

Western Isles Road Fuels

Notice of intention to accept modified commitments offered by Certas Energy UK Limited and DCC plc and invitation to comment

Contents

	<i>Page</i>
1. Introduction	2
2. Responses to the consultation on the proposed commitments	5
3. The proposed modifications to the commitments.....	8
4. The CMA's provisional assessment of the proposed modifications	9
5. The CMA's intentions and invitation to comment	11
ANNEX A – The modified commitments.....	12

1. Introduction

- 1.1. In March 2014, the Office of Fair Trading (OFT) gave notice¹ that it proposed to accept commitments offered by Certas Energy UK Limited (Certas) and DCC plc (DCC) (hereafter together referred to as ‘the Parties’) in case MP-SIP/0034 and invited representations from interested third parties on that proposed course of action.²
- 1.2. The commitments were offered by the Parties in relation to the OFT’s investigation into whether the Parties had infringed the Chapter II prohibition of the Competition Act 1998 (‘the Act’). Responsibility for that investigation passed to the Competition and Markets Authority (CMA) on 1 April 2014.³
- 1.3. The OFT’s competition concerns were set out in its Notice of 18 March 2014.⁴ In brief, the OFT was, and the CMA is, concerned that Certas entered into and maintained contracts with filling stations in the Western Isles which required each contracted filling station to exclusively purchase road fuels from Certas for a period of five years, without a possibility to terminate the contract during that period. The CMA is of the preliminary view that Certas’ long-term exclusive contracts with filling stations in the Western Isles were capable of preventing, and likely to prevent, those filling stations from using competing wholesalers, thereby potentially limiting the expansion of wholesalers active in the relevant market from time to time and raising a barrier to entry for wholesalers not yet active in the market.
- 1.4. The commitments that were offered by the Parties were set out in the OFT’s Notice of 18 March 2014.⁵ The proposed commitments provided that, among other things, the Parties would:
 - bring all existing contracts between Certas and filling stations in the Western Isles to an end

¹ As set out in paragraph 2 of Schedule 6A of the Competition Act 1998.

² ‘Western Isles Road Fuels – Notice of intention to accept binding commitments offered by Certas Energy UK Limited and DCC Plc and invitation to comment’, OFT1530, 18 March 2014, www.offt.gov.uk/shared_offt/ca-and-cartels/OFT1530.pdf.

³ From 1 April 2014, the CMA brought together the Competition Commission and the competition and certain consumer functions of the OFT in a single body. The CMA was established under the Enterprise and Regulatory Reform Act 2013.

⁴ OFT1530, *ibid*, Chapter 4.

⁵ OFT1530, *ibid*. The commitments were described in Chapter 5 and set out in full in Annexe 1.

- ensure that filling stations in the Western Isles that wished to continue to be supplied by Certas would have the opportunity to elect to be supplied either on a spot basis,⁶ or on a Platts plus⁷ priced contractual basis
 - open up access to the Loch Carnan marine terminal to rival wholesalers for a period of five years
 - allow rival wholesalers to enter into arrangements to draw fuels from the Stornoway marine terminal until 31 December 2017.
- 1.5. Eighty-six responses to the OFT's consultation were received. The CMA has carefully considered those representations, gathered further relevant information from a number of sources, and discussed the concerns raised by respondents to the consultation with the Parties.
- 1.6. Pursuant to the above, the Parties have proposed to make certain modifications ('the proposed modifications') to the commitments that they had previously offered. The proposed modifications combined with the commitments previously offered by the Parties are hereafter referred to as 'the modified commitments'. Having considered the proposed modifications, the CMA is currently of the view that acceptance of the modified commitments will address its competition concerns.
- 1.7. Therefore, the CMA hereby gives notice to interested third parties pursuant to paragraph 3 of Schedule 6A of the Act that it proposes to accept the modified commitments in accordance with section 31A(2) of the Act.
- 1.8. Formal acceptance of commitments by the CMA would result in the termination of its investigation, with no decision made on whether or not the Act has been infringed by the Parties.
- 1.9. Acceptance of commitments would not prevent the CMA from taking any action in relation to competition concerns which are not addressed by the commitments. Moreover, acceptance of commitments would not prevent the CMA from continuing the investigation, making an infringement decision, or giving a direction in circumstances where the CMA had reasonable grounds for:

⁶ Where the 'spot' price is based on the market conditions on the day of the order.

⁷ Where the price is based on the Platts benchmark price for refined petrol or diesel plus an agreed amount.

- believing that there had been a material change of circumstances since the commitments were accepted or
- suspecting that a person had failed to adhere to one or more of the terms of the commitments or
- suspecting that information which led the CMA to accept the commitments was incomplete, false or misleading in a material particular.

1.10. The remainder of this document is structured as follows:

- Chapter 2 summarises the responses to the consultation on the Parties' proposed commitments
- Chapter 3 describes the Parties' proposed modifications to the commitments
- Chapter 4 sets out the CMA's provisional assessment of the proposed modifications including why the CMA considers that they address its competition concerns
- Chapter 5 explains the CMA's intentions and invites representations on the proposed modifications
- Annex A sets out the modified commitments in full.

1.11. The CMA invites interested third parties to make representations on the proposed modifications which are described in Chapter 3 of this notice. The CMA will take representations into account before a final decision is made on whether to accept the modified commitments. Details of how to comment are provided in Chapter 5 of this document. The deadline for comments is 5pm on 4 June 2014.

2. Responses to the consultation on the proposed commitments

- 2.1. The OFT and the CMA received responses from 86 interested parties to the consultation on the OFT's proposal to accept the commitments that were offered by the Parties. The representations are summarised below.

The proposed duration of the throughput arrangements

- 2.2. Eighty-three respondents to the consultation stated that the proposed throughput arrangements relating to Certas' marine terminals were of insufficient duration to enable potential competitors to make investments that may be required to ensure that they can continue to compete on the markets after the expiry of the commitments. The majority of respondents considered that the commitments regarding the throughput arrangements should be of much longer (including, according to some respondents, indefinite) duration. However no supporting evidence was provided as to what duration would be sufficient to address the competition concerns.
- 2.3. One response to the consultation stated that it was questionable whether any new entrant wholesaler would be willing to take advantage of the throughput arrangements and to provide filling stations with an alternative source of road fuels given the duration of the arrangements.
- 2.4. The CMA put these concerns to the Parties in writing. Further to discussion with the CMA, the Parties have proposed to amend the duration of the proposed throughput arrangements relating to the Stornoway marine terminal. The proposed amendment is detailed in Chapter 3 of this Notice. The CMA's provisional assessment of the proposed amendment is set out in Chapter 4 of this notice.

Potential competitors' ability to compete with Certas on price

- 2.5. One respondent to the consultation raised concerns that a fuel wholesaler that made use of the throughput arrangements laid down in the proposed commitments may not be able to compete with Certas on price, given the level of the proposed throughput fees to be charged to such competitors by Certas.
- 2.6. The CMA put this concern to the Parties in writing. Further to discussion with the CMA, the Parties have offered to make an additional commitment which aims to address this concern. This proposed commitment is detailed in Chapter 3 of this Notice. The CMA's provisional assessment of the proposed commitment is set out in Chapter 4 of this notice.

The proposed rate of return on capital of 12%

- 2.7. One respondent to the consultation considered that the proposed rate of return on capital of 12% that is set out in the proposed formulae for calculating the throughput fees that Certas will charge to fuel distributors that draw fuels from Certas' marine terminals was an inappropriate rate for this type of asset. The respondent considered that the operation of the marine terminals was broadly analogous to the operation of storage/warehousing facilities or property investment and provided evidence for annual returns on property investment having averaged 5.7% in the year to December 2013.
- 2.8. The CMA does not consider that realised returns from general property investments in a single year constitutes an appropriate benchmark for the expected rate of return on Certas' marine terminals. In particular, the CMA considers that the operation of the marine terminals is likely to involve a different level of risk to that of general property investments. Further, the CMA notes that the quoted rate of 5.7 per cent is post-tax, while the Parties have confirmed to the CMA that the rate of return on capital of 12% is a nominal, pre-tax rate.
- 2.9. As such, the CMA does not consider that it has seen evidence to suggest that 12% is an unreasonable nominal, pre-tax rate of return on capital in the particular circumstances of this case.
- 2.10. The CMA also notes that a lower rate of return on capital would have a relatively small impact on the final throughput fee. Indeed, if a rate of return on capital of 10%, rather than 12%, were used, then this would make a difference of less than 0.15 pence per litre to the final throughput fee at both the Loch Carnan and the Shell Street terminals for the financial year ending March 2014.
- 2.11. In light of the above, the CMA does not consider it necessary or proportionate to calculate a detailed bottom-up calculation of Certas' weighted average cost of capital.
- 2.12. In addition, the CMA notes that applying what may be an excessively low rate of return on capital in the calculation of the throughput fees would be likely to be a disincentive for Certas from making necessary investments in the marine terminals. Further, an excessively low rate of return on capital could discourage potential competitors to Certas from investing in their own alternative fuel storage and distribution facilities as it would be more difficult for these rivals to compete against Certas' operations while ensuring that they covered their costs of doing so.

Other issues

- 2.13. In addition to the above, a small number of responses to the consultation made representations regarding issues – for example, regarding the relative cost of road fuels in the Western Isles compared to on the Scottish mainland – that did not directly relate to the commitments that had been offered by the Parties and which were the subject of the OFT’s consultation. Given that such representations did not directly apply to the matters on which the OFT consulted, they are not addressed further in this notice.

3. The proposed modifications to the commitments

3.1 Further to the CMA's consideration of the responses to the consultation on the Parties' proposed commitments, the Parties have offered to make specific modifications to the proposed commitments. The Parties have offered to:

- Amend the duration of the proposed throughput arrangements with respect to the Stornoway terminal to five years. This period will begin on 1 June 2015 (the date at which Highland Fuels' current throughput arrangements regarding the Stornoway terminal expire) and will end on 31 May 2020.
- Add a commitment that the Parties will ensure that the throughput fees, which are chargeable to wholesalers using Certas' terminals, will, along with Certas' other input costs, be incorporated in full within the prices that Certas charges to filling stations in the Western Isles. This pass-through of costs will be verifiable by the external advisers of a rival wholesaler seeking access to the relevant terminal and by an independent expert in the event of a dispute.

3.2 The above modifications are incorporated into the modified commitments set out at Annex A of this notice. The commitment relating to duration of the throughput arrangements at the Stornoway terminal is at paragraph 6 of the modified commitments and the commitment relating to Certas incorporating its costs into its fuel prices is at paragraphs 7.3.6 to 7.3.8 and 7.4.6 to 7.4.8 of the modified commitments.

4. The CMA's provisional assessment of the proposed modifications

- 4.1 The chapter sets out the CMA's provisional assessment of the proposed modifications.

The duration of the Stornoway throughput arrangements

- 4.2 The proposed commitments that were the subject of consultation included provisions for competitors to Certas to obtain access to the Parties' marine terminals at Stornoway and Loch Carnan for two and a half years and five years respectively.
- 4.3 As set out above, the Parties have offered to extend the duration of the Stornoway throughput arrangements to five years. This period will begin on 1 June 2015 and end on 31 May 2020. As such, the modified commitments provide for throughput arrangements in respect of both Stornoway and Loch Carnan for a duration of five years.
- 4.4 The CMA considers that the throughput arrangements set out in the modified commitments are capable of facilitating the entry and expansion of competitors to Certas and thereby increasing competition in the wholesale supply of road fuels in the Western Isles. Having the option to access Certas' marine terminals for up to five years ensures that rival wholesalers can benefit from access to the marine terminals (instead of having to transport fuels to the Western Isles by road tanker and ferry) and can compete on a level playing field with Certas for filling station demand. As a result, the modified commitments offer the prospect of pro-competitive change to the benefit of filling stations, consumers and businesses in the Western Isles.
- 4.5 The CMA provisionally considers that the duration of five years will allow adequate opportunity for rival wholesalers to establish and expand market share in the Western Isles and to make any investments that may be required to ensure that they can continue to compete on the market after the expiry of the commitments.
- 4.6 Such investments may include the building of alternative facilities for the storage and distribution of fuels. In this context, the Parties have provided the CMA with evidence relating to the construction of an inland fuel depot within seven months. The CMA has also obtained information from Comhairle nan Eilean Siar, the Western Isles Council, regarding the consents and authorisations that would be required to build a new marine terminal. The Western Isles Council has informed the CMA that it considers that obtaining the necessary consents and authorisations could be expected to take

approximately five to seven months. Given that obtaining such consents and the actual construction of a terminal would, along with finding and acquiring a suitable location, be key stages in the development of alternative fuel storage facilities, the CMA considers that the evidence referred to above is consistent with five years being sufficient time in total to develop such facilities.

- 4.7 In light of the above, the CMA considers that the five-year duration of the throughput arrangements relating to the Stornoway and Loch Carnan marine terminals that have been offered by the Parties is sufficient to address the CMA's competition concerns.

Commitment that Certas will pass through costs to filling station customers

- 4.8 One respondent to the consultation raised a concern that a rival wholesaler that made use of the throughput arrangements laid down in the proposed commitments may not be able to compete with Certas on price, given the level of the throughput fees to be charged by Certas. In particular, the respondent was concerned that the Parties could undercut competitors by not incorporating the costs of operating the terminals into the prices that Certas charged its filling station customers.
- 4.9 The CMA considers that in order for the throughput arrangements laid down in the proposed commitments to be effective, it is essential that an 'as efficient competitor' to Certas would be able to compete with Certas on a level playing field and without incurring losses.
- 4.10 As set out above, the Parties have offered to commit to ensuring that the throughput fees, which are chargeable to wholesalers using Certas' terminals, will along with Certas' other input costs, be incorporated in full within the prices that Certas charges to filling stations in the Western Isles. The Parties have also offered to commit to this pass-through of costs being verifiable by the external advisers of a rival wholesaler and by an independent expert in the event of a dispute.
- 4.11 The CMA provisionally considers that this proposed amendment will ensure that potential competitors to Certas will be able to compete with Certas on a level playing field and that businesses and consumers will benefit accordingly from such competition.

5. The CMA's intentions and invitation to comment

The CMA's intentions

- 5.1 In light of the above, the CMA provisionally considers that the modified commitments offered by the Parties and set out in Annex A of this notice are sufficient to address its competition concerns in this case. Therefore, the CMA proposes to accept the modified commitments by means of a formal commitments decision.
- 5.2 As required by paragraph 3 of Schedule 6A of the Act, the CMA now invites interested third parties to make representations on the proposed modifications to the commitments. For ease of reference the proposed modifications are:
- Amendment to the duration of the proposed throughput arrangements with respect to the Stornoway terminal from two and a half to five years, ending on 31 May 2020.
 - Addition of a commitment that the Parties will ensure that the throughput fees, which are chargeable to wholesalers using Certas' terminals, will along with Certas' other input costs, be incorporated in full within the prices that Certas charges to filling stations in the Western Isles. This pass-through of costs will be verifiable by the external advisers of a rival wholesaler seeking access to the relevant terminal and by an independent expert in the event of a dispute.
- 5.3 The CMA will take representations on these proposed modifications into account before making a final decision on whether to accept the modified commitments.

Invitation to comment

- 5.4 Any person wishing to comment on the proposed modifications to the commitments should submit written representations to the postal or email address given below, by 5pm on 4 June 2014. Please quote the case reference MP-SIP/0034 in all correspondence related to this matter.

Western Isles Fuels Commitments Consultation
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD

Email: WIFCConsultation@cma.gsi.gov.uk

ANNEX A – The modified commitments

CERTAS ENERGY UK LIMITED

MP-SIP/0034

DRAFT COMMITMENTS PROPOSAL IN RELATION TO THE CMA'S INVESTIGATION OF CERTAS CONTRACTUAL ARRANGEMENTS FOR WHOLESALE SUPPLY OF ROAD FUELS IN THE WESTERN ISLES (THE "INVESTIGATION")

1. These Commitments are provided by Certas Energy UK Limited ("Certas") and Certas' ultimate parent company DCC Plc (together "the Parties").
2. In order to address the CMA's competition concerns and assist with bringing the Investigation to a close, the Parties have offered Commitments under section 31A of the Competition Act 1998 (the 'Act').
3. Consistent with sections 31A and 31B of the Act, the Commitments are offered on the basis that if the CMA accepts the Commitments in accordance with section 31A(2) of the Act, it shall not continue its investigation, make a decision within the meaning of section 31(2) of the Act, or give a direction under section 35 of the Act.
4. The offering of the Commitments by the Parties does not constitute an admission of any wrongdoing by them.
5. The Commitments set out at 7.1 and 7.2 and 7.3 shall remain in force for a period of 5 years from the date on which the OFT formally accepts these Commitments. The Parties agree to consider, at the end of 5 years, extending these Commitments, but there is no obligation to so extend.
6. The Commitment set out at 7.4 shall commence on 1 June 2015 and remain in force until 31 May 2020. This would mean that the Commitments in respect of both the Stornoway and Loch Carnan terminals would have a duration of 5 years. The Parties agree to consider, at the end of this period, extending this Commitment, but there is no obligation to so extend.

Commitments from the Parties

7. Certas will, and DCC will secure that Certas will:
 - 7.1 ensure that every retailer of road fuels in the Western Isles ("WI retailer") currently supplied by Certas⁸, or seeking such supplies, will be given the opportunity in writing to elect to take future supplies of road fuels, only on the basis of one of the three contractual arrangements set out below, and Certas will amend or terminate (as appropriate) its existing wholesale supply agreements with such WI retailers accordingly:
 - 7.1.1 (Arrangement 1) on a "spot" basis, whereby Certas and the WI retailer will negotiate the price to apply to the purchase of road fuels for each individual transaction separately. For the avoidance of doubt, this option will include the termination of: (i) any obligation on the WI retailer to purchase road fuels exclusively from Certas ("the exclusive purchasing obligation") and (ii) the provision by Certas of rebates on the prices charged to retailers;

⁸ At the date of giving these Commitments, Certas has wholesale supply agreements for road fuels in place with the following Western Isles retailers: [CONFIDENTIAL].

- 7.1.2 (Arrangement 2) under a contract which provides for: (i) a Platts plus pricing mechanism; and (ii) an exclusive purchasing obligation for a period of no more than two years;
- 7.1.3 (Arrangement 3) under a rolling contract which provides for: (i) a Platts plus pricing mechanism and (ii) unilateral termination of the contract by either party upon the provision of three months notice by the terminating party.
- 7.1.4 If any WI retailer does not make any such election within 28 days of the date of such written offer, the WI retailer will be supplied on a “spot” basis but may, at any time during the period that these Commitments are in force, elect to enter into either of the alternative supply arrangements set out at 7.1.2 (Arrangement 2) and 7.1.3 (Arrangement 3).
- 7.2 ensure that following the amendment or termination of the existing wholesale supply agreements under 7.1 above, it applies fair and reasonable terms when collecting any outstanding debts from the WI retailer. Certas agrees to exercise consideration when doing so, including, where appropriate, permitting the debtor to make repayments in instalments. Where Certas owes a debt to a WI retailer, it will ensure the punctual repayment of the debt.
- 7.3 ensure that a throughput arrangement is put in place for the Loch Carnan terminal, (Scottish Fuels, Loch Carnan Pier, Loch Carnan, Isle of South Uist, HS8 5NU), according to which:
- 7.3.1 a third party supplier (such as Phillips 66) (“the supplier”) will procure supplies of oil products and deliver them to the terminal;
- 7.3.2 the supplier will directly negotiate terms and conditions of supply, including as to price, with the Parties and with any other distributor seeking supplies of oil products from the Loch Carnan terminal;
- 7.3.3 Certas will charge a throughput fee for the use of its Loch Carnan terminal, either to the supplier or to other distributors purchasing from the supplier which fee will be set to cover Certas’ costs of operating the terminal, including operating expenses and capital depreciation, as well as a reasonable return on the capital assets employed by Certas at the terminal.
- 7.3.4 The pence-per-litre price for the throughput fee will be updated by Certas on the 1 May⁹ of each year, and will be calculated according to the following formula:
- $$Price(ppl) = \frac{Opex + Depreciation + (Rate\ of\ Return\ on\ Capital) * Capital\ Employed}{Expected\ Volume}$$
- 7.3.5 where:
- (a) Operating Expenditures – these are Certas’ estimated expenditures in operating the Loch Carnan terminal. They will be calculated to exclude all costs of distribution from the terminal (i.e. excluding transportation costs from the terminal, marketing and communication costs, costs related to customer’s bad debt and an allocation of the terminal payroll based on the time dedicated to distribution activities), and will reflect the operating costs of the preceding financial year (i.e. year to 31 March prior to that date);

⁹ This is to allow sufficient time for the Parties to carry out necessary end-of-year administration and thereafter to conduct the necessary calculations accordingly

- (b) Depreciation – is the depreciation charged to Certas’ profit and loss account for the financial year then in progress for the capital base at the Loch Carnan terminal, including the depreciation to be charged on planned capital expenditures for that year (the depreciation rate will be the depreciation applied in the Profit and Loss account for the financial year which will include the depreciation of new capital expenditures);
 - (c) Capital Employed – this will be the total investment in fixed assets (as at the net book value or carrying value in the accounts) employed at the Loch Carnan terminal, including any planned capital expenditures for the financial year then in progress;
 - (d) Rate of Return on Capital – Certas has used a rate of return on capital of 12% to reflect the inherent risks of an island business;
 - (e) Expected Volume – the expected volume will be the total throughput (in litres) at the Loch Carnan terminal in the preceding year across all distributors.
- 7.3.6 ensure that the wholesale costs Certas incurs in obtaining fuel are passed on to WI retailers supplied by Certas and the price charged to any WI retailer will never be below the sum of the following items:
- (a) the throughput fee as described at 7.3.4 and 7.3.5;
 - (b) the fuel price (including the Platts price and product premium) charged by the supplier to Certas; and
 - (c) shipping costs incurred for product to be transported to the islands.
- 7.3.7 ensure that in any financial year, the gross margin after subtracting the wholesale costs listed above obtained by Certas from its distribution business across all customers will be sufficient to cover the following costs:
- (a) allowance for standard temperature accounting (“STA”)¹⁰; and
 - (b) distribution costs specific to the distribution of road fuels to retail customers including transport.
- 7.3.8 The Parties’ compliance with the Commitments at 7.3.6 and 7.3.7 will be verifiable by the external advisors of any fuel distributor seeking access to the Loch Carnan terminal and by the Expert (as defined in commitment 8.2 below) in the event of a dispute on this issue between that distributor and the Parties. An external advisor appointed by a fuel distributor pursuant to the Commitments at 7.3.6 and 7.3.7 will be allowed sufficient access to the Parties’ relevant accounts and financial records to allow that advisor to confirm to its client whether the Parties have (or have not) complied with their obligations under the Commitments at 7.3.6 and 7.3.7.
- 7.3.9 Each external advisor (and his or her employer) must, prior to being given access by the Parties to their relevant accounts and financial records pursuant to the Commitments at 7.3.6 and 7.3.7, enter into a non-disclosure agreement on terms

¹⁰ Per the HMRC guidance; The unit of quantity for excise duty purposes is 'litres at 15°C' as required by the EC Directive on the harmonisation of the structures of excise duties on mineral oils (Council Directive 92/81/EEC). 'Litres at 15°C' are referred to as 'standard litres' and the measurement and conversion process is referred to as 'Standard Temperature Accounting' ('STA').
http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pag eLibrary_ShowContent&propertyType=document&id=HMCE_CL_000041#P428_59041

reasonably satisfactory to the Parties. The purpose of such non-disclosure agreement shall be to prevent that advisor and his or her employer from disclosing to any third party (including to the fuel distributor appointing them) any of the data or documents disclosed to them by the Parties pursuant to the Commitments at 7.3.6 and 7.3.7.

- 7.3.10 By way of indication, the price per litre for the current financial year (ending March 2014) using the above formula would be 2.73 pence. The Parties are willing to provide, on a confidential basis, to the external advisers of any fuel distributor access to Certas' accounts to ensure that the price correctly reflects the above formula.
- 7.3.11 For the avoidance of doubt, a fuel distributor seeking to confirm Certas' compliance with the Commitments at 7.3.6, 7.3.7 and 7.3.9 shall bear its own costs associated with doing so, including but not limited to those of any external advisers it may appoint.

AND

7.4 ensure that a throughput arrangement is continued for the Stornoway terminal, (Scottish Fuels, Shell Street, Stornoway, Isle of Lewis, HS1 2BS), according to which:

- 7.4.1 the supplier will procure supplies of oil products and deliver them to the Stornoway terminal;
- 7.4.2 the supplier will directly negotiate terms and conditions of supply, including as to price, with the Parties and with any other distributor seeking supplies of oil products from the Stornoway terminal;
- 7.4.3 Certas will charge a throughput fee for the use of its Stornoway terminal, either to the supplier or to other distributors purchasing from the supplier which fee will be set to cover Certas' costs of operating the terminal, including operating expenses and capital depreciation, as well as a reasonable return on the capital assets employed by Certas at the terminal.
- 7.4.4 The ppl price for the throughput fee will be updated by Certas on 1 May¹¹ of each year, and will be calculated according to the following formula:

$$Price(ppl) = \frac{Opex + Depreciation + (Rate\ of\ Return\ on\ Capital) * Capital\ Employed}{Expected\ Volume}$$

7.4.5 where:

- (a) Operating Expenditures – these are Certas' estimated expenditures in operating the Stornoway terminal. They will be calculated to exclude all costs of distribution from the terminal (i.e. excluding transportation costs from the terminal, marketing and communication costs, costs related to customer's bad debt and an allocation of the terminal payroll based on the time dedicated to distribution activities), and will reflect the operating costs of the preceding financial year (i.e. year to 31 March prior to that date);
- (b) Depreciation – is the depreciation charged to Certas' profit and loss account for the financial year then in progress for the capital base at the

¹¹ This is to allow sufficient time for the Parties to carry out necessary end-of-year administration and thereafter to conduct the necessary calculations accordingly

Stornoway terminal, including the depreciation to be charged on planned capital expenditures for that year (the depreciation rate will be the depreciation applied in the Profit and Loss account for the financial year which will include the depreciation of new capital expenditures);

- (c) Capital Employed – this will be the total investment in fixed assets (as at the net book value or carrying value in the accounts) employed at the Stornoway terminal, including any planned capital expenditures for the financial year then in progress;
- (d) Rate of Return on Capital – Certas has used a rate of return on capital of 12% to reflect the inherent risks of an island business;
- (e) Expected Volume – the expected volume will be the total throughput (in litres) at the Stornoway terminal in the preceding year across all distributors;

7.4.6 ensure that the wholesale costs Certas incurs in obtaining fuel are passed on to WI retailers supplied by Certas and the price charged to any of WI retailer will never be below the sum of the following items:

- (a) the throughput fee as described at 7.4.4 and 7.4.5;
- (b) the fuel price (including the Platts price and product premium) charged by the supplier to Certas; and
- (c) shipping costs incurred for product to be transported to the islands.

7.4.7 ensure that in any financial year, the gross margin after subtracting the wholesale costs listed above obtained by Certas from its distribution business across all customers will be sufficient to cover the following costs:

- (a) allowance for standard temperature accounting (“STA”)¹²; and
- (b) distribution costs specific to the distribution of road fuels to retail customers including transport.

7.4.8 The Parties’ compliance with the Commitment at 7.4.6 and 7.4.7 will be verifiable by the external advisors of any fuel distributor seeking access to the Stornoway terminal and by the Expert (as defined in commitment 8.2 below) in the event of a dispute on this issue between that distributor and the Parties. An external advisor appointed by a fuel distributor pursuant to the Commitments at 7.4.6 and 7.4.7 will be allowed sufficient access to the Parties’ relevant accounts and financial records to allow that advisor to confirm to its client whether the Parties have (or have not) complied with their obligations under the Commitments at 7.4.6 and 7.4.7. Each external advisor (and his or her employer) must, prior to being given access by the Parties to their relevant accounts and financial records pursuant to the Commitments at 7.4.6 and 7.4.7, enter into a non-disclosure agreement on terms reasonably satisfactory to the Parties. The purpose of such non-disclosure agreement shall be to prevent that advisor and his or her employer from disclosing to any third party (including to the fuel distributor appointing them) any of the data

¹² Per the HMRC guidance; The unit of quantity for excise duty purposes is 'litres at 15°C' as required by the EC Directive on the harmonisation of the structures of excise duties on mineral oils (Council Directive 92/81/EEC). 'Litres at 15°C' are referred to as 'standard litres' and the measurement and conversion process is referred to as 'Standard Temperature Accounting' ('STA').

http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pag eLibrary_ShowContent&propertyType=document&id=HMCE_CL_000041#P428_59041

or documents disclosed to them by the Parties pursuant to the Commitments at 7.4.6 and 7.4.7.

- 7.4.9 By way of indication, the price per litre for the current financial year (ending March 2014) would be 2.01 pence. Certas is willing to provide, on a confidential basis, to the external advisers of any fuel distributor access to its accounts to ensure that the price correctly reflects the above formula.
- 7.4.10 For the avoidance of doubt, a fuel distributor seeking to confirm Certas' compliance with the Commitments at 7.4.6, 7.4.7 and 7.4.9 shall bear its own costs associated with doing so, including but not limited to those of any external advisors it may appoint.
- 7.5 During the period that the Commitments remain in force, the Parties will be under no obligation to continue the operation of either the Loch Carnan terminal and/or the Stornoway terminal, and the Parties will not be prevented by the Commitments from divesting themselves of, or closing, either the Loch Carnan terminal and/or the Stornoway terminal. Should the Parties elect to sell, assign or otherwise transfer either the Loch Carnan terminal and/or the Stornoway terminal they will ensure that any purchaser, assignee or transferee of the terminal(s) is contractually bound to abide by the Commitments at 7.3 and/or 7.4, 8 and 9.
- 7.6 The Parties shall not in any way circumvent, by actions and/or omissions any of the Commitments, including by selling, assigning or otherwise transferring any part of their Western Isles road fuel business to any other entity within the DCC Plc corporate group.

DISPUTE RESOLUTION

8. The Parties:
- 8.1 shall use reasonable endeavours to negotiate in good faith and settle amicably any dispute that arises in relation to 7.1, 7.2, 7.3 or 7.4 of these Commitments including through the use of mediation. If the parties are for any reason unable to resolve the dispute within 30 days of it being notified to them, the parties to the dispute will attempt to settle it by mediation.
- 8.2 will, in negotiating agreements pursuant to 7.3 or 7.4 of these Commitments, propose that any dispute relating to the calculation of the throughput fee be referred for resolution to an Independent Chartered Accountant (the "Expert") on the following terms:
- 8.2.1 the parties to the dispute will seek to agree on the Independent Chartered Accountant to be appointed as Expert and, if they have not agreed within 14 days of the process being commenced, the Expert shall be appointed by the President for the time being of the Institute of Chartered Accountants in England and Wales on the application of either party;
- 8.2.2 the Expert shall act as an expert and not as an arbitrator;
- 8.2.3 the Expert shall, in considering any dispute, do so according to generally accepted accounting principles (GAAP) and shall apply International Financial Reporting Standards; and, wherever such standards/principles leave discretion as to the determination of a specific amount or volume, the Expert shall seek to determine the fair, reasonable and non-discriminatory amount or volume in each specific case;
- 8.2.4 the parties to the dispute shall each have the right to make representations to the Expert;
- 8.2.5 the decision of the Expert shall, in the absence of manifest error, be final and binding on the parties to the dispute;

8.2.6 all costs incurred by the Expert shall be borne by the parties to the dispute in equal shares and the parties shall each bear their own legal costs associated with expert determination;

8.2.7 the Expert will be provided with full access to Certas' accounts.

REPORTING

9. The Parties:

9.1.1 will provide to the Competition and Markets Authority any information and documents which the Competition and Markets Authority reasonably requires for the purposes of enabling the Competition and Markets Authority to monitor and review the operation of the Commitments or any provisions of the Commitments;

9.1.2 may be required by the Competition and Markets Authority to keep, maintain and produce those records specified in writing by the OFT that relate to the operation of any provision of the Commitments; and

9.1.3 will deliver an annual compliance statement to the Competition and Markets Authority, for each period of 12 consecutive months "year" in which the Commitments are in force, within three months after the end of the year to which the annual compliance statement relates. The Parties will deliver the first such annual compliance statement no later than 14 days after the date on which the OFT formally accepts these Commitments, or by such other date as may be agreed between the Parties and the Competition and Markets Authority. The annual compliance statement shall include a detailed and accurate account of any matters notified to the Parties by the Competition and Markets Authority.

9.2 The obligations at 9.1.1 and 9.1.2 shall apply for the period that these Commitments are in force and for a further year after the Commitments end or expire.