

Anticipated acquisition of W Corbett & Co (Galvanizing) Limited by Joseph Ash Limited

ME/6518/15

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 9 July 2015. Full text of the decision published on 6 August 2015.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

1. Joseph Ash Limited (**Joseph Ash**) has agreed to acquire W Corbett & Co (Galvanizing) Limited (**Corbett**) (the **Merger**). Joseph Ash and Corbett are together referred to as the **Parties**.
2. On 25 June 2015, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**). Terms defined in the SLC Decision have the same meaning in this decision on reference unless otherwise indicated.
3. On the date of the SLC Decision, the CMA gave the Parties notice of the SLC Decision pursuant to section 34ZA(1)(b) of the Act. However, in order to allow the Parties the opportunity to offer undertakings in lieu of reference (**UILs**) to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision.
4. Pursuant to section 73A(1) of the Act, if a party wishes to offer UILs for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that if no UILs for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period, ie by 2 July 2015, or the Parties indicated before this deadline that they did not wish to offer such UILs, then the CMA would refer

the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

5. Pursuant to section 34ZA(2) of the Act the CMA is not prevented from making a reference under section 33 of the Act in the event that it decides that the duty to refer does not apply because it is considering whether to accept UILs under section 73 of the Act but no such UILs are offered or accepted.

The undertaking offered

6. On 2 July 2015, Joseph Ash offered to enter into a six-year capacity transfer agreement (the **Proposed Undertaking**), which Joseph Ash characterised as a form of toll manufacturing agreement, whereby:
 - (a) Joseph Ash would supply a competitor approved by the CMA (the **approved competitor**) with [X] tonnes of capacity per year (from any of Joseph Ash's plants, including the Corbett plant, in the Corbett catchment area at Joseph Ash's discretion) for a period of six years, with the capacity being reduced on a monthly basis to zero in the final 12 months of the capacity transfer agreement.
 - (b) Joseph Ash would supply the capacity on a 'cost plus' basis such that Joseph Ash would earn a margin of 3%.
 - (c) Joseph Ash would provide loading/unloading equipment and space as well as a 'home' parking space at a Joseph Ash plant.
 - (d) Joseph Ash would commit to a series of key performance indicators designed to ensure that Joseph Ash provides the same standard of service and range of services to the approved competitor as is currently provided from Corbett's plant.

Assessment of the Proposed Undertaking

7. Section 73(2) of the Act states that the CMA may, instead of making a reference and for the purpose or remedying, mitigating or preventing the SLC concerned or any adverse effect which, in relation to anticipated mergers, may be expected to result from it, accept UILs to take such action as it considers appropriate.
8. In accordance with section 73(3) of the Act, when deciding whether to accept UILs, the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.

9. In this regard, in order to accept UILs, the CMA must be confident that all the potential competition concerns that have been identified in its investigation would be resolved by means of the proposed UIL without the need for further investigation.¹ Therefore, UILs are appropriate only where the remedies proposed are 'clear-cut' and capable of 'ready implementation'.²
10. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).³
11. As a merger involves a structural change to a market, a structural divestment will therefore normally be the most appropriate remedy, as it would address the change to the market structure that gives rise to the competition concerns.⁴ Bearing in mind the obligation to achieve as comprehensive a solution as is reasonable and practicable, the CMA will therefore generally only consider alternatives to a structural divestment where it considers that such a divestment would be disproportionate or impracticable to remedy the SLC identified in its decision.
12. In the present case, the CMA does not consider that a structural divestment would be disproportionate or impracticable to remedy the SLC identified in the SLC Decision. The competitive constraint that would be lost as a result of the Merger relates to the constraint provided by the Corbett plant (and associated business activities) as a whole. In these circumstances, a divestment that seeks to replace the constraint provided by Corbett would be proportionate and practicable to the SLC identified in the SLC Decision.
13. Furthermore, the CMA considers that the Proposed Undertaking does not offer a clear-cut solution to the competition concerns identified for the following reasons.
14. First, the Proposed Undertaking would not restore competition to pre-Merger levels as it would not enable the approved competitor to provide the same level of competitive constraint as Corbett provided pre-Merger. In particular:

¹ *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122, 2010) (**Exceptions Guidance**), adopted by the CMA as set out in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), Annex D, paragraph 5.6.

² Exceptions Guidance, paragraph, 5.7.

³ Exceptions Guidance, paragraph 5.11.

⁴ Exceptions Guidance, paragraph 5.20.

- (a) The committed capacity available to the approved competitor reflects less than one-third of Corbett's output.
 - (b) The cost plus proposal – under which Joseph Ash would supply galvanizing services with the aim of achieving a 3% margin – would diminish the competitive strength of the approved competitor by raising its costs above that of Joseph Ash.
 - (c) The fact that Joseph Ash will have discretion over which plant will supply the galvanizing services may restrict the approved competitor's ability to fulfil ad-hoc/urgent orders or offer a competitive turnaround to the standard that the Parties were offering pre-Merger or in the same way as if they were operating their own plant.
15. Second, the CMA also notes that any effective remedy would need to apply as long as an SLC persists to provide a clear-cut solution. It considers that this period is difficult to predict in this case as it is uncertain to what extent market conditions may evolve in the next six years. It is therefore not sufficiently clear cut that any remedy would no longer be required after this relatively short period.
16. Third, the Proposed Undertaking raises concerns regarding implementation and monitoring as:
- (a) the costs of galvanizing are highly variable such that pre-determining a price in order to offer the approved competitor sufficient certainty may be difficult; and
 - (b) the key performance indicators proposed by Joseph Ash are highly variable, as Corbett's service offering will have varied by customer. They will therefore be difficult to establish, monitor and enforce.

Decision

17. For the reasons set out above, after examination of the Proposed Undertaking, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.
18. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.
19. Therefore, pursuant to sections 33(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under

Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

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9 July 2015