Anticipated acquisition by John Swire & Sons Limited of certain businesses of the Simadan Group

Decision on relevant merger situation and substantial lessening of competition

ME/6764/18

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 9 October 2018. Full text of the decision published on 25 October 2018.

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

SUMMARY

1. John Swire & Sons Limited (**JSS**) has agreed to acquire Biodiesel Amsterdam (**BDA**), Tankstorage Amsterdam (**TSA**) and Cleaning Services Amsterdam (**CSA**) (together, the **Target Business**) from the Simadan Group (**Simadan**) (the **Merger**). JSS and the Target Business are together referred to as the **Parties**.

2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of JSS and the Target Business is an enterprise, that these enterprises will cease to be distinct as a result of the Merger, and that the share of supply test is met. Accordingly, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

3. The Parties mainly overlap in the supply of pure second-generation (**2G**) biodiesel in the EEA. The CMA has assessed whether the Merger gives rise to competition concerns as a result of horizontal unilateral effects in this frame of reference.

4. The CMA's investigation found:

(a) the Parties have a combined share of supply of no more than [10-20]% in the supply of pure 2G biodiesel in the EEA;

(b) the merged entity will be constrained by other suppliers of pure 2G biodiesel operating both in the UK and the EEA, as evidenced by data on imports and by customers' and competitors' views; and

(c) most customers did not raise any concerns in relation to the Merger.

5. The CMA therefore believes that the Merger does not give rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects in the supply of pure 2G biodiesel in the EEA.

6. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties

7. JSS is the parent company of the JSS Group, a multinational conglomerate with numerous business activities, including the production of biodiesel through its UK subsidiary, Argent Energy (UK) Limited. The turnover of the JSS Group in the financial year ending 31 December 2017 was approximately £17.6 billion worldwide, of which approximately £[✂] million was generated in the UK.

8. The Target Business comprises three companies (BDA, TSA and CSA), which form part of the Simadan Group. BDA is a 2G biodiesel producer and supplier; TSA is a tank storage business for edible oils, fats, and biodiesel; and CSA offers tank and truck cleaning services. The turnover of the Target Business in the financial year ended 31 December 2017 was approximately £[✂] million worldwide, of which approximately £[✂] million was generated in the UK.

Transaction

9. JSS intends to acquire the Target Business from Simadan pursuant to a Sale and Purchase Agreement.

10. The Parties informed the CMA that the Merger is also the subject of review by the competition authority in the Netherlands.

Jurisdiction

11. Each of JSS and the Target Business is an enterprise. As a result of the Merger, these enterprises will cease to be distinct.

12. The Parties overlap in the supply of Tallow Methyl Ester **(TME)**. They have a combined share of supply of TME in the UK of approximately [80-90]%[1] by volume, excluding self-supply (with an increment of [50-60]%). The CMA therefore believes that the share of supply test in section 23 of the Act is met.

13. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

14. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on August 31 2018. The statutory 40 working day deadline for a decision is therefore 26 November 2018.

Counterfactual

15. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.[2]

16. In this case, there is no evidence supporting a different counterfactual, and the Parties and third parties have not put forward arguments in this respect. Therefore, the CMA believes the prevailing conditions of competition to be the relevant counterfactual.

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[1] This estimate is based on information received in response to the CMA's merger investigation and may slightly overstate the combined share (i.e. supply by small suppliers of TME may have been missed out).
[2] *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, from paragraph 4.3.5. The *Merger Assessment Guidelines* have been adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

Background

17. The Parties are active in the production and supply of pure 2G biodiesel and other related products (eg crude glycerine).

18. Biodiesel is a non-petroleum based fuel typically produced through the reaction of vegetable oils or animal fats with methanol to yield a methyl ester product (i.e. biodiesel) and glycerine.

19. Pure biodiesel produced from crops such as rapeseed, soybean and palm are referred to as 'First Generation' (**1G**) biodiesel. Pure biodiesel produced from animal fats (such as tallow and used cooking oil) or hydrogenated vegetable oils (**HVO**) are known as 'Second Generation' (**2G**) biodiesel. The resulting pure biodiesel is sometimes referred to by reference to the key input, i.e:

    (a) Rapeseed Methyl Ester (**RME**);

    (b) Palm Methyl Ester (**PME**);

    (c) Soybean Methyl Ester (**SME**);

    (d) Tallow Methyl Ester (**TME**); or

    (e) Used Cooking Oil Methyl Ester (**UCOME**).

20. The Renewable Energy Directive 2009[3] aims to promote the use of fuels derived from biological sources, in particular those biofuels which are derived from sources which have lower indirect land-use implications, by setting sustainability targets. In general, each biofuel is counted towards the sustainability targets set out in the directive in proportion to its energy content. However, the directive allows for certain feedstocks and fuels to be counted twice in terms of their energy content, this is known as 'double counting'.

21. The key difference between 1G and 2G biodiesel is that, depending on the national implementing legislation, 2G biodiesel can be counted twice for the purposes of these sustainability targets, whereas 1G biodiesel cannot. The UK currently allows double counting.

[3] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16–62, as amended by Directive 2015/1513 of the European Parliament and of the Council of 9 September 2015, OJ L 239, 15.9.2015, p. 1–29.

22. Pure biodiesel (whether 1G or 2G) can undergo further processing with mineral/petroleum diesel to produce 'blended biodiesel' which is used as a road transport fuel. The Target Business does not produce blended biodiesel.

23. In order to produce pure 2G biodiesel, the Parties purchase tallow. Tallow is the fat extracted from animal tissue in the normal rendering process and, as such, it is an animal by-product as defined under the Animal By-Products Regulation.[4] Tallow can be used as an energy source, for animal feed or used in the manufacture of soaps and oleo-chemicals. Under the Animal By-Products Regulation, animal by-products can fall into one of three categories (classified by degree of quality, from high to low[5]). The Parties overlap in the purchase of category 1 tallow in the UK.

24. A number of third parties told the CMA that, post-Merger, the Parties will account for the majority of the purchases of category 1 tallow in the UK. However, the CMA has not found any evidence to indicate that the merged entity will have the ability to use its buyer power to the detriment of customers in the UK, taking into account, amongst other things, the range of downstream competitors and potential suppliers.[6] The CMA has therefore not investigated further the overlap between the Parties in the purchase of tallow in the UK.

25. Crude glycerine is a naturally occurring chemical compound which is a by-product of the biodiesel production process. Both Parties produce crude glycerine and supply it to customers in the UK. Glycerine produced from category 1 tallow, such as that produced by the Parties, cannot enter the food chain, or be used in cosmetic applications for commercial reasons. Therefore, it is primarily used as a feedstock in biogas production. The CMA found that crude glycerine from biodiesel production is [✂]. The CMA found that BDA's supplies of glycerine in the UK produced from category 1 tallow are very low (less than £[✂]in 2017). Moreover, no third parties raised any competition concerns in relation to the supply of glycerine in the UK. The CMA has therefore not investigated this overlap further.

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[4] The Animal By-Products Regulation, Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002.

[5] Category 1 materials are the materials with the highest risk, while Category 3 materials are low risk materials. Category 2 is also high risk and the default status of any animal by-product not defined in Regulation (EC) 1069/2009 as either category 1 or category 3 material.

[6] In *Linergy/Ulster Farm (Phase 1 Decision)*, third parties told the CMA that there was little demand from the UK and Republic of Ireland for tallow and most renderers exported tallow to Mainland Europe (in particular, to customers located in the Netherlands, Belgium and Germany). One customer indicated that it had around 120 suppliers at any one time and sourced tallow from across Europe. The CMA therefore considered that the geographic frame of reference was wider than the UK and could be as broad as EEA-wide or Northern Europe-wide (paragraphs 103 and 105).

Frame of reference

26. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.[7]

27. The Parties overlap in the supply of pure 2G biodiesel in the EEA.

Product scope

28. The Parties submitted that that the appropriate product frame of reference should be all pure 2G biodiesel (where this includes TME, UCOME and HVO).

29. The CMA considered whether it was appropriate to further segment within biodiesel to consider TME and UCOME as separate frames of reference.

30. The CMA noted certain differences between TME and UCOME:

    (a) In terms of physicochemical characteristics, TME has a CFPP[8] value of appromimately 11, whereas UCOME has a CFPP of approximately 2, meaning that biodiesel which is blended with TME can start clotting in colder climates. UCOME also has lower acidity and lower sulphur counts, whereas TME requires further processing in order to be suitable for blending.

    (b) TME is cheaper to produce. One market report estimated that TME is approximately €100 cheaper per tonne than UCOME.

    (c) The Parties both specialise in the manufacture of TME, while most of their competitors produce UCOME.

31. However, the CMA's investigation found that:

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[7] *Merger Assessment Guidelines*, paragraph 5.2.2.

[8] CFPP stands for "Cold Filter Plugging Point", the lowest temperature, expressed in degrees Celsius (°C), at which a given volume of diesel type of fuel still passes through a standardized filtration device in a specified time when cooled under certain conditions.

(a) TME and UCOME generally serve the same purpose, and blenders who are able to blend TME are generally able to switch to UCOME relatively easily;

(b) the prices paid by customers for TME and UCOME are highly correlated;

(c) the regulatory treatment of TME and UCOME with respect to the double counting rules is consistent, both in the UK and most European countries;

(d) the majority of customers and competitors told the CMA that TME and UCOME are substitutable (because they are both eligible for double counting), and where there are differences in UCOME and TME (as described in paragraph 30(a)), these tend to reduce the ability of UCOME customers to switch to TME but not the ability of TME customers to switch to UCOME.

32. The CMA did not identify any correlation in the uses, prices or regulatory treatment of HVO with TME or UCOME and no third parties made any submissions to the CMA to support including HVO in the frame of reference.

33. On the basis of the above evidence, the CMA believes that the appropriate product frame of reference for its assessment of the Merger is the supply of pure 2G biodiesel (where this includes TME and UCOME, but excludes HVO).

Geographic scope

34. The Parties submitted that the market for biodiesel is global. The Parties both supply to customers on a global basis and there is a significant volume of biodiesel imported into the UK.

35. In Diester / Oleon[9], the Commission stated that its market testing indicated that the biodiesel market was at least EEA-wide, although it left open the precise geographic market definition.

36. Third parties told the CMA that it was common for biodiesel to be traded between different European countries. Most competitors told the CMA that they supplied biodiesel in different European countries from those where their production facilities were located.

37. The CMA found that more than 40% of TME used in the UK is imported from 12 different countries, mostly from EEA countries or from Switzerland, while

[9] Case COMP/M.5388 - *Diester Industrie / Oleon Group*, 08/01/2009

UCOME was supplied into the UK from 73 different countries, including 44% from outside of Europe.

38. For the reasons set out above, the CMA believes that the appropriate geographic frame of reference for pure 2G biodiesel is at least as wide as the EEA. However it was not necessary for the CMA to reach a conclusion on the geographic frame of reference since, as set out below, no competition concerns arise on any plausible basis.

Conclusion on frame of reference

39. For the reasons set out above, the CMA has assessed the impact of the Merger in the supply of pure 2G biodiesel in the EEA.

Competitive assessment

Horizontal unilateral effects

40. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.[10] Horizontal unilateral effects are more likely when the merging parties are close competitors. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to horizontal unilateral effects in the supply of pure 2G biodiesel in the EEA.

Shares of supply

41. The Parties submitted that their combined shares of supply were low, indicating that there was no plausible basis for any competition concerns.

42. The CMA estimated (using information from the Parties and third parties) that the Parties have a combined share of supply of pure 2G biodiesel by volume of around [20-30]% in the UK and no more than [10-20]% in the EEA. These shares of supply are higher than the shares submitted to the CMA by the Parties but not high enough to raise prima facie competition concerns.

Closeness of competition

43. Evidence from customers suggested that the Parties are close competitors in the supply of pure 2G biodiesel as they both supply TME. Some customers

[10] *Merger Assessment Guidelines*, from paragraph 5.4.1.

noted that, after the Merger, the merged entity and ecoMotion would be the only two large suppliers of TME in Western Europe.

44. However, the CMA's investigation found that the Parties also compete closely with suppliers of UCOME for the reasons set out in paragraph 31-33..

Competitive constraints

45. The Parties submitted that there will be a significant number of competitors remaining post-Merger who will sufficiently constrain the merged entity. They identified a number of alternative suppliers of biodiesel across the EEA, all of which can supply into the UK, including Olleco, Greenergy, Saria Bio-Industries (including its subsidiary ecoMotion) and Renewable Energy Group. They also submitted that imports from outside the EU are a significant constraint on EU biodiesel producers, with more than 852,000 tonnes of biodiesel being imported into the EU from Argentina alone between August 2017 and January 2018.

46. The CMA's investigation confirmed that the competitors listed above are viable alternative suppliers for customers. Each competitor said that it currently supplied pure 2G biodiesel to customers in a number of European countries. This was confirmed by a market report produced by a broker of 2G biodiesel, which indicated that there were a large number of alternative suppliers of pure 2G biodiesel in the EEA, including ecoMotion and Renewable Energy Group.

47. All customers which responded to the CMA's questions said that they were able to source pure 2G biodiesel from a range of suppliers based all over the EEA. The CMA found that, while most of the alternative suppliers of pure 2G biodiesel produce mostly or exclusively UCOME, they still represent a viable alternative for the Parties' customers, for the reasons set out in paragraph 31-33. Customers told the CMA that there were sufficient alternative suppliers of pure 2G biodiesel that the Merger would not raise competition concerns.

Conclusion on horizontal unilateral effects

48. Based on the evidence set out above, the CMA believes that there are a number of alternative suppliers of pure 2G biodiesel remaining in the EEA who will constrain the merged entity post-Merger. Accordingly, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the supply of pure 2G biodiesel in the EEA.

Barriers to entry and expansion

49. Entry, or the expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC.[11]

50. In this case, the CMA has not had to conclude on barriers to entry or expansion as the Merger does not give rise to competition concerns on any basis.

Decision

51. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in an SLC within a market or markets in the UK.

52. The Merger will therefore **not be referred** under section 33(1) of the Act.

Andrew Wright
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9 October 2018

[11] *Merger Assessment Guidelines*, from paragraph 5.8.1.