

Acquisition by Liqui-Box, Inc. of the flexible and rigid plastic packaging business of DS Smith

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/6813/19

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. Liqui-Box, Inc. (**Liqui-Box**) has agreed to acquire the flexible and rigid plastic packaging business of DS Smith Holdings Limited (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 situation¹ 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**). The text of the SLC Decision is available on the CMA webpages.²
3. On 26 July, Liqui-Box offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act.
4. On 2 August, the CMA gave notice to Liqui-Box, pursuant to section 73A(2)(b) of the Act, that it considers that there are reasonable grounds for believing

¹ Pursuant to section 25(4) of the Act the four-month period mentioned in section 24 of the Act is extended while the CMA is seeking undertakings in lieu of reference.

² See <https://www.gov.uk/cma-cases/liqui-box-inc-ds-smith-merger-inquiry>.

that the undertakings offered, or a modified version of them (the **Proposed Undertakings**), might be accepted by the CMA under section 73(2) of the Act and that it is considering Liqui-Box's offer (the **UIL Provisional Acceptance Decision**).³

The undertakings offered

5. As set out in the SLC Decision, the CMA found a realistic prospect of an SLC in relation to horizontal unilateral effects in 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**).
6. As set out in the UIL Provisional Acceptance Decision, to address the SLC identified by the CMA, Liqui-Box has the **Divestment Business**), as set out in the Proposed Undertakings, an Asset Purchase Agreement, and a transitional services agreement. As part of the Divestment Business, Liqui-Box has offered to: Divest assets comprising:
 - (i) BiB manufacturing equipment, specifically three BiB production lines currently installed at Liqui-Box's Wythenshawe facility (M1, M5 and M11), which are used to supply the beverages, wine, food and dairy end use segments in the UK;⁵
 - (ii) Injection moulding and fitment assembly equipment comprising: (i) B2S gland and cap tool, (ii) E210 gland and cap tooling, (iii) wine spout tooling, (iv) one gland cap assembly machine and (v) one moulding machine⁶;
 - (iii) A customer list for Liqui-Box's UK BiB customers in all end use segments, together with appropriate contact details;⁷
 - (iv) Liqui-Box endeavours to make best efforts to assist with these customer transfers, by engaging with these customers, taking part in customer visits as required, to reassure customers that there will be a smooth transition to the Proposed Purchaser;
 - (v) Manufacturing knowhow for BiB, including product specifications, quality testing criteria and information regarding machine settings for

³ See <https://www.gov.uk/cma-cases/liqui-box-inc-ds-smith-merger-inquiry>.

⁴ See <https://www.gov.uk/cma-cases/liqui-box-inc-ds-smith-merger-inquiry>.

⁵ Subject to confirmation by the Proposed Purchaser.

⁶ Note that the transfer of these items of equipment remain subject to confirmation by the Proposed Purchaser following further diligence.

⁷ Liqui-Box will give a best efforts undertaking to transfer all of Liqui-Box's UK BiB customers.

manufacturing and training on the operation of the equipment for divestment; and

(vi) [X]

together, referred to as the **Divestment Business**.

(b) The Proposed Undertakings also include:

- (i) An arm's length supply agreement in respect of the fitments used to supply BiB to [X], subject to [X] consent, an ownership interest in the relevant moulds, [X], as well as the transfer of any IP owned by Liqui-Box in these fitments;
- (ii) An arm's length supply agreement in respect of the bulk BiB products sold currently by Liqui-Box to [X], and a non-exclusive license to use relevant IP owned by Liqui-Box;
- (iii) An arm's length supply agreement in respect of the fitments used to supply BiB to [X], and a non-exclusive licence to use the relevant IP owned by Liqui-Box;
- (iv) An agreement for the transitional supply of fitments used on the divested production lines to the Proposed Purchaser; and
- (v) A transitional services agreement (**TSA**) governing the transitional operation of the divested production lines by Liqui-Box from the Wythenshawe facility while the 'lift and lay' to the Proposed Purchaser's facility remains underway and also the supply of BiB inventory and raw materials, during the transitional period;

(c) In addition to the above, Liqui-Box has agreed to provide:

- (i) A non-solicit undertaking of two years in duration with the Proposed Purchaser in respect of the customer list which forms part of the Divestment Business; and
- (ii) A non-solicit undertaking of two years in duration with the Proposed Purchaser [X].
- (iii) Subject to the novation of the [X] to the Proposed Purchaser, an undertaking to destroy all copies of the [X] except that Liqui-Box proposes to retain a single copy of the [X] which shall be held by the Finance and operations Director of LB Europe Limited, on a strictly confidential basis and which shall be retained for compliance

purposes, including reference in case of any audit enquiry or legal claim requiring access to the [REDACTED];

7. As set out in the UIL Provisional Acceptance Decision, Liqui-Box also offered to enter into an agreement for the sale and purchase of the Divestment Business with an upfront buyer, before the CMA finally accepts the Proposed Undertakings (the **Upfront Buyer Condition**).
8. Liqui-Box has proposed Peak Packaging Limited (**Peak Packaging**) as the upfront buyer. The agreement for the sale and purchase of the Divestment Business will be conditional on acceptance by the CMA of the Proposed Undertakings, including approval of Peak Packaging as the buyer of the Divestment Business.

CMA assessment

9. The CMA currently considers that, subject to responses to the consultation required by Schedule 10 of the Act, the Proposed Undertakings, or a modified version of them, 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 or concerns about their implementation.⁸
10. This is because 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 all of Liqui-Box's existing UK BiB business, which currently generates approximately [REDACTED] 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 Liqui-Box that would otherwise be lost following the Merger. The CMA believes that the Proposed Undertakings, or a modified version of them, are effective and capable of amounting to a sufficiently clear-cut remedy to resolve the CMA's competition concerns.
11. The CMA also considers that the Proposed Undertakings would be capable of ready implementation, because:

⁸ [Mergers Remedies \(CMA87\), December 2018](#), paragraph 3.38.

- (a) The Divestment Business is a viable business that is capable of being transferred to an upfront buyer, comprising revenue-generating customer contracts, key staff with expert knowledge of the BiB market and associated assets as well as additional contractual provisions (including the transitional services agreement).
- (b) The Upfront Buyer Condition means that the CMA would accept the Proposed Undertakings only after Liqui-Box has entered into an agreement with a proposed purchaser that the CMA considers to be suitable.⁹
- (c) In light of ready purchaser interest, the CMA considers that the sale process can move forward quickly and that signing of a business transfer agreement is achievable prior to the expiry of the CMA's 50 working day deadline.

Suitability of the proposed purchaser

12. In approving a purchaser as suitable, 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 proposed purchaser must remedy, mitigate or prevent the SLC concerned or any adverse effect resulting from it, achieving as comprehensive a solution as is reasonable and practicable.
 - (b) The purchaser should be independent from and have no significant connection to the merger parties that may compromise the purchaser's incentives to compete with the merged entity (eg an equity interest, common significant shareholders, shared directors, reciprocal trading relationships or continuing financial assistance). It may also be appropriate to consider links between the purchaser and other market players.
 - (c) The purchaser must have sufficient capability, including access to appropriate financial resources, expertise (including managerial, operational and technical capability) and assets, to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor. For example, a highly-leveraged acquisition of the

⁹ CMA87, paragraphs 5.28-5.32.

divestiture package which left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion. The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority.

- (d) The CMA will wish to satisfy itself that the purchaser is committed to, and has an appropriate business plan and objectives for competing in, the relevant market(s), and that the purchaser has the incentive and intention to maintain and operate the relevant business as part of a viable and active business in competition with the merged party and other competitors in the relevant market.
 - (e) Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.¹⁰
13. Peak Packaging is a manufacturer of bulk liquid packaging, including liners and fitments for BiB-style solutions for Intermediate Bulk Containers (IBCs), which are used for the bulk storage and transportation of liquid products. Peak Packaging also has its own injection moulding business, including in-house designed and developed tooling and moulding machinery. Peak Packaging has been operating for over 25 years and supplies UK and overseas customers in the edible products,¹¹ toiletries and cosmetics, pharmaceuticals, chemical and bio-product sectors. Peak Packaging has two manufacturing sites, one in Ilkeston in Derbyshire and one in Bartoszyce in Poland.
14. Subject to the responses to this consultation, and having regard in particular to the criteria set out in paragraph 12 above, the CMA currently considers Peak Packaging to be a suitable purchaser of the Divestment Business for the following reasons:
- (a) The acquisition by Peak Packaging of the Divestment Business would remedy, mitigate or prevent the SLC concerned and any adverse effect resulting from it, achieving as comprehensive a solution as is reasonable and practicable, as it would allow Peak Packaging to compete effectively as a BiB supplier in the UK and would create another source of supply for BiB packaging in the UK.
 - (b) The evidence available to the CMA indicates that Peak Packaging is independent and does not appear to have any significant connection to

¹⁰ CMA87, paragraphs 5.20 to 5.27.

¹¹ This includes food (including dairy), bulk wine for the food industry, and other beverages.

Liqui-Box or the Target that may compromise its incentives to compete with the merged entity if it were to acquire the Divestment Business.

- (c) The evidence available to the CMA indicates that Peak Packaging is capable of, and has access to appropriate financial resources, to acquire and operate the Divestment Business as an effective competitor. [X]. Peak Packaging has access to appropriate managerial, operational and technical expertise to enable the Divestment Business to be an effective competitor in the market. Although Peak Packaging is not currently active in the UK BiB market, there does not appear to be substantial differences in the manufacturing techniques for liquid packaging and BiB packaging and given the similarity in production techniques, Peak Packaging appears to have the manufacturing and technical know-how to effectively operate the Divestment Business. Peak Packaging's manufacturing facility in Derbyshire has already attained the required quality standards to meet the food grade hygiene standards that apply to the Divestment Business. Furthermore, Peak Packaging plans to locate the Divestment Business assets in its UK manufacturing facility, providing continuity to existing customers and staff. Finally, the management of Peak Packaging has the expertise and experience to successfully integrate the Divestment Business into its existing operations and develop the Divestment Business over time, particularly given its success in developing its Polish operations over the past decade. The CMA considers that any residual risk to continuity of supply to BiB customers during the integration of the Divestment Business will be mitigated sufficiently by a transitional services agreement to be entered into between Peak Packaging and Liqui-Box.
- (d) Peak Packaging has discussed its plans for the Divestment Business with the CMA and has also provided the CMA with financial forecasts for the two years following the acquisition of the Divestment Business. The evidence available to the CMA indicates that Peak Packaging is committed to the Divestment Business, has an appropriate plan and objectives for competing in the market and has the incentive and intention to maintain and operate the Divestment Business as part of a viable and active business in competition with the merged entity and other competitors in the market.
- (e) The evidence available to the CMA indicates that the acquisition of the Divestment Business by Peak Packaging should not create a realistic prospect of further competition or regulatory concerns.

15. Therefore, subject to responses to this consultation, the CMA currently considers Peak Packaging to be a suitable purchaser of the Divestment Business.

Proposed decision and next steps

16. For the reasons set out above, the CMA currently considers that the Proposed Undertakings and the purchase of the Divestment Business by Peak Packaging 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.
17. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings in lieu of a reference of the Merger for a phase 2 investigation. The text of the Proposed Undertakings is available on the CMA web pages.¹²
18. 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 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.¹³
19. Representations should be made in writing to the CMA and be addressed to:

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Mergers Group
Competition and Markets Authority
The Cabot
25 Cabot Square
London
E14 4QZ

Email: Miriam.Kenner@cma.gov.uk
Telephone: 020 3738 6363

Deadline for comments: 12 noon on 27 September 2019

¹² See <https://www.gov.uk/cma-cases/liqui-box-inc-ds-smith-merger-inquiry>.

¹³ Under paragraph 2(4) of Schedule 10 to the Act.