

Western Isles Road Fuels

Notice of intention to accept binding commitments offered by Certas Energy UK Limited and DCC Plc and invitation to comment

18 March 2014

OFT1530

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CONTENTS

| <i>Chapter/Annexe</i> | <i>Page</i> |
|--|-------------|
| 1 Introduction | 2 |
| 2 The OFT's investigation | 4 |
| 3 Background | 7 |
| 4 The OFT's competition concerns | 9 |
| 5 The commitments | 18 |
| 6 The OFT's intentions and invitation to comment | 28 |
| Annexe 1 – The proposed commitments | 30 |

1 INTRODUCTION

- 1.1. The Office of Fair Trading (the 'OFT') hereby gives notice¹ that it proposes to accept commitments offered by Certas Energy UK Limited ('Certas') and DCC Plc ('DCC') (hereafter together referred to as 'the Parties') in case MP-SIP/0034 and invites representations from interested third parties on this proposed course of action.
- 1.2. Formal acceptance of the commitments by the OFT would result in the termination of its investigation, with no decision made on whether or not the Competition Act 1998 (the 'Act') has been infringed by the company under investigation. The text of the commitments offered is set out at Annexe 1 to this document.
- 1.3. Acceptance of the proposed commitments would not prevent the OFT from taking any action in relation to competition concerns which are not addressed by the proposed commitments. Moreover, acceptance of the proposed commitments would not prevent the OFT from continuing the investigation, making an infringement decision, or giving a direction in circumstances where the OFT had reasonable grounds for:
 - believing that there had been a material change of circumstances since the commitments were accepted
 - suspecting that a person had failed to adhere to one or more of the terms of the commitments, or
 - suspecting that information which led the OFT to accept the commitments was incomplete, false or misleading in a material particular.
- 1.4. This document describes the OFT's investigation, the Parties, the market context in which the investigation has been carried out, and the OFT's competition concerns. The document then goes on to summarise the commitments offered by the Parties and to set out why the OFT considers that the proposed commitments address its competition concerns.

¹ As set out in Paragraph 2 of Schedule 6A of the Competition Act 1998.

- 1.5. The OFT invites interested third parties to make representations on the proposed commitments, which will be taken into account before a final decision is made on whether to accept the commitments. By articulating its competition concerns, the OFT hopes to assist those who respond to this consultation to understand both those concerns and why the OFT provisionally considers that the commitments offered address them. Details of how to comment are provided at the end of this document. The closing date for comment is 17 April 2014.

2 THE OFT'S INVESTIGATION

A. The investigation

- 2.1. In late 2012, the OFT received specific evidence relating to Certas' conduct in the Western Isles. In January 2013, the OFT launched a formal investigation under section 25 of the Act, having established there were reasonable grounds for suspecting that the Chapter II prohibition of the Act had been infringed and having determined that a formal investigation would be consistent with the OFT's Prioritisation Principles.²
- 2.2. During the course of its investigation, the OFT sent formal notices requiring the provision of documents and information under section 26 of the Act to a number of parties. In addition, the OFT met in person and conducted teleconferences with various parties to gather further substantive evidence, as well as conducting witness interviews with relevant individuals.
- 2.3. Following discussions with the OFT, the Parties indicated an intention to offer commitments to address the OFT's competition concerns. Accordingly, further to paragraph 4.18 of *Enforcement*³ ('the Enforcement Guidance') and paragraph 10.19 of *A guide to the OFT's investigation procedures in competition cases*⁴ ('the Procedural Guidance'), the OFT proceeded to discuss with the Parties the scope of any commitments which the OFT considered would be necessary to address the concerns that it had identified.
- 2.4. By way of background, the OFT notes that section 31A of the Act provides that, for the purposes of addressing the competition concerns it has identified, the OFT may accept, from such person or persons

² 'OFT Prioritisation Principles' (OFT953), October 2008, www.offt.gov.uk/shared_offt/about_offt/offt953.pdf.

³ 'Enforcement' (OFT407), December 2004, www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/offt407.pdf.

⁴ 'A guide to the OFT's investigation procedures in competition cases' (OFT1263rev), October 2012, www.offt.gov.uk/shared_offt/policy/OFT1263rev.

concerned as it considers appropriate, commitments to take such action (or refrain from such action) as it considers appropriate. The Enforcement Guidance describes the circumstances in which it may be appropriate to accept binding commitments, and the process by which parties to an investigation may offer commitments to the OFT.

- 2.5. In accordance with paragraph 4.16 of the Enforcement Guidance and paragraph 10.18 of the Procedural Guidance, a business under investigation can offer commitments at any time during the course of that investigation until a decision on infringement is made. In this case, no decision on infringement has been made.
- 2.6. Certas first offered formal commitments to the OFT on 21 November 2013. The OFT rejected this offer on 6 December 2013. The Parties then offered revised formal commitments, and further to discussion with the OFT, offered formal commitments as set out in Annexe 1 on 12 March 2014. The offering of the commitments does not constitute an admission of an infringement of the Chapter II prohibition of the Act by the Parties.
- 2.7. Having considered the Parties' proposed commitments, the OFT is currently of the view that the binding commitments offered, for the reasons set out in this notice, address its competition concerns and, as a result, it is appropriate for the OFT to exercise its discretion to close its investigation by way of a formal decision accepting the commitments. Formal acceptance of commitments would result in the OFT terminating its investigation, and not proceeding to a decision on whether or not the Chapter II prohibition of the Act has been infringed.

B. The Parties

i. Certas Energy UK Limited

- 2.8. Certas is involved in the wholesale supply of road fuels to filling stations in the UK. It is a private limited company which operates under its own name as well as under various other brands, including the Scottish Fuels and Gulf brands. Certas is, through a number of subsidiaries, wholly-owned by DCC Plc. Prior to 27 September 2013, Certas was registered and operated as GB Oils Limited. For the sake of clarity, the OFT uses the name Certas throughout this Notice when

referring to matters and events both before and after 27 September 2013.

ii. DCC Plc

- 2.9. DCC is an international sales, marketing, distribution and business support services group headquartered in Dublin with operations in Britain, continental Europe and Ireland. DCC has five divisions - DCC Energy, DCC SerCom, DCC Healthcare, DCC Environmental and DCC Food & Beverage. DCC Energy is involved in oil procurement, sales, marketing and distribution, liquid petroleum gas, and fuel card services in Britain, Ireland, Denmark, Sweden, Norway, the Netherlands, Belgium, Austria and Germany.

3 BACKGROUND

A. The geography of the Western Isles

3.1. The Western Isles are an archipelago of islands, also known as the Outer Hebrides or Na h-Eileanan Siar, located off the west coast of the Scottish mainland. The Western Isles include the following major populated islands (from north to south):

- Lewis and Harris
- North Uist
- Benbecula
- South Uist
- Barra.⁵

3.2. The Western Isles stretch approximately 130 miles from north to south. Causeways connect North Uist to Benbecula and Benbecula to South Uist. Ferry services connect Lewis and Harris to North Uist and South Uist to Barra. A number of ferry services connect the Western Isles with the Scottish mainland.

B. The wholesale supply of road fuels to filling stations in the Western Isles

3.3. Road fuel wholesalers, such as Certas, typically collect petrol and diesel from refineries, terminals, or depots for onward supply to customers, including filling stations.

3.4. There are no refineries in the Western Isles and all road fuels are transported to the Western Isles from the mainland by using a marine vessel and marine terminal or, less commonly, by road tanker and ferry service.

⁵ The Western Islands include a number of other less populated islands in addition to those listed at paragraph 3.1. However, the islands listed at paragraph 3.1 are those which have at least one filling station.

- 3.5. There are two marine terminals in the Western Isles: the Shell Street marine terminal in Lewis ('the Shell Street terminal') and the Loch Carnan marine terminal in South Uist ('the Loch Carnan terminal'). Both of these terminals are operated by Certas, which owns the Shell Street terminal and leases the Loch Carnan terminal from the Ministry of Defence.
- 3.6. There are 21 independent filling stations in the Western Isles. Certas generally supplies filling stations in Lewis and Harris with fuel collected from the Shell Street terminal and filling stations in North Uist, Benbecula, South Uist and Barra with fuel collected from the Loch Carnan terminal.
- 3.7. Since 2007, when Certas started to supply road fuels to filling stations in the Western Isles, there have been, at different times, three rival wholesalers to Certas that have supplied one or more filling stations in Lewis and Harris. Only one of these rival wholesalers did so at any one time. During the same period, no competitor to Certas has supplied road fuels to filling stations in North Uist, Benbecula, South Uist, or Barra.

4 THE OFT'S COMPETITION CONCERNS

A. Introduction

4.1. This chapter sets out the OFT's competition concerns regarding Certas' five-year exclusive supply contracts with filling stations in the Western Isles (hereafter referred to as 'long-term exclusive contracts'). The OFT first sets out its preliminary views on market definition and Certas' position on the relevant markets, followed by its concerns about Certas' conduct in these markets.

B. The relevant markets

i. The relevant product market

4.2. In the OFT's preliminary view the relevant product market in this case is the wholesale supply of road fuels to filling stations.

4.3. In line with previous Competition Commission⁶ and European Commission⁷ decisions, the OFT is of the preliminary view that demand side substitution from road fuels to other fuels (such as kerosene and gas oil – hereafter 'heating oils') would not occur in response to wholesale prices of road fuels being sustained at a small but significant amount above competitive levels.⁸

⁶ 'DCC Energy UK Limited/Rontec investment: A report on the completed acquisition by DCC Energy Limited from Rontec Investments LLP of certain oil distribution businesses previously owned by Total UK Limited', Competition Commission, 4 September 2012, www.competition-commission.org.uk/assets/competitioncommission/docs/2012/dcc-rontec/dcc_rontec_final_report.pdf, at paragraph 6.10.

⁷ Case No IV/M.1383, *Exxon/Mobil*, European Commission, http://ec.europa.eu/competition/mergers/cases/decisions/m1383_en.pdf, at paragraph 436.

⁸ In defining a relevant market, the OFT considers whether it would be profitable for a hypothetical monopolist of the product under consideration in the area under consideration to sustain the price of the product a small but significant amount (for example, five to 10 per cent) above competitive levels. If the answer to this question is 'yes', the product and area under the hypothetical monopolist's control is (usually) the relevant market. If the answer to this question is 'no', this is typically because a sufficiently large number of customers would switch some of their purchases to other substitute products (or areas) and these should be included in the relevant market. In this case, the OFT assumes that the hypothetical monopolist controls both the focal product and its closest substitute. The process is then repeated, but this

- 4.4. Some previous OFT merger decisions have found that there may be scope for supply side substitution between heating oils and road fuels.⁹ However, the OFT is of the preliminary view that given the specific circumstances that prevail in the Western Isles, material and sustainable supply side substitution by heating oils wholesalers does not appear to be practicable without access to the marine terminals in the Western Isles or similar facilities.
- 4.5. In particular, access to the marine terminals or similar facilities appears to be critical to supplying road fuels to filling stations in the Western Isles due to the need for filling stations to be guaranteed regular and timely supplies, including when freight ferry services to the islands may be disrupted due to poor weather conditions. Certas' exclusive access to the marine terminals in the Western Isles is discussed at paragraphs 4.15 and 4.18 below. The OFT is of the preliminary view that establishing suitable alternative facilities in the Western Isles would require a substantial sunk investment which, as set out in the OFT's market definition guideline,¹⁰ would prevent supply side substitution.
- 4.6. The OFT also notes that none of the heating oils wholesalers with which the OFT has spoken have indicated that they would, in the prevailing market conditions, switch to supplying road fuels in the Western Isles.

time in relation to the larger set of products (or areas) under the hypothetical monopolist's control. We continue expanding the product group in this way (that is, by adding the next best substitute) until we have found a group of products (or areas) for which it is profitable for the hypothetical monopolist to sustain prices five to 10 per cent above competitive levels. For more information, see *'Market Definition'* (OFT403), December 2004, www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft403.pdf.

⁹ See for example: *'Completed acquisition by GB Oils Limited of Brogan Holdings Limited'*, Case ME/4406/10, decision of 20 April 2010 (published on 20 May 2010), paragraphs 15 and 16, www.offt.gov.uk/shared_offt/mergers_ea02/678505/GBOils-Brogan-UILs-accept.pdf; and *'Anticipated acquisition by DCC plc of CPL Petroleum Limited'*, Case ME/3186/07, decision of 24 August 2007, published on 4 September 2007, paragraphs 8 to 9, www.offt.gov.uk/shared_offt/mergers_ea02/361227/DCC.pdf. None of these decisions reached a final view on this question.

¹⁰ *'Market Definition'* (OFT403), December 2004, paragraph 3.15, www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft403.pdf.

4.7. In light of the above, the OFT is of the preliminary view that in the circumstances of this specific case, material supply side substitution from heating oils to road fuels would not occur in response to the wholesale prices of road fuels charged to filling stations being a small but significant amount above competitive levels.

ii. The relevant geographic markets

4.8. In the OFT's preliminary view, there are two separate relevant geographic markets in this case. These are:

- Lewis and Harris ('the northern islands'), and
- North Uist, Benbecula, South Uist, and Barra ('the southern islands').

4.9. Although the OFT has previously found, in the context of a merger between fuel suppliers, that the Western Isles constituted a single relevant geographic market,¹¹ the OFT is of the preliminary view that a further separation is appropriate in this case. The reasons for the OFT's preliminary view regarding the relevant geographic markets are summarised below.

4.10. On the demand side, it does not appear to be practicable for filling stations themselves to collect fuel from outside the Western Isles, as this would involve significant transportation costs and investment in assets such as road tankers and/or storage facilities. For the same reasons, it also does not appear to be practicable for filling stations in the southern islands to themselves collect road fuels from the northern islands or vice versa.

4.11. On the supply side, the OFT is of the preliminary view that the potential for supply side substitution by road fuels wholesalers active on the mainland is not sufficient for the relevant geographic market to be defined more widely than the Western Isles. As with potential supply side substitution by heating oils wholesalers, access to the marine terminals or to suitable alternative facilities appears to be critical for

¹¹ Case ME/4406/10, *Ibid*, paragraph 34.

road fuels wholesalers active on the mainland to be able to switch to supplying road fuels to filling stations in the Western Isles. As set out above (at paragraph 4.5), the OFT's preliminary view is that establishing suitable alternative facilities in the Western Isles would require a substantial sunk investment which would prevent such geographic supply side substitution.

- 4.12. As such, the OFT is of the preliminary view that in the circumstances of this specific case, material supply side substitution by road fuels wholesalers not yet active in the Western Isles would not occur in response to a small but significant, non-transitory increase in the wholesale prices of road fuels charged to filling stations in the Western Isles.
- 4.13. For similar reasons, the OFT is of the preliminary view that the potential for supply side substitution between the northern islands and the southern islands is not sufficient for these to be defined as a single relevant geographic market.

C. Certas' position on the relevant markets

- 4.14. The OFT is of the preliminary view that Certas was likely to have a dominant position in the market for the wholesale supply of road fuels to filling stations in the northern islands during the period from March 2007 until November 2012.
- 4.15. Certas had a very large market share in the northern islands throughout the above period. Further, from March 2007 until July 2010, Certas had exclusive access to important infrastructure in the northern islands – namely, the Shell Street terminal – which allowed Certas to benefit from cost-efficient bulk transportation and storage of road fuels. The OFT is of the preliminary view that Certas' exclusive access to the Shell Street terminal during this period constituted a significant barrier to entry into the market.
- 4.16. Further to undertakings in lieu of a merger reference provided to the OFT by Certas, Highland Fuels gained the ability to draw fuels from the Shell Street terminal from July 2010 (see further details at paragraph 4.26 below). Nevertheless, the OFT is of the preliminary view that, between July 2010 and November 2012, Certas' market share, by volume, in the northern islands remained in excess of 80 per cent.

- 4.17. In November 2012, Certas provided filling stations in the Western Isles with an opportunity to discuss termination of their long-term exclusive contracts within a 28-day period. This led to a significant proportion (circa 40 – 50 per cent) of total filling station demand in the northern islands switching away from Certas to either take exclusive supplies from Highland Fuels, the only alternative wholesaler active at that time in the northern islands, or to purchase supplies on a non-contractual basis from both Certas and Highland Fuels. Although the OFT has not reached a preliminary view on whether or not Certas had a dominant position after November 2012, the OFT's main competition concerns (as described below) relate to the period before November 2012.
- 4.18. The OFT is also of the preliminary view that Certas is likely to have had a dominant position in the market for the wholesale supply of road fuels to filling stations in the southern islands during the period from March 2007 to date. Certas' market share in the southern islands has remained at 100 per cent throughout this period. In addition, Certas has had exclusive access to the Loch Carnan terminal, which allows it to benefit from cost-efficient bulk transportation and storage of road fuels throughout this period. The OFT is of the preliminary view that Certas' exclusive access to the Loch Carnan terminal constitutes a significant barrier to entry into the southern islands market.
- 4.19. Although Certas also gave filling stations in the southern islands a 28-day opportunity to terminate their long-term exclusive contracts in November 2012, none of the filling stations took up this opportunity. In addition, in December 2013, Certas informed filling stations in the southern islands that they were able to terminate their contracts with Certas at any time. To date none has done so. This appears to be because no alternative road fuels wholesaler was, or is, active in the southern islands, nor does any seem likely to enter the market given the existing barriers to entry.

D. Conduct raising concerns

i. The OFT's approach to exclusive contracts as a potential abuse of dominance

- 4.20. When a supplier has a dominant position, long-term exclusive contracts, by requiring customers to purchase all or significant parts of their

demand from a single supplier, may be capable of foreclosing competition. However, exclusive contracts do not necessarily infringe competition law. Their capability and likelihood of restricting competition will depend, among other things, on their duration and market coverage and on the legal, economic and social context in which the contracts operate. Generally speaking, the longer the contracts' duration and the larger their market coverage, the greater their capability to foreclose competition.

4.21. Any exclusionary effect that may arise from a dominant undertaking's exclusive contracts may be counterbalanced, or outweighed, by advantages in terms of efficiencies which also benefit consumers. In addition, exclusive contracts may be objectively justified for other reasons, such as technical or commercial constraints and public interest considerations. The contracts' exclusionary effect must, however, not go beyond what is necessary in order to attain those advantages or justifications.

4.22. In this particular case, the OFT has concerns that restrictions on actual or potential competitors' ability to do business with filling stations may have resulted from Certas' long-term exclusive contracts. The OFT's concerns regarding each relevant market are set out below.

ii. The OFT's competition concerns regarding Certas' conduct in the northern islands

4.23. From July 2008, Certas entered into and maintained contracts with filling stations in the northern islands which required each contracted filling station to exclusively purchase road fuels from Certas for a period of five years, without a possibility to terminate the contract during that period.

4.24. The OFT is of the preliminary view that Certas' long-term exclusive contracts with filling stations in the northern islands were, from July 2008 to November 2012, capable of preventing, and likely to prevent, those filling stations from using competing wholesalers, thereby potentially limiting the expansion of wholesalers active in the relevant market from time to time and raising a barrier to entry for wholesalers not yet active in the market.

- 4.25. The OFT is concerned that a very large share of the northern islands market may have been tied to Certas for a significant period as a result of its long-term exclusive contracts with filling stations. From as early as July 2008 and October 2009, Certas' long-term exclusive contracts covered the largest and second largest filling stations in the northern islands, by volume, respectively. By around December 2010, Certas' contracts appear to have covered around 80 per cent of the northern islands market, by volume. The OFT is of the preliminary view that the resultant inability of actual or potential competitors to Certas to supply these filling stations would have made it particularly difficult for such competitors to successfully enter, or expand in, the market.
- 4.26. In July 2010, Highland Fuels entered the northern islands market. This entry was facilitated by a throughput arrangement, which allowed a third-party supplier, Phillips66, to directly supply Highland Fuels with fuels through Certas' Shell Street terminal for a total period of five years in return for the payment of a specified throughput fee. These throughput arrangements were established as a result of undertakings provided to the OFT by Certas in lieu of the OFT referring Certas' acquisition of Brogan Fuels Limited to the Competition Commission.¹²
- 4.27. Further to the establishment of the throughput arrangements, Highland Fuels would, under conditions of normal competition, have had a window of five years in which it could compete to establish and increase its market share in the northern islands, while benefiting from supply arrangements that were comparable to those of Certas (as a result of having access to the Shell Street terminal).
- 4.28. The OFT is particularly concerned that this ability to compete on the merits for filling stations' demand for road fuels is likely to have been restricted until November 2012 when Certas gave its contracted filling stations a 28-day opportunity to discuss termination of their long-term exclusive contracts, and Highland Fuels was subsequently able to compete for the entire market.

¹² Case ME/4406/10, Ibid.

iii. The OFT's competition concerns regarding Certas' conduct in the southern islands

- 4.29. From September 2009, Certas entered into and maintained contracts with filling stations in the southern islands which required each contracted filling station to exclusively purchase road fuels from Certas for a period of five years, without a possibility to terminate the contract during that period.
- 4.30. The OFT is of the preliminary view that Certas' long-term exclusive contracts with filling stations in the southern islands were, from September 2009 until December 2013, capable of preventing filling stations from using wholesalers other than Certas. The OFT is concerned that this considerably raised the barriers to entry that were already present in the southern islands as a result of Certas' exclusive access to the Loch Carnan terminal.
- 4.31. The likelihood of Certas' long-term exclusive contracts having a foreclosure effect may have been increased by the contracts' significant collective market coverage. Indeed, from March 2011 the long-term exclusive contracts appear to have covered the entire southern islands market. Any foreclosure effect of the long-term exclusive contracts is likely to have persisted until December 2013, when Certas stated in writing to filling stations that they could terminate their long-term exclusive contracts with Certas at any time.¹³
- 4.32. The OFT is concerned that Certas' long-term exclusive contracts with filling stations in the southern islands, by tying the entire market to Certas, created a situation in which rival wholesalers were prevented from gaining any foothold in the southern islands. In turn, this ensured that it would not be viable for potential competitors to Certas to seek

¹³ The OFT is of the preliminary view that in the southern islands, the potentially abusive conduct did not end following the letters Certas sent in November 2012, because (i) none of the filling stations took up the offer to terminate their long-term exclusive contracts and (ii) Certas' offer to discuss termination was limited to 28 days, after which the filling stations did not have an enforceable option of discussing termination of the long-term exclusive contracts. The OFT is of the preliminary view that the contracts, therefore, retained their potential foreclosure effect until Certas confirmed in December 2013 that filling stations could terminate their contracts at any time.

access to the Loch Carnan terminal (for example, by seeking to obtain the lease on the terminal) or invest in alternative means of supplying road fuels to the southern islands. As a result, Certas was effectively insulated from the threat of potential competition in the southern islands.

5 THE COMMITMENTS

A. Introduction

- 5.1. In order to address the OFT's competition concerns, the Parties have offered formal commitments to the OFT, which would:
- bring all existing contracts between Certas and filling stations in the Western Isles to an end, and
 - ensure that filling stations in the Western Isles that wish to continue to be supplied by Certas will have the opportunity to elect to be supplied either on a spot basis,¹⁴ or on a Platts plus¹⁵ priced contractual basis, and
 - open up access to the Loch Carnan terminal to rival wholesalers for a period of five years, and
 - allow rival wholesalers to enter into arrangements to draw fuels from the Shell Street terminal until 31 December 2017.
- 5.2. The proposed commitments are set out in Annexe 1 to this notice and are described in detail below.
- 5.3. The OFT has reached the provisional view that its competition concerns are addressed by the proposed commitments. Formal acceptance of commitments would result in the OFT terminating its investigation into Certas' conduct in the Western Isles, and not proceeding to a decision on whether or not this conduct has infringed the Act.
- 5.4. Accordingly, a decision by the OFT to accept binding commitments will not include any statement as to whether or not the conduct of the Parties that is under investigation infringed the Act either prior to acceptance of the commitments or once the commitments are in place.

¹⁴ Where the 'spot' price is based on the market conditions on the day of the order.

¹⁵ Where the price is based on the Platts benchmark price for refined petrol or diesel plus an agreed amount.

B. The OFT's assessment of the appropriateness of this case for commitments

i. The OFT Guidance

- 5.5. The Enforcement Guidance and the Procedural Guidance state that the OFT is likely to consider it appropriate to accept binding commitments only in cases where (a) the competition concerns are readily identifiable; (b) the competition concerns are addressed by the commitments offered; and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.¹⁶
- 5.6. The OFT will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern, and/or where the OFT considers that not to complete its investigation and make a decision would undermine deterrence.¹⁷

ii. The OFT's assessment of this case

- 5.7. The OFT considers that this is an appropriate case for commitments for the following reasons:
- **The competition concerns are readily identifiable:** The OFT is concerned that Certas' long-term exclusive contracts were capable of restricting, and likely to restrict, competition in both relevant markets, which were already characterised by high barriers to entry as a result of Certas' exclusive access to important local infrastructure in the northern islands until July 2010 and in the southern islands throughout the relevant period. In addition, the OFT is concerned that when Highland Fuels obtained access to the Shell Street terminal in July 2010, its window of opportunity to establish and expand its market share was foreclosed for a significant period

¹⁶ Paragraph 4.3 of the Enforcement Guidance and paragraph 10.16 of the Procedural Guidance.

¹⁷ Paragraph 4.5 of the Enforcement Guidance.

by Certas' long-term exclusive contracts. The OFT's concerns are set out in more detail in paragraphs 4.23 to 4.32 above.

- **The OFT has reached the provisional conclusion that the commitments offered by the Parties address the OFT's competition concerns:** The commitments will effectively remove filling stations' long-term exclusive contractual ties to Certas, open access to the Loch Carnan terminal to potential competitors to Certas, and extend such access to the Shell Street terminal. An explanation of why these commitments are capable of addressing the OFT's concerns by increasing competition and lowering barriers to entry, is set out in paragraphs 5.27 to 5.39 below.
- **The commitments offered are capable of being implemented effectively and, if necessary, within a short period of time:** The commitments will come into force from the date that the OFT makes them legally binding.

5.8. Finally, the OFT does not consider that accepting commitments in this case would undermine deterrence. Indeed, the OFT considers that the fact that Certas has had to offer quasi-structural commitments relating to access to its Shell Street and Loch Carnan terminals is in itself likely to have a deterrent effect. In this context, the OFT notes that the proposed commitments relating to terminal access go beyond terminating Certas' contractual restrictions on filling stations in the Western Isles to also address the specific market structure which exists as a result of Certas' exclusive access to important infrastructure.¹⁸ As such, the proposed commitments are likely to deliver benefits that potentially go beyond those which would likely follow from an infringement decision which prohibited Certas' long-term exclusive contracts with filling stations in the Western Isles. The OFT considers that these clear forward-looking benefits (which are discussed in more detail at paragraphs 5.31 – 5.33) outweigh any potential loss of deterrence from not reaching an infringement decision.

¹⁸ In addition, the OFT notes that the commitments regarding wholesaler access to the marine terminals provide for wholesalers to draw 'oil products' including heating oils – not only road fuels, which are the focus of the OFT's concerns – from the terminals.

- 5.9. The proposed commitments do not preclude the OFT taking further enforcement action in relation to other abuses of dominance and/or related markets which raise competition concerns and harm consumers.
- 5.10. In light of the above, the OFT's provisional conclusion is that this is an appropriate case for it to accept binding commitments from the Parties.

C. The proposed commitments

- 5.11. The paragraphs below summarise the commitments proposed by the Parties.

i. Certas' contracts with filling stations

- 5.12. The Parties propose to ensure that every filling station in the Western Isles currently supplied by Certas, or seeking such supplies, will be given the opportunity in writing to elect to take future supplies of road fuels from Certas only on the basis of one of the three arrangements described below, and Certas will amend or terminate (as appropriate) its existing contracts with such filling stations accordingly:

- On a 'spot' basis, whereby the filling station and Certas will negotiate the price to apply to the purchase of road fuels for each individual transaction separately. This option will include the termination of any exclusive purchasing obligation on the filling station.
- Under a contract which provides for a Platts plus pricing mechanism and an exclusive purchasing obligation for a period of no more than two years.
- Under a non-exclusive contract with no fixed end-date, which provides for Platts plus pricing and options for Certas or the filling station to terminate the contract at any time by giving three months' notice.

- 5.13. The Parties propose that Certas will supply filling stations that do not make their choice explicit to Certas within 28 days of receiving the above offer on a spot basis. However, such filling stations may at any time during which the commitments are in force elect to enter into either of the alternative supply arrangements described above.

5.14. It is proposed that the commitments described in paragraphs 5.12 and 5.13 above shall remain in force for a period of five years from the date of the OFT's decision to make the commitments legally binding. The Parties will, at the end of this period, consider extending the commitments, but the commitments contain no obligation that they do so.

ii. Access to the Loch Carnan terminal

5.15. The Parties propose to ensure that a throughput arrangement is put in place for the Loch Carnan terminal, according to which a third party supplier such as Phillips 66 will deliver fuels to the terminal for supply to any distributor (including Certas). Under this arrangement, the third party supplier will negotiate terms and conditions of supply, including price, with any distributor (including Certas) seeking supplies of fuel from the Loch Carnan terminal.

5.16. The Parties propose to charge a throughput fee for the use of the Loch Carnan terminal, either to the third party supplier or to other distributors purchasing from the third party supplier. The fee will be set to cover Certas' costs of operating the terminal, including operating expenses and capital depreciation, as well as a return on the capital assets employed by Certas at the terminal.

5.17. The Parties propose to amend the throughput fee annually, and to calculate the fee as follows:

$$Price (ppl) = \frac{Opex + Depreciation + (Rate\ of\ Return\ on\ Capital) * Capital\ Employed}{Expected\ volume}$$

5.18. Each part of the equation is explained in the commitments set out in Annexe 1 (at paragraph 7.3.5). The OFT specifically discusses the rate of return on capital at paragraphs 5.34 to 5.37 below. By way of indication, the Parties state that the price per litre for the financial year ending March 2014 would be 2.73 pence.

5.19. The Parties propose to provide, on a confidential basis, access to Certas' accounts to the external advisers of any fuel distributor to ensure that the price correctly reflects the above formula.

5.20. The commitments described in paragraphs 5.15 to 5.19 above are proposed to remain in force for a period of five years from the date of the OFT's decision to make the proposed commitments legally binding. The Parties will, at the end of this period, consider extending the commitments, but the commitments contain no obligation that they do so.

iii. Extension of access to the Shell Street terminal

5.21. The Parties propose to ensure that a throughput arrangement is continued for the Shell Street terminal, according to which a third party supplier (currently Phillips 66) will deliver fuels to the terminal. Under this arrangement, the third party supplier will negotiate terms and conditions of supply, including price, with any distributor (including Certas itself) seeking supplies of fuel from the Shell Street terminal.

5.22. The Parties propose that the provisions described in paragraphs 5.16 to 5.19 above shall also apply to the throughput arrangements for the Shell Street terminal. By way of indication, the Parties state that the throughput fee for the Shell Street terminal would be 2.01 pence-per-litre for the financial year ending March 2014.

5.23. The commitments described in paragraphs 5.21 and 5.22 above are proposed to remain in force until 31 December 2017. The Parties will consider, at the end this period, extending the commitments, but the commitments contain no obligation that they do so.

iv. General provisions

5.24. In the event of any dispute arising as a result of the proposed commitments summarised above, the Parties propose to negotiate in good faith and settle such a dispute amicably, including through the use of mediation. Specifically, in the case of a dispute relating to the calculation of the throughput fee, the Parties propose to commit to refer such disputes to an Independent Chartered Accountant whose decision shall be binding on the parties.

- 5.25. To monitor the effectiveness of the commitments, the Parties will be required to report to the Competition and Markets Authority¹⁹ each year on the implementation of the commitments.
- 5.26. The commitments in no way oblige the Parties to continue the operation of either terminal. However, if the Parties elect to sell either terminal, they will ensure that any purchaser of the terminal(s) is contractually bound to abide by the commitments described in paragraphs 5.15 to 5.25 above.

D. The OFT's assessment of the proposed commitments

- 5.27. The OFT has carefully considered the Parties' proposed commitments, as set out in Annexe 1, and has considered whether these commitments address its competition concerns.
- 5.28. The OFT provisionally considers that accepting the Parties' proposed commitments relating to Certas' contracts with filling stations would ensure that for the next five years, filling stations have a choice between a number of arrangements, with varying pricing mechanisms and durations. Specifically, filling stations will be able to:
- buy road fuels on a 'spot' basis from Certas
 - enter into a contract with Certas which provides for a Platts plus pricing mechanism and an exclusive purchasing obligation for a period of no more than two years
 - enter into a non-exclusive contract with Certas with no fixed end-date, which provides for Platts plus pricing and options for Certas or the filling station to terminate the contract at any time by giving three months' notice

¹⁹ From 1 April 2014, The Competition and Markets Authority (CMA) will bring together the Competition Commission and the competition and certain consumer functions of the OFT in a single body. The CMA will promote competition, within and outside the UK, for the benefit of consumers.

- buy road fuels from a rival wholesaler either on a spot basis or having entered into a contract (whether exclusive or not) with the rival wholesaler.
- 5.29. The OFT provisionally considers that the commitments' duration of five years will allow an opportunity for rival wholesalers to establish and expand market share in the whole of the Western Isles and to make any investments that may be required to ensure that they can continue to compete on the market after the expiry of the commitments.
- 5.30. By accepting the possibility of filling stations entering into two-year exclusive contracts with Certas, the OFT provisionally considers that the possibility of attaining some of the efficiencies that may be associated with exclusive contracts in general is maintained. For example, with the certainty of two years of exclusive supplies, Certas may invest in a filling station's signage and branding. In addition, filling stations may use the certainty of two years of exclusive supplies when they negotiate their contractual terms with Certas. The OFT welcomes any observations and evidence relating to efficiency arguments, particularly where interested parties are of the view that a different duration would be objectively necessary to attain such efficiencies in this case.
- 5.31. The Parties' proposed commitments relating to access to the Loch Carnan terminal are in the OFT's provisional view able to facilitate the introduction of competing wholesalers into a market where none have previously existed. Thus, the proposed commitments relating to access to the Loch Carnan terminal not only do not undermine deterrence (see paragraph 5.6 and 5.8 above), they also enhance the effectiveness of the commitments relating to Certas' long-term exclusive contracts. While removing the exclusive contractual ties between Certas and the filling stations makes competition possible in theory, access to the Loch Carnan terminal ensures that rival wholesalers that want to enter the southern islands market can benefit from access to the marine terminal (instead of having to transport fuels to the Western Isles by road tanker and ferry) and can compete on the merits for filling station demand.
- 5.32. As a result, the commitments offer the prospect of pro-competitive change to the benefit of filling stations and consumers in the southern islands. The OFT provisionally considers that the commitments' duration

of five years will allow an opportunity for rival wholesalers to establish and expand market share in the southern islands and to make any investments that may be required to ensure that they can continue to compete on the market after the expiry of the commitments.

- 5.33. Further, the OFT provisionally considers that by extending the existing throughput arrangement relating to the Shell Street terminal until 31 December 2017, the proposed commitments ensure that a viable competitor to Certas will have had a total of five years of open access to the Shell Street Terminal and to the northern islands filling stations as was envisaged by the undertakings in lieu of a merger reference (see paragraphs 4.16 and 4.26 above) that were accepted by the OFT in 2010. In the provisional view of the OFT, this addresses the OFT's specific concerns that Highland Fuels' ability to compete on the merits for filling stations' demand for road fuels is likely to have been restricted between July 2010 and November 2012 in the northern islands. The OFT notes that the Parties' proposal is not limited to Highland Fuels: the third party supplier will be able to enter into a supply agreement relating to the Shell Street terminal with any rival wholesaler until at least 31 December 2017.
- 5.34. The OFT notes that the proposed formula for calculating the throughput fee for both terminals is based on objective factors that can be verified by a rival wholesaler's external advisers. In case of a dispute relating to the throughput fee which cannot be resolved within 30 days, an independent chartered accountant will be appointed to consider representations from the parties to the dispute and to make a final decision regarding the level of the fee.
- 5.35. With respect to the 12 per cent rate of return on capital that is part of the formula, the Parties have informed the OFT that in proposing this rate they took into account a range of internal rate of return benchmarks. These are:
- DCC's target rate of return when evaluating potential acquisitions in the energy sector
 - DCC's overall return on capital in the last financial year, which was 15.6 per cent

- Certas' internal investment target for return on capital hurdle rate for new investments, and
 - DCC's internal capital charge included in senior management's long term incentive plans.
- 5.36. By using a rate of return on capital of 12 per cent in the calculation of the relevant throughput fees, the OFT notes that the Parties have adopted a rate which is in line with the lower of the available benchmarks referred to above.
- 5.37. The OFT also notes that using a lower rate of return on capital would have a relatively small impact on the final throughput fee. Indeed, if a rate of return on capital of 10 per cent, rather than 12 per cent, were used, then this would make a difference of less than 0.2 pence-per-litre to the final throughput fee at both the Loch Carnan and the Shell Street terminals for the financial year ending March 2014.²⁰
- 5.38. The OFT welcomes views as to whether the proposed formula would lead to a fair and reasonable throughput fee if applied correctly. Further, the OFT invites interested parties to submit reasoned observations as to the appropriateness of the proposed rate of return on capital of 12 per cent.
- 5.39. Finally, the OFT is of the provisional view that the proposed mechanisms for dispute resolution and reporting will promote compliance with the commitments throughout their duration.
- 5.40. In light of the above considerations, the OFT provisionally considers that the proposed commitments address its competition concerns.

²⁰ The confidential pence-per-litre throughput fees that would apply if a rate of return on capital of 10 per cent were used, may be requested before 17 April 2014 by fuel wholesalers that may wish to distribute road fuels in the Western Isles.

6 THE OFT'S INTENTIONS AND INVITATION TO COMMENT

A. The OFT's intentions

- 6.1 In light of the above, the OFT provisionally considers that the commitments offered by the Parties as set out in Annexe 1 of this document are sufficient to address its competition concerns in this case. Therefore, the OFT proposes to accept the commitments by means of a formal commitments decision.
- 6.2 As required by paragraph 2(2)(d) of Schedule 6A of the Act, the OFT now invites interested third parties to make representations on the proposed commitments and will take such representations into account before making a final decision on whether to accept the commitments.
- 6.3 The OFT is particularly interested to hear from other fuel wholesalers, and from filling stations and consumers in the Western Isles.

B. Invitation to comment

- 6.4 Any person wishing to comment on the commitments should submit written representations to the postal or email address given below, by 17 April 2014. Please quote the case reference MP-SIP/0034 in all correspondence related to this matter.

Western Isles Fuels Commitments Consultation
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

Email: WIFCConsultation@oft.gsi.gov.uk

- 6.5 The OFT closes on 31 March 2014, after which this consultation and any decision in the investigation becomes the responsibility of the

Competition and Markets Authority²¹ ('the CMA'). Correspondence sent to the addresses above will be forwarded to the CMA.

²¹ The CMA will bring together the Competition Commission and the competition and certain consumer functions of the OFT in a single body. The CMA was established under the Enterprise and Regulatory Reform Act 2013 and came into being in shadow form in October 2013. It takes on its full powers and responsibilities, such as competition law enforcement, market studies and investigations, and merger control, on 1 April 2014. Visit the CMA's website at www.gov.uk/cma for more information.

ANNEXE 1 – THE PROPOSED COMMITMENTS

CERTAS ENERGY UK LIMITED

MP-SIP/0034

DRAFT COMMITMENTS PROPOSAL IN RELATION TO THE OFT'S INVESTIGATION OF CERTAS CONTRACTUAL ARRANGEMENTS FOR WHOLESALE SUPPLY OF ROAD FUELS IN THE WESTERN ISLES (THE 'INVESTIGATION')

1. These Commitments are provided by Certas Energy UK Limited ('Certas') and Certas' ultimate parent company DCC Plc (together 'the Parties').
2. In order to address the OFT's competition concerns and assist with bringing the Investigation to a close, the Parties have offered Commitments under section 31A of the Competition Act 1998 (the 'Act').
3. Consistent with sections 31A and 31B of the Act, the Commitments are offered on the basis that if the OFT accepts the Commitments in accordance with section 31A(2) of the Act, it shall not continue its investigation, make a decision within the meaning of section 31(2) of the Act, or give a direction under section 35 of the Act.
4. The offering of the Commitments by the Parties does not constitute an admission of any wrongdoing by them.
5. The Commitments set out at 7.1 and 7.2 and 7.3 shall remain in force for a period of 5 years from the date on which the OFT formally accepts these Commitments. The Parties agree to consider, at the end of 5 years, extending these Commitments, but there is no obligation to so extend.
6. The Commitment set out at 7.4 shall commence on 1 June 2015 and remain in force until 31 December 2017. The Parties agree to consider, at the end of this period, extending this Commitment, but there is no obligation to so extend.

Commitments from the Parties

7. Certas will, and DCC will secure that Certas will:
- 7.1 ensure that every retailer of road fuels in the Western Isles ('WI retailer') currently supplied by Certas,²² or seeking such supplies, will be given the opportunity in writing to elect to take future supplies of road fuels, only on the basis of one of the three contractual arrangements set out below, and Certas will amend or terminate (as appropriate) its existing wholesale supply agreements with such WI retailers accordingly:
- 7.1.1 (Arrangement 1) on a "spot" basis, whereby Certas and the WI retailer will negotiate the price to apply to the purchase of road fuels for each individual transaction separately. For the avoidance of doubt, this option will include the termination of: (i) any obligation on the WI retailer to purchase road fuels exclusively from Certas ("the exclusive purchasing obligation") and (ii) the provision by Certas of rebates on the prices charged to retailers;
- 7.1.2 (Arrangement 2) under a contract which provides for: (i) a Platts plus pricing mechanism; and (ii) an exclusive purchasing obligation for a period of no more than two years;
- 7.1.3 (Arrangement 3) under a rolling contract which provides for: (i) a Platts plus pricing mechanism and (ii) unilateral termination of the contract by either party upon the provision of three months notice by the terminating party.
- 7.1.4 If any WI retailer does not make any such election within 28 days of the date of such written offer, the WI retailer will be supplied on a "spot" basis but may, at any time during the period that these Commitments are in force, elect to enter into either of the alternative supply arrangements set out at 7.1.2 (Arrangement 2) and 7.1.3 (Arrangement 3).
- 7.2 ensure that following the amendment or termination of the existing wholesale supply agreements under 7.1 above, it applies fair and reasonable terms when collecting any outstanding debts from the WI retailer. Certas agrees to exercise consideration when doing so, including, where appropriate, permitting the debtor to make repayments

²² At the date of giving these Commitments, Certas has wholesale supply agreements for road fuels in place with the following Western Isles retailers: [Confidential].

in instalments. Where Certas owes a debt to a WI retailer, it will ensure the punctual repayment of the debt.

7.3 ensure that a throughput arrangement is put in place for the Loch Carnan terminal, (Scottish Fuels, Loch Carnan Pier, Loch Carnan, Isle of South Uist, HS8 5NU), according to which:

7.3.1 a third party supplier (such as Phillips 66) ('the supplier') will procure supplies of oil products and deliver them to the terminal;

7.3.2 the supplier will directly negotiate terms and conditions of supply, including as to price, with the Parties and with any other distributor seeking supplies of oil products from the Loch Carnan terminal;

7.3.3 Certas will charge a throughput fee for the use of its Loch Carnan terminal, either to the supplier or to other distributors purchasing from the supplier which fee will be set to cover Certas' costs of operating the terminal, including operating expenses and capital depreciation, as well as a reasonable return on the capital assets employed by Certas at the terminal.

7.3.4 The pence-per-litre price for the throughput fee will be updated by Certas on the 1 May²³ of each year , and will be calculated according to the following formula:

$$Price (ppl) = \frac{Opex + Depreciation + (Rate\ of\ Return\ on\ Capital) * Capital\ Employed}{Expected\ volume}$$

7.3.5 where:

- (a) Operating Expenditures – these are Certas' estimated expenditures in operating the Loch Carnan terminal. They will be calculated to exclude all costs of distribution from the terminal (that is, excluding transportation costs from the terminal, marketing and communication costs, costs related to customer's bad debt and an allocation of the terminal payroll based on the time dedicated to distribution activities), and will reflect the operating costs of the preceding financial year (that is, year to 31 March prior to that date);

²³ This is to allow sufficient time for the Parties to carry out necessary end-of-year administration and thereafter to conduct the necessary calculations accordingly

- (b) Depreciation – is the depreciation charged to Certas' profit and loss account for the financial year then in progress for the capital base at the Loch Carnan terminal, including the depreciation to be charged on planned capital expenditures for that year (the depreciation rate will be the depreciation applied in the Profit and Loss account for the financial year which will include the depreciation of new capital expenditures);
- (c) Capital Employed – this will be the total investment in fixed assets (as at the net book value or carrying value in the accounts) employed at the Loch Carnan terminal, including any planned capital expenditures for the financial year then in progress;
- (d) Rate of Return on Capital – Certas has used a rate of return on capital of 12% to reflect the inherent risks of an island business;
- (e) Expected Volume – the expected volume will be the total throughput (in litres) at the Loch Carnan terminal in the preceding year across all distributors.

7.3.6 By way of indication, the price per litre for the current financial year (ending March 2014) using the above formula would be 2.73 pence. The Parties are willing to provide, on a confidential basis, to the external advisers of any fuel distributor access to Certas' accounts to ensure that the price correctly reflects the above formula.

AND

- 7.4 ensure that a throughput arrangement is continued for the Stornoway terminal, (Scottish Fuels, Shell Street, Stornoway, Isle of Lewis, HS1 2BS), according to which:
- 7.4.1 the supplier will procure supplies of oil products and deliver them to the Stornoway terminal;
 - 7.4.2 the supplier will directly negotiate terms and conditions of supply, including as to price, with the Parties and with any other distributor seeking supplies of oil products from the Stornoway terminal;
 - 7.4.3 Certas will charge a throughput fee for the use of its Stornoway terminal, either to the supplier or to other distributors purchasing from the supplier which fee will be set to cover Certas' costs of

operating the terminal, including operating expenses and capital depreciation, as well as a reasonable return on the capital assets employed by Certas at the terminal.

- 7.4.4 The ppl price for the throughput fee will be updated by Certas on 1 May²⁴ of each year, and will be calculated according to the following formula:

$$\text{Price (ppl)} = \frac{\text{Opex} + \text{Depreciation} + (\text{Rate of Return on Capital}) * \text{Capital Employed}}{\text{Expected volume}}$$

- 7.4.5 where:

- (a) Operating Expenditures – these are Certas’ estimated expenditures in operating the Stornoway terminal. They will be calculated to exclude all costs of distribution from the terminal (that is, excluding transportation costs from the terminal, marketing and communication costs, costs related to customer’s bad debt and an allocation of the terminal payroll based on the time dedicated to distribution activities), and will reflect the operating costs of the preceding financial year (that is, year to 31 March prior to that date);
- (b) Depreciation – is the depreciation charged to Certas’ profit and loss account for the financial year then in progress for the capital base at the Stornoway terminal, including the depreciation to be charged on planned capital expenditures for that year (the depreciation rate will be the depreciation applied in the Profit and Loss account for the financial year which will include the depreciation of new capital expenditures);
- (c) Capital Employed – this will be the total investment in fixed assets (as at the net book value or carrying value in the accounts) employed at the Stornoway terminal, including any planned capital expenditures for the financial year then in progress;

²⁴ This is to allow sufficient time for the Parties to carry out necessary end-of-year administration and thereafter to conduct the necessary calculations accordingly

- (d) Rate of Return on Capital – Certas has used a rate of return on capital of 12% to reflect the inherent risks of an island business;
- (e) Expected Volume – the expected volume will be the total throughput (in litres) at the Stornoway terminal in the preceding year across all distributors;

7.4.6 By way of indication, the price per litre for the current financial year (ending March 2014) would be 2.01 pence. Certas is willing to provide, on a confidential basis, to the external advisers of any fuel distributor access to its accounts to ensure that the price correctly reflects the above formula.

7.5 During the period that the Commitments remain in force, the Parties will be under no obligation to continue the operation of either the Loch Carnan terminal and/or the Stornoway terminal, and the Parties will not be prevented by the Commitments from divesting themselves of, or closing, either the Loch Carnan terminal and/or the Stornoway terminal. Should the Parties elect to sell, assign or otherwise transfer either the Loch Carnan terminal and/or the Stornoway terminal they will ensure that any purchaser, assignee or transferee of the terminal(s) is contractually bound to abide by the Commitments at 7.3 and/or 7.4, 8 and 9.

7.6 The Parties shall not in any way circumvent, by actions and/or omissions any of the Commitments, including by selling, assigning or otherwise transferring any part of their Western Isles road fuel business to any other entity within the DCC Plc corporate group.

DISPUTE RESOLUTION

8. The Parties:

8.1 shall use reasonable endeavours to negotiate in good faith and settle amicably any dispute that arises in relation to 7.1, 7.2, 7.3 or 7.4 of these Commitments including through the use of mediation. If the parties are for any reason unable to resolve the dispute within 30 days of it being notified to them, the parties to the dispute will attempt to settle it by mediation.

8.2 will, in negotiating agreements pursuant to 7.3 or 7.4 of these Commitments, propose that any dispute relating to the calculation of the throughput fee be referred for resolution to an Independent Chartered Accountant (the "Expert") on the following terms:

- 8.2.1 the parties to the dispute will seek to agree on the Independent Chartered Accountant to be appointed as Expert and, if they have not agreed within 14 days of the process being commenced, the Expert shall be appointed by the President for the time being of the Institute of Chartered Accountants in England and Wales on the application of either party;
- 8.2.2 the Expert shall act as an expert and not as an arbitrator;
- 8.2.3 the Expert shall, in considering any dispute, do so according to generally accepted accounting principles (GAAP) and shall apply International Financial Reporting Standards; and, wherever such standards/principles leave discretion as to the determination of a specific amount or volume, the Expert shall seek to determine the fair, reasonable and non-discriminatory amount or volume in each specific case;
- 8.2.4 the parties to the dispute shall each have the right to make representations to the Expert;
- 8.2.5 the decision of the Expert shall, in the absence of manifest error, be final and binding on the parties to the dispute;
- 8.2.6 all costs incurred by the Expert shall be borne by the parties to the dispute in equal shares and the parties shall each bear their own legal costs associated with expert determination;
- 8.2.7 the Expert will be provided with full access to Certas' accounts.

REPORTING

9. The Parties:

- 9.1.1 will provide to the Competition and Markets Authority any information and documents which the Competition and Markets Authority reasonably requires for the purposes of enabling the Competition and Markets Authority to monitor and review the operation of the Commitments or any provisions of the Commitments;
- 9.1.2 may be required by the Competition and Markets Authority to keep, maintain and produce those records specified in writing by the OFT that relate to the operation of any provision of the Commitments; and
- 9.1.3 will deliver an annual compliance statement to the Competition and Markets Authority, for each period of 12 consecutive months "year" in which the Commitments are in force, within

three months after the end of the year to which the annual compliance statement relates. The Parties will deliver the first such annual compliance statement no later than 14 days after the date on which the OFT formally accepts these Commitments, or by such other date as may be agreed between the Parties and the Competition and Markets Authority. The annual compliance statement shall include a detailed and accurate account of any matters notified to the Parties by the Competition and Markets Authority.

- 9.2 The obligations at 9.1.1 and 9.1.2 shall apply for the period that these Commitments are in force and for a further year after the Commitments end or expire.