

# Western Isles Road Fuels

**Decision to accept binding commitments  
from Certas Energy UK Limited  
and DCC plc**

24 June 2014

## Contents

	<i>Page</i>
1. Introduction .....	1
2. Background .....	3
The OFT and CMA investigation.....	3
The Parties .....	4
Certas Energy UK Limited.....	4
DCC Plc.....	4
Market context.....	5
The geography of the Western Isles .....	5
The wholesale supply of road fuels to filling stations in the Western Isles .....	5
3. The CMA's competition concerns .....	7
Introduction .....	7
The relevant markets.....	7
The relevant product market .....	7
The relevant geographic markets.....	8
Certas' position on the relevant markets.....	9
Conduct raising concerns .....	10
The CMA's approach to exclusive contracts as a potential abuse of dominance. 10	
The CMA's competition concerns regarding Certas' conduct in the northern islands .....	11
The CMA's competition concerns regarding Certas' conduct in the southern islands .....	12
4. The commitments.....	14
Introduction .....	14
The CMA's assessment of the appropriateness of this case for commitments.....	14
The CMA Guidance .....	14
The CMA's assessment in this case .....	15
The Final Commitments .....	16
Certas' contracts with filling stations .....	16
Access to the Loch Carnan terminal .....	17
Access to the Shell Street terminal .....	18
General provisions .....	18
Responses to the public consultations and subsequent modifications to the commitments.....	19
The First Consultation.....	19
The second consultation .....	21
The CMA's assessment of the Final Commitments.....	21
5. The commitments decision .....	24
ANNEX 1 – The Final Commitments .....	25

## 1. Introduction

- 1.1. In this Decision, the Competition and Markets Authority (CMA) accepts<sup>1</sup> the Final Commitments offered by Certas Energy UK Limited (Certas) and DCC plc (DCC) (hereafter together referred to as ‘the Parties’) as set out at Annex 1. Concomitant to the acceptance of the Final Commitments, the CMA is terminating its investigation of the Parties’ conduct, with no decision made on whether or not the Competition Act 1998 (the Act) has been infringed. For the avoidance of doubt, the decision by the CMA to accept commitments does not amount to or imply any finding as to the legality or otherwise of the conduct by the Parties.
- 1.2. Acceptance of the Final Commitments will not prevent the CMA from taking any action in relation to competition concerns which are not addressed by the commitments. Moreover, acceptance of the Final Commitments would not prevent the CMA from continuing its investigation, making an infringement decision, or giving a direction in circumstances where the CMA had reasonable grounds for:
  - 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.
- 1.3. The remainder of this Decision is structured as follows.
- 1.4. Chapter 2 sets out relevant background, including details of the Office of Fair Trading (OFT) and CMA investigation, the Parties, and the market context in which the investigation has been carried out.
- 1.5. Chapter 3 sets out the CMA’s competition concerns regarding Certas’ conduct.
- 1.6. Chapter 4 summarises the Final Commitments offered by the Parties, the responses to the OFT’s and CMA’s consultations regarding the commitments and modified commitments offered by the Parties, and sets out why the CMA considers that the Final Commitments address its competition concerns.

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<sup>1</sup> In accordance with section 31A of the Competition Act 1998.

- 1.7. Chapter 5 sets out the CMA's decision to accept the Final Commitments and to make them binding on the Parties.

## 2. Background

### ***The OFT and CMA investigation***

- 2.1. In late 2012, the OFT received specific evidence relating to Certas' conduct in the Western Isles. In January 2013, the OFT launched an investigation under section 25 of the Act, having established that there were reasonable grounds for suspecting that the Chapter II prohibition of the Act had been infringed and having determined that an investigation would be consistent with the OFT's Prioritisation Principles.<sup>2</sup>
- 2.2. During the course of its investigation, the OFT sent notices requiring the provision of documents and information under section 26 of the Act to a number of parties. In addition, the OFT met in person and conducted teleconferences with various parties to gather further substantive evidence, as well as conducting witness interviews with relevant individuals.
- 2.3. Following discussions with the OFT, the Parties indicated an intention to offer commitments to address the OFT's competition concerns. Accordingly, further to paragraph 4.18 of *Enforcement*<sup>3</sup> ('the Enforcement Guidance') and paragraph 10.19 of *A guide to the OFT's investigation procedures in competition cases*<sup>4</sup> ('the OFT Procedural Guidance'), the OFT proceeded to discuss with the Parties the scope of any commitments which the OFT considered would be necessary to address the concerns that it had identified.
- 2.4. Certas first offered commitments to the OFT on 21 November 2013. The OFT rejected this offer on 6 December 2013. The Parties then offered a new set of commitments. Further to discussion with the OFT, the Parties offered the commitments in relation to which the OFT issued, on 18 March 2014, a Notice setting out its intention to accept binding commitments and invited interested third parties to make representations (the First Consultation).<sup>5</sup>
- 2.5. The OFT closed on 31 March 2014, after which the investigation became the responsibility of the CMA.
- 2.6. The First Consultation closed on 17 April 2014 and representations were received from 86 interested third parties.<sup>6</sup> The CMA carefully considered those representations, gathered further relevant information from a number of sources, and discussed the concerns raised by respondents to the

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<sup>2</sup> *OFT Prioritisation Principles* (OFT953), October 2008.

<sup>3</sup> *Enforcement* (OFT407), December 2004.

<sup>4</sup> *A guide to the OFT's investigation procedures in competition cases* (OFT1263rev), October 2012.

<sup>5</sup> *Western Isles Road Fuels: Notice of intention to accept binding commitments offered by Certas Energy UK Limited and DCC Plc and invitation to comment* (OFT 1530), March 2014.

<sup>6</sup> A summary of these representations is set out in Chapter 4 of this Decision.

consultation with the Parties. Further to these discussions, the Parties proposed to make certain modifications ('the proposed modifications') to the commitments that they had previously offered. On 22 May 2014, the CMA issued a Notice setting out its intention to accept the modified commitments and invited interested third parties to make representations on the proposed modifications (the Second Consultation).<sup>7</sup>

- 2.7. The CMA received three responses to the Second Consultation which closed on 4 June 2014.<sup>8</sup> Having taken account of representations made during the First Consultation and the Second Consultation, the CMA considers that the Final Commitments as set out in Annex 1 of this Decision<sup>9</sup> address its competition concerns in this case and it has therefore decided to accept the Final Commitments. Accordingly, the CMA will close its file in respect of this investigation.

### ***The Parties***

#### *Certas Energy UK Limited*

- 2.8. Certas is involved in the wholesale supply of road fuels to filling stations in the UK. It is a private limited company which operates under its own name as well as under various other brands, including the Scottish Fuels and Gulf brands. Certas is, through a number of subsidiaries, wholly owned by DCC Plc. Prior to 27 September 2013, Certas was registered and operated as GB Oils Limited. For the sake of clarity, the CMA uses the name Certas throughout this Notice when referring to matters and events both before and after 27 September 2013.

#### *DCC Plc*

- 2.9. DCC is an international sales, marketing, distribution and business support services group headquartered in Dublin with operations in Britain, continental Europe and Ireland. DCC has five divisions – DCC Energy, DCC Technology, DCC Healthcare, DCC Environmental and DCC Food & Beverage. DCC Energy is involved in oil procurement, sales, marketing and distribution, liquid petroleum gas, and fuel card services in Great Britain, Ireland, Denmark, Sweden, Norway, the Netherlands, Belgium, Austria and Germany.

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<sup>7</sup> *Western Isles Road Fuels: Notice of intention to accept modified commitments offered by Certas Energy UK Limited and DCC plc and invitation to comment*, May 2014.

<sup>8</sup> A summary of these representations is set out in Chapter 4 of this Decision.

<sup>9</sup> The Final Commitments are substantively identical to those which were set out in the Second Consultation. See paragraph 4.39 for further details.

## **Market context**

### *The geography of the Western Isles*

2.10. The Western Isles are an archipelago of islands, also known as the Outer Hebrides or Na h-Eileanan Siar, located off the west coast of the Scottish mainland. The Western Isles include the following major populated islands (from north to south):

- Lewis and Harris
- North Uist
- Benbecula
- South Uist
- Barra<sup>10</sup>

2.11. The Western Isles stretch approximately 130 miles from north to south. Causeways connect North Uist to Benbecula and Benbecula to South Uist. Ferry services connect Lewis and Harris to North Uist and South Uist to Barra. A number of ferry services connect the Western Isles with the Scottish mainland.

### *The wholesale supply of road fuels to filling stations in the Western Isles*

2.12. Road fuel wholesalers, such as Certas, typically collect petrol and diesel from refineries, terminals, or depots for onward supply to customers, including filling stations.

2.13. There are no refineries in the Western Isles and all road fuels are transported to the Western Isles from the mainland by using a marine vessel and marine terminal or, less commonly, by road tanker and ferry service.

2.14. There are two marine terminals in the Western Isles: the Shell Street marine terminal in Lewis ('the Shell Street terminal') and the Loch Carnan marine terminal in South Uist ('the Loch Carnan terminal'). Both of these terminals are operated by Certas, which owns the Shell Street terminal and leases the Loch Carnan terminal from the Ministry of Defence.

2.15. There are 21 independent filling stations in the Western Isles. Certas generally supplies filling stations in Lewis and Harris with fuel collected from

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<sup>10</sup> The Western Islands include a number of other less populated islands in addition to those listed in paragraph 2.10. However, the islands listed in paragraph 2.10 are those which have at least one filling station.

the Shell Street terminal and filling stations in North Uist, Benbecula, South Uist and Barra with fuel collected from the Loch Carnan terminal.

- 2.16. Since 2007, when Certas started to supply road fuels to filling stations in the Western Isles, there have been, at different times, three rival wholesalers to Certas that have supplied one or more filling stations in Lewis and Harris. Only one of these rival wholesalers did so at any one time. During the same period, no competitor to Certas has supplied road fuels to filling stations in North Uist, Benbecula, South Uist or Barra.

### 3. The CMA's competition concerns

#### *Introduction*

3.1 This chapter sets out the CMA's competition concerns regarding Certas' five-year exclusive supply contracts with filling stations in the Western Isles (hereafter referred to as 'long-term exclusive contracts'). The chapter first sets out the CMA's preliminary views on market definition and Certas' position on the relevant markets, followed by the CMA's concerns about Certas' conduct in these markets.

#### *The relevant markets*

##### *The relevant product market*

- 3.2 In the CMA's preliminary view the relevant product market in this case is the wholesale supply of road fuels to filling stations.
- 3.3 In line with previous Competition Commission<sup>11</sup> and European Commission<sup>12</sup> decisions, the CMA is of the preliminary view that demand-side substitution from road fuels to other fuels (such as kerosene and gas oil – hereafter 'heating oils') would not occur in response to wholesale prices of road fuels being sustained at a small but significant amount above competitive levels.<sup>13</sup>
- 3.4 Some previous OFT merger decisions have found that there may be scope for supply-side substitution between heating oils and road fuels.<sup>14</sup> However, the CMA is of the preliminary view that given the specific circumstances that prevail in the Western Isles, material and sustainable supply-side substitution

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<sup>11</sup> [DCC Energy UK Limited/Rontec investment: A report on the completed acquisition by DCC Energy Limited from Rontec Investments LLP of certain oil distribution businesses previously owned by Total UK Limited](#), Competition Commission, 4 September 2012, paragraph 6.10.

<sup>12</sup> Case No IV/M.1383, [Exxon/Mobil](#), European Commission, paragraph 436.

<sup>13</sup> In defining a relevant market, the CMA considers whether it would be profitable for a hypothetical monopolist of the product under consideration in the area under consideration to sustain the price of the product a small but significant amount (for example, 5 to 10%) above competitive levels. If the answer to this question is 'yes', the product and area under the hypothetical monopolist's control is (usually) the relevant market. If the answer to this question is 'no', this is typically because a sufficiently large number of customers would switch some of their purchases to other substitute products (or areas) and these should be included in the relevant market. In this case, the CMA assumes that the hypothetical monopolist controls both the focal product and its closest substitute. The process is then repeated, but this time in relation to the larger set of products (or areas) under the hypothetical monopolist's control. We continue expanding the product group in this way (that is, by adding the next best substitute) until we have found a group of products (or areas) for which it is profitable for the hypothetical monopolist to sustain prices 5 to 10% above competitive levels. For more information, see [Market Definition](#) (OFT403), March 2014.

<sup>14</sup> See, for example: [Completed acquisition by GB Oils Limited of Brogan Holdings Limited](#), Case ME/4406/10, decision of 20 April 2010 (published on 20 May 2010), paragraphs 15 & 16, and [Anticipated acquisition by DCC plc of CPL Petroleum Limited](#), Case ME/3186/07, decision of 24 August 2007, published on 4 September 2007, paragraphs 8 & 9. None of these decisions reached a final view on this question.

by heating oils wholesalers does not appear to be practicable without access to the marine terminals in the Western Isles or similar facilities.

- 3.5 In particular, access to the marine terminals or similar facilities appears to be critical to supplying road fuels to filling stations in the Western Isles due to the need for filling stations to be guaranteed regular and timely supplies, including when freight ferry services to the islands may be disrupted due to poor weather conditions. Certas' exclusive access to the marine terminals in the Western Isles is discussed in paragraphs 3.15 and 3.18 below. The CMA is of the preliminary view that establishing suitable alternative facilities in the Western Isles would require a substantial sunk investment which, as set out in the CMA's market definition guideline,<sup>15</sup> would prevent supply-side substitution.
- 3.6 The CMA also notes that none of the heating oils wholesalers with which the OFT spoke during the course of the investigation indicated that it would, in the prevailing market conditions, switch to supplying road fuels in the Western Isles.
- 3.7 In light of the above, the CMA is of the preliminary view that in the circumstances of this specific case, material supply-side substitution from heating oils to road fuels would not occur in response to the wholesale prices of road fuels charged to filling stations being a small but significant amount above competitive levels.

#### *The relevant geographic markets*

- 3.8 In the CMA's preliminary view, there are two separate relevant geographic markets in this case. These are:
- Lewis and Harris ('the northern islands')
  - North Uist, Benbecula, South Uist, and Barra ('the southern islands')
- 3.9 Although the OFT has previously found, in the context of a merger between fuel suppliers, that the Western Isles constituted a single relevant geographic market,<sup>16</sup> the CMA is of the preliminary view that a further separation is appropriate in this case. The reasons for the CMA's preliminary view regarding the relevant geographic markets are summarised below.

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<sup>15</sup> OFT403, *ibid*, paragraph 3.15. This guidance was originally published by the OFT and has been adopted by the CMA.

<sup>16</sup> Case ME/4406/10, *ibid*, paragraph 34.

- 3.10 On the demand side, it does not appear to be practicable for filling stations themselves to collect fuel from outside the Western Isles, as this would involve significant transportation costs and investment in assets such as road tankers and/or storage facilities. For the same reasons, it also does not appear to be practicable for filling stations in the southern islands to themselves collect road fuels from the northern islands or vice versa.
- 3.11 On the supply side, the CMA is of the preliminary view that the potential for supply-side substitution by road fuels wholesalers active on the mainland is not sufficient for the relevant geographic market to be defined more widely than the Western Isles. As with potential supply-side substitution by heating oils wholesalers, access to the marine terminals or to suitable alternative facilities appears to be critical for road fuels wholesalers active on the mainland to be able to switch to supplying road fuels to filling stations in the Western Isles. As set out above (paragraph 3.5), the CMA's preliminary view is that establishing suitable alternative facilities in the Western Isles would require a substantial sunk investment which would prevent such geographic supply-side substitution.
- 3.12 As such, the CMA is of the preliminary view that in the circumstances of this specific case, material supply-side substitution by road fuels wholesalers not yet active in the Western Isles would not occur in response to a small but significant, non-transitory increase in the wholesale prices of road fuels charged to filling stations in the Western Isles.
- 3.13 For similar reasons, the CMA is of the preliminary view that the potential for supply-side substitution between the northern islands and the southern islands is not sufficient for these to be defined as a single relevant geographic market.

#### ***Certas' position on the relevant markets***

- 3.14 The CMA is of the preliminary view that Certas had a dominant position in the market for the wholesale supply of road fuels to filling stations in the northern islands during the period from March 2007 until November 2012.
- 3.15 Certas had a very large market share in the northern islands throughout the above period. Further, from March 2007 until July 2010, Certas had exclusive access to important infrastructure in the northern islands – namely, the Shell Street terminal – which allowed Certas to benefit from cost-efficient bulk transportation and storage of road fuels. The CMA is of the preliminary view that Certas' exclusive access to the Shell Street terminal during this period constituted a significant barrier to entry into the market.

- 3.16 Further to undertakings in lieu of a merger reference provided to the OFT by Certas, Highland Fuels gained the ability to draw fuels from the Shell Street terminal from July 2010 (see further details in paragraph 3.26 below). Nevertheless, the CMA is of the preliminary view that, between July 2010 and November 2012, Certas' market share, by volume, in the northern islands remained in excess of 80%.
- 3.17 In November 2012, Certas provided filling stations in the Western Isles with an opportunity to discuss termination of their long-term exclusive contracts within a 28-day period. This led to a significant proportion (about 40 to 50%) of total filling station demand in the northern islands switching away from Certas to either take exclusive supplies from Highland Fuels, the only alternative wholesaler active at that time in the northern islands, or to purchase supplies on a non-contractual basis from both Certas and Highland Fuels. Although the CMA has not reached a preliminary view on whether or not Certas had a dominant position after November 2012, the CMA's main competition concerns (as described below) relate to the period before November 2012.
- 3.18 The CMA is also of the preliminary view that Certas had a dominant position in the market for the wholesale supply of road fuels to filling stations in the southern islands during the period from March 2007 to date. Certas' market share in the southern islands has remained at 100% throughout this period. In addition, Certas has had exclusive access to the Loch Carnan terminal, which allows it to benefit from cost-efficient bulk transportation and storage of road fuels throughout this period. The CMA is of the preliminary view that Certas' exclusive access to the Loch Carnan terminal constitutes a significant barrier to entry into the southern islands market.
- 3.19 Although Certas also gave filling stations in the southern islands a 28-day opportunity to terminate their long-term exclusive contracts in November 2012, none of the filling stations took up this opportunity. In addition, in December 2013, Certas informed filling stations in the southern islands that they were able to terminate their contracts with Certas at any time. To date none has done so. This appears to be because no alternative road fuels wholesaler was, or is, active in the southern islands, nor does any seem likely to enter the market given the existing barriers to entry.

### ***Conduct raising concerns***

#### *The CMA's approach to exclusive contracts as a potential abuse of dominance*

- 3.20 When a supplier has a dominant position, long-term exclusive contracts, by requiring customers to purchase all or significant parts of their demand from a

single supplier, may be capable of foreclosing competition. However, exclusive contracts do not necessarily infringe competition law. Their capability and likelihood of restricting competition will depend, among other things, on their duration, market coverage and the relevant context (in particular the legal and economic context) in which the contracts operate. Generally speaking, the longer the contracts' duration and the larger their market coverage, the greater their capability to foreclose, and their likelihood of foreclosing, competition.

- 3.21 Any exclusionary effect that may arise from a dominant undertaking's exclusive contracts may be counterbalanced, or outweighed, by advantages in terms of efficiencies which also benefit consumers. In addition, exclusive contracts may be objectively justified for other reasons, such as technical or commercial constraints and public interest considerations. The contracts' exclusionary effect must, however, not go beyond what is necessary in order to attain those advantages or justifications.
- 3.22 In this particular case, the CMA has concerns that restrictions on actual or potential competitors' ability to do business with filling stations may have resulted from Certas' long-term exclusive contracts. The CMA's concerns regarding each relevant market are set out below.

*The CMA's competition concerns regarding Certas' conduct in the northern islands*

- 3.23 From July 2008, Certas entered into and maintained contracts with filling stations in the northern islands which required each contracted filling station exclusively to purchase road fuels from Certas for a period of five years, without a possibility to terminate the contract during that period.
- 3.24 The CMA is of the preliminary view that Certas' long-term exclusive contracts with filling stations in the northern islands were, from July 2008 to November 2012, 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.
- 3.25 The CMA is concerned that a very large share of the northern islands market may have been tied to Certas for a significant period as a result of its long-term exclusive contracts with filling stations. From as early as July 2008 and October 2009, Certas' long-term exclusive contracts covered the largest and second largest filling stations in the northern islands, by volume, respectively. By around December 2010, Certas' contracts appear to have covered around 80% of the northern islands market, by volume. The CMA is of the preliminary view that the resultant inability of actual or potential competitors to Certas to

supply these filling stations would have made it particularly difficult for such competitors to successfully enter, or expand in, the market.

- 3.26 In July 2010, Highland Fuels entered the northern islands market. This entry was facilitated by a throughput arrangement, which allowed a third-party supplier, Phillips 66, to directly supply Highland Fuels with fuels through Certas' Shell Street terminal for a total period of five years in return for the payment of a specified throughput fee. These throughput arrangements were established as a result of undertakings provided to the OFT by Certas in lieu of the OFT referring Certas' acquisition of Brogan Fuels Limited to the Competition Commission.<sup>17</sup>
- 3.27 Further to the establishment of the throughput arrangements, Highland Fuels would, under conditions of normal competition, have had a window of five years in which it could compete to establish and increase its market share in the northern islands, while benefiting from supply arrangements that were comparable to those of Certas (as a result of having access to the Shell Street terminal).
- 3.28 The CMA is particularly concerned that this ability to compete on the merits for filling stations' demand for road fuels is likely to have been restricted until November 2012 when Certas gave its contracted filling stations a 28-day opportunity to discuss termination of their long-term exclusive contracts, and Highland Fuels was subsequently able to compete for the entire market. The CMA notes that, even then, filling stations' ability to switch away from Certas was limited to a 28-day period<sup>18</sup> and that, by November 2012, there was a significantly shorter amount of time remaining during which Highland Fuels would have access to the Stornoway terminal.

*The CMA's competition concerns regarding Certas' conduct in the southern islands*

- 3.29 From September 2009, Certas entered into and maintained contracts with filling stations in the southern islands which required each contracted filling station exclusively to purchase road fuels from Certas for a period of five years, without a possibility to terminate the contract during that period.
- 3.30 The CMA is of the preliminary view that Certas' long-term exclusive contracts with filling stations in the southern islands were, from September 2009 until December 2013, capable of preventing filling stations from using wholesalers other than Certas. The CMA is concerned that this considerably raised the

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<sup>17</sup> Case ME/4406/10, *ibid*.

<sup>18</sup> Until December 2013, when Certas stated in writing to filling stations that they could terminate their long-term exclusive contracts with Certas at any time.

barriers to entry that were already present in the southern islands as a result of Certas' exclusive access to the Loch Carnan terminal.

- 3.31 The likelihood of Certas' long-term exclusive contracts having a foreclosure effect may have been increased by the contracts' significant collective market coverage. Indeed, from March 2011 the long-term exclusive contracts appear to have covered the entire southern islands market. Any foreclosure effect of the long-term exclusive contracts is likely to have persisted until December 2013, when Certas stated in writing to filling stations that they could terminate their long-term exclusive contracts with Certas at any time.<sup>19</sup>
- 3.32 The CMA is concerned that Certas' long-term exclusive contracts with filling stations in the southern islands, by tying the entire market to Certas, created a situation in which rival wholesalers were prevented from gaining any foothold in the southern islands. In turn, this ensured that it would not be viable for potential competitors to Certas to seek access to the Loch Carnan terminal (for example, by seeking to obtain the lease on the terminal) or invest in alternative means of supplying road fuels to the southern islands. As a result, Certas was effectively insulated from the threat of potential competition in the southern islands.

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<sup>19</sup> The CMA is of the preliminary view that in the southern islands, the potentially abusive conduct did not end following the letters Certas sent in November 2012, because (i) none of the filling stations took up the offer to terminate their long-term exclusive contracts and (ii) Certas' offer to discuss termination was limited to 28 days, after which the filling stations did not have an enforceable option of discussing termination of the long-term exclusive contracts. The CMA is of the preliminary view that the contracts, therefore, retained their potential foreclosure effect until Certas confirmed in December 2013 that filling stations could terminate their contracts at any time.

## 4. The commitments

### *Introduction*

- 4.1 In order to address the CMA's competition concerns, the Final Commitments provide that the Parties will, among other things:
- amend or terminate (as appropriate) all existing contracts between Certas and filling stations in the Western Isles
  - ensure that filling stations in the Western Isles that wish to continue to be supplied by Certas will have the opportunity to elect to be supplied either on a spot basis,<sup>20</sup> or on a Platts plus<sup>21</sup> priced contractual basis
  - open up access to the Loch Carnan terminal to rival wholesalers for a period of five years
  - open up access to the Shell Street terminal to rival wholesalers for a period of five years from 1 June 2015 (the date at which Highland Fuels' current throughput arrangements regarding the Stornoway terminal expire) until 31 May 2020
- 4.2 The Final Commitments are set out in Annex 1 to this Decision and are discussed below. The CMA has concluded that its competition concerns are addressed by the Final Commitments for reasons which are also set out below.

### ***The CMA's assessment of the appropriateness of this case for commitments***

#### *The CMA Guidance*

- 4.3 The Enforcement Guidance and the 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases'<sup>22</sup> (the CMA's Procedural Guidance) provide that the CMA is likely to consider it appropriate to accept binding commitments only in cases where (a) the competition concerns are readily identifiable; (b) the competition concerns are addressed by the commitments offered; and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.<sup>23</sup>

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<sup>20</sup> Where the 'spot' price is based on the market conditions on the day of the order.

<sup>21</sup> Where the price is based on the Platts benchmark price for refined petrol or diesel plus an agreed amount.

<sup>22</sup> [Guidance on the CMA's investigation procedures in Competition Act 1998 cases](#) (CMA8), March 2014.

<sup>23</sup> Paragraph 4.3 of the Enforcement Guidance and paragraph 10.16 of the CMA Procedural Guidance.

4.4 The CMA will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern, and/or where the CMA considers that not to complete its investigation and make a decision would undermine deterrence.<sup>24</sup>

*The CMA's assessment in this case*

4.5 The CMA considers that this is an appropriate case for commitments for the following reasons:

- **The competition concerns are readily identifiable:** The CMA is concerned that Certas' long-term exclusive contracts were capable of restricting, and likely to restrict, competition in both relevant markets, which were already characterised by high barriers to entry as a result of Certas' exclusive access to important local infrastructure in the northern islands until July 2010 and in the southern islands throughout the relevant period. In addition, the CMA is concerned that when Highland Fuels obtained access to the Shell Street terminal in July 2010, its window of opportunity to establish and expand its market share was foreclosed for a significant period by Certas' long-term exclusive contracts. The CMA's concerns are set out in more detail in paragraphs 3.23 to 3.32 above.
- **The CMA has reached the conclusion that the commitments offered by the Parties address the CMA's competition concerns:** The commitments will effectively remove filling stations' long-term exclusive contractual ties to Certas, open access to the Loch Carnan terminal to potential competitors to Certas, and extend such access to the Shell Street terminal. An explanation of why these commitments address the CMA's concerns by increasing competition and lowering barriers to entry, is set out in paragraphs 4.40 to 4.47 below.
- **The commitments offered are capable of being implemented effectively and, if necessary, within a short period of time:** The commitments will come into force from the date of this Decision.

4.6 Finally, the CMA does not consider that accepting commitments in this case undermines deterrence. Indeed, the CMA considers that the fact that Certas has had to offer quasi-structural commitments relating to access to its Shell Street and Loch Carnan terminals is in itself likely to have a deterrent effect. In this context, the CMA notes that the Final Commitments relating to terminal access go beyond terminating Certas' contractual restrictions on filling

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<sup>24</sup> Paragraph 4.5 of the Enforcement Guidance.

stations in the Western Isles also to address the specific market structure which exists as a result of Certas' exclusive access to important infrastructure.<sup>25</sup> The CMA considers that the resultant forward-looking benefits (which are discussed in more detail in paragraphs 4.43 to 4.45) outweigh any potential loss of deterrence from not reaching an infringement decision.

- 4.7 Acceptance of the Final Commitments does not preclude the CMA taking further enforcement action in relation to other alleged abuses of dominance and/or in related markets which raise competition concerns and where there may be harm to consumers.
- 4.8 In light of the above, the CMA's conclusion is that this is an appropriate case for it to accept binding commitments from the Parties.

### ***The Final Commitments***

- 4.9 The paragraphs below summarise the Final Commitments offered by the Parties and accepted by the CMA.

#### *Certas' contracts with filling stations*

- 4.10 The Parties commit to ensuring that every filling station in the Western Isles currently supplied by Certas, or seeking such supplies, will be given the opportunity in writing to elect to take future supplies of road fuels from Certas only on the basis of one of the three arrangements described below, and Certas will amend or terminate (as appropriate) its existing contracts with such filling stations accordingly:
- On a 'spot' basis, whereby the filling station and Certas will negotiate the price to apply to the purchase of road fuels for each individual transaction separately. This option will include the termination of any exclusive purchasing obligation on the filling station
  - Under a contract which provides for a Platts plus pricing mechanism and an exclusive purchasing obligation for a period of no more than two years
  - Under a contract with no fixed end-date, which provides for Platts plus pricing and options for Certas or the filling station to terminate the contract at any time by giving three months' notice

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<sup>25</sup> In addition, the CMA notes that the commitments regarding wholesaler access to the marine terminals provide for wholesalers to draw 'oil products' including heating oils – not only road fuels, which are the focus of the CMA's concerns – from the terminals.

- 4.11 The Parties commit to ensuring that Certas will supply on a spot basis those filling stations that do not make their choice explicit to Certas within 28 days of receiving the above offer. However, such filling stations may at any time during which the commitments are in force elect to enter into either of the alternative supply arrangements described above.
- 4.12 The commitments described in paragraphs 4.10 and 4.11 above shall remain in force for a period of five years from the date of this Decision. The Parties will, at the end of this period, consider extending the commitments, but the commitments contain no obligation that they do so.

*Access to the Loch Carnan terminal*

- 4.13 The Parties commit to ensuring that a throughput arrangement is put in place for the Loch Carnan terminal, according to which a third party supplier such as Phillips 66 will deliver fuels to the terminal for supply to any distributor (including Certas). Under this arrangement, the third party supplier will negotiate terms and conditions of supply, including price, with any distributor (including Certas) seeking supplies of fuel from the Loch Carnan terminal.
- 4.14 The Parties will charge a throughput fee for the use of the Loch Carnan terminal, either to the third party supplier or to other distributors purchasing from the third party supplier. The fee will be set to cover Certas' costs of operating the terminal, including operating expenses and capital depreciation, as well as a return on the capital assets employed by Certas at the terminal.
- 4.15 The Parties will amend the throughput fee annually, and commit to calculating the fee as follows:

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

- 4.16 Each part of the equation is explained in the commitments set out in Annex 1 (paragraph 7.3.5). By way of indication, the Parties state that the price per litre for the financial year ending March 2014 would be 2.73 pence.
- 4.17 The Parties commit to provide, on a confidential basis, access to Certas' accounts to the external advisers of any fuel distributor to ensure that the price correctly reflects the above formula.
- 4.18 The Parties will ensure that the throughput fees, which are chargeable to wholesalers using the Loch Carnan terminal, will, along with Certas' other input costs, be incorporated in full within the prices that Certas charges to filling stations. 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.

- 4.19 The commitments described in paragraphs 4.13 to 4.18 will remain in force for a period of five years from the date of this Decision. The Parties will, at the end of this period, consider extending the throughout arrangements, but the commitments contain no obligation that they do so.

#### *Access to the Shell Street terminal*

- 4.20 The Parties commit to ensuring that a throughput arrangement is put in place for the Shell Street terminal, according to which a third party supplier (currently Phillips 66) will deliver fuels to the terminal. Under this arrangement, the third party supplier will negotiate terms and conditions of supply, including price, with any distributor (including Certas itself) seeking supplies of fuel from the Shell Street terminal.
- 4.21 The provisions described in paragraphs 4.14 to 4.18 above shall also apply to the throughput arrangements for the Shell Street terminal. By way of indication, the Parties state that the throughput fee for the Shell Street terminal would be 2.01 pence per litre for the financial year ending March 2014.
- 4.22 The commitments described in paragraphs 4.20 and 4.21 above will commence 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. The Parties will consider, at the end this period, extending the commitments, but the Final Commitments contain no obligation that they do so.

#### *General provisions*

- 4.23 In the event of any dispute arising as a result of the Final Commitments summarised above, the Parties commit to negotiating in good faith and to settling such a dispute amicably, including through the use of mediation. In the case of a dispute relating to the calculation of the throughput fee, the Parties commit to referring such disputes to an Independent Chartered Accountant whose decision shall be binding on the parties to the dispute.
- 4.24 To monitor the effectiveness of the Final Commitments, the Parties commit to reporting to the CMA each year on the implementation of the commitments.
- 4.25 The Final Commitments in no way oblige the Parties to continue the operation of either terminal. However, if the Parties elect to sell either terminal, they will

ensure that any purchaser of the terminal(s) is contractually bound to abide by the commitments described in paragraphs 4.13 to 4.24 above.

### ***Responses to the public consultations and subsequent modifications to the commitments***

#### *The First Consultation*

4.26 The OFT and the CMA received responses from 86 interested parties to the First Consultation. The representations are summarised below.

#### *The proposed duration of the throughput arrangements*

4.27 Eighty-three respondents to the consultation stated that the proposed throughput arrangements relating to Certas' marine terminals, as set out in the First Consultation, 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.

4.28 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.

4.29 The CMA put these concerns to the Parties in writing. Further to discussion with the CMA, the Parties proposed to extend the proposed throughput arrangements relating to the Stornoway terminal to five years, as described in paragraph 4.22 above. The CMA invited representations on this proposed modification to the commitments in the Second Consultation.

#### *Potential competitors' ability to compete with Certas on price*

4.30 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.

4.31 The CMA put this concern to the Parties in writing. Further to discussion with the CMA, the Parties offered to make an additional commitment to ensure that

the throughput fees, which are chargeable to wholesalers using the terminals, will, along with Certas' other input costs, be incorporated in full within the prices that Certas charges to filling stations. This additional commitment, as it applies to the Loch Carnan terminal, is described in paragraph 4.18 above (as noted in paragraph 4.21, an identical commitment also applies to the Stornoway terminal). The CMA invited representations on this proposed modification to the commitments in the Second Consultation.

*The proposed rate of return on capital of 12%*

- 4.32 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.
- 4.33 As set out in the Second Consultation, the CMA did 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 considered 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 noted that the quoted rate of 5.7% 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.
- 4.34 As such, the CMA did not consider that it had seen evidence to suggest that 12% is an unreasonable nominal, pre-tax rate of return on capital in the particular circumstances of this case.
- 4.35 The CMA also noted 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 have made 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.
- 4.36 In light of the above, the CMA did not consider it necessary or proportionate to calculate a detailed bottom-up calculation of Certas' weighted average cost of capital.

4.37 In addition, the CMA noted that applying what may be an excessively low rate of return on capital in the calculation of the throughput fees would be likely to have been a disincentive for Certas from making necessary investments in the marine terminals. Further, an excessively low rate of return on capital could have discouraged 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*

4.38 In addition to the above, a small number of responses to the First 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 consultation. Given that such representations did not directly apply to the matters on which the OFT consulted, they were not considered further.

#### *The second consultation*

4.39 The CMA received three responses to the Second Consultation, which sought representations from interested third parties on the modifications to the commitments as described above. None of the responses raised any concerns regarding the CMA's proposed intention to accept the modified commitments. The modified commitments which were set out in the Second Consultation are identical in substance to the Final Commitments set out in Annex 1 of this Decision.

#### ***The CMA's assessment of the Final Commitments***

4.40 The CMA considers that accepting the Final Commitments relating to Certas' contracts with filling stations will ensure that for the next five years, filling stations in the Western Isles have a choice between a number of arrangements, with varying pricing mechanisms and durations. Specifically, filling stations will be able to:

- buy road fuels on a 'spot' basis from Certas
- enter into a contract with Certas which provides for a Platts plus pricing mechanism and an exclusive purchasing obligation for a period of no more than two years

- enter into a non-exclusive contract with Certas with no fixed end-date, which provides for Platts plus pricing and options for Certas or the filling station to terminate the contract at any time by giving three months' notice
  - buy road fuels from a rival wholesaler either on a spot basis or having entered into a contract (whether exclusive or not) with the rival wholesaler
- 4.41 The CMA considers that the duration of five years will allow an 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.
- 4.42 By accepting the possibility of filling stations entering into two-year exclusive contracts with Certas, the CMA considers that the possibility of attaining some of the efficiencies that may be associated with exclusive contracts in general is maintained. For example, with the certainty of two years of exclusive supplies, Certas may invest in a filling station's signage and branding. In addition, filling stations may use the certainty of two years of exclusive supplies when they negotiate their contractual terms with Certas.
- 4.43 In the CMA's view, the Final Commitments relating to access to the Loch Carnan terminal create an opportunity for competing wholesalers to enter into a market where competition has not previously existed. Thus, the Final Commitments relating to access to the Loch Carnan terminal not only do not undermine deterrence (see paragraphs 4.4 and 4.6 above), they also enhance the effectiveness of the commitments relating to Certas' long-term exclusive contracts. While removing the exclusive contractual ties between Certas and the filling stations makes competition possible in theory, access to the Loch Carnan terminal ensures that rival wholesalers that want to enter the southern islands market can benefit from access to the marine terminal (instead of having to transport fuels to the Western Isles by road tanker and ferry) and can compete on the merits for filling station demand.
- 4.44 As a result, the Final Commitments offer the prospect of pro-competitive change to the benefit of filling stations and consumers in the southern islands. The CMA considers that the duration of five years will allow an opportunity for rival wholesalers to establish and expand market share in the southern islands 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.
- 4.45 Further, the CMA considers that the Final Commitments relating to access to the Shell Street terminal from 1 June 2015 until 31 May 2020 ensure that a viable competitor to Certas will have a window of five consecutive years of potential access to the Shell Street Terminal and to the northern islands filling

stations as was envisaged by the undertakings in lieu of a merger reference (see paragraphs 3.26 and 3.27 above) that were accepted by the OFT in 2010. The CMA considers that this addresses its specific concerns regarding the likely restriction of Highland Fuels' ability to compete in the northern islands (see paragraph 3.28). The CMA notes that the Final Commitments are not limited to Highland Fuels: the third party supplier will be able to enter into a supply agreement relating to the Shell Street terminal with any rival wholesaler between 1 June 2015 and 31 May 2020.

- 4.46 The CMA notes that the formula for calculating the throughput fee for both terminals is based on objective factors that can be verified by a rival wholesaler's external advisers. In case of a dispute relating to the throughput fee which cannot be resolved within 30 days, an independent chartered accountant will be appointed to consider representations from the parties to the dispute and to make a final decision regarding the level of the fee.
- 4.47 In light of the above considerations, the CMA considers that the Final Commitments address its competition concerns.

## **5. The commitments decision**

- 5.1. In light of the above, the CMA considers that the Final Commitments as set out in Annex 1 of this document address its competition concerns in this case and it has therefore decided to accept the Final Commitments. Accordingly, the CMA has closed its file in respect of this investigation.

***(signed) Ann Pope***

**on behalf of the Competition and Markets Authority**

*Senior Director, Antitrust Enforcement*

# ANNEX 1 – The Final Commitments

## CERTAS ENERGY UK LIMITED

### MP-SIP/0034

#### COMMITMENTS 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 hereby offer final 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 final 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 CMA 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 Certas<sup>1</sup>, 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;
    - 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;

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<sup>1</sup> At the date of giving these Commitments, Certas has wholesale supply agreements for road fuels in place with the following Western Isles retailers: [CONFIDENTIAL].

- 7.1.3 (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 May<sup>2</sup> 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);
- (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);

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<sup>2</sup> 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

- (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”)<sup>3</sup>; 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 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

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<sup>3</sup> 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](http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pag eLibrary_ShowContent&propertyType=document&id=HMCE_CL_000041#P428_59041)

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 advisors 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 May<sup>4</sup> 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 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;

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<sup>4</sup> 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

- (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”)<sup>5</sup>; 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 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

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<sup>5</sup> 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](http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pag eLibrary_ShowContent&propertyType=document&id=HMCE_CL_000041#P428_59041)

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 CMA any information and documents which the CMA reasonably requires for the purposes of enabling the CMA to monitor and review the operation of the Commitments or any provisions of the Commitments;
- 9.1.2 may be required by the CMA to keep, maintain and produce those records specified in writing by the CMA that relate to the operation of any provision of the Commitments; and
- 9.1.3 will deliver an annual compliance statement to the CMA, 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 CMA formally accepts these Commitments, or by such other date as may be agreed between the Parties and the CMA. The annual compliance statement shall include a detailed and accurate account of any matters notified to the Parties by the CMA.

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.

SIGNED on behalf of the Parties:

\_\_\_\_\_

Paul Vian, Managing Director, Certas Energy UK Limited

on \_\_\_\_\_ (date)

at \_\_\_\_\_ (place)

\_\_\_\_\_

Donal Murphy, Director, DCC plc

on \_\_\_\_\_ (date)

at \_\_\_\_\_ (place)