

# Anticipated acquisition by Liqui-Box Inc. of the rigid and flexible packaging business of DS Smith Holdings Limited

## Decision that undertakings might be accepted

ME/6813/19

### Introduction

1. Liqui-Box Inc. (**Liqui-Box**), a portfolio company owned by Olympus Partners, has agreed to acquire DS Smith Holdings Limited's rigid and flexible plastic packaging business (the **Target**) (the **Merger**). Liqui-Box and the Target are together referred to as the **Parties**.
2. On 19 July 2019, 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 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 26 July 2019, 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 flexible plastic 'Bag-in-Box' (**BiB**) packaging for edible products (namely, beverages, wine, food, and dairy products) in the United Kingdom (**UK**). To address this SLC, the Parties have offered to give undertakings in lieu of a reference (the **Proposed Undertakings**). The Proposed Undertakings comprise:
  - (a) All of Liqui-Box's BiB manufacturing equipment currently used to serve all end-use segments in the UK (in particular, three BiB production lines currently installed at Liqui-Box's Wythenshawe facility<sup>1</sup>) as well as manufacturing know how and training on the operation of the divested equipment;
  - (b) Injection moulding and fitment assembly line equipment currently installed at the Liqui-Box Wythenshawe facility, with sufficient capacity to serve the divested production lines going forwards (subject to purchaser requirements), UK-based moulds used to make the fitments currently used on the divested production lines, and any intellectual property held by Liqui-Box in the fitments in question;
  - (c) All of Liqui-Box's existing UK BiB customers and, in particular, Liqui-Box's existing BiB supply agreements with UK customers subject to customer consent to transfer<sup>2</sup> (detailed further in paragraph 8 below), together with

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<sup>1</sup> Liqui-Box proposes to install equipment to one machine which will make it capable of making a specific BiB handle required by an existing UK BiB customer [X] prior to the transfer to the purchaser.

<sup>2</sup> Liqui-Box will give a "best-efforts" undertaking to transfer all of Liqui-Box's UK BiB customers.

a non-solicit undertaking of two years' in duration from Liqui-Box in respect of these customers<sup>3</sup>;

- (d) The leasehold interest in Liqui-Box's Wythenshawe factory premises to house the production line assets proposed for divestment (subject to purchaser interest); and
- (e) Liqui-Box's [X], together with a non-solicit undertaking from Liqui-Box in respect of these employees of two years' in duration;
- (f) Sufficient inventory of BiB to enable to purchaser to service Liqui-Box's UK customer base from the date of completion; and
- (g) A transitional supply of fitments used on the production lines proposed for divestment (subject to purchaser interest).

8. The Proposed Undertakings also include:

- (a) an arm's length supply agreement in respect of the fitments used to supply BiB packaging to [X], a mould which could be used by the proposed purchaser to manufacture these fitments, and any IP rights held by Liqui-Box in relation to these fitments; and
- (b) an arm's length supply agreement in respect of the fitments used to supply BiB packaging to [X].

These customers together represented £[X] of Liqui-Box's 2018 UK sales (around [20-30]%). The agreement with [X] is Europe-wide, and Liqui-Box also supplies BiB packaging to [X] in Denmark (it is intended that this supply to [X] in Denmark would also be included in the transfer to the purchaser).

9. Under the Proposed Undertakings, the Parties have also offered to enter into a purchase agreement with a buyer approved by the CMA before the CMA finally accepts the Proposed Undertakings (Upfront Buyer Condition).<sup>4</sup>

## **The CMA's provisional views**

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<sup>3</sup> Liqui-Box also supplies a small volume (less than [X] annually) of bulk bags including a fitment to [X], a UK company which uses a Liqui-Box filling machine that requires BiB products with a specific fitment only supplied from Liqui-Box's US facility. Liqui-Box only supplies these particular BiB products to [X] in the UK. Rather than transfer the machines installed in the USA that supply the bulk bags and fitment used by [X] to the purchaser, Liqui-Box proposes to supply these bulk bags including fitments to the purchaser at the internal transfer price currently charged within Liqui-Box.

<sup>4</sup> *Merger remedies (CMA87)*, December 2018, (in particular paragraphs 3.27, 3.28 and 3.30).

10. 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.<sup>5</sup>
11. The CMA believes that the Proposed Undertakings, 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 would likely allow the purchaser to compete effectively as a BiB supplier in the UK and would create another source of supply for BiB packaging in the UK, including in each of the beverages, dairy, wine and food end use segments. The Proposed Undertakings include the divestment of the entirety of Liqui-Box's existing UK BiB business, which currently generates approximately £[~~£~~] million per annum, and would result in the transfer of manufacturing capacity representing approximately three times Liqui-Box's current level of UK BiB sales and the incremental UK manufacturing capacity resulting from the Merger to a third party. As such, the Proposed Undertakings may result in replacing the competitive constraint provided by the Acquirer that would otherwise be lost following the Merger.
12. The CMA currently believes that the Proposed Undertakings, or a modified version of them, are capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns. The Proposed Undertakings include the divestiture of manufacturing assets for the supply of BiB packaging for edible products, and fitment components, customer contracts and a customer list, and other undertakings set out above.
13. The CMA believes at this stage that the Proposed Undertakings may be capable of ready implementation. The assets and other features of the Proposed Undertakings (as set out in paragraphs 7 and 8 above) comprise a sufficient standalone BiB supply business such that the purchaser will be able to compete effectively in the UK for the supply of BiB packaging for edible products in the UK.
14. It is anticipated that the remedy will be implemented as a sale of a single package of assets to a single purchaser. To implement this package, Liqui-Box submitted that the sale process can move forward quickly and that signing of a business transfer agreement is highly achievable prior to the expiry of the CMA's 50 working day deadline. In light of ready purchaser interest, Liqui-Box believes that it can sign a sale and purchase agreement in

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<sup>5</sup> *Merger remedies (CMA87)*, December 2018, (in particular, paragraphs 3.27, 3.28 and 3.30).



relation to the proposed divestment business (with or without the Wythenshawe facility included) within 30 days. Liqui-Box has submitted that closing of the sale and purchase agreement with the divestment purchaser could take place as soon as CMA approval is obtained.

15. The Upfront Buyer Condition means that the CMA will only accept the Proposed Undertakings after the Parties have entered into an agreement with (a) nominated buyer(s) 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. In order to consider the proposed buyer(s) as being suitable, the CMA will need to be satisfied that the purchaser suitability criteria in the CMA's Merger Remedies guidance are met. These criteria include the requirement that the proposed purchaser has the financial resources, expertise, incentive and intention to maintain and operate the divestment business as part of a viable and active business in competition with the merged party in the relevant market.
16. For the reasons set out above, the CMA currently believes that there are reasonable grounds for believing that 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 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, the CMA must be confident that the nominated buyer is effective and credible such that the competitive constraint provided by the Acquirer absent the Merger is replaced to a sufficient extent.

## **Consultation process**

18. 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.<sup>6</sup>

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<sup>6</sup> CMA2, paragraph 8.29.

## **Decision**

19. The CMA therefore considers that there are reasonable grounds for believing that 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 30 September 2019 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 25 November 2019 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.

**Joel Bamford**  
**Senior Director of Mergers**  
**Competition and Markets Authority**  
**2 August 2019**