

ANTICIPATED ACQUISITION BY CARPENTER CO. OF THE ENGINEERED FOAMS BUSINESS OF RECTICEL NV/SA

Issues statement

26 August 2022

The reference

1. On 18 July 2022, the Competition and Markets Authority (**CMA**), in exercise of its duty under [section 33\(1\)](#) of the Enterprise Act 2002 (the **Act**), referred the anticipated acquisition (the **Merger**) by Carpenter Co. (**Carpenter**) of the engineered foams business (**REF**) of Recticel NV/SA (**Recticel**) for further investigation and report by a group of CMA panel members. **Carpenter** and **Recticel** are together referred to as the **Parties** and, for statements referring to the future, the **Merged Entity**.
2. In exercise of its duty under [section 36\(1\)](#) of the Act, the CMA must decide:
 - (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (b) if so, whether the creation of that relevant merger situation may be expected to result in a substantial lessening of competition (**SLC**) within any market or markets in the United Kingdom (**UK**) for goods or services.

Background

3. Carpenter is a USA-headquartered manufacturer of a range of flexible polyurethane (**PU**) foam and foam-related products. Recticel is a Belgium-headquartered manufacturer of flexible PU foam (through REF), bedding and insulation products. On 6 December 2021, Carpenter agreed to acquire the relevant Recticel companies that currently own all assets and liabilities of and operate REF, for €656 million (approximately £559 million).
4. The Parties overlap in the manufacture and supply of various types of flexible PU foam in the UK, namely:
 - (a) Unconverted polyether comfort foam (**comfort foam**), which is used mainly for applications such as upholstered furniture and mattresses.

- (b) Unconverted technical foam (**technical foam**) which is used for a wide range of applications, including cleaning sponges (technical sponge foam, the primary segment in which the Parties overlap).
- (c) **Converted comfort foam**, which is comfort foam that has been processed (or converted) into components for use in comfort applications.

Concession of the SLCs identified at phase 1

- 5. On 10 August 2022, the Parties requested to concede the SLCs identified in the CMA's Phase 1 decision (the **Phase 1 Decision**)¹, accepting that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in the following markets:
 - (a) The supply of comfort foam in the UK.
 - (b) The supply of technical foam in the UK.
 - (c) The supply of converted comfort foam in the UK.
- 6. The Parties have agreed to waive their right to challenge this position during the CMA's phase 2 investigation and have confirmed that they intend to submit remedies to address the SLCs.
- 7. The process that applies where merging parties request to concede an SLC is set out in paragraphs 7.18 to 7.21 of [CMA2 revised](#).²
- 8. We accepted the Parties' request to concede the SLCs on 24 August 2022.

Purpose of this issues statement

- 9. Although we have accepted the Parties' request to concede all three SLCs identified in the Phase 1 Decision, which will enable us to undertake a streamlined investigation with a focus on the assessment of remedial action, we must still reach a decision, applying a balance of probabilities threshold, on the SLC question (paragraph 2(b) above) having had regard to the evidence available to us to date, including the Phase 1 Decision.
- 10. We are publishing this issues statement to assist parties submitting evidence to our investigation. This statement sets out the issues we currently envisage being relevant to our investigation and we invite interested parties to notify us if there are additional relevant issues which they believe we should consider.

¹ [Phase 1 Decision](#), 05 August 2022.

² [CMA2 Revised](#), paragraphs 7.18-7.21.

Our inquiry

11. The Phase 1 Decision contains much of the detailed background to this issues statement. Below we set out some specific areas of our intended assessment to help parties who wish to make representations to us.

Jurisdiction

12. We shall consider the question of jurisdiction in our inquiry. In the Phase 1 Decision the CMA found that it is or may be the case that the CMA has jurisdiction to review the Merger on the basis:
 - (a) each of the Parties should be considered an enterprise and these enterprises will cease to be distinct as a result of the Merger; and
 - (b) the share of supply test is met.³

The counterfactual

13. The application of the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger. The latter is called the 'counterfactual'.⁴ The CMA's Phase 1 Decision found that the counterfactual was the pre-existing conditions of competition.⁵ In our phase 2 investigation we intend to adopt the prevailing conditions of competition as the most likely counterfactual to the Merger.

Assessment of the competitive effects of the Merger

14. Taking into account the Parties' SLC concession, the evidence gathered during phase 1, and any further evidence we obtain during our investigation, we intend to assess whether the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in the following markets:
 - (a) the supply of comfort foam in the UK;
 - (b) the supply of technical foam in the UK; and
 - (c) the supply of converted comfort foam in the UK.⁶

³ [Phase 1 Decision](#), paragraphs 16 to 19.

⁴ The counterfactual is not a statutory test but rather an analytical tool used in answering the question of whether a merger gives rise to an SLC. See [MAGs](#), paragraph 3.1.

⁵ [Phase 1 Decision](#), paragraph 20.

⁶ The concern under horizontal unilateral effects essentially relates to the elimination of a competitive constraint by removing an alternative to which customers could switch to. The CMA's main consideration is whether there are sufficient remaining good alternatives to constrain the merged entity post-merger. See [Merger Assessment Guidelines \(CMA129\) \(March 2021\)](#), paragraph 4.3.

15. Subject to new evidence being submitted, we do not currently intend to investigate any other theories of harm in relation to this Merger.
16. We will also consider any evidence put to us on:
 - (a) Market definition – the starting point for our analysis will be the frame of reference used in the Phase 1 Decision (see paragraph 5 above).
 - (b) Whether there are countervailing factors which are likely to prevent or mitigate any SLC that we may find.
 - (c) Entry and/or expansion by third parties and whether such entry or expansion would be timely, likely, and sufficient to prevent any SLC from arising as a result of the Merger.⁷

Possible remedies and relevant customer benefits

17. Should we conclude that the Merger may be expected to result in an SLC within any market or markets in the UK, we will consider whether, and if so what, remedies might be appropriate. The Parties have confirmed they intend to submit remedies.
18. In any consideration of possible remedies, we may in particular have regard to their effect on any relevant customer benefits that might be expected to arise as a result of the Merger and, if so, what these benefits are likely to be and which customers would benefit.⁸

Responses to this issues statement

19. Any party wishing to respond to this issues statement should do so in writing, by **no later than 5pm on Friday 09 September 2022** by emailing carpenter.recticel@cma.gov.uk.

⁷ MAGs, paragraphs 8.30 & 8.31.

⁸ [Merger Remedies](#) (CMA87), paragraphs 3.4 and 3.15–3.24.