

Anticipated acquisition by Carpenter Co. of the engineered foams business of Recticel NV/SA

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups¹

Introduction

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 by Carpenter Co. (**Carpenter**) of the engineered foams business (**REF**) of Recticel NV/SA (**Recticel**) (the **Merger**) for further investigation and report by a group of CMA panel members (the **Inquiry Group**).
2. In its Provisional Findings on the reference, notified to Carpenter and Recticel (the **Parties**) on 28 September 2022, the CMA, among other things, provisionally concluded that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (**SLC**) in relation to the:
 - (i) supply of comfort foam in the UK;
 - (ii) supply of technical foam in the UK; and
 - (iii) supply of converted comfort foam in the UK(collectively, the **SLCs**).
3. Our provisional view is that the SLCs, individually and collectively, may be expected to result in adverse effects. For example, the Merged Entity would be under less pressure to compete and this would result in reduced choice, and higher prices or lower quality and reduced innovation compared to what would otherwise have been the case absent the Merger.
4. This notice of possible remedies (**Remedies Notice**) sets out the actions which the CMA considers it might take for the purpose of remedying,

¹ See [CMA rules of procedure for merger, market and special reference groups: CMA17 \(March 2014 \(corrected November 2015\) \(CMA Rules\)](#).

mitigating or preventing the SLC and/or any resulting adverse effects identified in the Provisional Findings Report.²

5. We invite comments on possible remedies by **17:00 hours on Wednesday 12 October 2022**.³

Criteria

6. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.⁴
7. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.⁵
8. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.⁶

Possible remedies on which views are sought

9. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC and/or any resulting adverse effects that have been provisionally identified.
10. As set out in published remedies guidance, the CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies because:
 - (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and

² See the Provisional Findings report published on the CMA [website](#); see also sections 36(2) and 41 of the Act and rule 12 CMA Rules.

³ Responses to the Remedies Notice are typically requested within 14 days of publication of the Notice (and in any event, no less than seven days) so that they can be considered before response hearings ([Mergers: Guidance on the CMA's jurisdiction and procedure](#) CMA2 (as amended on 4 January 2022), paragraph 13.1).

⁴ Section 36(3) of the Act.

⁵ [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 3.4.

⁶ [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 3.4.

- (c) structural remedies rarely require monitoring and enforcement once implemented.⁷
11. Our current view is that a behavioural remedy is unlikely to be an effective remedy to the SLCs and/or any resulting adverse effects that we have provisionally identified. However, we will consider any behavioural remedies put forward as part of this consultation.
12. At this stage, we have identified two potential structural remedies:
- (a) prohibition of the Merger; or
 - (b) a remedy option proposed by the Parties,⁸ which comprises the partial divestiture of the UK assets and operations of REF (the **Parties' Remedy Proposal**).
13. Prohibition of the Merger would result in Carpenter and REF continuing to operate under separate ownership as independent competitors. It would therefore prevent an SLC from resulting in any relevant market. Given this, we currently take the view that prohibition would represent a comprehensive solution to all aspects of the SLCs we have provisionally found (and consequently any resulting adverse effects) and that the risks in terms of its effectiveness are very low. Prohibition would also avoid the risk of market distortions (both foreseeable and unforeseeable) that might be associated with other possible remedies.
14. The CMA's experience is that partial divestiture is, in some cases, capable of effectively remedying SLCs in many mergers. Divestiture is generally considered to be less intrusive than prohibition in terms of its impact on the Parties' ability to implement their strategic aims.
15. However, the CMA would only accept a partial divestiture if it could be demonstrated that it could be appropriately configured to allow a purchaser to operate as an effective competitor in the relevant market and to attract a suitable purchaser.⁹
16. Moreover, with any partial divestiture of REF, we would need to be confident that it remedied the SLCs in their entirety and had an acceptable risk profile. We will ensure that any remedy of this type would have an acceptable risk profile, in particular in relation to:

⁷ [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 3.46.

⁸ See the non-confidential version of the Parties' proposed remedy option on the CMA [website](#).

⁹ [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 5.3.

- (a) the ability of the divested business to innovate and compete effectively if the divestiture package does not have its own R&D facilities, personnel and expertise;
 - (b) all relevant R&D projects are part of the divestiture package; and
 - (c) the ability to spread out the cost of chemicals and additives used to manufacture flexible polyether PU foam at the Alfreton 1 facility.
17. The Parties' Remedy Proposal includes a partial divestiture of REF's assets and operations involving the following divestiture of REF's UK subsidiary Recticel Ltd. It includes assets and operations that the Parties have submitted are sufficient to address effectively each of the SLCs, including:
- (a) REF's plant, assets and business in Alfreton, Derbyshire, UK, that manufactures and supplies unconverted flexible polyether polyurethane (PU) comfort and technical foam (Alfreton 1);
 - (b) REF's plant, assets and business in Alfreton, Derbyshire, UK, that manufactures and supplies converted flexible polyether PU comfort foam (Alfreton 2);
 - (c) Data and information (**Relevant IPR**) arising out of completed REF Research and Development (**R&D**) projects which is used by the divestiture package; and
 - (d) All Relevant IPR held by REF as at closing of the sale for relevant current REF R&D projects¹⁰ as follows:
 - (i) Where the project is planned to benefit REF's UK operations only, a full transfer of rights with Carpenter retaining no rights.
 - (ii) Where the project is planned to benefit both REF's UK operations and REF's non-UK operations, a perpetual, irrevocable royalty-free licence to the purchaser for UK applications only.
18. We note the Parties' Remedy Proposal also includes that Carpenter will enter into a Transitional Service and Supply Agreements (**TSA**) for a fixed period with a potential purchaser for:
- (a) R&D services in relation to current R&D projects and new projects relating to unconverted and converted comfort foam and unconverted polyether

¹⁰ Relevant current projects are those which are not closed and which involve comfort foam (upstream/unconverted and converted) and polyether foam for sponge applications (upstream/unconverted; not converted) (also referred to as "polyether sponge foam").

sponge foam subject to a cap set at a specified number of hours annually across all projects;

- (b) supply arrangements relating to chemicals and additives used in manufacturing flexible polyether PU foam at Alfreton 1 facility;
- (c) consulting arrangements to provide expertise to the potential purchaser to conduct its own negotiations with suppliers of chemicals; and
- (d) Information technology, finance and HR support services.

19. We will consider whether any action should be taken in relation to the above agreements in conjunction with our assessment of the Parties' Remedy Proposal.
20. We will consider any other practicable remedies that the Parties, or any interested third parties, may propose that could be effective in remedying, mitigating or preventing the SLCs and/or any resulting adverse effects.
21. In determining an appropriate remedy, we will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLCs and/or any resulting adverse effects that have been provisionally identified.
22. We will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. We will evaluate the impact of any such combination of measures on the SLCs and/or any resulting adverse effects.

Issues to be considered in relation to a prohibition or partial divestiture remedy

23. In evaluating possible divestitures as a remedy to the provisional SLC it has provisionally found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the CMA will have regard to the following critical elements of the design of divestiture remedies:
 - (a) the scope of the divestiture package;
 - (b) identification of a suitable purchaser; and

(c) the effectiveness of the divestiture process.¹¹

The scope of the divestiture package

24. To be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate as an effective independent competitor.
25. We invite views on:
- (a) Whether a prohibition of the Merger would be an effective remedy to the provisional SLCs; and
 - (b) whether the Parties' Remedy Proposal would be an effective remedy to the provisional SLCs and if so:
 - (i) whether there are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market;¹²
 - (ii) whether there are risks that a suitable purchaser is not available or that the merger parties will divest to a weak or otherwise inappropriate purchaser;¹³ and
 - (iii) any other elements that may be required.
26. We also invite views on whether the R&D facilities for the divestiture package could be replicated by:
- (a) a TSA between Carpenter and a potential purchaser;
 - (b) outsourcing to specialist providers of R&D services;
 - (c) the divestiture package setting up its own R& facilities; or
 - (d) a purchaser having its own R&D facilities.
27. We invite views on the proposed TSA between Carpenter and a potential purchaser for supply arrangements relating to chemicals and additives used in manufacturing flexible polyether PU foam at Alfreton 1 facility, and in

¹¹ [Merger Remedies: CMA87 \(December 2018\)](#), chapter 5.

¹² [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 5.3(a).

¹³ [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 5.3(b).

particular whether this would restrict or distort competition between the merging parties and the divested business.

28. Finally, we invite views on the composition of the divestiture package, whether there are additional REF assets or functions that would be necessary to ensure an effective remedy.

Identification of a suitable purchaser

29. There may be a number of potential purchasers for the divestiture package. We will wish to be satisfied that a prospective purchaser:

- (a) is independent of the Parties;
- (b) has the necessary capability to compete;
- (c) is committed to competing in the relevant markets; and
- (d) will not create further competition concerns.¹⁴

30. We invite views on whether there are any specific factors to which we should pay particular regard in assessing purchaser suitability, eg:

- (a) whether a purchaser should have particular attributes or credentials to allow it to overcome any risks associated with the composition of the divestiture package, including the need to provide the divested business with R&D facilities to be able to operate as an effective competing supplier of comfort, technical or converted comfort foam in the UK;
- (b) whether a purchaser should have experience of purchasing chemicals for use in foam or other plastic manufacturing;
- (c) any specific purchasers or types of purchasers which should be ruled out as potentially suitable purchasers (eg any specific suppliers of comfort, technical or converted comfort foam or financial buyers); and
- (d) whether there are any other factors that we should consider.

The effectiveness of the divestiture process

31. We will consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture.

¹⁴ [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 5.21.

32. We invite views on:
- (a) the appropriate timescale for achieving a partial divestiture (the initial divestiture period);¹⁵ and
 - (b) the risks that the competitive capability of a divestiture package will deteriorate before completion of the partial divestiture, and whether the Parties should be required to appoint a monitoring trustee should a partial divestiture remedy be pursued. The monitoring trustee's role would be to monitor the ongoing management of the divestiture package and the conduct of the divestiture process.¹⁶
33. The CMA will have the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
- (a) The Parties fails to procure divestiture to a suitable purchaser within the initial divestiture period; or
 - (b) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
34. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. We invite views on whether the circumstances of this Merger necessitate such an approach.

Cost of remedies and proportionality

35. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction.¹⁷
36. We invite views on what costs are likely to arise in implementing each remedy option.

¹⁵ The initial divestiture period will normally commence once the CMA has accepted final undertakings or made a final order (up to 12 weeks after the final report) in relation to the required remedy in the CMA's final report. The length of this initial divestiture period will depend on the circumstances of the merger, but will normally be a maximum period of six months (see [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 5.41).

¹⁶ [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 5.38.

¹⁷ [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 3.6.

Relevant customer benefits

37. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.¹⁸
38. Relevant customer benefits are limited by the Act to benefits to relevant customers¹⁹ in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom [...] or
 - (b) greater innovation in relation to such goods or services'.²⁰
39. For the purposes of an anticipated merger, the Act provides that a benefit is only a relevant customer benefit if:
- (a) it may be expected to accrue within a reasonable period as a result of the creation of the relevant merger situation; and
 - (b) it is unlikely to accrue without the creation of that situation or a similar lessening of competition.²¹
40. We invite views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

Next steps

41. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by **17:00 hours on Wednesday 12 October 2022** (see Note (i)).
42. A copy of this notice will be posted on the CMA [case page](#).

Kip Meek

Inquiry Group Chair

28 September 2022

¹⁸ [Section 36\(4\)](#) of the Act, see also [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 3.15.

¹⁹ Relevant customers for these purposes are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution and are therefore not limited to final consumers: [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 3.18. See also section 30(4) of the Act.

²⁰ [Section 30\(1\)\(a\)](#) of the Act, see also [Merger Remedies: CMA87 \(December 2018\)](#), paragraph 3.17.

²¹ [Section 30\(3\)](#) of the Act.

Note

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC and/or any resulting adverse effects is made having regard to the Provisional Findings announced on 28 September 2022. Interested parties have until 17:00 hours on Wednesday 19 October 2022 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its provisional findings, in which case the CMA may consider other possible remedies, if appropriate.