

## **Anticipated acquisition by Muller UK & Ireland Group LLP of the dairies operations of Dairy Crest Group plc**

**ME/6524/15**

1. Muller UK & Ireland Group LLP (**Müller**) has agreed to acquire the liquid milk, packaged cream, flavoured milk and bulk commodity ingredient business (**Target Business**) of Dairy Crest Group plc (**Dairy Crest**) (the **Merger**). Müller and Dairy Crest are together referred to as the Parties.
2. On 12 June 2015, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).
3. On 19 June 2015, Müller offered an undertaking to the CMA for the purposes of section 73(2) of the Act. As required under section 73A(1) of the Act, Müller made this offer within five working days beginning with the day after the CMA notified it of the SLC decision under section 34ZA(1)(b) of the Act.
4. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to Müller that it considers that there are reasonable grounds for believing that the undertaking offered, or a modified version of it, might be accepted by the CMA under section 73(2) of the Act and that it is considering the offer.

### **The undertaking offered**

5. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the merger parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.

6. Müller has offered to enter into a toll processing agreement with a specified third party (the **Nominated Purchaser**) under which the Nominated Purchaser will have the option to request Müller to process and supply up to 100 million litres of fresh milk per annum from Dairy Crest's Severnside dairy for the purposes of supplying major grocery retailers with a national scope (**national multiples**),<sup>1</sup> hereinafter referred to as the **Proposed Undertaking**. The toll processing agreement will have an initial duration of five years, but may be extended by a maximum of three additional years to fulfil any ongoing contract the Nominated Purchaser may have entered into with a national multiple.
7. Under the Proposed Undertaking the price to be paid by the Nominated Purchaser under the toll processing agreement will consist of two elements. First, the Nominated Purchaser will pay a sum upfront for the option to be supplied with fresh milk by Müller. This sum will be determined in an auction process to identify the Nominated Purchaser and will form a contribution towards Müller's fixed costs. Secondly, the Nominated Purchaser will pay a per litre component price based on variable cost as the toll processing fee.
8. The Proposed Undertaking also includes Müller's commitment, if required by the Nominated Purchaser:
  - (a) to enter into an agreement with the Nominated Purchaser for the collection of raw milk (including, to the extent possible, to facilitate the procurement of raw milk);
  - (b) to segregate fresh milk as required by the national multiple customer of the Nominated Purchaser (subject to technical feasibility);
  - (c) to enter into an agreement with the Nominated Purchaser for the distribution of fresh milk to national multiples; and
  - (d) to enter into a service level agreement with key performance indicators to set a level of acceptable service in relation to the toll processing agreement.

The Nominated Purchaser will have the right to request an independent audit (at shared cost with Müller) if it has reasonable grounds to believe that Müller is not adhering to any of its commitments under the Proposed Undertaking. A copy of this audit would be made available to the CMA.

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<sup>1</sup> In paragraph 115 of the SLC decision and for the purpose of that decision, the CMA defined 'national multiples' as comprising: Tesco, Asda, Sainsbury's, Morrisons, Co-op, Aldi, Lidl, Iceland, Waitrose and M&S.

9. Müller further proposes that it will put arrangements in place to protect against dissemination of commercially sensitive information throughout the Parties' businesses. These arrangements will include the separation of Müller personnel dealing with negotiations with the Nominated Purchaser from Müller personnel dealing with national multiple bids in order to ensure the ring-fencing of information relating to the cost considerations of fresh milk volumes processed under the toll processing agreement.
10. Finally, under the Proposed Undertaking, Müller has offered that it will have entered into the toll processing agreement with a Nominated Purchaser approved by the CMA before the CMA finally accepts the Proposed Undertaking (**upfront purchaser condition**).

### **The CMA's provisional views**

11. The CMA's aim when considering UILs is to seek an outcome that restores competition to the level that would have prevailed absent the merger.<sup>2</sup>
12. The SLC Decision found that the Merger gives rise to a realistic prospect of an SLC in the supply of fresh milk to national multiples in the Severnside catchment area. This SLC finding was based on a counterfactual in which, absent the Merger, Dairy Crest would downsize its dairy operations to a single dairy at Severnside. As part of this restructuring, Dairy Crest would focus its milk processing capacity on the most profitable part of its business, meaning that the capacity at the Severnside plant that Dairy Crest might use to supply national multiples may be significantly lower than under the prevailing market conditions. The CMA estimated, based on the parties' internal documents, in the SLC decision that the capacity available at the Severnside plant for the supply of national multiples would be likely be 55 to 100 million litres of fresh milk per annum.
13. The CMA considers that the Proposed Undertaking might be acceptable as a suitable remedy to the SLC identified by the CMA, given that it may enable a third party dairy processor to compete to supply national multiples in the Severnside catchment area. As such, the Proposed Undertaking may result in replacing the competitive constraint provided by Dairy Crest that would otherwise be lost following the Merger.

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<sup>2</sup> *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, paragraph 5.11. *OFT1122* was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

14. The CMA currently considers that, subject to the conditions yet to be satisfied, the Proposed Undertaking is akin to a quasi-structural remedy that is capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns.<sup>3</sup> The CMA also believes at this stage that the Proposed Undertaking may be capable of ready implementation, in particular in light of Müller's submission that toll processing arrangements of this nature are not uncommon within the dairy industry.
15. The upfront purchaser condition means that the CMA will only accept the Proposed Undertaking after Müller has entered into a toll processing agreement with a Nominated Purchaser that the CMA considers to be suitable. It also means that, before acceptance, the CMA will consult publicly on the suitability of the Nominated Purchaser, as well as other aspects of the proposed toll processing agreement, during the public consultation period. The CMA considers that an upfront purchaser condition is necessary because the Proposed Undertaking is not a standard structural divestment remedy and the number of suitable Nominated Purchasers is likely to be relatively small in the CMA's view.<sup>4</sup>
16. For these reasons, the CMA currently considers that there are reasonable grounds for believing that the Proposed Undertaking, or a modified version of it, might be accepted by the CMA under section 73(2) of the Act.
17. The CMA's decision on whether to ultimately accept the Proposed Undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things, third party views (including national multiples, dairy processors and any other relevant stakeholders) on whether the Proposed Undertaking is suitable to address the competition concerns identified by the CMA.
18. In particular, before ultimately accepting the Proposed Undertaking, the CMA must be confident that the nominated purchaser is an effective and credible supplier to national multiples such that the competitive constraint provided by Dairy Crest under the counterfactual is replaced to a sufficient extent.

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<sup>3</sup> See [OFT1122](#), paragraph 5.24.

<sup>4</sup> See [CMA2](#), paragraph 8.34.

## **Consultation process**

19. Full details of the undertaking offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.<sup>5</sup>

## **Decision**

20. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertaking offered by Müller, or a modified version of it, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 21 August 2015 pursuant to section 73A(3) of the Act to decide whether to accept the undertaking, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 19 October 2015 if it considers that there are special reasons for doing so. If no undertaking is accepted, then the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

**Sheldon Mills**  
**Senior Director, Mergers**  
**Competition and Markets Authority**  
**26 June 2015**

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<sup>5</sup> [CMA2](#), paragraph 8.29.