

ANTICIPATED ACQUISITION BY CLARIANT OF THE EUROPEAN AIRCRAFT ANTI-/DE-ICING FLUID AND RAIL ANTI-/DE-ICING FLUID BUSINESS OF THE KILFROST GROUP

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups

Introduction

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 International AG, Clariant Produkte (Deutschland) GmbH and Clariant Production UK Limited subsidiaries of Clariant AG (together Clariant) of the European aircraft anti-/de-icing fluid (ADF) and rail de-/anti-icing fluid business of Kilfrost Group Public Limited Company (Kilfrost), for further investigation and report by a group of CMA panel members (the Group).
2. In its provisional findings on the reference notified to Clariant and Kilfrost (the main parties) on **19 May 2016**, the CMA provisionally concluded that the anticipated acquisition would result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in the market for the supply of ADF in the United Kingdom.
3. It was expected that if the anticipated acquisition were to go ahead this would lead to adverse effects, for example in the form of higher prices and lower quality of service or less innovation than would otherwise have been the case, absent the merger.
4. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying the anticipated SLC and any resulting adverse effects identified in the provisional findings. The CMA invites comments on possible remedies by **3 June 2016**.

Criteria

5. In choosing appropriate remedial action, the Act requires the CMA to have regard to the need to achieve as comprehensive a solution as is reasonable

and practicable to remedy the SLC and any adverse effects resulting from it.¹ When deciding on an appropriate remedy, our guidance states the CMA will consider the effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. When deciding between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.²

The provisional SLC

6. We have provisionally found that the anticipated acquisition by Clariant of certain assets of Kilfrost 'the Merger' may be expected to result in an SLC in the market for the supply of ADF in the UK.

Possible remedies on which views are sought

7. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
 - (c) structural remedies, unlike behavioural remedies, do not normally require monitoring and enforcement once implemented.
8. At this stage the CMA has provisionally identified the following potential remedies: prohibition of the proposed acquisition, licensing and a behavioural remedy based on a price cap and minimum service level requirement.
9. The Group's current view is that prohibition is an effective remedy to the SLC that it has provisionally identified.
10. The Group's current view is that neither a licensing nor a behavioural remedy is likely to be effective. However, the Group will consider views on licensing and behavioural remedies as set out below. As part of this consultation, the

¹ Section 36(3) of the Act.

² *Merger remedies: CC8* (November 2008), paragraph 1.9. This has been adopted by the CMA board.

Group will also consider any other practicable remedies that may be proposed to address the SLC and any resulting adverse effects.

11. In determining an appropriate remedy, the Group will consider the extent to which different remedy options would be effective in remedying the SLC that has been provisionally identified. The Group will also consider whether a combination of measures is required to achieve a comprehensive solution, and will evaluate the cumulative impact of any such combination of measures on the SLC.

Prohibition of the Merger

12. The Group's current view is that prohibition of the Merger would prevent an SLC from arising in the relevant market. It would therefore represent a comprehensive solution to all aspects of the SLC which the Group has provisionally found and has very few risks in terms of effectiveness.
13. In its consideration of prohibition as an effective remedy the Group has taken into account the current and historic financial performance of Kilfrost's European and UK ADF business.
14. The Group also notes that the prohibition of the Merger would not have any retrospective effect on the sale of Kilfrost's operations in North America, South Korea, Japan and China, completed in August 2015 (described as Phase 1 in section 3 of the provisional findings report).

Licensing

15. The Group has initially considered a possible licensing remedy which would involve a licensee selling Kilfrost products within the UK under licence from Clariant.
16. To be effective in remedying the provisional SLC, any licensing package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate as an effective independent competitor.
17. In its consideration of a licensing remedy the Group would have regard to how the proposed licence addressed the following critical design elements:
 - (a) Any licensing remedy would need to address the SLC and its adverse effects for the duration of the SLC.
 - (b) The scope of the licence: the Group's initial view is that a licence would need to include at a minimum the ability to manufacture the relevant ADF

products as well as access to the necessary supply chain to be able to demonstrate security of supply. The territorial scope of the licence would need to be at a minimum the UK but may need to be wider to ensure a viable business and provide the ability and incentive for the licensee to compete effectively in the UK.

- (c) The Group also considers that given the lack of switching observed in the UK, a third party licensee would most likely need access to Kilfrost's UK customers initially. Novation of customer contracts is likely to be highly problematic in practice and there is a risk that customers may be unwilling to remain with the licensee post novation given the importance for a supplier to have a reputation for security of supply, and a robust supply chain.
 - (d) The duration of any licence would need to be sufficient to allow the licensee to become established as an effective competitor to the merged entity. Relevant factors would include: the time expected for a licensee to develop products to enable customers to switch to the licensee's new or existing products; and the estimated time required for a licensee to achieve a market share to compete effectively.
18. The Group will wish to satisfy itself that a prospective licensee is independent of the main parties, has the necessary capability to compete and is committed to competing in the market for the supply of ADF in the UK and that the licensee will not create further competition concerns.
19. The Group's current view is that a licence to a third party for the supply of ADF in the UK is unlikely to be an effective remedy. Whilst it is possible to define within the scope of a licence some elements, such as the use of intellectual property rights, critically it does not seem to be possible to devise a licence that provides a new entrant with the strong reputation for security of supply; an essential component of a customer's purchasing decision.
20. A third party licence would also involve substantial risks in terms of implementation (in particular the novation and immediate retention of Kilfrost's customers), monitoring and enforcement.

Behavioural

21. The Group has considered whether it would be possible to devise a behavioural remedy that addresses the adverse effects arising from the SLC. This could involve: a mechanism to limit price rises; service level guarantees; product maintenance; and a requirement to supply current customers with their current product specification (ie concentrate or pre-mix). The Group does

not consider such a remedy would be likely to be effective as there is significant uncertainty with regard to:

- (a) The prices, service levels and product quality that would be defined in the remedy. The remedy would introduce regulation in a market which to date has been characterised by competitive processes. Under such a system, the level of prices, service levels and product quality would be controlled in a way which would be unlikely to replicate the outcome of competition, reducing the likelihood of UK customers benefiting from innovation or price competition and reducing the likelihood of entry. The effects of any such distortion are likely to increase the longer the remedy is in force.
- (b) The time period over which the remedy would need to be in place. Because of the distorting effects described in (a) above, behavioural remedies will generally only be used where the SLC is expected to have a short duration, ie the remedy is time limited. To establish what this time period should be the Group would need to be confident that at the end of that time period market conditions would be such that competition is comparable to the pre-Merger situation, for example through an ADF supplier entering/expanding into the market to act as a competitive constraint to Clariant. However, the Group does not consider that a timeframe for such an event can be determined at present with any degree of confidence. This would mean that any behavioural remedy would need to be in place for an indefinite period of time increasing the risks of market distortion discussed above and enforcement and monitoring costs discussed below.
- (c) What would be required for effective monitoring and enforcement. Given the nature of the market, prices are not transparent nor are service quality metrics. There would need to be robust monitoring of the remedy as market participants do not have any external means of adequately monitoring compliance. It would also be difficult to devise an effective enforcement mechanism.

22. The Group currently considers that for the reasons given above a behavioural remedy is unlikely to be effective in addressing the SLC.

Relevant customer benefits

23. The Group will have regard to the effects of remedial action on any relevant customer benefits within the meaning of section 30 of the Act arising from the merger situation. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services. A benefit is only a relevant customer benefit if the CMA

believes that: (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.

24. The Group welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent to which these are preserved by the different remedy options we are considering.

Next steps

25. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the Group to consider, by **3 June 2016** (see note (i)).
26. A copy of this notice will be posted on the [CMA website](#).

Note

- (i) This notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the provisional findings announced on **19 May 2016**. The main parties have until **10 June 2016** to respond to the provisional findings. The Group's findings may alter in response to comments it receives on its provisional findings, in which case the Group may consider other possible remedies, if appropriate.