Anticipated merger between Noble Corporation and Maersk Drilling

Decision that undertakings might be accepted

ME/6980-21

The CMA's decision under section 73A(2) of the Enterprise Act 2002 that undertakings might be accepted, given on 9 May 2022. Full text of the decision published on 12/5/2022.

Introduction

1. On 10 November 2021, Noble Corporation (**Noble**) and The Drilling Company of 1972 A/S (**Maersk Drilling**) signed a business combination agreement pursuant to which they agreed to merge (the **Merger**). Noble and Maersk Drilling are together referred to as the **Parties.**

2. On 22 April 2022, 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 in order 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 29 April 2022, 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 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 as a result of horizontal unilateral effects in relation to the supply of jack-up rigs for offshore drilling in Denmark, the Netherlands and the UK (**NW Europe**). The CMA also found that drilling contractors that are active in both NW Europe and Norway may use their jack-up rig fleet across these regions flexibly and have bid for contracts in NW Europe using AoC[1] compliant rigs. Accordingly, the CMA found that these AoC compliant jack-up rigs located in Norway, even though outside the geographic frame of reference, exert a constraint on the supply of jack-up rigs for offshore drilling in NW Europe.

8. To address this SLC, the Parties have offered to give undertakings in lieu of a reference to divest Noble's full fleet of jack-up rigs located in NW Europe (the Noble Hans Deul, Noble Sam Hartley, Noble Sam Turner and Noble Houston Colbert[2]). The Parties have also offered to divest the Maersk Innovator, a CJ70 jack-up rig owned and operated by Maersk Drilling and also currently located in NW Europe. This rig has been included to replicate the constraint posed by the Noble Lloyd Noble (a CJ70 rig), which was until very recently located under contract in NW Europe before being relocated to Norway.[3] These five rigs and the assets listed in paragraph 10 are referred to as the **Parties' Preferred Divestment Package**.

9. In the alternative, in case the CMA considers that the Parties' Preferred Divestment Package is not effective and clear-cut, the Parties have offered to give undertakings in lieu of a reference to divest Noble's full fleet of jack-up rigs located in NW Europe (ie the Noble Hans Deul, Noble Sam Hartley, Noble Sam Turner, Noble Houston Colbert), along with the Noble Lloyd Noble. These five rigs and the assets listed in paragraph 10 are referred to as the **Alternative Divestment Package**.

10. The divestments would occur by way of a sale of the relevant assets. As indicated, apart from the rigs described above, the Parties' Preferred Divestment Package and the Alternative Divestment Package include other assets, including (but not limited to):

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[1] Ie an 'acknowledgment of compliance', which is required to operate in Norway.
[2] The Noble Houston Colbert is currently warm stacked in the UK and will shortly be re-located to the Middle East to commence a contract with Qatargas.
[3] The Noble Lloyd Noble recently completed a four-year contract for Equinor on the Mariner field in the UK. The Noble Lloyd Noble finished its contract in February 2021 and moved to Norway and obtained an AoC in September 2021.

(a) Customer contracts for each of the rigs;[4]

(b) Management and all offshore crew for each of the rigs;

(c) Noble's leased office space and storage yard space in Aberdeen and Stavanger[5] as well as in Qatar (if required by a purchaser);

(d) Onshore support including all employees based at Noble's Aberdeen and Stavanger[6] offices, three employees based at Maersk Drilling's Aberdeen office, focused on providing onshore support to the Maersk Innovator,[7] as well as a rig manager and Health and Safety Executive staff that provide support to the Noble Houston Colbert in Qatar (if required by a purchaser);

(e) Agency worker contracts;[8]

(f) All other supply contracts (eg catering, medical, storage, communications);[9] and

(g) Spare parts inventory, maintenance history and all relevant books and records for each of the rigs.

11. The Parties are also offering certain transitional services arrangements (the **TSAs**) to ensure the continuity of the operations of the Parties' Preferred Divestment Package and the Alternative Divestment Package immediately post-divestiture. According to the Parties, the TSAs will have a maximum duration of one year.

12. Under both the Parties' Preferred Divestment Package and the Alternative Divestment Package, the Parties have offered to enter into a purchase agreement with a buyer approved by the CMA before the CMA finally accepts the undertakings in lieu (**Upfront Buyer Condition**).

The CMA's provisional views

Parties' Preferred Divestment Package

13. When considering whether to accept undertakings in lieu of a reference, the CMA has an obligation under the Act to have regard to the need to achieve as

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[4] The Parties will also undertake best efforts to transfer pipeline customer dialogues (to the extent Noble or Maersk Drilling is already in discussion with them).
[5] The Stavanger office and storage yard supports the Noble Lloyd Noble and is only included in the Alternative Divestment Package.
[6] The employees at the Stavanger office support the Noble Lloyd Noble and will only transfer under the Alternative Divestment Package.
[7] These employees support the Maersk Innovator and will only transfer under the Parties' Preferred Divestment Package.
[8] The Parties will use their best efforts to transfer all agency worker supply agreements relating to the divestment rigs requested by a purchaser.
[9] The Parties will use their best efforts to transfer all other supply arrangements relating to the divestment rigs requested by a purchaser.

comprehensive a solution as is reasonable and practicable to the SLC and any resulting adverse effects.[10] The CMA considers that undertakings in lieu of a reference are appropriate when they are clear-cut and capable of ready implementation. The clear-cut requirement has two dimensions. In relation to the substantive competition assessment, it means that there must not be material doubts about the overall effectiveness of the remedy. In practical terms, it means that remedies of such complexity that their implementation is not feasible within the constraints of the phase 1 timetable are unlikely to be accepted.[11]

14. The CMA believes there are material doubts as to whether the Parties' Preferred Divestment Package would be effective in resolving the competition concerns identified in the SLC Decision.

15. 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.[12] In assessing divestiture packages, the CMA will take as its starting point a divestiture of all or part of the acquired business.[13] This is because restoration of the pre-merger situation in the markets subject to an SLC will generally represent a straightforward remedy.[14] In particular, divestiture of a mixture of assets from both merger parties (a so-called 'mix-and-match' approach) may create additional composition risks such that the divestiture package will not function effectively.[15] It will normally be preferable for all the assets to be provided by one of the merger parties unless it can be demonstrated to the CMA's satisfaction that there is no significant increase in risk from a mix-and-match alternative.

16. As set out in paragraph 8, the Parties' Preferred Divestment Package comprises four Noble rigs currently located in NW Europe and the Maersk Innovator. The Maersk Innovator has been included by the Parties to replicate the constraint posed by the Noble Lloyd Noble (which has spent most of its recent history in the NW Europe market before very recently relocating from the UK to Norway but could, consistent with broader industry trends in which assets are moved, to some extent, between different markets, return to serve contracts in NW Europe in future). The CMA considers that, although the Noble Lloyd Noble and the Maersk Innovator are both CJ70 design rigs, there are material differences between them in terms of age and specification. As such, the CMA believes there are material doubts over whether the Maersk Innovator would replicate the constraint that would be exerted by the Noble Lloyd Noble absent the Merger.

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[10] Section 73(3) of the Act, and *Mergers remedies (CMA87)*, December 2018, paragraph 3.30.
[11] *Mergers remedies (CMA87)*, December 2018, paragraph 3.28.
[12] *Mergers remedies (CMA87)*, December 2018, Chapter 3 (in particular paragraphs 3.27, 3.28 and 3.30).
[13] *Mergers remedies (CMA87)*, December 2018, paragraph 5.6.
[14] *Mergers remedies (CMA87)*, December 2018, paragraph 5.6
[15] *Mergers remedies (CMA87)*, December 2018, paragraph 5.18.

17. The Maersk Innovator was built in 2003 whereas the Noble Lloyd Noble was built much more recently, in 2016. Furthermore, the CMA notes that the remaining asset life on an accounting basis of the Maersk Innovator is only six years. Although the Parties submitted that the Maersk Innovator will likely continue to operate beyond this point, potentially for some time, the CMA considers that there remains a material degree of uncertainty about the expected lifetime of the rig, and therefore in relation to how long the rig could provide a competitive constraint in NW Europe.[16]

18. The CMA further notes that, while the Maersk Innovator is the first CJ70 design rig to be constructed anywhere in the world, the Noble Lloyd Noble is considered a 'third generation' rig and a number of its specifications differ from those of the Maersk Innovator.[17] Based on the evidence available at present, the CMA has been unable to exclude that the capabilities of the Noble Lloyd Noble would allow it to provide a materially different competitive constraint to the Maersk Innovator (eg because there could be future exploration projects in NW Europe where only the Noble Lloyd Noble could operate or where the Noble Lloyd Noble would be more competitive).[18]

19. In order to accept undertakings in lieu, the CMA must be confident that all of the potential competition concerns identified in its investigation would be resolved without the need for further investigation.[19] For the reasons set out above, the CMA considers that there are a number of differences between the Maersk Innovator and the Noble Lloyd Noble, which could mean that a divestment package that includes the Maersk Innovator would exert a materially weaker constraint in NW Europe than a package that includes the Noble Lloyd Noble (which would restore the current competitive structure of the relevant markets).[20]

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[16] In support, the Parties submitted that the Maersk Innovator has spent much of the last five years either stacked, or operating in more benign conditions in the UK North Sea (ie the most regulated offshore environment in the world) rather than the most extreme conditions for which it is designed, referred to examples of rigs that had continued to operate for more than 25 years and submitted views from a number of third parties that the Maersk Innovator was likely to operate for longer than six years. The Parties noted that as the Maersk Innovator was the first CJ70 design rig to be constructed anywhere in the world and it was therefore not possible to point to past examples of rigs of the same design working beyond 25 years (see Parties' submissions of 7, 25 and 28 April 2022).

[17] For example, the Noble Lloyd Noble was designed to have a larger maximum 'air gap' (the gap between the water surface and the hull of the rig), resulting in the additional nine metres of leg length. The Parties submitted that this specification was only relevant for a project in the Mariner field to allow drilling work to occur whilst a different permanent platform was installed.

[18] The Parties submitted that both rigs have similar characteristics and that the main differences between them are Noble Lloyd Noble's 'air gap' (see footnote 17). The Parties further submitted both rigs meet the technical capabilities of the drilling opportunities in NW Europe (that the Parties could identify) within the next five years.

[19] *Mergers remedies (CMA87)*, December 2018, paragraph 3.27.

[20] The Parties submitted that including the Maersk Innovator (rather than the Noble Lloyd Noble) in the divestment package would mean that the purchaser would provide a greater competitive constraint in NW Europe going forward than Noble does, as the Maersk Innovator is already currently under contract in NW Europe and represents a more effective source of competition in this region than the Noble Lloyd Noble. The CMA does not consider that it would be appropriate for it to weigh up factors that might make the two rigs

20. Accordingly, after examination of the Parties' Preferred Divestment Package, the CMA does not believe that the Parties' Preferred Divestment Package would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.

Alternative Divestment Package

21. The CMA believes that the Alternative Divestment Package, or a modified version of it, might be acceptable as a suitable remedy to the SLC identified by the CMA, given that it would remove the overlap between the Parties in the supply of jack-up rigs for offshore drilling in NW Europe. As such, the Alternative Divestment Package may result in the replacement of the competitive constraint provided by Noble that would otherwise be lost following the Merger.

22. Furthermore, while the Alternative Divestment Package forms part of a broader business at present, the CMA currently considers that the rigs included in the Alternative Divestment Package have limited reliance on the wider Noble business, and that the Alternative Divestment Package includes all that is required to replace the competitive constraint that would otherwise be lost as a result of the Merger.

23. The CMA therefore currently believes that the Alternative Divestment Package is capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns.

24. The CMA also believes at this stage that the Alternative Divestment Package may be capable of ready implementation, in particular because the Alternative Divestment Package has already drawn interest from a variety of potential purchasers. The CMA also notes that it is common in this industry for drilling contractors to sell rigs to other drilling contractors. For instance, in the last two years the Parties carried out five such transactions.[21]

25. The Upfront Buyer Condition means that the CMA will only accept the Alternative Divestment Package after the Parties have entered into an agreement with a nominated purchaser that the CMA considers to be suitable. It also means that, before acceptance, the CMA will consult publicly on the suitability of the nominated purchaser, as well as other aspects of the Alternative Divestment Package. In order to consider the proposed purchaser as being suitable, the CMA will need to be satisfied that the purchaser suitability criteria in the Remedies Guidance are met.[22] These criteria include the requirement that the proposed purchaser has the financial resources, expertise, incentive and intention to maintain and operate the Alternative

more or less competitive and that doing so would be inconsistent with the requirement for undertakings in lieu to be clear-cut.

[21] FMN, paragraphs 26-30.

[22] *Mergers remedies (CMA87)*, December 2018, Chapter 4 (in particular paragraphs 4.30 – 4.34), and Chapter 5 (in particular paragraphs 5.20 – 5.32).

Divestment Package as part of a viable and active business in competition with the merged entity in the relevant market. In addition, the proposed purchaser will be expected to obtain all necessary approvals, licences and consents from any regulatory or other authority.[23]

26. For these reasons, the CMA currently thinks that there are reasonable grounds for believing that the Alternative Divestment Package, or a modified version of it, might be accepted by the CMA under section 73(2) of the Act.

27. The CMA's decision on whether ultimately to accept the Alternative Divestment Package or refer the Merger for a phase 2 investigation will be informed by, among other things, third-party views on whether the Alternative Divestment Package is suitable to address the competition concerns identified by the CMA. In particular, before ultimately accepting the Alternative Divestment Package, the CMA must be confident that the rigs included within the Alternative Divestment Package have limited reliance on the wider Noble business and that the nominated purchaser is effective and credible such that the competitive constraint provided by Noble absent the Merger is replaced to a sufficient extent.

Consultation process

28. 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.[24]

Decision

29. The CMA therefore considers that there are reasonable grounds for believing that the Alternative Divestment Package offered by the Parties, or a modified version of it, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 6 July 2022 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 1 September 2022 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 22(1) and 34ZA(2) of the Act.

Colin Raftery
Senior Director, Mergers
Competition and Markets Authority
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[23] *Mergers remedies (CMA87)*, December 2018, paragraph 5.21.
[24] *CMA2*, paragraph 8.29.