

Anticipated Acquisition by Wolseley UK Limited of Kooltech Limited

Decision that undertakings might be accepted

ME/7038/23

The Competition and Markets Authority (**CMA**) has excluded from this published version of the decision information which the CMA considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [X]. Some numbers have been replaced by a range, which are shown in square brackets.

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1. INTRODUCTION

1. Wolseley UK Limited (**Wolseley**) has agreed to acquire Kooltech Limited (**Kooltech**) (the **Merger**). Wolseley and Kooltech are together referred to as the **Parties** and, for statements relating to the future, the **Merged Entity**.
2. On 23 November 2023, 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. On this basis, on 30 November 2023, 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.

2. 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 (a) the wholesale supply of air conditioning (**AC**) products in Aberdeen and (b) the wholesale supply of refrigeration products in Aberdeen.

8. To address the competition concerns set out in the SLC Decision, the Parties have offered to give undertakings in lieu of a reference that will result in the divestment of Kooltech's branch in Aberdeen (the **Proposed Undertakings**). The divestment of Kooltech's Aberdeen branch (the **Aberdeen Branch**) will be by way of the sale of an asset package comprising the following:
- (a) All assets of the Aberdeen Branch (including the branch lease, delivery vehicle, forklift truck, mobile phones, PCs etc.)
 - (b) Customer lists and goodwill relating to customers that have made either collections or delivery purchases from the Aberdeen Branch in the last two financial years (FY22 and FY23) (**Aberdeen Customers**).
 - (c) All four staff working at the Aberdeen Branch, including those that manage the relationships with the Aberdeen Customers.
- Together the '**Divestment Package**'.
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**).

3. THE CMA'S PROVISIONAL VIEWS

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.¹
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 they would remove entirely the horizontal overlap between the Parties in (a) the wholesale supply of AC products in Aberdeen and (b) the wholesale supply of refrigeration products in Aberdeen. As such, the Proposed Undertakings may result in replacing the competitive constraint provided by Kooltech that would otherwise be lost following the Merger.
12. The CMA currently believes that the Proposed Undertakings are capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns. The CMA also believes, at this stage, that the Proposed Undertakings may be capable of ready implementation, in particular given that the Divestment Package is a business that is capable of being sold and the Parties have provided evidence that there are potential purchasers who have expressed

¹ [Mergers remedies \(CMA87\)](#), December 2018, Chapter 3 (in particular paragraphs 3.27, 3.28 and 3.30).

interest in the Divestment Package. The CMA has also taken into account the following facts:

- (a) The Divestment Package includes all four employees based at the Aberdeen Branch, which, to a material extent, operates independently of Kooltech's head office.²
- (b) Kooltech generally does not have customer contracts and its customers place orders as and when required by their own customers. In this regard, the Divestment Package includes the customer list and goodwill associated with the Aberdeen Customers (which accounts for [the vast majority] of the total revenue of the Aberdeen Branch in the last two financial years (ie 2022 and 2023)).³
- (c) The Divestment Package includes all assets required to operate the Aberdeen Branch (including the branch lease, delivery vehicle, forklift truck, mobile phones, PCs etc.)

13. 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 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. At Phase 1, the CMA will generally require an upfront buyer unless it considers that there are reasonable grounds for not doing so and, in particular, where the risk profile of the remedy does not require it.⁴
14. The CMA considers that an Upfront Buyer Condition is necessary in this case to mitigate the composition risk (and related purchaser risk) associated with the Proposed Undertakings. These risks arise from the facts that (i) Kooltech will cease to provide back-office support to the Aberdeen Branch post-divestment,⁵ (ii) Kooltech's head office will cease to provide strategic support to the Aberdeen Branch post-divestment,⁶ and (iii) the Aberdeen Branch does not hold any customer contracts (nationally or locally), meaning that it will likely need a well-

² The Aberdeen Branch only relies on Kooltech headquarters for back office support and limited management support on an ongoing basis.

³ The Aberdeen Branch derived the remainder of its revenue from customers who placed orders with other Kooltech branches but ultimately had those orders fulfilled by the Aberdeen Branch. The Parties submitted that these are customers with a national footprint, with planned, non-urgent needs, who typically purchase across multiple Kooltech branches. The CMA considers that these customers are unlikely to be relevant to competition at the local level for customers with urgent needs, and therefore to the concerns in the SLC Decision. The CMA also notes that the Aberdeen Branch would remain profitable even if it lost [X]% of its current revenue and therefore that the non-inclusion of these customers is unlikely to have any material impact on the competitiveness of the Aberdeen Branch. In any event, the CMA considers that an upfront purchaser with the profile described in paragraph 15 below is likely to have an existing set of national customers who would be in a position to contribute to the Aberdeen Branch's revenue through orders placed with other branches.

⁴ [CMA87](#), paragraph 5.29

⁵ This would include finance, payroll, HR, IT etc.

⁶ [CMA87](#), paragraphs 5.28–5.32.

recognised brand immediately post-divestment in order to sustain or exceed its current revenue levels.

15. Given these three factors, the CMA considers that a suitable buyer would likely need to demonstrate that it is able to provide the Divestment Package with back-office and strategic support going forward which is comparable to what Kooltech currently provides, as well as with a brand which is well recognised and respected among customers in Aberdeen. This limits the likely pool of suitable buyers, giving rise to a purchaser risk which an Upfront Buyer Condition is required to mitigate.
16. For these reasons, the CMA currently thinks 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 Kooltech absent the Merger is replaced to a sufficient extent.

4. 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.⁷

⁷ [CMA87](#), paragraph 4.27–4.28.

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 06 February 2024 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 04 April 2024 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.

Colin Raftery
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Competition and Markets Authority
07 December 2023