would either have identified alternative premises Electro Rent would have considered more suitable for the UK business or would have had more time to negotiate a new lease over the premises.
60. As stated above, the CMA is of the view that the commercial rationale for issuing the Notice is irrelevant to the question of failure to comply with an Interim Order. The premises were part of a divestment package and as such the right to exercise the option to terminate the lease early lay with the acquirer not Electro Rent. By failing to comply with the Interim Order, Electro Rent deprived the acquirer of this right. The CMA considers a penalty is still appropriate notwithstanding Electro Rent's attempt to remedy the failure.²⁷
61. Electro Rent's failure to comply was a flagrant breach as Electro Rent was aware of its obligations under the Interim Order and the breach was committed [X], and Electro Rent had previously sought consent of the CMA for derogations from the Interim Order. There was also no urgency to issue the Notice and the Notice itself recognises that it had been served around six months prior to the deadline in the lease for exercising the break option.
62. Electro Rent has sufficient administrative and financial resources available to ensure compliance and has engaged external legal advisers through whom previous requests for consent had been made.
63. The CMA considers that it is of utmost importance to the CMA's ability to conduct effective and efficient investigations that parties have due regard to the requirements imposed on them by, among other things, an Interim Order. The purpose of an Interim Order is to preserve businesses under investigation so that the CMA has the full range of remedy options open to it if required by the findings of the investigation. The imposition of an administrative penalty under [section 94A](#) EA02 is critical to achieve deterrence, ie to impress both on Electro Rent in this specific case, and other businesses more widely, the importance of compliance with an Interim Order and the seriousness of a failure to comply without a reasonable excuse.

²⁷ [CMA 4](#), paragraph 4.10.

64. In this case, the CMA is of the view that because the failure to comply has impacted upon a remedy, specific deterrence is required to deter Electro Rent from further non-compliance during the remedies process.
65. Consistent with the Guidance²⁸, the CMA has assessed all relevant circumstances in the round to determine an appropriate level of penalty. The factors outlined above combine to indicate that a material penalty should be imposed. However, the CMA has also taken account of the following mitigating factors in line with the Guidance.
66. Although the extent of potential adverse effects of the breach could have been significant, the scale of actual adverse effect is likely to be limited (in part due to the CMA itself taking action as well as remedial steps taken by Electro Rent).
67. Although Electro Rent failed to bring the failure to the attention of the CMA, there is no indication of any attempt to conceal the failure as Electro Rent notified the MT of its intention to issue the Notice.
68. Although the reasons given by Electro Rent for issuing the Notice indicated a commercial rationale, it has gained no advantage from the failure to comply as under the terms of the new lease Electro Rent is potentially exposed to financial risk.
69. Electro Rent has sought to remedy its failure by negotiating a new lease over the UK premises albeit this new lease is not on equivalent terms. In light of remedial action taken by Electro Rent at the CMA's prompting, the imposition of a penalty is not required to encourage swift compliance.
70. The CMA has had careful regard to the actions of the MT in this case. Whilst the CMA is of the view that the MT's failure to notify the CMA of Electro Rent's intention to issue the Notice did not amount to a reasonable excuse for Electro Rent's failure to comply with the Interim Order, it is a significant factor which the CMA has considered in determining the level of penalty. The CMA is of the view that had the MT not been involved in this way, the penalty would have been very significantly higher.
71. Finally, when assessing overall proportionality, the CMA has had regard to the financial resources available to Electro Rent which show that it has significant financial resources available and would not be materially affected by a penalty of £100,000. For example, Electro Rent's group worldwide turnover (including

²⁸ CMA 4, paragraph 4.11.

Microlease and Microlease, Inc.) was c.£234 million in FY 2016, its group UK turnover was c.£[~~2~~] million, and its group worldwide operating profit was c.£10 million.²⁹

72. The CMA finds that a penalty at this level: (i) would reflect the significance of the breach and the adverse impact on the CMA's investigation; (ii) would act as a specific and general deterrent; and (iii) is appropriate, reasonable and proportionate in all the circumstances having regard, amongst other things, to the nature of the failure, the role of the MT, the submissions put forward by Electro Rent³⁰ and the financial position of Electro Rent.
73. In all the circumstances, the CMA finds that the imposition of a penalty of £100,000 (which is substantially below the statutory maximum of 5% of the Parties' combined global turnover) is appropriate and proportionate in this case, and hereby imposes such penalty under [section 94A](#) EA02.

Signed by authority of the CMA

Simon Polito
CMA Group Chairman
11 June 2018

²⁹ Sources: [Merger Notice](#), Section I (page 1) and [Electro Rent Corporation 2016 10-K](#), page 16 (\$8.1 million converted at 0.6711 \$/£, as used in the [Merger Notice](#)); Microlease FY16 annual accounts, page 9 (as printed).

³⁰ See Appendix C to this decision: Response Letter.

Appendix A:

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Appendix B:

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Appendix C:

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