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From: Adam Land

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Telephone: 020 3738 6000

Our ref:

Your ref:

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Dear Mr Dawson

Request for an indication of enforcement prioritisation

In December 2003, Centrica plc and Centrica Storage Limited (CSL) gave undertakings in relation to the completed acquisition by Centrica plc of Dynegy Storage Ltd and Dynegy Onshore Processing UK Ltd (the 'Rough Undertakings'). By letter of 18 September 2015, CSL and Centrica plc have requested the CMA indicate whether or not the CMA would prioritise taking enforcement action under section 94(6)¹ of the Enterprise Act 2002, in the event that CSL and Centrica² fail to comply with the undertakings in 2016/17 given the circumstances that CSL identifies have arisen at the Rough Gas Storage Facility and provided CSL takes the actions set out in their letter.

The background

CSL has submitted that '...recent changes in the physical capabilities of the Rough Gas Storage Facility...are consistent with the general change to the nature of the Facility as an ageing asset that is likely to require changes to its operating

¹ While the Rough Undertakings were given under the Fair Trading Act, the obligation on Centrica to comply with the Rough undertakings, and enforcing compliance with it by the CMA, now arises under the s.94 of the Enterprise Act 2002 (EA02), the relevant undertaking having been transferred to the CMA's legacy bodies by Statutory Instrument (this is the effect of paragraph 15(1) of Schedule 24 to EA02 as regards the Rough Undertakings they are a specified undertaking by virtue of Schedule 1 to SI 2004/2181). Under sub-paragraph 15(3) of Schedule 24 to EA02, compliance with the Rough Undertakings is enforceable by a CMA Group.

² Hereafter when referring to the parties to the undertaking we refer for ease only to Centrica Storage Limited (CSL).

parameters in increasingly unpredictable ways in order to keep it functioning efficiently and safely'. It has therefore sought a review of the Rough Undertakings from the CMA.³ The CMA has announced it will consult on whether to conduct a review of the undertakings.⁴

However, CSL, recognising that such a review, if conducted, may not conclude before the Rough Undertakings would require CSL to offer the obliged storage capacity to the market, considers there is a 'significant risk' it will not be able to comply with its obligations to offer storage capacity for the 2016/17 Storage Year due to reduced storage capacity and gas injection performance relating to concerns about well integrity. CSL has therefore sought an indication from the CMA whether, provided CSL takes the steps it has set out, the CMA would be likely to prioritise enforcement action in relation to a breach of CSL's obligations to offer minimum amounts of storage capacity for sale during the 2016/17 Storage Year pending the outcome of any review.⁵

CSL has indicated it wishes to finalise its capacity offering for the Rough Gas Storage Facility and to inform the market of what storage capacity will be available for the 2016/17 Storage Year. It has considered the extent to which it is able to comply with the 'Rough Undertakings' and has set out what it intends to do.⁶

Consideration

A person who gives an undertaking has a duty⁷ to comply with it. The CMA does not have the power to suspend the effect of an undertaking, outside the statutory process⁸ of reviewing and deciding whether to vary or release an undertaking, and therefore cannot do so.

The decision on whether to seek an injunction requiring compliance or other relief before the High Court is a decision to be made by a CMA Group of independent CMA panel members appointed by the CMA Chair⁹ and the decision on what, if any, remedy is appropriate to impose is ultimately for the High Court.

³ Letter dated 18 September 2015: 'Application to the CMA for a variation to the Undertakings'.

⁴ CMA: Centrica Storage Limited ("CSL") and Centrica plc ("Centrica") – Invitation to comment on a request to vary the 'Rough' undertakings, 22 September 2015.

⁵ Letter dated 18 September 2015: 'Indication of the CMA's prioritisation principles in relation to the Undertakings'.

⁶ Letter dated 18 September 2015: 'Indication of the CMA's prioritisation principles in relation to the Undertakings'.

⁷ As above, the duty under Rough Undertakings now arises under s.94(2) EA02, having been specified by SI.

⁸ See Competition and Markets Authority, *CMA11: Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders*, January 2014 (revised August 2015).

⁹ The Rough Undertaking being a "specified undertaking" under paragraph 15(3)(a) of Schd. 24 EA02 (see s.2 and Schd.1 to SI 2004/2181) and therefore "shall also be enforceable by civil proceedings brought by [a group

However, having discussed this matter with relevant CMA officials, I am willing to indicate, on the assumed set of facts submitted by CSL and the steps CSL set out, which it submits is the maximum feasible compliance consistent with the spirit of the undertakings, whether in those circumstances CMA officials would be likely to recommend prioritising undertaking enforcement action under section 94(6) of the Enterprise Act 2002 to seek an injunction from the High Court to order further steps than those CSL has set out it intends to take.

Such an indication is limited to the assumed facts and circumstances set out in CSL's request. This indication may not apply if the CMA were to determine the facts and circumstances are different to those indicated by CSL.

Prioritisation

The CMA's mission is to make markets work well in the interests of consumers, businesses and the economy.¹⁰ In order to make the best use of our resources in terms of real outcomes for UK consumers, we need to ensure that we make appropriate decisions about the work we undertake across all areas of our responsibility. In seeking to target both our resources and enforcement strategy, the CMA needs to consider a range of factors including impact on consumers, strategic significance, risks and resources to decide if a particular enforcement case is an appropriate one to take forward. We generally prioritise according to the impact of work on consumers and according to the strategic significance of the work. We balance this against the risks and resources involved.¹¹

In considering the impact and strategic significance of taking enforcement action, the CMA considers the energy market and the role of Rough Gas Storage Facility in the wholesale gas market to be strategically significant, such that total non-compliance with the undertakings could have a substantial impact on that market and consumers.

However in considering whether enforcement action would be likely to be proportionate or effective, the CMA has had regard to CSL's submission that the reason storage capacity may not be offered is that it is not available, as CSL asserts that the Rough Gas Storage Facility is currently unable to operate at the pressure envisioned in the Rough Undertakings.

The CMA has had regard to the steps CSL has identified and proposes to take, which it submits will '...ensure it can offer the maximum capacity of Rough to the market in a form which is consistent with the physical capabilities of Rough and

constituted for the purpose by the chair of the CMA under Schedule 4 to the Enterprise and Regulatory Reform Act 2013] for an injunction...".

¹⁰ Competition and Markets Authority, [Annual Report and Accounts 2014-15](#), July 2015. Page 12.

¹¹ Further detail can be found in Competition and Markets Authority, [CMA16: Prioritisation Principles for the CMA](#), April 2014.

which is consistent with the spirit of the Undertakings'. While the CMA has not made a determination whether those steps constitute all steps CSL could be required to take, the CMA has had regard to the risk that successful enforcement action may not achieve additional compliance, or might only bring CSL marginally closer to full compliance, with the Rough Undertakings due to the storage capacity not being physically available at the current operating pressure.¹² Further the CMA has considered the resources that would be diverted from other work, including the requested review of the Rough Undertakings, were enforcement action to be pursued.

The CMA has had regard to the constructive engagement by CSL with the CMA and Ofgem in relation to this matter. It notes that the requested indication is to allow CSL to determine its sales strategy for the 16/17 Storage Year and inform the market of the capacity it is making available. The CMA also notes that the situation is envisioned to be temporary pending its requested review of the Rough Undertakings. That review, if conducted, will make a determination of whether there has been a change of circumstances, the reasons for it and what obliged storage capacity should be offered to the market.

Conclusion

For the reasons given above, provided the assumed facts set out in CSL's letter of 18 September 2015 were to continue to apply and the proposed actions set out in the letter were undertaken by CSL, I anticipate that CMA officials would not recommend prioritising the taking of enforcement action in relation to a breach of CSL's minimum storage capacity obligations under the Rough Undertakings as a result of physical constraints associated with pressure limiting at the Rough Storage Facility.

This position is based on the representations made to the CMA in CSL's letter dated 18 September. As noted above, any different facts or conditions might require the CMA to reach a different conclusion. For the avoidance of doubt this indication of prioritisation is not a decision or determination of whether a breach has or will occur, nor whether the steps identified are, as asserted to be, the maximum compliance possible in accordance with the spirit of the undertakings. Rather it is an indication of whether CMA officials would recommend prioritising the resources on the assumed facts, to seek to require additional steps be taken over those set out in CSL's letter of 18 September 2015. This indication also does not represent a constraint on potential variations to the undertakings, including as to the amount of capacity which CSL is

¹² In considering whether enforcement action should be prioritised, the CMA has had regard to the risk that were it to establish a breach of the Rough Undertakings in the High Court, whether the relief that would follow would actually order further capacity to be made available than the Rough Gas Storage Facility can provide at the current pressure ie a mandatory injunction notwithstanding the physical limitation, or instead be limited to declaratory relief and not require capacity that does not exist be sold, ie not require further steps be taken.

required to offer for sale, should the CMA decide to conduct a review of the undertakings.

The fact that the CMA may not take enforcement action also does not prevent affected third parties from taking action pursuant to section 94(4) of the Enterprise Act 2002.

Yours sincerely

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