
Completed acquisition by GB Oils Limited of Brogan Holdings Limited

ME 4406/10

The OFT's decision on reference under section 22(1) given on 20 April 2010 (the Decision). The full text of the Decision was published on 20 May 2010.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

THE PARTIES

1. GB Oils Limited (GB Oils) is a wholly owned subsidiary of DCC plc (DCC) and operates as DCC's oil distribution business in Great Britain, distributing heating and transport fuels and fuel oils to domestic, commercial, industrial and agricultural customers throughout Great Britain. GB Oils operates under a number of different brands, principally: Carlton Fuels, CPL, Bayfords and Scottish Fuels. It also retails fuels under the Shell and Texaco brands.
2. DCC plc (DCC) is an international procurement, sales, marketing, distribution and business support service group headquartered in Dublin and listed on the Irish and London Stock Exchanges. DCC has five core businesses: DCC Energy, DCC SerCom (IT and entertainment products), DCC Healthcare, DCC Food and Beverage and DCC Environmental. DCC Energy is an oil procurement, sales, marketing and distribution, liquefied petroleum gas (LPG) and fuel card services business in Great Britain, Ireland, Denmark and Austria.
3. Brogan Holdings Limited (Brogans) is a privately held company, headquartered in Motherwell Scotland. Brogans' principal activities are the distribution of heating oils and transport fuels to domestic,

commercial, industrial and agricultural customers in the North of England and Scotland, and the operation of a fuel card business.¹ It operates 16 depots in England and Scotland. Brogans' turnover for the year ending 31 May 2009 was approximately £305m. However, after excluding elements of the Brogans' business which were not part of this transaction (ironmongery and commercial property), the turnover was approximately £296m for the year ended 31 May 2009.

TRANSACTION

4. By virtue of a share purchase agreement completed on 15 December 2009, GB Oils acquired the entire issued share capital of Brogans.
5. The OFT became aware of the transaction through a number of complaints. The OFT sent a preliminary enquiry letter to DCC on 5 January 2010. On 12 January 2010, GB Oils and DCC gave initial undertakings to the OFT pursuant to section 71 of the Enterprise Act 2002 (the Act) to 'hold separate' both businesses.
6. On 20 April 2010, the OFT announced its decision to suspend its duty to refer the completed acquisition by GB Oils of Brogans to the Competition Commission (CC) under section 22 of the Enterprise Act 2002 (the Act) because the OFT was considering whether to accept appropriate undertakings from GB Oils in lieu of reference.

JURISDICTION

7. As a result of this transaction GB Oils and Brogans have ceased to be distinct. The UK turnover of Brogans exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

BACKGROUND

8. In its decision, the OFT stated that it believes that it is or may be the case that the merger has resulted or may be expected to result in a

¹ The main Brogans businesses are Brogan Fuels, Thistle Petroleum, UK Fueline and Dieselink Services.

substantial lessening of competition in the distribution of heating oils and transport fuels in the Western Isles of Scotland (the Western Isles).

9. In particular, the OFT found that the parties were the only two distributors of heating oils and transport fuels in the Western Isles. The OFT received a large number of customer complaints. These customers were concerned that the merger would result in a lack of choice of heating oils and transport fuel distribution and, as a consequence, that prices will increase or the quality of service reduce. The OFT could not rule out the possibility that GB Oils' operation in the Western Isles had been constrained by Brogans' entry. In addition, despite the evidence of one distributor supplying oil from mainland Scotland on the Western Isles, further new entry was not likely, timely and sufficient enough to constrain the parties post-merger, in particular for certain customer segments (that is, smaller customers).
10. Accordingly, the OFT found itself under a duty to refer the merger to the CC.

DIVESTMENT UNDERTAKINGS OFFERED BY GB OILS

11. To address the OFT's competition concerns, GB Oils offered to divest Brogans' oil distribution business on Western Isles (the Isle of Lewis Divestment Business). This consists of two oil tankers, customer records and customer contracts.
12. The parties stated that GB Oils would not be in a position to transfer the lease over Brogans' Stornoway site where its depot was located because it had recently been terminated. Indeed, the parties stated that Brogans is under an obligation under the terms of the lease to remove its depot infrastructure by 30 June 2010. GB Oils therefore offered to provide a potential purchaser of the Isle of Lewis Divestment Business with an option of a throughput arrangement for a minimum period of five years at its Stornoway marine terminal on the Isle of Lewis.
13. The OFT considered there to be a reasonably small number of potential purchasers that would be capable of viable distribution of heating oils and transport fuels in the Western Isles in such a way as to restore

pre-merger competitive levels. The OFT was also mindful of the fact that, to be acceptable as a suitable purchaser, any acquirer of the divestment business would need either to: (a) agree a new lease with the owner of the Brogans site, or (b) secure a suitable new site for a depot, or (c) agree the terms of a throughput agreement with GB Oils. As a result, the OFT considered it appropriate to pursue GB Oils' offer to make disposal of the Isles of Lewis Divestment Business subject to an up-front buyer provision in the undertakings.

14. In approving a purchaser for the Isle of Lewis Divestment Business, 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.
15. The parties put forward Highland Fuels Limited (Highland Fuels) as the proposed purchaser of the Isle of Lewis Divestment Business. Highland Fuels is active in the distribution of heating oils and transport fuels in Scotland. Founded in 1960, Highland Fuels is an ESSO-authorized distributor for both heating oils, lubricants and fuels and operates nine depots across Scotland. It has depots on Orkney and Shetland and, as a result, has significant experience of establishing and maintaining a viable business in island markets comparable to the Western Isles. Highland Fuels is not, however, currently active in the supply of heating oils or transport fuels to the Western Isles.
16. On 1 June 2010 GB Oils and Highland Fuels entered into a legally binding sale agreement regarding the Isle of Lewis Divestment Business, conditional only on acceptance of the undertakings in lieu by the OFT and approval of Highland Fuels as a suitable purchaser under the undertakings.
17. On 28 June 2010 Highland Fuels entered into a new lease with the owner of the property (the Brogans site) to commence after expiry of Brogans' existing lease on 30 June 2010. With this lease and the assets it has acquired from GB Oils pursuant to the undertakings in lieu, Highland Fuels will be in the same competitive position that Brogans enjoyed prior to the merger to exercise a competitive

constraint on GB Oils in the Western Isles.² The OFT considers that Highland Fuels will have the ability and incentive to operate the Isle of Lewis Divestment Business in such a way as to restore competition to pre-merger levels in the Western Isles from the time of the divestment.

CONSULTATION

18. On 4 June 2010 the OFT published the proposed undertakings inviting interested parties to give their views on them by 24 June 2010 pursuant to paragraph 2(1) Schedule 10 of the Act.
19. The OFT received no comments from interested parties during the consultation period.³

DECISION

20. 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.
21. The OFT considers that the undertakings provided by GB Oils 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 GB Oils.
22. The merger will therefore not be referred to the Competition Commission and the undertakings, which have been signed by GB Oils, will come into effect from this date.

² The undertakings in lieu include a provision under which the OFT may require GB Oils to offer a throughput agreement for the benefit of Highland Fuels. However, the throughput agreement is of reduced significance given that Highland Fuels has obtained a new lease for the Brogans site.

³ See Annex attached.

29 June 2010

Annex to Decision – Consultation Paper

Completed acquisition by GB Oils Limited of Brogan Holdings Limited

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 20 April 2010, the OFT announced its decision to suspend its duty to refer the completed acquisition by GB Oils Limited (GB Oils) of Brogan Holdings Limited (Brogans) to the Competition Commission (CC) under section 22 of the Enterprise Act 2002 because the OFT was considering whether to accept appropriate undertakings from GB Oils in lieu of reference.

The OFT believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in the distribution of heating oils and transport fuels in the Western Isles of Scotland (the Western Isles). The text of the OFT's decision, published on 20 May 2010 (the decision), provides full details on the OFT's findings.

In summary, the OFT found that the parties are the only two distributors of heating oils and transport fuels in the Western Isles. The OFT received a large number of customer complaints that customers will have no choice in distribution post-merger and, as a consequence, that prices will increase or the quality of service reduce. The OFT could not rule out the possibility that GB Oils' operation in the Western Isles had not been constrained by Brogans' entry. In addition, despite the evidence of one distributor supplying oil from mainland Scotland on the Western Isles, further new entry was not likely, timely and sufficient enough to constrain the parties post-merger, in particular for certain customer segments (that is, smaller customers).

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

Divestment undertakings offered by GB Oils

To address the OFT's competition concerns, GB Oils offered to divest Brogans' oil distribution business on Western Isles (the Isle of Lewis Divestment Business). This would include the two oil tankers used by Brogans on the Isle of Lewis, the self-bunded storage tanks which Brogans owns on the Isle of Lewis, and the customer records and any customer contracts of the Brogans business relating to the customers in the Western Isles.

The parties stated that GB Oils would not be in a position to transfer the lease over Brogans' Stornoway site where its depot was located because it had recently been terminated. Indeed, the parties stated that Brogans is under an obligation under the terms of the lease to remove its depot infrastructure by 30 June 2010. GB Oils therefore offered to provide a potential purchaser of the assets outlined above with an option of a throughput arrangement for a minimum period of five years, or such shorter minimum period as the purchaser would be prepared to accept, at its Stornoway marine terminal on the Isle of Lewis.

The OFT considered there to be a reasonably small number of potential purchasers that would be capable of viably distributing heating oils and transport fuels in the Western Isles in such a way as to restore pre-merger competitive levels. The OFT was also mindful of the fact that, to be acceptable as a suitable purchaser, any acquirer of the divestment business would need either to: (a) agree a new lease with the owner of the Brogans site, or (b) secure a suitable new site for a depot, or (c) agree the terms of a throughput agreement with GB Oils. As a result, the OFT considered it appropriate to pursue GB Oils' offer to make disposal of the Isles of Lewis Divestment Business subject to an up-front buyer provision in the undertakings.

Suitability of the proposed purchaser

In approving a purchaser for the Isle of Lewis Divestment Business, 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 Highland Fuels Limited (Highland Fuels) as the proposed purchaser of the Isle of Lewis Divestment Business.

Highland Fuels is active in the distribution of heating oils and transport fuels in Scotland. Founded in 1960, Highland Fuels is an ESSO-authorized distributor for both heating oils, lubricants and fuels and has nine depots across Scotland. Highland Fuels is not, however, currently active in the supply of heating oils or transport fuels to the Western Isles.

GB Oils and Highland Fuels have entered into a legally binding sale agreement regarding the Isle of Lewis Divestment Business, conditional only on acceptance of the undertakings in lieu by the OFT and approval of Highland Fuels as a suitable purchaser under the undertakings.

As noted above, GB Oils is not able to transfer the lease of the site currently occupied by Brogans. The OFT understands that Highland Fuels has provisionally reached an agreement with the owner of the property to enter into a new lease to commence after expiry of Brogans' existing lease. If this lease is entered into, it will mean that Highland Fuels will be in the same competitive position that Brogans enjoyed prior to the merger.

However, given that the OFT understands that the lease has not yet been finally agreed, the proposed undertakings include a provision under which the OFT may require GB Oils to offer a throughput agreement for the benefit of Highland Fuels. If called upon, this provision would require GB Oils to allow a fuel supplier to provide fuel to Highland Fuels through GB Oils' ship-fed oil storage terminal located in Stornoway. The undertakings provide that such a throughput agreement would:

- be for a minimum term of five years, with no ability of GB Oils to terminate earlier
- be on fair and reasonable pricing terms (with reference to a third party expert for resolution in the event of a failure to agree), and
- not contain any minimum throughput volumes or fees imposed by GB Oils.

Although neither the lease nor any negotiations as to suitable throughput arrangements have been finally agreed, the OFT understands that

discussions in respect of both are at an advanced stage such that it is appropriate for the OFT to begin consultation on the proposed undertakings. The OFT would not intend to accept the undertakings in lieu until either the lease or the throughput arrangements had been finally determined.

Based on the information before it, the OFT considers that Highland Fuels will have the ability and incentive to operate the Isle of Lewis Divestment Business in such a way as to restore competition to pre-merger levels in the Western Isles 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 GB Oils 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](#) (pdf 211kb)

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: **24 June 2010**

