Anticipated acquisition by Dover Corporation of Wayne Fueling Systems Ltd

Decision that undertakings might be accepted

ME/6626/16

Introduction

1. Dover Corporation (**Dover**) has agreed to acquire Wayne Fueling Systems Ltd **(Wayne)** (the **Merger**). Dover and Wayne are together referred to as the **Parties**.

2. On 10 October 2016, 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**).

3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, 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 in order to allow the Parties the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act.

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings 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. Accordingly, on 17 October 2016, the Parties offered undertakings to the CMA for the purposes of section 73(2) of the Act.

5. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to the Parties that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the offer.

The undertakings offered

6. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the merger parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.

7. The SLC Decision found that the Merger gives rise to a realistic prospect of an SLC in relation to the supply of fuel dispensers in the UK. The SLC Decision found that the supply of fuel dispensers in the UK is highly concentrated, with three large competitors (the Parties and Gilbarco), and it concluded that smaller competitors pose only a limited constraint on the Parties, due to (i) their small shares of supply; (ii) third party comments on their lack of credibility, in particular in relation to their ability to distribute and provide customer support on a large scale; and (iii) the internal documents of the Parties, which focus on each other and Gilbarco. The SLC Decision also identified significant barriers to entry and expansion in the supply of fuel dispensers in the UK, particularly given the difficulty in establishing reliable distribution on a scale necessary to serve large national customers.

8. To address this SLC, the Parties have offered to either:

   (a) give undertakings in lieu of a reference to release the Tokheim sales and services division (**Tokheim SSD**) from its obligations to exclusively distribute Dover's fuel dispensers in the UK, and to take measures to facilitate the distribution by Tokheim SSD of fuel dispensers from a rival manufacturer (the **Proposed Undertakings to Release**); or

   (b) give undertakings in lieu of reference to divest Wayne Fueling Systems UK Ltd, which comprises Wayne's UK distribution business (the **Proposed Undertakings to Divest**). The Parties have also offered to enter into a purchase agreement with a buyer approved by the CMA before the CMA finally accepts these undertakings (the **Upfront Buyer Condition**).

The CMA's provisional views

9. The CMA considers that undertakings in lieu of a reference are appropriate when they are clear-cut and capable of ready implementation. The CMA's starting point when assessing undertakings is to seek an outcome that

restores competition to the level that would have prevailed absent the merger.[1]

Proposed Undertakings to Release

10. The CMA believes that the Proposed Undertakings to Release, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA, given that the Proposed Undertakings to Release may allow the competitive constraint from smaller competitors to become more significant by mitigating or eliminating a key barrier to entry and expansion which was identified in the SLC Decision, ie the difficulty which manufacturers have in finding a large and credible distributor for fuel dispensers in the UK. As such, the Proposed Undertakings to Release may result in replacing the competitive constraint provided by Wayne that would otherwise be lost following the Merger.

11. The CMA would only accept the Proposed Undertakings to Release after Tokheim SSD had entered into an agreement to distribute the fuel dispensers of another manufacturer, and only if the CMA believes this agreement to be sufficient to facilitate that manufacturer's entry or expansion in the UK such that this manufacturer would replace the competitive constraint provided by Wayne that would otherwise be lost following the Merger.

12. The CMA currently believes that the Proposed Undertakings to Release are capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns. The CMA also believes at this stage that the Proposed Undertakings to Release may be capable of ready implementation, in particular as Tokheim SSD is likely to be amenable to being released from its exclusivity obligations to Dover.

Proposed Undertakings to Divest

13. The CMA believes that the Proposed Undertakings to Divest, or a modified version of them, might also be acceptable as a suitable remedy to the SLC identified by the CMA, given that the Proposed Undertakings to Divest may allow the competitive constraint from smaller competitors to become more significant by mitigating or eliminating a key barrier to entry and expansion which was identified in the SLC Decision, ie the difficulty which manufacturers have in finding a large and credible distributor for fuel dispensers in the UK.

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[1] *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7 to 5.8 and 5.11). This guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

As such, the Proposed Undertakings to Divest may result in replacing the competitive constraint provided by Wayne that would otherwise be lost following the Merger.

14. The Upfront Buyer Condition means that the CMA would only accept the Proposed Undertakings to Divest after the Parties have entered into an agreement with a nominated buyer that the CMA considers to be suitable. It also means that, before acceptance, the CMA will consult publicly on the suitability of the nominated buyer, as well as other aspects of the Proposed Undertakings to Divest. The CMA considers that an Upfront Buyer Condition is necessary because the CMA wishes to ensure that the acquisition of Wayne's distribution business by the purchaser would induce a manufacturer (or manufacturers) of fuel dispensers to expand or enter in the UK such that the competitive constraint provided by Wayne that would otherwise be lost following the Merger is replaced.[2]

15. The CMA currently believes that the Proposed Undertakings to Divest are capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns. The CMA also believes at this stage that the Proposed Undertakings to Divest may be capable of ready implementation, in particular in light of the fact that the Wayne distribution business is an ongoing UK business which can be separated from its overseas parent company.

Provisional conclusion on the proposed undertakings

16. For these reasons, the CMA currently considers that there are reasonable grounds for believing that either of the proposed undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.

17. The CMA's decision on whether ultimately to accept either of the proposed undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things, third party views on whether the proposed undertakings are suitable to address the competition concerns identified by the CMA. In particular, before ultimately accepting the Proposed Undertakings to Release, the CMA would have to be confident that the agreement with a fuel dispenser manufacturer to facilitate its entry or expansion is effective and credible such that the competitive constraint provided by Wayne absent the Merger is replaced; or, alternatively, before ultimately accepting the Proposed Undertakings to Divest, the CMA would have to be confident that the

[2] See *OFT1122*, paragraphs 5.31 to 5.37, and *CMA2*, paragraph 8.34.

nominated buyer is effective and credible such that the competitive constraint provided by Wayne absent the Merger is replaced.

18. The CMA is, exceptionally, accepting in principle more than one potential set of undertakings in this case because both proposals appear clear-cut, effective and capable of ready implementation and it is unclear which proposal will be more effective in facilitating the entry or expansion needed to replace the competitive constraint provided by Wayne that would otherwise be lost following the Merger. The CMA intends to gather views on both proposed sets of undertakings from third parties.

Consultation process

19. Full details of the undertakings offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.[3]

Decision

20. The CMA therefore considers that there are reasonable grounds for believing that either of the proposed undertakings offered by the Parties, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 19 December 2016 pursuant to section 73A(3) of the Act to decide whether to accept either of the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 16 February 2017 if it considers that there are special reasons for doing so. If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

Sheldon Mills
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[3] *CMA2*, paragraph 8.29.