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

12 February 2019

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 £200,000.

(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 D.
- **Section C** sets out the legal framework
- **Section D** 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 £200,000 is appropriate and proportionate in this case.

A. Executive Summary[1]

Failure to comply with Interim Order

1. Electro Rent[2] failed to comply with the Interim Order made on 7 November 2017 by failing to seek the prior written consent of the CMA, as required by the Interim Order, before appointing Mr John Hafferty, the Chief Financial Officer (CFO) of Electro Rent on 25 January 2018 as director of Test Equipment Asset Management Limited ('TEAM') and its subsidiaries, namely:

(a) Microlease Limited ('Microlease UK');

[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.
[2] The CMA addresses this decision to Electro Rent Corporation, rather than TEAM, 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 TEAM, Microlease UK, Newmir, Livingston Group, Hamilton, Microlease Europe, Microlease Finance and Livingston did not also breach the Interim Order.

(b) Microlease Europe Limited ('Microlease Europe');

(c) Microlease Finance Limited (Microlease Finance';

(d) Newmir Limited ('Newmir');

(e) Hamilton Hall Consultants Limited ('Hamilton');

(f) Livingston Group Limited ('Livingston Group'); and

(g) Livingston Limited ('Livingston'),

together known as 'the Appointments'.

2. Electro Rent failed to comply with the following provisions of the Interim Order:

- Paragraph 4 which provides "Except with the prior written consent of the CMA, Electro Rent Corporation, Electro Rent Europe (including its UK branch) or Test Equipment Asset Management Limited shall not, during the specified period, take any action which might prejudice a reference of the Merger under section 22 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might:

  (a) lead to the integration of the Microlease business with the Electro Rent Corporation business;

  (b) transfer the ownership or control of the Electro Rent Corporation business or the Microlease business or any of their subsidiaries; or

  (c) otherwise impair the ability of the Microlease business or the Electro Rent Corporation business to compete independently in any of the markets affected by the transaction."

- Paragraph 5 which provides in so far as material, "Electro Rent Corporation, Electro Rent Europe (including its UK branch) and Test Equipment Asset Management Limited shall at all times during the specified period procure that, except with the prior written consent of the CMA:

  (a) the Microlease business is carried on separately from the Electro Rent Corporation business and the Microlease business's separate sales or brand identity is maintained;

(c) except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within the Microlease business or the Electro Rent Corporation business;

(i) no changes are made to key staff of the Microlease business or Electro Rent Corporation business."

- Paragraph 6 which provides "Electro Rent Corporation, Electro Rent Europe (including its UK branch) and Test Equipment Asset Management Limited shall procure that each of their subsidiaries complies with this Order as if the Order had been issued to each of them".

- Paragraph 8 which provides "At all times, Electro Rent Corporation, Electro Rent Europe (including its UK branch) and Test Equipment Asset Management Limited shall actively keep the CMA informed of any material developments relating to the Microlease business or the Electro Rent Corporation business, which includes but is not limited to:

  (a) details of key staff who leave or join the Microlease business or the Electro Rent Corporation business".

3. TEAM was the UK registered company acquired by Electro Rent and now is a wholly owned subsidiary of Electro Rent. Microlease UK is the operating company of TEAM. Microlease Europe is an operating subsidiary of Microlease UK, Newmir is the corporate shareholder of Microlease UK. Livingston Group, Hamilton, Microlease Finance and Livingston are wholly owned subsidiaries of TEAM.

4. Electro Rent failed to comply with the Interim Order because:

(a) The purpose of the Interim Order is to guard against the possibility of prejudice to the reference or impediment to any remedial action including preventing steps to integrate the enterprises which are the subject of the merger inquiry and preventing the potential flow of confidential information between them; and,

(b) The ordinary role of a director includes having access to confidential information, attending meetings and making decisions affecting the strategic direction of the company, promoting its success, and ensuring it fulfils its statutory obligations. The appointment of Mr Hafferty to this role was incompatible with the scheme set out in the Interim Order as it carried a material risk for potential integration and exchange of confidential information. It was therefore foreseeable that the consent of the CMA would be required.

No reasonable excuse

5. Electro Rent made no representations regarding reasonable excuse for failing to comply with the Interim Order and therefore the CMA finds it has no reasonable excuse for its failure to comply with the Interim Order.

Decision to impose a penalty

6. It is appropriate to impose a penalty for the following reasons:

   (a) the failure to comply was serious and amounted to pre-emptive action which is precisely the type of conduct the Interim Order seeks to prevent;

   (b) it had a potentially adverse effect on the merger inquiry. The Interim Order required Electro Rent to hold itself separate from TEAM and its subsidiaries. The failure to comply potentially allowed for the exchange of confidential information and the integration of Microlease UK, the operating company with Electro Rent as a result of the diligent discharge of the ordinary role of directors.

   (c) 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.

   (d) this was a flagrant breach and was committed in large part by the senior management of Electro Rent in particular the Chief Executive Officer ('CEO') who is responsible for ensuring Electro Rent's compliance with the Interim Order and who was at the time of the Appointments and remains a director of TEAM, Microlease UK, Newmir, Livingston Group, Hamilton, Microlease Europe, Microlease Finance and Livingston[3] and the Chief Financial Officer ('CFO') of Electro Rent, Mr Hafferty; and,

   (e) neither Electro Rent nor TEAM nor its subsidiaries brought the breach to the CMA's attention.

Mitigating factors

7. The CMA took account of Electro Rent's submissions of the restricted nature of Mr Hafferty's duties as a mitigating factor and that there was no actual

[3] Nigel Brown was appointed as CEO of Electro Rent before the CMA made the Initial Enforcement Order (the 'IEO' on 1 February 2017 at phase 1 and held and continues to hold these directorships as a result of his prior position of CEO of Microlease UK.

adverse effect on the merger inquiry as a result of the Appointments due to the restricted nature of Mr Hafferty's duties, namely:

(i) Mr Hafferty did not attend any meetings or receive any notes of any meetings;

(ii) Mr Hafferty did not have any operational or strategic role or decision-making abilities; and

(iii) Mr Hafferty did not receive any commercially-sensitive information whilst holding these positions.

8. A penalty of £200,000 is therefore appropriate, reasonable and proportionate in all the circumstances, including:

(a) the seriousness of the potential effect on the merger inquiry and remedies process of the failure to comply with an Interim Order without reasonable excuse;

(b) the fact that Electro Rent has sufficient administrative and financial resources available to ensure compliance, had engaged external legal advisers and had previously sought derogations from the Interim Order and was therefore aware of its obligation to do so; and

(c) more generally, the financial position of Electro Rent.

B. Factual Background and Relevant Facts

9. 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 to the Enterprise and Regulatory Reform Act 2013 in accordance with section 22(1) of the EA02, to investigate and report on the completed acquisition by Electro Rent of Microlease, Inc. and TEAM (the 'Merger')[4].

10. On 7 November 2017 the CMA made the Interim Order[5] addressed to Electro Rent, Electro Rent Europe and TEAM (the 'Addressees') and on the same day issued directions under the Interim Order for the Parties to appoint a monitoring trustee ('MT').

11. The Appointments were made on 25 January 2018.[6]

[4] Microlease, Inc. was the United States registered operating company and TEAM was the UK registered company.
[5] The Interim Order replaced the Initial Enforcement Order (the 'IEO') made by the CMA on 1 February 2017 at phase 1. The Interim Order ceased to be in force on 19 July 2018 on acceptance of final undertakings pursuant to section 82 of the EA02.
[6] Notices of the Appointments are at Appendix C.

12. On 22 February 2018 the CMA was informed via email that, subject to the CMA's consent, Mr Allen Sciarillo, CFO Americas at Electro Rent would leave Electro Rent on or around 2 March 2018 and Mr John Hafferty, Group CFO at Electro Rent would take over his function, including his interim role as CEO of Electro Rent Europe.[7] The CMA did not object to Mr Hafferty's assuming the functions of Mr Sciarillo.

13. On 17 May 2018 the CMA issued its Final Report which found that the Merger had resulted in a substantial lessening of competition ('SLC') in the market for rental supply of test and measurement equipment in the UK and required the divestment of Electro Rent's UK business in order to remedy the SLC and its adverse effects.

14. On 7 August 2018 following a request from the MT regarding the Appointments, Electro Rent confirmed that Mr Hafferty was appointed as director of Microlease UK and TEAM on 25 January 2018 "for compliance and regulatory purposes".[8] Copies of the executed shareholder resolutions for TEAM and Microlease UK were provided which did not indicate any limitation on the duties of Mr Hafferty as director.

15. In August 2018, the CMA, conducting its own search of Companies House records found that Mr Hafferty had also been appointed as a director of Newmir, Livingston Group, Hamilton, Microlease Europe, Microlease Finance and Livingston subsidiaries of TEAM on 25 January 2018.

16. The consent of the CMA was not sought prior to the Appointments in January 2018. Electro Rent has not disclosed the Appointments in any compliance report filed since 25 January 2018.

17. On 28 August 2018 the CMA wrote to Electro Rent requesting an explanation for the Appointments and why the consent of the CMA was not sought.

18. On 4 September 2018 Electro Rent responded (the 'Response Letter') setting out reasons why the Appointments were made and said it had not failed to comply with the Interim Order as the consent of the CMA was not required prior to making the Appointments.

19. On 18 September 2018 Electro Rent informed the CMA that, subject to the CMA's consent, Mr Hafferty intended to resign his position at Electro Rent and the Appointments and his replacement as interim CFO would not be taking up the Appointments. The CMA gave its consent on 4 October 2018.

[7] Mr Hafferty subsequently on 19 March 2018 was appointed director of Electro Rent Europe NV ('Electro Rent Europe') replacing Mr Sciarillo.
[8] Email dated 7 August 2018 to Monitoring Trustee

The CMA's provisional decision on administrative penalty

20. On 11 October 2018 the CMA issued a provisional decision to impose a penalty on Electro Rent under section 94A of the EA02. Electro Rent was given until 8 November to make oral and written representations. On 5 November Electro Rent advised it would not be making oral representations and on 9 November it advised it would not be making written representations.

21. In light of that response, the CMA has conducted its own review of the provisional decision and further considered points raised by Electro Rent in its Response Letter.

22. On 20 December 2018, the CMA issued a revised provisional decision to impose a penalty on Electro Rent under section 94A of the EA02. Electro Rent was given until 10 January 2019 to make oral and written representations. On 10 January 2019 Electro Rent advised the CMA it would t make neither written nor oral representations on the provisional decision.[9]

23. In accordance with paragraphs 5.2 and 5.9 of the CMA's Guidance,[10] the CMA's General Counsel was consulted on the reasons for, the proposed approach to and level of the penalty.

C. Legal Framework

Relevant legislation and relevant provisions of the Interim Order

Relevant legislation

24. Section 81 of the EA02 provides that where a reference has been made the CMA may for the purpose of preventing pre-emptive action make an order to:

    (a) prohibit or restrict the doing of things which the CMA considers would constitute pre-emptive action;

    (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets;

    (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner;

[9] Email from Latham and Watkins to CMA dated 10 January 2019.
[10] Administrative Penalties: statement of policy on the CMA's approach. CMA 4 January 2014.

(d) do anything which may be done by virtue of paragraph 19 of Schedule 8.

25. Section 80(10) of the EA02 defines "pre-emptive action" as:

"…action which might prejudice the reference concerned or impede the taking of any action under this Part which may be justified by the CMA's decisions on the reference."

26. Section 86(6) of the EA02 provides that an order made pursuant to section 81 is an enforcement order. Sections 94(1) and 94(2) of the EA02 provide that any person to whom such an order relates has a duty to comply with it. A company is a person within the meaning of section 94(2) of the EA02 and Schedule 1 of the Interpretation Act 1978.

27. Section 94A of the EA02 provides:

(1) 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.

(2) A penalty imposed under subsection (1) shall not exceed 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom it is imposed.

28. Section 94A(8) of the EA02 defines "interim measure" as including an interim order made under section 81 of the EA02.

29. Section 94B(1) of the EA02 requires the CMA to prepare and publish a statement of policy on how it uses its powers to impose a financial penalty and how it will determine the level of the penalty imposed.[11]

30. Section 114 of the EA02 provides an appeal mechanism for a person on whom a penalty is imposed.

Relevant case law

31. The meaning of 'pre-emptive action' and role of interim orders in merger control has been considered by the Competition Appeal Tribunal ('CAT') on a number of occasions.

32. In *Stericycle*[12] the CAT considered the meaning of pre-emptive action in section 80(10) of the EA02, and held that "*the word 'might' implies a relatively low threshold of expectation that the outcome of a reference might be*

[11] On 10 January 2014, the CMA published its statement of policy regarding its powers under section 94A of the EA02 amongst other provisions.
[12] Stericycle International LLC v Competition Commission [2006] CAT 21 ('*Stericycle*').

impeded" and that "*the order making power under Section 81 enables the CMA to intervene where it considers that there is at least some risk of that happening*".[13]

33. In *ICE/Trayport*[14] the CAT observed 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*" and held that *"[t]he word 'might' means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The IEO catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the IEO to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment*".[15]

- *Purpose of the Interim Order and relevant provisions*

34. The Supreme Court has held that the "*purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets*".[16] It is of central importance to the UK's voluntary, non suspensory merger regime that interim measures should be effective, particularly where, as in this case, the merger is completed before it is examined by the CMA.

35. The purpose of the Interim Order is to prevent any action which might prejudice the merger investigation (the reference concerned) or impede the taking of any action which may be justified by the CMA's ultimate decision.[17] The broad nature of pre-emptive action is reflected in the similarly broad wording of the Interim Order which the CAT held in *ICE/Trayport "should be interpreted to give full effect to its legitimate precautionary purpose"*.[18]

36. The Interim Order contains positive obligations on the addressees to do certain things as well as obligations to refrain from taking certain actions. As noted above in paragraph 34 the onus is on the addressees to seek consent if their conduct creates the possibility of prejudice or impediment.[19]

37. Where a merger has been completed, it is critical that the acquired business continues to compete independently with the purchaser's and is maintained as a going concern. If the acquired business were to be integrated more than necessary or its viability undermined pending the outcome of the merger

[13] Stericycle at 129.
[14] Intercontinental Exchange v Competition and Markets Authority [2017] CAT 6 ('*ICE/Trayport*').
[15] ICE/Trayport at 220.
[16] *Société Coopérative de Production SeaFrance SA v CMA* [2015] UKSC 75, §4; see also §35.
[17] Sections 80(10) and 81(2) of the Act.
[18] ICE/Trayport at 220.
[19] ICE/Trayport at 220, emphasis added.

investigation, this would risk any action the CMA might need to undertake should it find the merger has resulted in an adverse effect on competition.

38. The relevant provisions of the Interim Order are:

4. Except with the prior written consent of the CMA, Electro Rent Corporation, Electro Rent Europe (including its UK branch) or Test Equipment Asset Management Limited shall not, during the specified period, take any action which might prejudice a reference of the Merger under section 22 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might:

(a) lead to the integration of the Microlease business with the Electro Rent Corporation business;

(b) transfer the ownership or control of the Electro Rent Corporation business or the Microlease business or any of their subsidiaries; or

(c) otherwise impair the ability of the Microlease business or the Electro Rent Corporation business to compete independently in any of the markets affected by the transaction.

5. Further and without prejudice to the generality of paragraph 4 and subject to paragraph 3, Electro Rent Corporation, Electro Rent Europe (including its UK branch) and Test Equipment Asset Management Limited shall at all times during the specified period procure that, except with the prior written consent of the CMA:

(a) the Microlease business is carried on separately from the Electro Rent Corporation business and the Microlease business's separate sales or brand identity is maintained;

(c) except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within the Microlease business or the Electro Rent Corporation business;

(i) no changes are made to key staff of the Microlease business or Electro Rent Corporation business.

6. Electro Rent Corporation, Electro Rent Europe (including its UK branch) and Test Equipment Asset Management Limited shall procure that each of their subsidiaries complies with this Order as if the Order had been issued to each of them.

8. At all times, Electro Rent Corporation, Electro Rent Europe (including its UK branch) and Test Equipment Asset Management Limited shall actively keep the CMA informed of any material developments relating to the Microlease business or the Electro Rent Corporation business, which includes but is not limited to:

    (f) details of key staff who leave or join the Microlease business or the Electro Rent Corporation business.

13. Definitions:

- '**the Electro Rent Corporation business**' means the business of Electro Rent Corporation and its subsidiaries (including Electro Rent Europe);
- '**key staff**' means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business;
- '**the Microlease business**' means the business of Test Equipment Asset Management Limited and its subsidiaries;
- '**the ordinary course of business**' means matters connected to the day-to-day supply of goods and/or services by the Microlease business or Electro Rent Corporation business and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of Test Equipment Asset Management Limited and Electro Rent Corporation.

Ordinary role of directors and directors' duties

39. A company must act through natural persons. Those ultimately responsible for the performance of the company are the directors. The legal duties of directors attach to them personally as do the powers given to directors to act on behalf of the company and these are discharged either alone in the case of a sole director company or collectively by the Board.

40. Generally, the role of directors is to manage the affairs of the company by making decisions regarding its strategic and operational direction and ensuring it has sufficient resources to achieve that. In order to diligently discharge these duties, a director necessarily has access to confidential information.

41. Directors are collectively responsible for the internal governance of the company but delegate day to day tasks to management whilst retaining

overall responsibility and accountability to the shareholders and in some cases creditors, for the viability of the business. In addition to executive responsibility, a director may also hold a management position such as managing director or sales director.

42. The Companies Act 2006 ('CA 2006') in sections 171–181 has codified directors' general duties. Of these, the most significant are:

- Section 172*:* "to promote the success of the company having regard to:

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company

and,

- Section 174: to exercise reasonable care, skill and diligence."

43. Directors are also subject to other duties relating to the preparation of company accounts (section 414) and its strategic report (section 414A) which informs the members/shareholders how the directors have performed their duties under section 172. There are also obligations imposed under other legislation such as the Insolvency Act 1986, duties regarding ensuring the health, safety and welfare of employees at work under health and safety legislation, environmental obligations and obligations under anti-bribery legislation.

44. Directors who breach the general duties, which are owed to the company, are liable to civil consequences (section 178) and breach of other duties may be grounds for disqualification as a director under the Company Directors Disqualification Act 1986.

45. A director is therefore responsible for the company's overall performance. In order to diligently discharge these duties a director must be informed about the affairs of a company and have unrestricted access to the company's

confidential commercial and financial information. This places a director in a unique position of having full knowledge of the company's financial situation and its operational goals and strategies and its weaknesses.

46. The appointment of a director is therefore significant as it has implications for both the person and the running of the company.

D. Legal Assessment

Failure to comply with the Interim Order

47. Electro Rent, TEAM and its subsidiaries failed to comply with the following provisions of the Interim Order:

- paragraph 4, because the Appointments potentially prejudiced the reference and potentially impeded any remedial action the CMA might have been required to take following its decision on the reference and in particular:

  (i) in respect of paragraph 4(a) of the Interim Order, the Appointments potentially risked integration of the Microlease business[20] with the Electro Rent business[21] by the appointment of the CFO of Electro Rent and director of Electro Rent Europe as a director of Microlease UK which is the operational subsidiary of TEAM.

  (ii) in respect of paragraph 4(b) of the Interim Order, the Appointments potentially risked the transfer of ownership or control of the Microlease business by the appointment of the CFO of Electro Rent as a director of TEAM and its operational subsidiary Microlease UK.

  (iii) in respect of paragraph 4(c) of the Interim Order, the Appointments potentially impeded the ability of the Electro Rent business and the Microlease business to compete independently by potentially enabling Electro Rent by the appointment of the CFO of Electro Rent as a director of TEAM and its operational subsidiary Microlease UK to change the commercial strategy of the Microlease business and potentially allowing the Electro Rent business to have access to commercially confidential information of the Microlease business.

- paragraph 5(a), which requires the Microlease business to be carried on separately from the Electro Rent business;

[20] Defined in the Interim Order as the business of TEAM and its subsidiaries which were subject to the Interim Order.
[21] Defined in the Interim Order as the business of Electro Rent Corporation and its subsidiaries.

- paragraph 5(c), which requires that except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within the Microlease business or the Electro Rent Corporation business;

- paragraph 5(i), which requires that no changes are made to key staff[22] of the Microlease business or Electro Rent Corporation business;

- paragraph 6, by Electro Rent and TEAM failing to ensure the prior written consent of the CMA was obtained before the Appointments were made; and

- paragraph 8, which requires Electro Rent to actively keep the CMA informed of any material developments relating to the Microlease business or the Electro Rent business by failing to notify of a change of key staff.

Electro Rent's Submissions

48. Electro Rent submitted in the Response Letter that instead of the ordinary duties of a director, Mr Hafferty was appointed with a specific and restricted role, namely:

    (a) Mr Hafferty did not attend any meetings or receive any notes of any meetings;

    (b) Mr Hafferty did not have any operational or strategic role or decision-making abilities; and

    (c) Mr Hafferty did not receive any commercially-sensitive information whilst holding these positions.

49. Electro Rent submitted no evidence substantiating the restricted nature of the duties in any of the resolutions appointing Mr Hafferty and no evidence of how the limited duties were reconciled with the statutory duties of a director under CA 2006.

50. In respect of the failure to comply with the Interim Order, Electro Rent submitted[23] there was no failure to comply with the Interim Order because:

    (a) the CMA's prior written consent was not required;

[22] Defined in the Interim Order as staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business.
[23] Electro Rent made two submissions: email to MT dated 7 August 2018 and Response Letter dated 4 September 2018.

(b) the Appointments were made for compliance and/or regulatory purposes or were strictly necessary in the ordinary course of business;

(c) the Appointments did not amount to pre-emptive action because:

(i) the duties were limited;

(ii) there has been no integration;

(iii) there has been no transfer of ownership or control;

(iv) there has been no change to management responsibilities or organisational structure;

(v) there has been no change of key staff;

(d) there has been no prejudice to the reference or impediment to the remedies process.

51. The CMA considered each of the submissions first as regards reasons why Electro Rent had not failed to comply with the Interim Order and then as reasons amounting to reasonable excuse.

(a) Prior written consent not required

52. In the Response Letter Electro Rent submitted that that the consent of the CMA was not required prior to making the Appointments as "[t]he Parties are not aware of any provision of the Interim Order that explicitly prevents the Parties from appointing directors to entities that are subject to the Interim Order."[24]

53. As noted in paragraphs 34 to 35 above the purpose of the Interim Order is to prevent pre-emptive action. The diligent discharge of duties by a director, as noted above in paragraphs 39 to 46, requires access to confidential financial and commercial information in order to participate in meetings and make decisions regarding the strategy and operation of the company. Some of these decisions may amount to pre-emptive conduct in the context of an investigation of a completed merger such as decisions regarding integration of the acquired business, how it competes in the market, whether it maintains its pre-merger commercial strategies.

54. When the director appointed to the target company is a senior employee of the acquirer the risk of pre-emptive action is necessarily raised. This is because in diligently discharging the duties of a director, the senior employee

[24] Response Letter, page 3.

will ordinarily have access to the target's confidential information in order to participate in meetings, make decisions regarding the strategy and operations of the company. The risk is that some of these decisions may result in pre-emptive action such as integration with or the transfer of control of the target business to the acquirer which the Interim Order prohibits, without the CMA's prior written consent.

55. One of Mr Hafferty's Appointments was to Microlease UK the operating company of TEAM and Mr Hafferty subsequently also became a director of Electro Rent Europe, the main competitor to Microlease UK. The appointment to Microlease UK was by resolution of the sole shareholder, Newmir Limited represented by Mr Nigel Brown, the Chief Executive Officer of Electro Rent, the employer of Mr Hafferty.

56. The CMA is of the view that in these circumstances, in order to comply with the Interim Order, it was foreseeable that the consent of the CMA was required for Mr Hafferty to be appointed as director of Microlease UK. In any event this should have been notified to the CMA at the time when Electro Rent appointed Mr Hafferty, subject to the CMA's consent, as interim CEO and director of Electro Rent Europe, replacing Mr Sciarillo.

57. The CMA is of the view that in respect of the other Appointments it was also foreseeable that the prior consent of the CMA was required because in order to diligently discharge the duties and responsibilities (as discussed in paragraphs 39 to 46) a director necessarily risks engaging in conduct which might amount to pre-emptive action.

(b) Necessary for compliance and/or regulatory purposes or in the ordinary course of business.

58. Electro Rent submitted in its 7 August response to the MT and again in the Response Letter that the Appointments were made:

(a) for compliance and/or accounting purposes or were strictly necessary in the ordinary course of business;

(b) to enable Mr Hafferty as global CFO of the Electro Rent group (which includes Microlease entities), "to sign contracts and official bank documents, and to file any mandatory government filings, including annual statutory accounts and other official documents"; and

(c) "in the Parties' experience, it is standard market practice for CFOs to be appointed as directors of group subsidiaries to ensure that statutory accounts are prepared in accordance with local statutory requirements and, in the case of Electro Rent, reconciled with US accounting rules".

59. It is not in dispute that Electro Rent was required to ensure compliance with Unites States' accounting rules. However, Electro Rent has provided no evidence that regulatory compliance and execution of documents could only have been achieved by making the Appointments. Further, Electro Rent has not submitted any supporting evidence of "standard market practice" to appoint the CFO of an acquirer as director of the target and its subsidiaries to ensure regulatory compliance or to enable the execution of contracts, bank documents and the filing of mandatory government filings.

60. If requested to give a derogation, the CMA could have examined if it were genuinely necessary for Mr Hafferty to be appointed as a director of TEAM and its subsidiaries in order to sign documents and make regulatory filings. If it were indeed necessary, the CMA would have weighed these considerations against the realistic risks of pre-emptive action. However, in the absence of any such request for a derogation these arguments do not alter the CMA's assessment that a breach occurred.

61. The CMA notes that Electro Rent does not intend to make equivalent appointments in respect of Mr Hafferty's replacement indicating that accounting/compliance and execution of contractual and bank documents may be satisfied in another way.[25]

62. Electro Rent submitted in the alternative the Appointments were strictly necessary in the ordinary course of business as defined by the Interim Order.

63. The Interim Order defines "ordinary course of business" as "matters connected to the day-to-day supply of goods and/or services by the Microlease business or Electro Rent Corporation business and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of Test Equipment Asset Management Limited and Electro Rent Corporation".

64. The CMA has found that the Appointments were not necessary in the ordinary course of business as defined by the Interim Order as the appointment of a director is not a matter "connected to the day-to-day supply of goods and/or services by the Microlease business". Those matters are delegated to management and sales representatives and are not performed by directors. Electro Rent has not demonstrated why the Appointments were "strictly necessary" for this purpose and the fact that it is not intended to make equivalent appointments in respect of Mr Hafferty's successor provides clear indication to the contrary. Moreover, the appointment of the CFO of Electro Rent as a director of the target and its subsidiaries in circumstances where the latter was required to be maintained as an independent competitor clearly

[25] Email dated 18 September to CMA.

falls outside the definition of ordinary course of business and on the contrary amounts to "matters… related to the post-merger integration".

(c) Not pre-emptive action.

65. Electro Rent submitted in the Response letter that the Appointments did not amount to pre-emptive action because:

(i) the duties were limited;

(ii) there has been no integration;

(iii) there has been no transfer of ownership or control;

(iv) did not result in a change to management responsibilities or organisational structure;

(v) was not a change of key staff;

- *Limited duties*

66. Electro Rent submitted in the Response Letter that the duties associated with the Appointments were limited:

(i) Mr Hafferty did not attend any meetings or receive any notes of any meetings;

(ii) Mr Hafferty did not have any operational or strategic role or decision-making abilities; and

(iii) Mr Hafferty did not receive any commercially-sensitive information in relation to these positions.

67. The CMA does not accept that the restricted nature of Mr Hafferty's duties obviates the need for prior consent. These are unusual restrictions to the ordinary general duties of a director as discussed in paragraphs 39 to 46. The CMA would not be aware of the unusual nature of the duties without notification making the need for prior consent foreseeable.

68. Had Electro Rent requested consent, these would be matters that the CMA would consider when weighing the obvious risks of pre-emption associated with the Appointments. Further, had the CMA consented to the Appointments, it would most likely have instructed the MT to monitor to ensure the safeguards were being adhered to.

- *No integration and no transfer of ownership or control*

69. Electro Rent submitted in the Response Letter that the Appointments had not resulted in the integration of the Microlease business with the Electro Rent business (as defined by the Interim Order) or the transfer of ownership or control of the Microlease business and therefore the Appointments did not amount to pre-emptive action and Electro Rent had not failed to comply with the Interim Order.

70. As stated above, at paragraphs 34-35, the purpose of the Interim Order is to guard against pre-emptive action which paragraph 4 of the Interim Order provides is conduct which ***might*** lead to integration of the acquired business with the acquiring business, or the transfer of ownership or control of the acquired business to the acquiring business, or otherwise impair the ability of the acquired business to compete independently with the acquiring business.

71. The CMA considers that the appointment of the CFO of Electro Rent as a director of TEAM and its subsidiaries, where in most cases he was the only other director, raised a real risk of pre-emptive action because the ordinary role of a director as explained in paragraphs 39 to 46 is to make decisions based on confidential information about the direction of the company. Accordingly, just because those risks are not realised, does not obviate the need to seek consent because, as noted in *ICE/Trayport*, it is the possibility of pre-emptive action which triggers the need to seek consent.

72. Accordingly, the CMA is of the view that making the Appointments raised the possibility of pre-emptive action and it was foreseeable that the consent of the CMA would be required prior to the Appointments being made.

73. Similarly, the CMA does not accept Electro Rent's submission that because none of the risks associated with pre-emptive action were realised on the facts, Electro Rent did not fail to comply with the Interim Order.

- *No change to management responsibilities or organisational structure and not a change of key staff*

74. Electro Rent submitted that the Appointments had not led to a change of management responsibilities or organisational structure and because Mr Hafferty was not included on a list of Microlease key staff, did not result in a change of key staff.

75. The appointment of Mr Hafferty the CFO of Electro Rent and director of Electro Rent Europe as a director of TEAM and its subsidiaries created a direct structural link between the two businesses which is precisely the type of

link that the Interim Order is intended to prevent. Being a director of Electro Rent Europe Microlease UK's main competitor and a director of Microlease UK, would potentially enable Mr Hafferty to participate in and potentially influence the decisions of both companies.

76. The CMA is of the view that the potential for pre-emptive action arising from the ordinary role of a director and a director's duties as set out in paragraphs 39 to 46, make it foreseeable that the Appointments required the prior written consent of the CMA.

77. The CMA does not accept Electro Rent's submission in the Response Letter that because Mr Hafferty was not on the list of identified Microlease key staff he was "obviously not" Microlease key staff.

78. The definition of 'key staff' in paragraph 13 of the Interim Order includes those with executive responsibility. As noted in paragraph 39, a director has executive responsibility and may also have management responsibility. The CMA is therefore of the view that the Appointments resulted in a change of key staff within the Microlease business.

(d) No prejudice to the reference or impediment to the remedies process

79. Electro Rent submitted in the Response Letter that the Appointments had not impaired the ability of the Microlease and Electro Rent businesses to compete independently or impeded the remedies process.

80. The CMA is of the view that the appointment of Mr Hafferty the CFO of Electro Rent and a director of Electro Rent Europe, Microlease UK's main competitor, as a director of TEAM and its subsidiaries created a direct link between the two businesses raising the risk of pre-emptive action.

81. Whether or not the action taken did or did not lead to prejudice of the investigation or remedies process being impeded is not determinative of whether a breach has occurred. As noted by the CAT in *ICE/Trayport,* it is the possibility of pre-emptive action that puts the onus on the addressees of an Interim Order to seek the consent of the CMA. Accordingly, the CMA is of the view that the Appointments raised the possibility of prejudice to the reference or impediment to the remedies process and the consent of the CMA was required.

Conclusion on failure to comply with the Interim Order

82. The CMA is of the view that it should have been obvious to Electro Rent that the appointment of its CFO as a director of TEAM and its subsidiaries, in

particular of its main rival in the UK market Microlease UK, was a matter that "might arouse the reasonable concern of the CMA".[26]

83. The CMA is of the view that by failing to seek the written consent of the CMA prior to making the Appointments, Electro Rent failed to comply with paragraphs 4, 5(a), (c) and (i), 6 and 8(a) of the Interim Order.

Without reasonable excuse

84. Section 94A(1) of the EA02 provides that penalties can only be imposed if a failure to comply is '*without reasonable excuse*'. The statute does not define "reasonable excuse".

85. The CMA's Guidance[27] provides:

The circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond [the person's] control has caused the failure and the failure would not otherwise have taken place.[28]

86. More generally, once a breach of an Interim Order is established, the person who has committed the breach bears the evidential burden of setting out a case for reasonable excuse. Any excuse must be objectively reasonable.[29] The CMA will consider any arguments put forward as to reasonable excuse on the facts of the case. However, Electro Rent made no separate submissions on reasonable excuse.

87. The CMA has carefully considered whether Electro Rent's submissions on failure to comply with the Interim Order, set out at paragraph 48, amounted to reasons why Electro Rent considered it had a reasonable excuse not to comply with the Interim Order.

88. The CMA is of the view that each of the reasons put forward are matters that do not amount to reasonable excuse. None of the reasons disclose a genuinely unforeseeable or unusual event and/or an event beyond Electro Rent's control causing it to fail to comply with the Interim Order, nor do they provide an alternative basis for finding a reasonable excuse.

[26] *ICE/Trayport* at 220.
[27] Administrative Penalties: Statement of Policy on the CMA's approach. CMA 4 January 2014.
[28] Guidance at 4.4.
[29] Electro Rent Corporation v Competition and Markets Authority [2019] CAT 4 at 69 and 112.

89. Electro Rent made no submissions on a reasonable excuse for failing to comply with the Interim Order.

90. The CMA is therefore of the view that Electro Rent had no reasonable excuse for the failure to comply with the Interim Order as identified above.

Conclusion on statutory requirements for imposing a penalty under section 94A

91. The CMA has concluded in paragraphs 53 to 83 that Electro Rent has failed to comply with the Interim Order and in paragraphs 84 to 89 that it has no reasonable excuse for the failure to comply.

92. The CMA therefore concludes that the statutory requirements for imposing a penalty under section 94A of the EA02 are met.

Appropriateness of imposing a penalty at the level proposed

Appropriateness of imposing a penalty

93. Having had regard to its statutory duties and the Guidance, and having carefully considered all relevant facts, the CMA considers that the imposition of a penalty is appropriate. In reaching this view, the CMA has had regard to the need to achieve general deterrence, as well as the seriousness of the breaches in this case.

General deterrence

94. The CMA considers that it is of utmost importance to the UK's voluntary, non-suspensory regime that interim measures should be effective, particularly in the small number of completed mergers which the CMA identifies as warranting review. Interim orders serve a particularly important function where, as in this case, the merger was completed. Their function is to prevent conduct that might prejudice a reference or impede action justified by the CMA's final decision. The purpose of the Interim Order, as recently noted by the CAT, is precautionary, guarding against the possibility of pre-emptive action.[30]

95. It is therefore important for the CMA's ability to conduct effective and efficient investigations that parties have due regard to the requirements imposed on them by an Interim Order and to emphasise to businesses to whom the UK's

[30] ICE/Trayport at 220 and see paragraphs 53 to 61.

merger regime applies the importance of compliance and the seriousness of a failure to comply without a reasonable excuse

Seriousness of the breach

96. Electro Rent's failure to comply with the Interim Order was significant and had a potentially adverse effect on the merger inquiry. The diligent discharge of the duties normally associated with a director requires a director to participate in meetings and take decisions affecting the strategic direction of a company and to have access to commercially confidential information. This is conduct which carried a risk of prejudice to the merger inquiry and risked impediment to the remedies process.

97. The CMA is of the view that because of the precautionary nature of the Interim Order, it is necessary to ensure compliance, to impose an administrative penalty even where, as in this case, no actual harm to the merger inquiry or the remedies process has resulted from the failure to comply. It is also consistent with the statutory definition of pre-emptive action being action which might prejudice the reference or impede the taking of action justified by the CMA's ultimate decisions on the reference.[31] The CMA therefore considers that it was foreseeable at the time that the Appointments were made that the CMA's consent was required, and Electro Rent's breach is therefore a fundamental breach of the obligations imposed under the Interim Order.

98. Electro Rent's failure to comply was a flagrant breach as Electro Rent is a well-resourced company which had access to legal advice and was aware of its obligations to comply with Interim Order. Furthermore, the breach was committed by the CEO who was also a director of the entities and responsible for the fortnightly compliance statements and the CFO.

Appropriateness of the amount of penalty proposed

99. Consistent with its statutory duties and the Guidance[32], the CMA has assessed all relevant circumstances to determine an appropriate level of penalty. It has also taken account of the following aggravating factor in line with the Guidance, which suggests a higher penalty.

[32] Guidance at 4.11.

Aggravating factor

100. The failure to comply was due to the acts and omissions of the senior management of Electro Rent. These include the CEO who signed the compliance statements for Electro Rent and the CFO. These were senior officers and as submitted by Electro Rent, the CFO was responsible for amongst other matters regulatory compliance.

101. However, whilst the CMA has the power to impose a penalty of up to 5% of global turnover (which in this case would amount to approximately £11.5 million), the CMA does not consider the breaches are so serious as to warrant a penalty at the upper end of the scale. In reaching that view the CMA has taken account of the following mitigating factors, in line with the Guidance.

Mitigating factors

102. Although the extent of potential adverse effects on the merger inquiry of the Appointments could have been significant, no actual adverse effect has arisen as a result of the failure to comply. This is because of the restricted nature of the duties associated with the Appointments, namely:

(a) Mr Hafferty does not attend any meetings or receive any notes of any meetings;

(b) Mr Hafferty does not have any operational or strategic role or decision-making abilities; and

(c) Mr Hafferty does not receive any commercially-sensitive information in relation to these positions.

103. Although the CMA has taken account of the representations made by Electro Rent in relation to the above as mitigating factors, the CMA notes that it has not been provided with any contemporaneous evidence supporting the fact that such restrictions were put in place at the time the Appointments were made nor any contemporaneous evidence that steps were taken from the outset to monitor and ensure compliance with such restrictions.

104. The CMA has also had regard to the financial resources available to Electro Rent. Electro Rent's group worldwide turnover (including Microlease and Microlease, Inc.) was approximately £234 million in FY 2016, its group UK turnover was approximately £21 million, and its group worldwide operating profit was approximately £10 million. This indicates Electro Rent has

significant financial resources available and would not be materially affected by a penalty of £200,000.[33]

105. In all the circumstances, the CMA considers that the imposition of a penalty of £200,000 is appropriate on the basis that it: (i) would reflect the seriousness of the breach and the potential impact on the CMA's investigation; (ii) would act as a deterrent to other companies and to Electro Rent in the future; and (iii) is substantially below the statutory maximum of 5% of Electro Rent's combined global turnover and is not disproportionate in this case.

106. In all the circumstances, the CMA finds that the imposition of a penalty of £200,000 (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 of EA02.

Signed by authority of the CMA

Andrea Gomes da Silva,
Executive Director, Markets and Mergers
acting for and on behalf of the Competition and Markets Authority
12 February 2019

[33] 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).

Appendix A:

- CMA letter dated 28 August 2018

Appendix B:

- Email to MT
- Response Letter

Appendix C:

- Notices of the Appointments