

ANTICIPATED ACQUISITION BY CLARIANT OF CERTAIN ASSETS OF KILFROST

Statement of Issues

11 March 2016

The reference

1. On 17 February 2016, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition by Clariant AG (Clariant)¹ of the European aircraft de-/anti-icing fluid (ADF) business, the rail de-/anti-icing fluid (RDF) business and associated assets (the Target Business) from Kilfrost Group Public Limited Company (Kilfrost) (altogether the Merger) for further investigation and report by a Group of CMA Panel Members (Inquiry Group).
2. In exercise of its duty under section 36(1) of the Act, the CMA must decide:
 - (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.
3. In this Statement of Issues, we set out the main issues we are likely to consider in reaching our decisions, having had regard to the evidence currently available to us including evidence set out in the CMA decision to refer the anticipated acquisition by Clariant of certain assets of Kilfrost for further investigation (the phase 1 decision).² This does not preclude the consideration of any other issues that may be identified during the course of our investigation.

¹ Through its subsidiaries, Clariant International AG, Clariant Produkte GmbH (Deutschland) and Clariant Production UK limited.

² See the [full text decision](#) on the case page.

4. Throughout this document, where appropriate, we refer to Clariant and Kilfrost collectively as the Parties.

Background

5. On 20 November 2015, Clariant announced that it has signed an agreement with Kilfrost to acquire Kilfrost's aircraft de-icing business in Europe. The deal includes Kilfrost's customer contracts, stock, intellectual property (IP) and selected fixed assets for the provision of ADF and RDF products. Kilfrost's production plant at Haltwistle (Northumberland) will not be transferred as part of the acquisition. Clariant is also not acquiring Kilfrost's storage capacity for ADF and Kilfrost's research and development (R&D) business. A more detailed description of the Parties and their activities can be found at paragraphs 9 and 10 of the phase 1 decision.
6. Both companies supply ADF in the UK. This product is sprayed onto aeroplanes while on the ground to prepare them for take-off and flight in winter conditions. Its main constituent is monopropylene glycol (MPG), to which thickening agents may be added, depending on the type of ADF that is produced. In Europe (including the UK), three types of ADF are in use: Type I is typically used for de-icing aircraft and contains very little or no thickening agents, while Types II and IV are primarily used for anti-icing (ie to protect the aircraft from (re-)icing until take-off) and, as such, contain thickening agents (to enable the fluids to adhere for longer to the aircraft).³ More information on regulatory requirements associated with the production and supply of ADF can be found at paragraph 23 of the phase 1 decision.
7. Nearly all ADF is purchased under contracts, which have a duration of one to three years. Customers, which may be ground handlers, airlines, specialist de-icing services companies or airports, either run formal tenders or carry out informal negotiations with suppliers when these contracts come to an end.

Market definition

8. The purpose of market definition is to provide a framework for the analysis of the competitive effects of the Merger. When defining the market, the aim is to include the most significant competitive alternatives available to the customers of the merger firms. Although market definition is a useful

³ Type III ADF is not used in Europe.

analytical tool, it is not an end in itself, and identifying the relevant market(s) involves an element of judgement.⁴

9. With regard to product market definition, the evidence received by the CMA so far shows that the three types of ADF in use in Europe are not interchangeable from the point of view of customers, that customers generally require a range of ADF products and that customers typically buy all the types of ADF they require from one supplier. Although some suppliers in the EEA offer only one type of ADF, those operating in the UK offer the three relevant types of products and the conditions of competition between these suppliers do not appear to vary by ADF type in the UK. The CMA considered in its phase 1 decision that the relevant product market was the supply of ADF products, encompassing Types I, II and IV. More detail can be found at paragraphs 27 to 31 of the phase 1 decision.
10. Given that the evidence received by the CMA has generally been consistent across suppliers of ADF and customers and that it was received from a significant proportion of customers and suppliers, we are not minded, at this stage, to investigate further whether all three types of ADF are in the same market. We will however consider the strength of the constraint posed by suppliers of one type of ADF only, as part of our competitive assessment.
11. With regard to geographic market definition, Clariant submitted that the relevant geographic market was at least EEA-wide (see paragraph 32 of the phase 1 decision). The evidence received from suppliers on the infrastructure that is necessary to compete in the UK and differences between the conditions of competition in the UK and elsewhere (set out at paragraphs 33 to 38 of the phase 1 decision) as well as certain customer requirements, suggest that there may be a distinct UK market. The evidence received in phase 1 strongly supports the view that the market is no wider than the EEA.
12. In order to reach a decision on the boundaries of the applicable geographic market, we will seek additional evidence on the requirements of customers and the ways in which different suppliers structure their supply chain to meet those requirements. We will also consider the ability of each supplier currently active in the EEA to win customers in the UK.

⁴ [Merger Assessment Guidelines](#), paragraphs 5.2.1 and 5.2.2.

Assessment of the competitive effects of the merger

Counterfactual

13. We will assess the potential effects of the Merger on competition compared with the competitive conditions in the counterfactual situation (ie the competitive situation that would be likely to prevail absent the Merger).
14. As part of that assessment, we will consider what would have been likely to happen if the Parties had not agreed to the Merger and what would be likely to happen in the foreseeable future, in particular whether:
 - (a) Kilfrost's ADF operations would have been likely to be retained, or sold, in whole or in part, to another purchaser; and/or
 - (b) whether Kilfrost's ADF production facilities and related assets would be likely to continue to be used in competition with Clariant's.
15. In making our assessment, we will consider possible alternative scenarios and decide upon the most likely counterfactual situation based on the facts available to us and the extent to which events or circumstances and their consequences are foreseeable.

Theories of harm

16. Theories of harm describe the possible ways in which an SLC could arise as a result of the Merger and provide the framework for our analysis of the competitive effects of the Merger. We have set out below the theories of harm which we are currently minded to investigate. However, we may revise our theories of harm as our inquiry progresses. Also, the identification of a theory of harm does not preclude an SLC being identified on another basis following further work by us, or the receipt of additional evidence. We welcome views on all the theories of harm set out below.

Theory of harm 1: loss of a supplier of ADF to customers in the UK

17. The concern under this theory of harm is that, as a result of the Merger, Clariant would have the ability to increase the price of ADF (or to submit less attractive bids) or otherwise worsen other elements of its offering, as compared with its and Kilfrost's pre-merger offerings.
18. In general, for this theory of harm to hold, two conditions need to be met:
 - (a) the merging firms are close competitors (ie they are considered to be good alternatives by customers); and

- (b) other suppliers cannot replicate the competitive constraint that the merging firms exert on one another.
19. The analysis carried out in phase 1 showed that the Parties had shares of supply in excess of 90% in the UK and in excess of 80% in the EEA. Evidence received from customers indicated that there was only one other supplier currently active in the UK (Proviron Functional Chemicals NV (Proviron)) and another three (Abax Industries (Abax), LNT Solutions Ltd and ADDCON GmbH) in the EEA. The CMA found that the Parties had similar offerings and were considered by customers as good alternatives to each other. By contrast, the evidence received in phase 1 indicated that the constraint exerted by other suppliers was significantly weaker. One supplier, Proviron, does not have a long track record in the supply of ADF in the UK or the EEA but intends to expand its sales of ADF in the UK significantly (see paragraph 79 of the phase 1 decision).
20. In order to understand better the nature and extent of competition between different ADF suppliers, we will seek the following evidence:
- (a) Additional information on customers' approaches to contract negotiations and tender processes, the responses received from suppliers and the prices paid.
 - (b) Views on the non-price factors that are relevant to the supply of ADF (eg storage, delivery terms, payment terms, penalty clauses).
 - (c) Characteristics of customers that may have an impact on their choice of supplier and/or on the competitiveness of the offers they receive from suppliers (eg the scale of their operations and which airports they operate at).
21. We will also seek to obtain data on margins in order to understand whether a higher number of bidders for contracts tends to result in lower profit margins.

Theory of harm 2: loss of a potential competitor

22. A loss of competition similar to that described in paragraphs 17 and 18 above may arise if, as a result of their expansion plans, the two Parties would have been likely to overlap in the supply of products which one or both Parties does not currently supply. In the present case, there are two separate products to which this theory might apply in principle.

The supply of runway de-icing products

23. Clariant manufactures and sells liquid and solid runway de-icing chemicals. We understand from evidence obtained in phase 1 that although Kilfrost has undertaken research into runway de-icing fluids, it does not currently produce this product, nor has it sold this product in the past three years.
24. We are therefore not currently minded to investigate this theory of harm. However, should any party have reasons to believe that the Merger is likely to lead to the loss of potential competition in the supply of runway de-icing products, it should provide a reasoned submission.

The supply of RDF

25. While the Target Business includes assets (including IP) for the production of RDF, our understanding based on evidence provided in phase 1 is that Clariant is not currently involved in the production of RDF.
26. We are therefore not currently minded to investigate this theory of harm. However, should any party have reasons to believe that the Merger is likely to lead to the loss of potential competition in the supply of RDF, it should provide a reasoned submission.

Countervailing factors

27. We will consider whether there are countervailing factors which are likely to prevent or mitigate any SLC that we may find. In particular, we intend to consider the following:
 - *Entry and expansion.* We will consider whether entry or expansion by effective competitors could be expected to be timely, likely and sufficient to prevent any SLC that might otherwise arise. To do this we will in particular obtain additional evidence on:
 - UK customers' switching costs;
 - the actual costs of entry/expansion into the UK incurred by Clariant and Proviron;
 - the factors that led Abax to decide to cease supplying customers in the UK and the costs of exit;
 - Proviron's expansion plans;
 - the expansion plans of other EEA suppliers, if any;

- whether the particularly strong market position of Clariant in the UK post-merger may affect the plans of other ADF suppliers by increasing the perceived risks of entry or expansion in the UK;
 - UK customers' perception of Proviron as a supplier;
 - UK customers' perception of other EEA suppliers;
 - the production and logistics costs of EEA suppliers; and
 - the likelihood of successful entry/expansion into the UK of EEA suppliers that currently manufacture Type I ADF only and not the other types of ADF.
- *Buyer power.* We will assess whether any UK customers buying ADF from Clariant or Kilfrost have countervailing buyer power and whether any such buyer power would be sufficient to protect all customers from any effects of an SLC. In this regard, we note that prices tend to be individually negotiated and that a small number of customers account for a very high proportion of ADF volumes sold by the Parties in the UK. We will consider both the likely impact of the acquisition on any pre-existing countervailing buyer power and the extent to which customers could 'sponsor' the entry of a new supplier, eg by financing the cost of storage ADF on their premises and thus lowering entry costs or by buying ADF types separately.
 - *Efficiencies.* We will examine any evidence available to us in relation to efficiencies arising from the Merger. In particular, we will examine whether any potential efficiencies are rivalry-enhancing and could be expected to offset the effects of any loss of competition.

Possible remedies and relevant customer benefits

28. Should we provisionally conclude that the Merger may be expected to result in an SLC in one or more markets, we will consider whether, and if so what, remedies might be appropriate, and will issue a further statement.
29. In any consideration of possible remedies, we will take into account whether any relevant customer benefits might be expected to arise as a result of the Merger and, if so, what these benefits are likely to be and which customers would benefit.

Responses to the issues statement

30. Any party wishing to respond to this Statement of Issues should do so in writing, by no later than **5pm on 29 March 2016**. Please email clariant.kilfrost@cma.gsi.gov.uk or write to:

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