
STATUTORY INSTRUMENTS

2019 No. 1490

COMPETITION

The Public Interest Merger Reference (Gardner Aerospace Holdings Ltd. and Impcross Ltd.) (Pre-emptive Action) Order 2019

Made - - - - at 12.05 p.m. on 5th December 2019

Coming into force - - at 12.10 p.m. on 5th December 2019

To be laid before Parliament

The Secretary of State has reasonable grounds for suspecting that it is or may be the case that as a result of the proposed acquisition by Gardner Aerospace Holdings Limited of Impcross Limited arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct.

An intervention notice in respect of the relevant merger situation concerned, given by the Secretary of State on 5th December 2019 under section 42 of the Enterprise Act 2002(a), is in force.

In the opinion of the Secretary of State the exercise of the powers as set out in this Order is required for the purpose of preventing action which might prejudice a reference of the matter to the Competition and Markets Authority under section 45 of the Enterprise Act 2002(b) or impede the taking of any action under Part 3 of that Act which may be justified by the Secretary of State's decisions on the reference.

The Secretary of State, for the purpose of preventing pre-emptive action, in exercise of the powers conferred by sections 86(1) and (3), 87(1) and (3) and 124(2)(b) of, and paragraph 2(2) of Schedule 7 to, the Enterprise Act 2002(c), makes the following Order:

Citation and commencement

1. This Order may be cited as the Public Interest Merger Reference (Gardner Aerospace Holdings Ltd. and Impcross Ltd.) (Pre-emptive Action) Order 2019 and comes into force at 12.10 p.m. on 5th December 2019.

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- (a) 2002 c.40; section 42 was amended by paragraphs 59 and 82 of Schedule 5, and paragraphs 15 and 21 of Schedule 15, to the Enterprise and Regulatory Reform Act 2013 (c. 24) and S.I. 2011/1043; it is also prospectively amended by S.I. 2019/93.
- (b) Section 45 was amended by paragraphs 59 and 85 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013; there is another amendment to section 45 but it is not relevant to this Order.
- (c) Paragraph 2(2) of Schedule 7 was amended by paragraphs 59 and 160 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

Interpretation

2.—(1) In this Order—

“the Act” means the Enterprise Act 2002;

“Gardners” means Gardner Aerospace Holdings Limited (a company incorporated in England and Wales, registered number 07978111), and any body corporate which is interconnected with Gardner Aerospace Holdings Limited (other than Impcross);

“the Gardners business” means any enterprises carried on by Gardners;

“Impcross” means Impcross Limited (a company incorporated in England and Wales, registered number 02909757);

“the Impcross business” means any enterprises carried on by Impcross;

“key staff”, in relation to a business, means—

- (a) staff in positions of executive or managerial responsibility or whose performance affects the viability of the business; or
- (b) staff whose work for the business involves creating, developing, understanding, using or applying any of the information referred to in article 8;

“the ordinary course of business” means matters connected to the day-to-day supply of goods or services by Impcross and does not include matters involving significant changes to the organisational structure of the Impcross business or related to the integration of the Impcross business and the Gardners business;

“working day” means any day which is not—

- (a) a Saturday, a Sunday, Good Friday or Christmas Day, or
- (b) a day which is a bank holiday in England and Wales.

(2) For the purposes of this Order, one person (A) is an “affiliate” of another person (B), if any enterprise that A carries on from time to time and any enterprise that B carries on from time to time would be regarded as being under common control for the purposes of section 26 of the Act (enterprises ceasing to be distinct enterprises).

Interim provisions

3. Gardners and any affiliate of Gardners must not—

- (a) bring the Impcross business under its or, as the case may be, their ownership or control;
- (b) complete any existing agreement or arrangement or enter into any new agreement or arrangement to secure ownership or secure or exercise control of the Impcross business;
- (c) do anything alone or with any other person with a view to or for the purpose of acting together to secure ownership or secure or exercise control of the Impcross business.

4. Impcross must ensure that—

- (a) the Impcross business is maintained as a viable going concern; and
- (b) ownership or control of the Impcross business is not transferred to any other person.

5. Sections 26(2) to (4) and 127(1), (2) and (4) to (6) (associated persons) of the Act^(a) apply for the purposes of articles 3 and 4(b) as they do for the purposes of section 26 of the Act.

6. Gardners and Impcross must ensure that no step is taken to integrate the Impcross business with the Gardners business.

7. Without limiting article 6, Gardners and Impcross must so far as within their respective powers ensure that—

(a) Section 127 was amended by paragraph 168 of Schedule 27 to the Civil Partnership Act 2004 (c. 33); there is another amendment to section 127 but it is not relevant to this Order.

- (a) the Impcross business is carried on separately from the Gardners business and the Impcross business's separate sales or brand identity is maintained;
- (b) except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within, the Impcross business;
- (c) the nature, description, range and quality of goods and services supplied by the Impcross business are maintained and preserved;
- (d) except in the ordinary course of business for the separate operation of the Impcross business—
 - (i) all of the assets of the Impcross business are maintained and preserved, including facilities and goodwill;
 - (ii) none of the assets of the Impcross business is disposed of; and
 - (iii) no interest in the assets of the Impcross business is created or disposed of;
- (e) no steps are taken to integrate the information technology systems of the Impcross business with those of the Gardners business, and the software and hardware platforms of the Impcross business remain unchanged, except for routine changes and maintenance;
- (f) the customer and supplier lists of the Impcross business are operated and updated separately from those of the Gardners business and, in particular—
 - (i) any negotiations with any existing or potential customers or suppliers in relation to the Impcross business are carried out by Impcross alone and without any assistance from Gardners; and
 - (ii) Impcross and Gardners do not enter into any joint agreements with existing or potential customers or suppliers of the Impcross business;
- (g) subject to paragraph (h), all contracts awarded to the Impcross business continue to be serviced by that business;
- (h) Impcross and Gardners do not perform or continue to perform any existing agreement between them (including any joint agreement between them and any other person);
- (i) no key staff are removed from their positions within the Impcross business;
- (j) no key staff are transferred between the Impcross business and the Gardners business;
- (k) all reasonable steps are taken to encourage all key staff to remain with the Impcross business.

8. No trade secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to the Impcross business may be disclosed or transferred, directly or indirectly, by Impcross (or any of its employees, directors, agents or affiliates) to Gardners (or any of its employees, directors, agents or affiliates).

Compliance

9.—(1) Within the period of 10 working days beginning with the date on which this Order comes into force and, subsequently, at intervals of not more than 10 working days, Gardner Aerospace Holdings Limited and Impcross must each give the Secretary of State a compliance statement.

(2) A compliance statement is a statement in writing confirming that Gardners or Impcross, as the case may be—

- (a) is in compliance with the requirements of this Order, and
- (b) has at all times since the coming into force of this Order been in compliance with those requirements.

(3) A compliance statement must be signed by the chief executive, a director, or senior manager of the body giving the statement.

(4) In paragraph (3), “senior manager”, in relation to a body, means a person who plays a significant role in—

- (a) the making of decisions about how the whole or a substantial part of the body’s activities are to be managed or organised, or
- (b) the actual managing or organising of the whole or a substantial part of those activities.

10. At all times, Impcross must keep the Secretary of State informed of any material developments relating to the Impcross business, including—

- (a) details of key staff who leave or join the Impcross business;
- (b) any interruption of the Impcross business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for more than 24 hours;
- (c) all substantial customer volumes won or lost or substantial changes to the customer contracts for the Impcross business including any substantial changes in customers’ demand;
- (d) substantial changes in the Impcross business’s contractual arrangements or relationships with key suppliers.

11. If Gardner Aerospace Holdings Limited or Impcross has any reason to suspect that this Order might have been contravened it must immediately notify the Secretary of State.

12.—(1) The Secretary of State may give directions in writing falling within paragraph (2) to—

- (a) a person specified in the directions; or
- (b) to the holder for the time being of an office so specified in any body of persons corporate or unincorporate.

(2) Directions fall within this paragraph if they are directions—

- (a) to take such action as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, this Order; or
- (b) to do or refrain from doing, anything so specified or described which the person might be required by this Order to do or refrain from doing.

(3) The Secretary of State may vary or revoke any directions given under this article.

13. For the purposes of paragraph 2(2C) of Schedule 7 to the Act(a), the Secretary of State is not to be treated as having consented to the taking of action or action of a particular description which would otherwise constitute a contravention of this Order unless the consent is in writing.

Andrea Leadsom

Secretary of State for Business, Energy and Industrial Strategy

At 12.05 p.m. on 5th December 2019 Department for Business, Energy and Industrial Strategy

(a) Paragraph 2(2C) was inserted by paragraphs 1 and 4 of Schedule 7 to the Enterprise and Regulatory Reform Act 2013 (c. 24).

EXPLANATORY NOTE

(This note is not part of the Order)

The Secretary of State has given the Competition and Markets Authority an intervention notice on public interest grounds in respect of the anticipated merger of Gardner Aerospace Holdings Limited and Impcross Limited. This Order is made for the purpose of preventing action which might prejudice a reference of the matter to the Competition and Markets Authority under section 45 of the Enterprise Act 2002 (c. 41) or impede the taking of any action under Part 3 of that Act which may be justified by the Secretary of State's decisions on the reference.

Article 3 of the Order prevents completion of the anticipated merger and articles 4 to 8 require the parties to the proposed merger to maintain the business of Impcross Limited separately from that of Gardner Aerospace Holdings Limited and impose obligations in relation to the carrying on of the business and the safeguarding of assets. Articles 9 to 11 impose reporting obligations on the parties to the proposed merger and article 12 allows the Secretary of State to give directions for the purpose of ensuring compliance with the Order.

This Order, unless previously revoked, will cease to have effect if the Secretary of State accepts an undertaking under paragraph 3 of Schedule 7 to the Enterprise Act 2002 instead of referring the merger to the Competition and Markets Authority under section 45 of that Act or when the intervention notice otherwise ceases to be in force in accordance with section 43.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen. An Explanatory Memorandum is available alongside the instrument on the UK legislation website, www.legislation.gov.uk.