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CMA Charges PayPal with Biggest Fine So Far for Single Breach of UK Merger Rules

On 24 September 2019, the UK antitrust authority imposed a £250k fine on PayPal in connection with its acquisition of iZettle, a competing Swedish payment systems provider. This is the highest fine levied to date for a single violation of UK merger control rules. The fine came after the Competition and Markets Authority ("**CMA**") held that PayPal had breached an initial enforcement order ("**IEO**") by contacting UK-based customers about its acquisition during the CMA's merger review. The case illustrates that despite the UK being a voluntary filing jurisdiction, merging parties may need to be careful when engaging in post-close integration while an IEO is in effect. The case further sheds light on the limits of the otherwise rather liberal approach of the CMA with respect to the extra-territorial reach of their jurisdiction.

The CMA fine comes only months after the CMA imposed a £146k fine on Nicholls' Fuel Oils in July 2019[1] and a £200k fine on Electro Rent in February 2019[2], with both fines coming for failure to abide by the terms of an IEO.

The CMA's Investigation

In July 2018, the CMA launched an investigation into the acquisition of iZettle by PayPal. Both companies are payment service providers headquartered in the US and Sweden respectively. Prior to submitting a formal notification in September 2018, PayPal (lawfully) completed the transaction. In line with its standard practice, the CMA imposed an IEO on PayPal, instructing it to freeze the integration of the two companies.[3] By way of an IEO the CMA prevents merging parties from taking "pre-emptive action" that might prejudice the outcome of the CMA's investigation. Following an amendment of the Enterprise Act ("**EA02**") in April 2014, the CMA now customarily imposes IEOs (as opposed to the previous practice of negotiating initial undertakings with the merging parties).[4]

PayPal submitted a derogation request to engage in international integration activities that included conducting cross-selling pilot campaigns involving its non-UK businesses. The CMA granted the

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1 *CMA's Penalty Notice in PayPal Holdings, Inc/iZettle AB merger inquiry* ("**CMA's Penalty Notice**") in *Nicholls' (Fuel Oils) Limited/DCC Energy Limited in Northern Ireland*.

2 CMA's Penalty Notice in *Electro Rent Corporation/Test Equipment Asset Management and Microlease (upheld on appeal).*

3 Initial Enforcement Order issued by the CMA under section 72 of the EA02 on 19 September 2018 in relation to *CMA's Penalty Notice in PayPal Holdings, Inc/iZettle AB merger inquiry.*

4 In the previous regime, the OFT was agreeing to/negotiating initial undertakings with the merging parties. In addition, the CMA is no longer required to establish that (i) the transaction gives rise to a relevant merger situation, (ii) the merging parties are contemplating pre-emptive action, or (iii) there are preliminary indications of competition concerns, before imposing an IEO.

derogation on the basis that any of these international activities (i) should not affect the UK and (ii) were confined to non-UK jurisdictions.[5] The Monitoring Trustee - which was appointed upon the opening of an in-depth Phase 2 investigation - alerted the CMA that beyond the granted derogation regarding ex-UK activities, PayPal had conducted cross-selling pilot campaigns intended to target customers in France and Germany that led to it contacting 76 out of 221 customers with online and/or offline presence in, *inter alia*, the United Kingdom. Online presence was defined as having a domain name ending with "co.uk" or "en-gb", whereas "offline" was intended to capture customers that have a physical store/sales point in the UK. Further, as part of the campaign, in one of the waves of correspondence with customers, the logos of PayPal and iZettle were separated by a "+" sign, which "may suggest that the two companies operated together".[6]

In its representations, PayPal submitted, among other things, that UK customers would have had technical difficulties when opening a relevant webpage in French or German with country-specific information to sign up for an iZettle reader.[7] Moreover, PayPal claimed that it seemed highly unlikely that the emails sent to French and German customers would have made their way to UK-based customers with sufficient language skills to understand the content of the emails.[8] The arguments raised by PayPal were rejected by the CMA with the explanation that the IEO was breached by the fact that potential UK customers were contacted regardless of whether they may then have had difficulties signing up for an iZettle reader directly from the landing pages to which they were directed.[9]

Based on the Google Analytics reports, PayPal submitted that there were fewer than 75 instances of the campaign pages being accessed by unique users in the UK, which represents only 0.01% of the emails sent across the whole campaign.[10] Despite these unique numbers and hard evidence of how many customers ultimately landed on the campaign page, the CMA further rejected PayPal's argument that a "materiality threshold" should apply when determining whether the IEO had been breached. Referring to the Competition Appeal Tribunal's ("**CAT**") judgment in *InterContinental Exchange* and *Electro Rent,* the CMA re-emphasized the CAT point that a "pre-emptive action" should be interpreted broadly to satisfy the purpose of an IEO.[11]

Interestingly, with regard to materiality, it was the Monitoring Trustee, who agreed with PayPal and addressed the number of unique hits in the UK, questioning the level of proportionality applied to this issue. Ultimately, the Monitoring Trustee concluded that the figures were too minimal to pose a serious concern. Nonetheless, this case shows that the threshold for materiality is extremely low and very little is required to trigger it.

Unfortunately, in its decision, the CMA provides little to no guidance as to what PayPal could have done better to avoid the penalty. The reality is that, contrary to what the CMA claimed, PayPal had, indeed, put safeguards in place to ensure that the pilot campaign did not affect any UK-based customers. PayPal had (i) only targeted existing PayPal customers in France or Germany with a billing address in France or Germany; (ii) sent the emails to the targeted customers only in French or German and further designed

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5 CMA´s Penalty Notice, paras 16-25.

6 Ibid, para 48.

7 Ibid, para 90.

8 Ibid, para 86.

9 Ibid, para 90.

10 Ibid, para 103.

11 *Intercontinental Exchange v CMA* [2017] CAT 6; *Electro Rent Corporation v CMA* [2017] CAT 4.

the sign-up process for the purchasing of the card reader to be in French or German; (iii) advertised the prices in the emails in Euros, indicating that this campaign was not targeted to the UK; and (iv) conducted in-depth KYC checks to verify that the customers were based in the local jurisdictions[12].

Although the CMA accepted that PayPal had not intentionally breached the IEO[13], PayPal's argument that it had a "reasonable excuse" for carrying out the activities in question or that it was never "its intention to target UK potential customers" was not recognised, as the failure was not caused by a significant and genuinely unforeseeable or unusual event.[14] In the Penalty Notice, the CMA found that the failure to comply with the IEO was "*of a serious nature*"[15] and repeatedly noted *"[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"*[16]. Further, PayPal was negligent "*in the manner in which it planned and conducted its cross-selling pilot campaigns*".[17]

The fine level was well below the maximum fine possible, i.e. up to 5% of the total value of the global turnover of the enterprises owned or controlled by PayPal.[18] Interestingly, the CMA recognized in its Penalty Notice that, although this is the highest fine to date, it is the lowest fine by proportion of profits after tax and is *"therefore not disproportionate in terms of the level of penalties imposed in previous cases"*[19]. It is further worth noting that the CMA considered the fact that they incurred costs, due to the investigation of the case, as a strong aggravating factor when assessing the level of the fine. However, oddly, the CMA did not accept PayPal´s incurred costs complying with the IEO as a mitigating factor for calculation purposes.[20]

The PayPal case illustrates how rigid the CMA could be when it comes to UK-related integration activities of merging parties, and yet careful not to restrict any integration outside its very own jurisdiction.

Another Case of a Gun-Jumping Violation

The CMA, alongside other antitrust regulators[21], has been taking an increasingly tough stance towards activities that are broadly described as "gun-jumping":

- In July 2019, the CMA imposed a fine of £146k on **Nicholls' (Fuel Oils)** for breaching an IEO during its review of Nicholls's acquisition of DCC Energy Limited[22]. The CMA found that Nicholls had failed to comply, without reasonable excuse, with the IEO by: (1) relocating the staff of the

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12 CMA's Penalty Notice, para 83ff.

13 Ibid, para 150.

14 Ibid, paras 125-130.

15 Ibid, para 138.

16 ICE/Trayport at 220.

17 CMA's Penalty Notice, paras 150-155.

18 Cf., Section 94A(2) of EA02.

19 CMA's Penalty Notice, para 179.

20 Ibid, paras 171-173.

21 At a European level, the European Commission fined Canon €28 million in 2019 for completing its acquisition of Toshiba Medical Systems Corporation through a two-step warehousing structure before obtaining the required clearance, whilst in 2018, it fined Altice a record fine of €124.5 million for breaching its standstill obligation.

22 CMA's Penalty Notice in *Nicholls' (Fuel Oils) Limited/DCC Energy Limited in Northern Ireland*.

acquired DCC business to Nicholls' premises; (2) using a Nicholls mini-tanker and employees to deliver oil to customers of the acquired DCC business; and (3) failing to provide compliance statements to the CMA on time.

- In March 2019, the CMA imposed a fine of £120k on **Vanilla Group ("JLA")** for breaching an IEO during its review of the acquisition of Washstation by Vanilla Group.[23] The CMA found that JLA entered into an agreement with a third party to sell certain assets that it was due to acquire under the deal under review by the CMA.

- In February 2019, the CMA imposed a fine of £200k on **Electro Rent** for failure to comply with the IEO in the context of Electro Rent's acquisition of Microlease, which the CMA cleared conditionally in February 2019, subject to Electro Rent selling its UK division to a third party.[24] Electro Rent breached the IEO by serving a break notice terminating the lease of its sole UK premise, despite the CMA cautioning the company during a meeting that this lease would form part of the sale of the business to a third party.

- In December 2018, the CMA imposed two fines (£150k each) on **Ausurus** for breaching an IEO in the course of the acquisition of Metal & Waste Recycling by Ausurus.[25] Ausurus (i) directed the customers and suppliers of Metal & Waste Recycling to make payments into bank accounts of Ausurus without seeking the consent of the CMA; and (ii) failed to give the managing director of Metal & Waste Recycling a clear delegation of authority to take decisions without consulting or obtaining the permission of Ausurus.

Practical Implications

The use of IEOs by the CMA has become a hot topic. Where the CMA investigates a completed merger, the regulator will usually impose an IEO. When an IEO has been imposed, the CMA may grant derogations so that merging parties can undertake certain actions that would otherwise be prohibited by the IEO.[26] Such derogations are of significant practical importance, especially given that the majority of IEOs are based on a standard template for IEOs, i.e. due to time constraints they are not tailored to the specifics of the case at hand.[27]

There is no comprehensive list indicating which type of derogations could be acceptable. One the one hand, the CMA has granted numerous derogation requests in prior cases in relation to, *inter alia*, (i) exclusion from the scope of the IEO of parts of one party's business that are not competing with the other party's business[28], (ii) replacement of key staff[29], (iii) payroll, HR, and other back-office functions[30], (iv)

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23 CMA's Penalty Notice in *Vanilla Group/Washstation.*

24 CMA's Penalty Notice and Final Undertakings in *Electro Rent Corporation/Test Equipment Asset Management and Microlease* (upheld on appeal).

25 CMA's Penalty Notice in Ausurus Group/Metal&Waste Recycling.

26 For further information, please see Chapter 3 of CMA's Guidance on Interim Measures in Merger Investigations, 28 June 2019 ("**Guidance on interim measures**") and CMA's Template Derogation Letter ("**Derogation Letter**").

27 Guidance on interim measures, para 2.31 and the Derogation Letter.

28 Guidance on interim measures, para 3.43 ff.

29 Ibid, para 3.57 ff.

30 Ibid, para 3.30. See, for example, *Euro Car Parts/Andrew Page* and *Tayto Group/The Real Pork Crackling Company*.

access to the acquiring business's group credit arrangements or funding[31], (v) access to the acquirer's group insurance coverage[32] and (vi) legal services[33]. On the other hand, the CMA has made clear that derogations are unlikely to be granted in relation to (i) IT, (ii) customer-facing functions such as sales and marketing, or (iii) R&D and (iv) technological support.[34]

As in the PayPal/iZettle case, the CMA is generally inclined to grant derogations for ex-UK integration steps, especially where the CMA investigation is at an advanced stage and it is apparent that the non-UK business has no material connection to the UK.[35]

Key takeaways:

- We expect the CMA to remain open to grant derogations to IEOs, especially where the CMA relies on a standard IEO that has not been tailored to the case at hand.
- Once granted, companies need to strictly adhere to the derogation in question.
- Given that the extensive safeguards PayPal had put in place were considered insufficient by the CMA, it is worth exploring whether an appropriate and well-structured disclaimer in any correspondence with third parties outside the UK would eliminate the CMA's concerns.
- Take extra care when including the logo of the merging parties in any email correspondences. It needs to be ensured that that they are perceived as distinct and separate entities.
- When engaging in ex-UK integration steps (absent an IEO prohibiting those), merging parties need to ensure that such integration measures have no effect on the UK market. In light of the CMA (regrettably) not allowing for some form of "materiality threshold", merging parties need to be mindful that measures with small and/or unintended effect on the UK market could be caught.
- Providing assurances about compliance with an IEO, which in the end are not met, could be seen as an aggravating factor when the CMA assesses the level of the fine.
- In the course of an investigation, the CMA would most likely disregard arguments pertaining to technical difficulties (including lack of language skills) or the absence of an intention/strategy to carry out particular activities.

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31 Guidance on interim measures, para 3.30. See, for example, *Valeo Foods/Tangerine Confectionery, CareTech Holdings/Cambian Group, Rentokil Initial/MPCL, Tobii/Smartbox and Global Radio Services/Semper Veritas (Exterion)*.

32 Guidance on interim measures, para 3.30. See, for example, *PayPal/iZettle*, and *CareTech Holdings/Cambian Group*.

33 Guidance on interim measures, para 3.30. See, for example, *Interserve/Initial Facilities*.

34 Guidance on interim measures, para 3.31.

35 Ibid, para 3.52. See, for example, *ProStrakan/Archimedes Pharma* and *VTech/LeapFrog*.

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