Merger Control: the issue with not holding your companies separate after a ‘hold separate’

Hold separate orders are known for being a burden on businesses which wish to start integrating post-completion. The CMA’s recent penalties should remind businesses why they need to be compliant.

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In December 2018 the Competition and Markets Authority (**CMA**) fined Ausurus Group Ltd and its subsidiary European Metal Recycling Limited (together, **Ausurus**) £300,000 for failing to comply with an Initial Enforcement Order (**IEO**). This is the second instance in six months of the CMA penalising a company for breaching an IEO and demonstrates the increasing readiness of the CMA to impose fines on companies for breaching the administrative process.

Initial Enforcement Orders

Unlike most jurisdictions around the world, the UK has a voluntary merger control regime. This means that parties to mergers which meet the jurisdictional thresholds can choose to either notify the transaction to the CMA or complete without notification. However, completing without notification risks the CMA launching a merger investigation on its own initiative. The CMA's Merger Intelligence Committee monitors the news and specialist publications for un-notified mergers that may warrant investigation for this purpose (for more information see our article on the risks of not notifying here).

An IEO may be imposed by the CMA when it is investigating completed mergers (or mergers that it considers may be at risk of completing during the course of the investigation). IEOs generally prevent the parties from integrating any further, require the businesses to be run separately and impose reporting requirements on the companies to regularly confirm to the CMA that they are abiding by the order. This is inevitably a significant practical burden on the merged company that is likely to want to start (or, often worse, continue) the integration process.

Ausurus / CuFe Investments

In August 2017 Ausurus acquired CuFe Investments Limited and its subsidiary Metal & Waste Recycling Limited (together, **CuFe**) without notifying the CMA. On its own initiative the CMA imposed an IEO on the companies in September 2017 and a Phase I merger investigation was launched on 27 November 2017. This was followed by a Phase II investigation and a finding in August 2018 that the merger had resulted, or would be expected to result, in a substantial lessening of competition. Ausurus was required to sell five of the scrap metal recycling yards purchased from CuFe.

The IEO required the two companies to remain separate whilst the investigation was ongoing and prevented any further integration. Specifically the order prohibited any action which might lead to the integration of the two businesses; transfer the ownership or control of either business or any of their subsidiaries; and any action which would impair the ability of the two businesses to compete independently. Ausurus was required to provide ongoing compliance statements to the CMA every two weeks.

During the Phase II investigation, it became clear to the CMA that the two companies were breaching the IEO. The customers of CuFe had been directed to make payments into bank accounts of the wider Ausurus group and the Ausurus group was making payments to CuFe's suppliers without consent from the CMA. In addition, the Managing Director of Metal & Waste Recycling Limited was not clear on the extent of his delegation of authority and was unsure of what decisions he was able to make with regards to matters such as pay or bonuses without permission from Ausurus. Both instances were highlighted to the CMA by the Monitoring Trustee in March 2018 following its appointment after the start of Phase II.

In December 2018 the CMA decided to fine Ausurus and MWR £300,000 for failing to comply with the IEO without reasonable excuse. The CMA considered that the use of Ausurus bank accounts for customer and supplier facing payments in and out of the CuFe business was clearly a step towards integration that also might prejudice the ability of CuFe to compete independently by undermining its brand identity and its goodwill. The failure to clearly delegate authority to management of Metal & Waste Recycling Limited was also seen as failure to take adequate steps to ensure the businesses were carried on separately and CuFe was maintained as a going concern.

Electro Rent/ Microlease Inc.

The CMA imposed a similar penalty of £100,000 in June 2018 on Electro Rent Corporation (**Electro Rent**) for its breach of an IEO during the investigation of its completed acquisition of Microlease, Inc and Test Equipment Asset Management Limited.

In this instance the CMA found that Electro Rent had failed to comply with the IEO by not seeking the CMA’s consent before issuing a notice to exercise a break option (terminating the lease over the only premises it and its subsidiary had in the UK) and negotiate new heads of terms with the landlord. The CMA considered that issuing the notice could constitute pre-emptive action and impede any remedial action, this was particularly the case as the parties were aware that the potential divestment of Electro Rent's UK branch, including leasehold property rights, were being considered as a potential remedy to the CMA's provisional finding of a substantial lessening in competition (**SLC**).

Lessons Learnt

Both instances demonstrate an increasing readiness by the CMA to impose penalty notices on companies which breach a CMA order, highlighting that IEO’s must be taken seriously.

In both instances, the mergers resulted in the findings of an SLC at Phase II requiring remedies for the mergers to be permitted. The breach of an IEO in these circumstances could potentially make the CMA's job significantly harder and in imposing penalties the

CMA considered the breaches to be a serious failure to comply with the IEO without any reasonable excuse for non-compliance. In both instances the CMA was of the view that the imposition of a penalty was required to deter future breaches as IEO's formed an important part of the UK's merger control regime.

These penalties highlight the importance of companies considering a merger to carefully consider the risks of deciding not to make a notification to the CMA (with specialist competition law advice) and, if a decision to risk it is made, making sure that the merged entity is in a good position to carefully comply with any subsequent IEO.