Completed acquisition by Acergy S.A. (since renamed Subsea 7 S.A.) of Subsea 7 Inc

ME/4689/10

The OFT's decision on reference under section 33 given on 21 December 2010 (the Decision). The full text of the Decision was published on 2 February 2011.

THE PARTIES

1. **Acergy S.A (since renamed Subsea 7 S. A. but referred to as 'Acergy' in this notice)** is an offshore engineering, construction, and maintenance company, working for oil and gas companies worldwide. This involves engineering, project management, procurement, fabrication, installation, construction, commissioning and maintenance of fixed surface and subsea production facilities, offshore pipelines and associated infrastructure.

2. **Subsea 7 Inc. (Subsea 7)** is a subsea engineering and construction contractor which operates worldwide. Subsea 7 provided project management, engineering, procurement, fabrication, installation and commissioning services for the development of oil and gas production facilities on the seabed and the tie-back of these facilities to fixed or floating production platforms or to shore facilities.

TRANSACTION

3. On 20 June 2010 the parties entered into a business combination agreement. The parties notified the transaction to the Office of Fair Trading (OFT) on 23 September 2010. The OFT's extended administrative deadline for deciding whether to refer the merger to the Competition Commission (CC) was 6 December 2010.

4. On 21 December 2010, the OFT announced its decision to suspend its duty to refer the merger to the CC under section 33 of the Enterprise Act 2002 (the Act) because the OFT was considering whether to accept appropriate undertakings from the parties in lieu of reference.

5. The parties completed the acquisition on 7 January 2011 by way of share purchase agreement.

JURISDICTION

6. As a result of this transaction Acergy and Subsea 7 ceased to be distinct. The UK turnover of Subsea 7 exceeded £70 million, so the turnover test in section 23(1)(b) of the Act was satisfied. The OFT therefore believed that it is or may be the case that a relevant merger situation has been created.

BACKGROUND

7. In its decision, the OFT concluded that it is or may be the case that the merger had resulted or may be expected to result in a substantial lessening of competition in relation both to the provision of small diameter rigid pipelay services in the North Sea and of integrated services for small diameter rigid pipelay and diving projects in the North Sea.

8. In particular, in relation to pipelay services in the North Sea, the OFT concluded that operators laying larger diameter rigid pipes and flexible pipes in the North Sea were not imposing a competitive constraint to the parties in the provision of small diameter rigid pipelay. In addition, evidence indicated that Acergy Falcon, Seven Navica and Technip's Apache II were the only vessels that had worked on small diameter rigid pipelay projects in recent years and that many of the competing vessels listed by the parties had not won any contracts to lay small diameter rigid pipes in the North Sea and only one operator had minimal success in the bids they made. The OFT concluded that the parties (with Technip) were the closest competitors for small diameter rigid pipelay projects in the North Sea. Therefore, the OFT concluded that there was a realistic prospect of a substantial lessening of competition in the provision of small diameter rigid pipelay in the North Sea resulting from the merger.

9. In addition, in relation to integrated projects combining small diameter rigid pipelay and related diving capability services, concerns had been put to the OFT that the merger may lead to increased prices and/or reduced service levels. Based on the evidence before it, the OFT understood that there might be possibilities of different companies providing separately the diving and the pipelay parts of these projects. However, customers expressed some concerns that it was not efficient for them to tender such work to separate contractors because of the additional project management required and increased project risk.

10. Evidence gathered by the OFT showed that the parties were close competitors and Technip as the only other effective competitor for these integrated projects. Therefore, the OFT concluded that the merger resulted in the reduction from 'three to two' of companies providing an integrated service for small diameter pipelay and diving projects in the North Sea. The OFT concluded that there was a realistic prospect of a substantial lessening of competition in the provision of projects in the North Sea combining small diameter rigid pipelay and diving capability.

11. Accordingly, the OFT found itself under a duty to refer the merger to the CC.

DIVESTMENT UNDERTAKINGS OFFERED BY ACERGY

12. To address the OFT's competition concerns in small diameter rigid pipelay, Acergy offered to divest the vessel, Acergy Falcon. This would include the vessel's existing pipelay spread.

13. The OFT considered that the structural undertakings offered to divest the Acergy Falcon were in principle capable of clearly addressing the competition concerns identified in the decision in relation to the provision of small diameter rigid pipelay in the North Sea.

14. However, the OFT believed that such a divestment would be capable of remedying the substantial lessening of competition, in the provision of integrated service for small diameter rigid pipelay and diving projects, only if the effect of implementation of the remedy was to recreate the competitive constraint which was lost by the merger – that is, a third player (alongside Technip and Acergy) with at least one pipelay vessel

and at least two Diving Support Vessels (DSVs) operating in the North Sea.[1]

15. Therefore, the OFT considered it necessary that the Acergy Falcon was divested to a buyer that had access to at least two DSVs operating in the North Sea.

16. In this way, the OFT considered that the undertakings in lieu would remedy the competition concerns identified above by allowing the potential purchaser to impose the same competitive constraint on the merged entity that the parties did on each other, and on Technip, pre-merger.

17. In this case, the OFT considered that an up-front buyer was required for a number of reasons. Firstly, the OFT believed that there was a reasonably small number of likely acceptable potential purchasers. Second, the OFT was mindful of the potential commercial attractiveness of the Acergy Falcon. Finally, the offer of undertakings in lieu did not extend alternatively to sale of the Subsea 7 Navica, a newer vessel. Therefore, the OFT considered that the most appropriate way of handling any potential divestment risk in relation to the saleability of the *Acergy Falcon* was through the upfront buyer mechanism. [2]

18. Therefore, the OFT concluded that it was appropriate to suspend its duty to refer only on the basis that Acergy would seek an up-front buyer for the divestment remedy in this case.

Suitability of the proposed purchaser

19. In approving a purchaser for the Acergy Falcon, the OFT's starting position is that it must be confident, without the need to undertake a detailed investigation, that the proposed purchaser will restore pre-merger levels of competition. In addition, the proposed purchaser must not raise prima facie competition concerns of its own.

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[1] The OFT understands that Acergy generally has two DSVs active in the North Sea.
[2] See the *Exceptions and undertakings* guidance, ibid, paragraph 5.3.4, in which the OFT states: 'the certainty provided for by the upfront buyer mechanism may provide latitude for exploration of a remedy option that the OFT would not feel confident accepting in a non-upfront context. For example, certainty around saleability becomes less important where the OFT retains the ability to refer should a suitable purchaser not be found within a limited, specified period.'

20. The parties put forward Grup Servicci Petroliere SA (GSP) jointly with Bibby Offshore Holdings Limited (Bibby) as the proposed purchaser of the Acergy Falcon.

21. GSP is a subsidiary of Upetrom Group, a private owned group. GSP is a global operating company providing a wide range of offshore drilling and construction services including significant recent pipelay projects. Its current main focus, in pipelay, is in the Black Sea and Mediterranean and is expanding into Nigeria. GSP is not, however, currently active in the provision of pipelay projects in the North Sea.

22. Bibby is part of Bibby Line Group, a UK deep-water ship owner, with a long-established and strong presence in the UK and in the North Sea, generating around 90 per cent of its revenue from projects in the North Sea. Bibby has focused historically in Inspection, Maintenance and Repair (IMR) services and diving work with two DSVs in the North Sea but is not currently providing pipelay services in the area.

23. GSP and Acergy have entered into a legally binding Memorandum of Agreement regarding the sale of Acergy Falcon to GSP, conditional only on acceptance of the undertakings in lieu by the OFT and approval of GSP as a suitable purchaser under the undertakings.

24. In addition, GSP and Bibby have entered into a legally binding cooperation agreement under which Bibby will enter into an association with GSP for the purpose of GSP buying the Acergy Falcon and for Bibby and GSP to thereafter work together for pipelay projects in the North Sea. In particular, GSP shall be solely responsible for the purchase, operation and maintenance of the Acergy Falcon. GSP and Bibby will together market the Acergy Falcon for pipelay projects with diving services in the North Sea. GSP will act as the primary contractor responsible for the pipelay scope of work (as is customary in this sector), and Bibby will be the exclusive provider of diving services, tie-ins and similar activities associated with the Acergy Falcon in the North Sea, using its fleet of North Sea-class DSVs.

25. The association will enable GSP/Bibby to utilise the vessel in the North Sea for small diameter rigid pipelay projects and for integrated services for small diameter rigid pipelay and diving projects.

26. Based on the information before it, the OFT considers that GSP/Bibby will have the ability and incentive to operate the Acergy Falcon in such a way as to restore competition to pre-merger levels in the North Sea from the time of the divestment.

CONSULTATION

27. On 1 August 2011 the OFT published the proposed undertakings inviting interested parties to give their views on them by 12 August 2011 pursuant to paragraph 2(1) Schedule 10 of the Act.[3]

28. The OFT received a number of comments from interested parties during the consultation period. A number of the comments were in support of the divestment and welcomed the competition it would bring. Others had no concerns or comments. None opposed the divestment or the intended buyer.

DECISION

29. The Decision concluded that the merger would be referred to the CC if the parties failed to give suitable undertakings pursuant to section 73 of the Act to address the competition concerns identified in the Decision.

30. The OFT considers that the undertakings provided by the parties are clear cut and appropriate to remedy, mitigate or prevent the substantial lessening of competition and any adverse effects resulting from it. The OFT has therefore decided to accept the undertakings offered by the parties.

31. The merger will therefore not be referred to the Competition Commission and the undertakings, which have been signed by the parties, will come into effect from this date.

[3] See Annex attached.

Annex to Decision – Consultation Paper

Completed acquisition by Acergy S.A. (now renamed Subsea 7 S.A.) of Subsea 7 Inc.

Notice under Paragraph 2(1) Schedule 10 of the Enterprise Act 2002 of proposed undertakings in lieu of reference pursuant to section 73 of the Enterprise Act 2002

OFT's duty to refer

On 21 December 2010, the OFT announced its decision to suspend its duty to refer the completed acquisition by Acergy S.A. of Subsea 7 Inc. to the Competition Commission (CC) under section 22 of the Enterprise Act 2002 because the OFT was considering whether to accept appropriate undertakings from Subsea 7 S.A. in lieu of reference.

The OFT believed that it is or may be the case that the merger had resulted or may be expected to result in a substantial lessening of competition in relation both to the provision of small diameter rigid pipelay services in the North Sea and of integrated services for small diameter rigid pipelay and diving projects in the North Sea. The text of the OFT's decision, published on 2 February 2011 (the decision), provides full details on the OFT's findings.

In summary, in relation to pipelay services in the North Sea, the OFT concluded that operators laying larger diameter rigid pipes and flexible pipes in the North Sea were not imposing a competitive constraint to the parties in the provision of small diameter rigid pipelay. In addition, evidence indicated that Acergy Falcon, Seven Navica and Technip's Apache II were the only vessels that had worked on small diameter rigid pipelay projects in recent years and that many of the competing vessels listed by the parties had not won any contracts to lay small diameter rigid pipes in the North Sea and only one operator had minimal success in the bids they made. The OFT concluded that the parties (with Technip) were the closest competitors for small diameter rigid pipelay projects in the North Sea. Therefore, the OFT concluded that there was a realistic prospect of a substantial lessening of competition in the provision of small diameter rigid pipelay in the North Sea resulting from the merger.

In addition, in relation to integrated projects combining small diameter rigid pipelay and related diving capability services, concerns had been put to the

OFT that the merger may lead to increased prices and/or reduced service levels. Based on the evidence before it, the OFT understood that there might be possibilities of different companies providing separately the diving and the pipelay parts of these projects. However, customers expressed some concerns that it was not efficient for them to tender such work to separate contractors because of the additional project management required and increased project risk. Evidence gathered by the OFT showed that the parties were close competitors and Technip as the only other effective competitor for these integrated projects. Therefore, the OFT concluded that the merger resulted in the reduction from 'three to two' of companies providing an integrated service for small diameter pipelay and diving projects in the North Sea. The OFT concluded that there was a realistic prospect of a substantial lessening of competition in the provision of projects in the North Sea combining small diameter rigid pipelay and diving capabilities.

Accordingly, the OFT found itself under a duty to refer the merger to the CC.

Divestment undertakings offered by Subsea 7 S. A.

To address the OFT's competition concerns in small diameter rigid pipelay, Subsea 7 S.A. offered to divest the vessel, Acergy Falcon. This would include the vessel's existing rigid pipelay spread.

The OFT considers that the structural undertakings offered to divest the Acergy Falcon are in principle capable of clearly addressing the competition concerns identified in the decision in relation to the provision of small diameter rigid pipelay in the North Sea.

However, the OFT believes that such a divestment will be capable of remedying the substantial lessening of competition in the provision of integrated service for small diameter rigid pipelay and diving projects only if the effect of implementation of the remedy is to recreate the competitive constraint which is lost by the merger – that is, a third player (alongside Technip and Subsea 7 S.A.) with at least one pipelay vessel and at least two DSVs operating in the North Sea.[4]

Therefore, the OFT considers it necessary that the Acergy Falcon is divested to a buyer that has access to at least two DSVs operating in the North Sea.

[4] The OFT understands that Acergy generally has two DSVs active in the North Sea.

In this way, the OFT considers that the undertakings in lieu will remedy the competition concerns identified above by allowing the potential purchaser to impose the same competitive constraint on the merged entity that the parties did on each other, and on Technip, pre-merger.

In this case, the OFT considered that an up-front buyer was required for a number reasons. Firstly, the OFT believes that there were a reasonably small number of likely acceptable potential purchasers. Second, the OFT was mindful of the potential commercial attractiveness of the Acergy Falcon. Finally, the offer of undertakings in lieu did not extend alternatively to sale of the Seven Navica, a newer vessel. Therefore, the OFT considered that the most appropriate way of handling any potential divestment risk in relation to the saleability of the Acergy Falcon was through the upfront buyer mechanism.[5]

Therefore, the OFT concluded that it was appropriate to suspend its duty to refer only on the basis that it would seek an up-front buyer for the divestment remedy in this case.

Suitability of the proposed purchaser

In approving a purchaser for the Acergy Falcon, the OFT's starting position is that it must be confident, without the need to undertake a detailed investigation, that the proposed purchaser will restore pre-merger levels of competition. In addition, the proposed purchaser must not raise prima facie competition concerns of its own.

The parties put forward Grup Servicii Petroliere SA (GSP) as the proposed purchaser of the Acergy Falcon, in an association with Bibby Offshore Holdings Limited (Bibby Offshore).

GSP is a subsidiary of Upetrom Group, a privately owned group. GSP is a global operating company providing a wide range of offshore drilling and construction services including significant recent pipelay projects. Its current

[5] See the *Exceptions and undertakings* guidance, ibid, paragraph 5.3.4, in which the OFT states: 'the certainty provided for by the upfront buyer mechanism may provide latitude for exploration of a remedy option that the OFT would not feel confident accepting in a non-upfront context. For example, certainty around saleability becomes less important where the OFT retains the ability to refer should a suitable purchaser not be found within a limited, specified period.'

main focus, in pipelay, is in the Black Sea and Mediterranean and is expanding into Nigeria. GSP is not, however, currently active in the provision of pipelay projects in the North Sea.

Bibby Offshore is part of Bibby Line Group, a UK deep-water ship owner, with a long-established and strong presence in the UK and in the North Sea, generating around 90 per cent of its revenue from projects in the North Sea. Bibby Offshore has focused historically in Inspection, Maintenance and Repair (IMR) services and diving work with two DSVs in the North Sea but is not currently providing rigid pipelay services in the area.

GSP and Subsea 7 S.A. have entered into a legally binding Memorandum of Agreement regarding the sale of Acergy Falcon to GSP, conditional only on acceptance of the undertakings in lieu by the OFT and approval of GSP as a suitable purchaser under the undertakings.

In addition, GSP and Bibby Offshore have entered into a legally binding cooperation agreement under which Bibby Offshore will enter into an association with GSP for the purpose of GSP buying the Acergy Falcon and for Bibby Offshore and GSP to thereafter work together for pipelay projects in the North Sea. In particular, GSP shall be solely responsible for the purchase, operation and maintenance of the Acergy Falcon. GSP and Bibby Offshore will together market the Acergy Falcon for pipelay projects with diving services in the North Sea. GSP will act as the primary contractor responsible for the pipelay scope of work (as is customary in this sector), and Bibby Offshore will be the exclusive provider of diving services, tie-ins and similar activities associated with the Acergy Falcon in the North Sea, using its fleet of North Sea-class DSVs.

In line with its stated intentions, GSP has made strong marketing efforts in recent months to service pipelay projects in the North Sea, from its North Sea base in Rotterdam. The association will enable GSP/Bibby Offshore to utilise the vessel in the North Sea for small diameter rigid pipelay projects and for integrated services for small diameter rigid pipelay and diving projects in the North Sea.

Based on the information before it, the OFT considers that GSP/Bibby Offshore will have the ability and incentive to operate the Acergy Falcon in such a way as to restore competition to pre-merger levels in the North Sea from the time of the divestment.

Process going forward

The acceptance by the OFT of these proposed undertakings in lieu is dependent on this public consultation.

The OFT considers that the proposed undertakings offered by Subsea 7 S.A are clear cut and appropriate to remedy, mitigate or prevent the competition concerns identified in the decision.

The OFT therefore gives notice that it is minded to accept undertakings in lieu in the form of the proposed undertakings.

Download the proposed undertakings in lieu at www.oft.gov.uk

Before reaching a decision as to whether to accept the proposed undertakings, interested parties are invited to make their views known.

Representations should be made in writing to:

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Deadline for comments: 12 August 2011