

Anticipated acquisition by Dover Corporation of Wayne Fueling Systems Ltd

Notice under paragraph 2(1) of Schedule 10 to the Enterprise Act 2002 (the Act) – consultation on proposed undertakings in lieu of reference pursuant to section 73 of the Act

ME/6626/16

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

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 17 October 2016, the Parties offered undertakings to the CMA for the purposes of section 73(2) of the Act.
4. On 24 October 2016, pursuant to section 73A(2)(b) of the Act, the CMA gave notice to the Parties that it considered that there were 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 was considering the offer (the **In principle acceptance decision**).
5. As set out in the SLC Decision, the CMA believes that, in the absence of appropriate undertakings, it would be under a duty to refer the Merger for a

phase 2 investigation. The text of the SLC Decision is available on the CMA webpages.¹

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. To address this SLC, Dover has offered to either:
 - (a) give undertakings in lieu of a reference to release Tokheim sales and servicing 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 (the **Divestment Business**), which comprises Wayne's UK distribution business by way of a sale and purchase agreement (the **Sale and Purchase Agreement**) and a distribution agreement (the **Master Distribution Agreement**) (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**).

CMA assessment

Suitability of the proposed undertakings

Proposed Undertakings to Release

8. In its **In principle acceptance decision**, the CMA said that it believed 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. Before

¹ See the [case page](#).

it could accept the Proposed Undertakings to Release, the CMA said that the Tokheim sales and services division would need to enter into an agreement to distribute the fuel dispensers of a manufacturer to replace the competitive constraint provided by Wayne that would otherwise be lost following the Merger.

9. Such an agreement has not been made, and the CMA does not believe that such an agreement will be made before it must make its decision on whether to accept undertakings in lieu of reference for a phase 2 investigation. The CMA is therefore not proposing to accept the Proposed Undertakings to Release.

Proposed Undertakings to Divest

10. The CMA currently considers that, subject to responses to the consultation required by Schedule 10 of the Act, the Proposed Undertakings to Divest will resolve the SLC identified in the SLC Decision in a clear-cut manner, ie the CMA currently does not have material doubts about the overall effectiveness of the Proposed Undertakings to Divest or concerns about their implementation.² This is because the Proposed Undertakings to Divest would eliminate a key barrier to entry and expansion which was identified in the SLC Decision, by allowing a manufacturer (or manufacturers) of fuel dispensers to access a large and credible distributor for fuel dispensers in the UK. As such, the Proposed Undertakings to Divest would result in replacing the competitive constraint provided by Wayne that would otherwise be lost following the Merger.
11. The CMA also considers that the Proposed Undertakings would be capable of ready implementation because the Wayne distribution business is an ongoing UK business which can be separated from its overseas parent company.
12. 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. The CMA considers that an Upfront Buyer Condition is necessary because the CMA considers that the identity of the purchaser will affect the undertakings' ability to remedy the CMA's competition concerns by inducing a manufacturer (or manufacturers) of fuel dispensers to expand or enter in the UK.

² *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7–5.8 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).

13. The Sale and Purchase Agreement and the Master Distribution Agreement are both subject to the CMA's approval. The CMA will have regard to the fact that they will both contain provisions ensuring that:
- the proposed purchaser will be Wayne's sole distributor in the UK for a period of two years;
 - the employees transferred to the purchaser will not be solicited for a period of two years;
 - the sale and purchase agreement provides for the provision of the necessary transitional services by Wayne to ensure that the Divestment Business continues to operate as an ongoing business.

Suitability of the proposed purchaser

14. In approving a purchaser, the CMA's starting position is that it must be confident without undertaking a detailed investigation that the proposed purchaser will restore pre-merger levels of competition. The CMA therefore seeks to ensure that:
- (a) the acquisition by the purchaser remedies, mitigates or prevents the SLC concerned and any adverse effect resulting from it;
 - (b) the proposed purchaser is independent of and unconnected to the merging parties;
 - (c) the proposed purchaser has the necessary financial resources, expertise, incentive and intention to maintain and operate the divested business as an effective competitor in the marketplace;
 - (d) the proposed purchaser is reasonably expected to obtain all necessary approvals, licences and consents from any regulatory or other authority; and
 - (e) the acquisition by the proposed purchaser does not itself create an SLC within any market or markets in the UK.³
15. The CMA was asked by Dover to consider a number of prospective purchasers, including Eurotank Service Group Limited (**Eurotank**) and Petrotec S.G.P.S. S.A. (**Petrotec**). Should the CMA decide that both purchasers are suitable following its public consultation process, Dover will

³ [OFT1122](#), paragraphs 5.25–5.30.

decide which purchaser will proceed with the acquisition. The sale and purchase agreement between Dover and the purchaser to transfer the Divestment Business will be conditional only upon acceptance by the CMA of the UIL, including approval of the purchaser of the Divestment Business and the terms of the share purchase agreement.

16. Eurotank is a UK group of companies that provides distribution and servicing of fuelling equipment including dispensers, payments systems, tanks and vapour recovery systems. It has a 40-strong network of engineers based out of three operating centres in England, Scotland and Northern Ireland. It has 15 years' experience in the wider petroleum service industry and has distributed and serviced dispensers since 2012 when it became an authorised distributor and service partner for Scheidt & Bachmann (**S&B**). In 2015, Eurotank began distributing, installing and servicing Tatsuno dispensers in the UK.
17. Petrotec is headquartered in Portugal, with an annual turnover of around €[REDACTED] million, and approximately 900 employees worldwide. It has a direct presence in seven countries, including Germany, Portugal, Spain and the UK, and a distribution network covering 84 countries worldwide. Petrotec provides a complete fuelling solution for petrol stations, including retail and fleet fuel dispensers, car wash systems, payment and automation systems, engineering and services, storage solutions, and aviation and marine. It has been in the UK for over 10 years, initially selling through [REDACTED] as its distributor. It supplies [REDACTED] petrol retail sites in the UK and has also won business with a number of independent UK petrol station operators. Since 2010, Petrotec has started building a presence as a direct seller in the UK.

Would the SLC be remedied, mitigated or prevented?

18. As a current distributor of S&B and Tatsuno fuel dispensers, Eurotank told the CMA that it would use the Divestment Business's network to promote these rival manufacturers of fuel dispensers as alternatives to Gilbarco and the Parties in the UK. Eurotank told the CMA that by purchasing the Divestment Business it would increase the scale of its operations, which would allow it to make sales of Tatsuno and S&B fuel dispensers to large volume customers which it would otherwise be unable to supply. Eurotank provided evidence showing support from both Tatsuno and S&B for its sales strategy.
19. Petrotec told the CMA that the acquisition of the Divestment Business would give it a national service, installation and maintenance network with which to support sales of its fuel dispensers. The acquisition would give Petrotec the

opportunity to expand substantially its current presence in the UK and improve the level of service to customers.

20. In the SLC Decision, the CMA identified a lack of large, credible distributors as a key factor preventing expansion by manufacturers of fuel dispensers other than Gilbarco and the Parties. The CMA considers that the acquisition of the Divestment Business by either Eurotank or Petrotec would facilitate the entry or expansion in the UK of an alternative manufacturer of fuel dispensers and so would remedy or mitigate the SLC.

Independence

21. Neither Eurotank nor Petrotec have any structural or financial links with either Dover or Wayne. The CMA therefore considers both Eurotank and Petrotec to be independent of the parties.

Financials, expertise, incentive and intention to operate as an effective competitor

22. Both Eurotank and Petrotec told the CMA that they will finance the acquisition out of [REDACTED]. The CMA believes that both companies possess the necessary financial resources and expertise to operate and maintain the Divestment Business.
23. Whichever purchaser acquires the Divestment Business, there will be an interim period in which the purchaser continues to supply Wayne fuel dispensers through the Divestment Business. The CMA has therefore carefully assessed the proposed purchasers' incentives to offer the fuel dispensers of a rival manufacturer. The CMA believes that Eurotank will be incentivised to facilitate competition with Wayne in order to reduce its dependence on the supply of fuel dispensers from Wayne, and to maintain its relationships with Tatsuno and S&B. As Petrotec is itself a manufacturer of fuel dispensers, it has a clear incentive to increase its supply of fuel dispensers into the UK.
24. The CMA therefore considers that both Eurotank and Petrotec would maintain and operate the Divestment Business as an effective competitor.

Approvals and consents

25. The business is being sold with all of the same licences, permits and authorisations that the Divestment Business currently owns that are necessary to carry on business in the UK in its current form. No regulatory consents or approvals are required.

Acquisition does not create an SLC

26. Eurotank is active in the distribution and maintenance of fuel dispensers in the UK. However, as noted in the SLC Decision, Eurotank has only distributed small volumes of fuel dispensers in the past.
27. Petrotec supplies fuel dispensers in the UK as a manufacturer. However, as noted in the SLC Decision,⁴ Petrotec has a low share of supply of fuel dispensers in the UK.
28. The CMA considers that the acquisition of the Divestment Business by either Eurotank or Petrotec will not in itself create an SLC.

Conclusion

29. Therefore, subject to responses to this consultation, the CMA currently considers both Eurotank and Petrotec to be suitable purchasers of the Divestment Business.

Proposed decision and next steps

30. For the reasons set out above, the CMA currently considers that the Proposed Undertakings and the purchase of the Divestment Business by either Eurotank or Petrotec are, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision and form as comprehensive a solution to these concerns as is reasonable and practicable.
31. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings to Divest in lieu of a reference of the Merger for a phase 2 investigation. The text of the Proposed Undertakings is available on the CMA case page.⁵
32. If Dover's acquisition of Wayne does not complete before the CMA accepts these undertakings, the CMA may need to accept undertakings from both Wayne and Dover, and will modify the text of the undertakings accordingly.
33. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views known to it. The CMA will have regard to any representations made in response to this consultation and may make modifications to the Proposed Undertakings as a

⁴ Paragraph 149.

⁵ See the [case page](#).

result. If the CMA considers that any representation necessitates any material change to the Proposed Undertakings, the CMA will give notice of the proposed modifications and publish a further consultation.⁶

34. Representations should be made in writing to the CMA and be addressed to:

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Mergers Group
Competition and Markets Authority
Victoria House
37 Southampton Row
London
WC1B 4AD

Email: maxwell.harris@cma.gsi.gov.uk

Telephone: 020 3738 6843

Deadline for comments: 14 December 2016

⁶ Under paragraph 2(4) of Schedule 10 to the Act.