

Anticipated acquisition by Dover Corporation of Wayne Fueling Systems Ltd

Decision on acceptance of undertakings in lieu of reference

ME/6626/16

The CMA's decision to accept undertakings in lieu of reference under section 73(2) of the Enterprise Act 2002 given on 19 December 2016. Full text of the decision published on 18 January 2017.

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.

Introduction

1. On 8 June 2016, Dover Corporation (**Dover**) entered into an agreement to acquire Wayne Fueling Systems Ltd (**Wayne**) (the **Merger**). This transaction completed on 9 December 2016. 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 UK (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. 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 **UILs Provisional Acceptance Decision**).

4. 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 and the UILs Provisional Acceptance Decision are available on the CMA webpages.¹

The undertakings offered

5. 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.
6. 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 offered to either:
 - (a) give undertakings in lieu of reference to release the 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 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**).

¹ See the [case page](#).

Consultation

The CMA's preliminary views

7. On 29 November 2016, pursuant to paragraph 2(1) of Schedule 10 to the Act, the CMA published the proposed undertakings in lieu of reference (**UILs**), inviting interested parties to give their views.²
8. For the reasons set out in the consultation, the CMA did not consider that the Proposed Undertakings to Release would remedy its concerns.
9. The CMA's preliminary view was that the Proposed Undertakings to Divest would resolve the SLC identified in the SLC decision in a clear-cut manner. This was because the CMA considered that the Proposed Undertakings to Divest would eliminate a key barrier to entry and expansion which was identified in paragraph 228 of the SLC Decision, namely a lack of access to a large and credible distributor for fuel dispensers in the UK. The Proposed Purchaser would therefore facilitate the entry or expansion by a manufacturer of fuel dispensers other than Gilbarco and the Parties. As such, the Proposed Undertakings to Divest would in a clear-cut manner result in the replacement of the competitive constraint provided by Wayne that would otherwise be lost following the Merger.
10. The success of the Proposed Undertakings to Divest rely on the purchaser's ability to continue the business activities of the Divestment Business. The Proposed Purchaser would therefore need to continue to purchase and sell Wayne's products for a period, while the Proposed Purchaser grows its sales of a rival manufacturer's fuel dispensers. In order to ensure the success of the Divestment Business, which has previously relied on supplies from its parent company, the CMA considered it essential that under the terms of the divestment the Proposed Purchaser would be Wayne's sole distributor in the UK for a period of two years.
11. The CMA's preliminary view was that both Eurotank Service Group Limited (**Eurotank**) and Petrotec S.G.P.S. S.A. (**Petrotec**) (the **Proposed Purchasers**), as proposed by the Parties, would be suitable purchasers of the Divestment Business. In particular, the CMA believed that either Proposed Purchaser would be incentivised to facilitate competition with Wayne in order to reduce its dependence on the supply of fuel dispensers from Wayne. Eurotank would also be incentivised to maintain its relationships with Tatsuno

² The full consultation text was published on the [case page](#).

and Scheidt & Bachmann (**S&B**), and Petrotec would also be incentivised by its ability to retain the margin from the sale of its own fuel dispensers.

12. Therefore the CMA did not have material doubts about the overall effectiveness of the Proposed Undertakings to Divest or concerns about their implementation.³

Responses to the consultation

13. The CMA received six submissions during the consultation period.

Customers

14. All four customers which responded to the consultation approved of the remedy, and none raised concerns about Petrotec as a proposed purchaser. One customer said that Eurotank might find the acquisition of the Divestment Business to be a challenge, given its current level of experience in fuel dispenser distribution.

Distributors

15. Two distributors of fuel dispensers responded to the CMA's consultation. Although neither objected to the remedy in principle, one said that the acquirer should be prevented from selling Wayne dispensers in order to encourage it to introduce an alternative brand.
16. The CMA considers that seeking to prevent the proposed purchaser from selling Wayne fuel dispensers is not necessary to achieve the remedy's goal. Indeed, for the reasons set out above in paragraph 10, the CMA considers it essential to ensure that the Divestment Business is able to continue to sell Wayne fuel dispensers for an interim period. Accordingly, taking into account all responses to the consultation, the CMA does not consider that the undertakings should exclude the Proposed Purchaser from distributing Wayne fuel dispensers.
17. One distributor raised concerns about Petrotec's ability to act as an independent distributor, as it would be incentivised to distribute its own dispensers.

³ *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).

18. The CMA does not believe that, if Petrotec were to concentrate on selling its own products, this would make the remedy less effective. This reflects Petrotec's current low levels of activity in the UK market, and the low level of constraint that Petrotec currently imposes on Dover and Wayne, as the CMA noted in paragraphs 145 to 150 of its SLC Decision. Indeed, the intent of the remedy in the longer term is to facilitate the supply of fuel dispensers in the UK from a manufacturer other than the Parties and Gilbarco. Accordingly, taking into account all responses to the consultation, Petrotec's record as a supplier of fuel dispensers in the UK and its international experience in the distribution of fuel dispensers, the CMA believes that Petrotec will be a suitable purchaser.
19. Both distributors raised concerns about Eurotank. One said that Eurotank's previous unsuccessful attempts to expand its distribution of rival fuel dispenser brands indicate that it would be unsuccessful at doing so as an owner of the Divestment Business. The other distributor raised concerns about Eurotank's independence.
20. Taking into account all responses to the consultation, and submissions from Eurotank and other third parties prior to the consultation, the CMA is confident that (after acquiring the Divestment Business) Eurotank would remedy its competition concerns by facilitating entry or expansion by a rival manufacturer. In particular, CMA has considered Eurotank's 15 years of experience in the petroleum service industry, its current activities in the servicing and distribution of S&B and Tatsuno dispensers, evidence of support from both Tatsuno and S&B for Eurotank's sales strategy, the details of Eurotank's business plan which was provided to the CMA and the step-change in scale which the acquisition of the Divestment Business would provide to Eurotank's distribution operations.

Conclusion

21. For the reasons set out above and in the consultation notice, the CMA believes that either Eurotank or Petrotec would be suitable purchasers of the Divestment Business, and the Proposed Undertakings to Divest would be an acceptable remedy of the SLC identified.
22. Dover has [✂] signed a share purchase agreement to sell the Divestment Business to Petrotec.

Decision

23. For the reasons set out above, the CMA considers that the UILs provided by

Dover are as comprehensive a solution as is reasonable and practicable to remedy, mitigate or prevent the SLC identified in the SLC Decision and any adverse effects resulting from it. The CMA has therefore decided to accept the UILs offered by Dover pursuant to section 73 of the Act. The Merger will therefore not be referred for a phase 2 investigation.

24. The undertakings, which have been signed by Dover, and which will be published on the CMA webpages,⁴ will come into effect from the date of this decision.

Sheldon Mills
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Competition and Markets Authority
19 December 2016

⁴ See the [case page](#).