

Completed acquisition by Hain Frozen Foods UK Limited of Orchard House Foods Limited

Decision on relevant merger situation and substantial lessening of competition

ME/6585/16

The CMA's decision on reference under section 22(1) of the Enterprise Act 2002 given on 17 May 2016. Full text of the decision published on 8 June 2016.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

SUMMARY

1. On 21 December 2015, Hain Frozen Foods UK Limited (**Hain**) acquired Orchard House Foods Limited (**Orchard**) (the **Merger**). Hain and Orchard are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that the Parties' enterprises have ceased to be distinct. The UK turnover of Orchard exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act (the **Act**) is satisfied. The four month period for a decision, as extended, has not yet expired. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
3. The Parties overlap in the wholesale supply of own-label freshly squeezed fruit juice and own-label prepared fruit to retail and food service customers. Hain is also active in the supply of branded fruit juice to retail and food service customers. The CMA has assessed the impact of the Merger against the product frames of reference of wholesale supply of:
 - (a) own-label and branded freshly squeezed fruit juice to retail and food service customers (both separately and together); and

- (b) own-label prepared fruit to retail and food service customers (both separately and together).
4. In relation to the geographic frame of reference, the CMA assessed the impact of the Merger on a national basis (and, where relevant, taking into account the constraint of supplies from continental Europe in the competitive assessment).
 5. The CMA examined whether the Merger would give rise to horizontal unilateral effects in the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers (both separately and together) as a result of the loss of a competitor. In the wholesale supply of branded freshly squeezed fruit juice, the CMA considered the loss of potential competition.
 6. The CMA found that the Merger involves the two largest wholesale suppliers of own-label freshly squeezed fruit juice in the UK, with combined shares of supply ranging from [90–100]% to [90–100]% (depending on whether retail and food service customers are treated separately or together). The evidence the CMA found (including internal documents and customer views) also consistently indicated that the Parties are each other's closest competitors.
 7. The very high combined shares of supply indicated that there are few or no rivals with significant scale currently serving customers with freshly squeezed fruit juice. The CMA was therefore careful to assess whether there are suppliers who nonetheless compete to supply and/or have sufficient capacity to do so. One rival was identified who may have exerted some constraint on the merged entity but did not have experience in supplying retail customers and was, therefore, an untested proposition in the market to some extent. The CMA also talked to suppliers who might have been placed to expand or enter but there were no signs of such intentions. Furthermore, the CMA did not find that suppliers of branded Not From Concentrate juice (**NFC**) products, such as Innocent and Tropicana, would be sufficiently strong substitutes for the Parties' freshly squeezed fruit juice products such that they would sufficiently mitigate the loss of competition between the Parties. The CMA therefore concluded that there would be insufficient competition remaining to constrain the merged entity.
 8. Hain submitted that the Parties had faced significant countervailing buyer power in the past and that the buyer power of both retail and food service customers would continue to constrain the merged entity. The CMA notes the Competition Commission's (**CC**) Groceries Market Investigation (2008), which found that large grocery retailers have buyer power in relation to at least some

of their suppliers.¹ However, in this case, which involved a merger of two closely competing rivals with very high shares of supply, the evidence was not sufficient to find that countervailing buyer power would constrain the merged entity. In particular, it was not clear that any buyer power that Hain sought to evidence through supplier-retailer emails was not attributable to the retailer having the outside option of one of the Parties, which the retailer would not have post-Merger.

9. The CMA therefore believes that the Merger gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects through the loss of actual competition in the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers (separately and together) in the UK.
10. In relation to the potential competition theory of harm, the evidence showed that Orchard had no plans to start supplying branded freshly squeezed fruit juice products, nor that Hain perceived a threat of entry from Orchard. Accordingly, the CMA found no competition concerns on the basis of potential competition.
11. The CMA also found no competition concerns in relation to the wholesale supply of own-label prepared fruit to retail and food service customers in the UK. The Merger would result in combined shares of supply ranging from [20–30]% to [30–40]% (depending on whether retail and food service customers are treated separately or together) and, while the CMA believes that pre-Merger the Parties were competing against each other, the constraint from other suppliers of own-label prepared fruit will be sufficient enough to constrain the merged entity.
12. Having found a realistic prospect of an SLC in relation to the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers (both separately and together) in the UK, the CMA is considering whether to accept undertakings under section 73 of the Enterprise Act 2002 (the **Act**). Hain has until 24 May 2016 to offer an undertaking to the CMA that might be accepted by the CMA. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 22(1) and 34ZA(2) of the Act.

¹ Competition Commission, *The supply of groceries in the UK market investigation*, 30 April 2008, paragraph 9.82.

ASSESSMENT

Parties

13. Hain has a number of subsidiaries, including Daniels Chilled Foods Limited (**Daniels Chilled**), which is a manufacturer of fruit and vegetable-based food and drink products for supply to the retail and food service industry in the UK. Daniels Chilled's Luton and Leeds sites are dedicated to the production of prepared fruit whilst the site in Kent is focused on drinks production.
14. The ultimate parent company of Hain is The Hain Celestial Group, Inc. (**Hain Celestial**). Hain Celestial is an organic and natural products company with operations in North America, Europe and India. Hain Celestial operates in the UK through its wholly-owned subsidiary The Hain Daniels Group Limited (**Hain Daniels**). The turnover of Hain Celestial in the fiscal year ending 30 June 2015 was £1.7 billion worldwide and £[] million in the UK.
15. Orchard is a manufacturer and supplier of own-label 'ready-to-eat' fresh fruit products such as prepared fruit, juices, fruit desserts and ingredients to retailers and food service providers in the UK. It is active in the UK and has facilities in Corby, Northamptonshire and Gateshead, Tyne and Wear. The turnover of Orchard in the fiscal year ending 31 December 2015 was £[] million in the UK.

Transaction

16. The Merger was implemented by means of a share purchase agreement pursuant to which Hain acquired Orchard in its entirety.

Jurisdiction

17. The Merger was completed on 21 December 2015 and made public on 22 December 2015. The four month deadline for a decision under section 24 of the Act is 23 May 2016, following extension under section 25(1) of the Act.
18. As a result of the Merger, the enterprises of Hain and Orchard have ceased to be distinct.
19. The UK turnover of Orchard exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is met.
20. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.

21. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 18 March 2016 and the statutory 40 working day deadline for a decision is therefore 17 May 2016.

Counterfactual

22. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For completed mergers the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.²
23. In this case, there is no evidence supporting a different counterfactual, and Hain has not put forward arguments in this respect. Therefore, the CMA believes the pre-Merger conditions of competition to be the relevant counterfactual.

Frame of reference

24. The CMA considers that market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merger parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.³
25. The Parties overlap in the wholesale supply of the following:
- (a) Own-label freshly squeezed fruit juice to retail and food service customers in the UK. Hain is also active in the supply of branded fruit juice to retail and food service customers with its Johnson's Juice product.

² [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, from paragraph 4.3.5. The [Merger Assessment Guidelines](#) have been adopted by the CMA (see [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, Annex D).

³ [Merger Assessment Guidelines](#), paragraph 5.2.2.

(b) Own-label⁴ prepared fruit to retail and food service customers in the UK.

26. The Parties also overlap in wholesale supply of own-label smoothies and own-label chilled desserts to retail and food service customers in the UK. However, these overlaps will not be considered further in this decision, as no competition concerns arise on any plausible basis.⁵
27. The CMA considers the appropriate frames of reference for the Parties' overlapping products below.

Own-label freshly squeezed fruit juice

Product scope

28. Hain submitted that the fruit juice market forms part of the overall non-alcoholic beverages market, and provided the following overview of the fruit juice sector in Table 1.

Table 1: Fruit juice sector

<i>Ambient fruit juice</i>	<i>Chilled fruit juice</i>	
	<i>Fresh fruit juice</i>	<i>Other fruit juice</i>
Fruit Drink ⁶ NFC From Concentrate juice (FC) Others (eg coconut water, fruit flavoured waters)	Freshly squeezed fruit juice NFC Smoothies	Fruit Drink FC Others (eg coconut water, fruit flavoured waters)

Source: Merger Notice.

29. Hain submitted that the size of chilled fruit juice market is about £1,672 million, of which fresh fruit juice (ie freshly squeezed fruit juice, NFC and smoothies) accounts for £1,174 million. Within fresh fruit juice, freshly squeezed fruit juice accounts for approximately £112 million.⁷
30. The Parties' businesses are focused on chilled fruit juice, specifically in the fresh fruit juice category described in Table 1 above, as neither supply ambient fruit juice or FC. Hain submitted that the relevant frame of reference should be chilled fruit juice, which could possibly be segmented further into

⁴ Daniels Chilled supplies own-label prepared fruit and a branded prepared fruit product – Sun-ripe. Orchard only supplies own-label prepared fruit.

⁵ The Merger results in a small increment ([0-5]%) in the Parties' combined share of supply of own-label smoothies even on the narrowest basis (ie own-label to retail customers). The Parties' chilled desserts products are differentiated (ie Orchard producing desserts with whole fruit content, and Hain producing desserts containing fruit content (ie coulis), but not whole fruit), and the Merger results in a small combined share of supply (approximately [5-10]% with a small increment of [0-5]%).

⁶ This would include water-based fruit juices such as 'coolers'. Fruit drinks can be sold as either ambient or chilled drink products and are a sweetened beverage of diluted fruit juice. They do not contain sufficient fruit juice concentration levels which are required to be classified solely as a fruit 'juice', according to the Fruit Juices and Fruit Nectars (England) Regulations 2013.

⁷ Based on estimates provided by Hain and third parties.

‘fresh fruit juice’ and ‘other fruit juice’. Under this frame of reference ambient fruit juices would be excluded, and there would be no further segmentation based on: (i) labelling – own-label vs. branded; (ii) customer type – retail vs. food service; and (iii) fruit juice by flavour.

31. The CMA’s approach to frame of reference is to begin with the overlapping products of the parties in the narrowest plausible candidate frame of reference and then to see if this can be widened on the basis of demand-side and supply-side substitution.⁸ Therefore, in this case, the CMA has started with the supply of own-label freshly squeezed fruit juice to retail and food service customers (separately) and then assessed whether this can be widened to include:
- (a) NFC (which Hain submitted was the next closest substitute fruit juice);
 - (b) branded freshly squeezed fruit juice; and
 - (c) both retail and food service customers (rather than separately).

Freshly squeezed fruit juice and NFC

- *Demand-side substitution*

32. Hain submitted that there was little difference between freshly squeezed fruit juice and NFC from the customer’s and end-consumer’s perspective, with nutritional content, labelling, marketing, and pricing all similar for both products. Hain also provided data and results from a number of cases studies which it suggested showed substitution between freshly squeezed fruit juice and NFC. These case studies are discussed later in paragraphs 38 to 42. On the basis of the above evidence, Hain submitted that NFC should not be excluded from the product frame of reference.
33. As a starting point, the CMA observed that, while there are some similarities between freshly squeezed fruit juice and NFC, there is also significant differentiation between the two. In terms of production methods, NFC is squeezed at the harvest source rather than at a manufacturing facility which is typically located closer to the customer (this is the case for freshly squeezed fruit juice). Hain acknowledged that there is a taste difference between the two (with NFC being a ‘flatter’ taste), and the shelf life of NFC is considerably longer than for freshly squeezed fruit juice (see paragraph 63 below). There are clear differences in labelling, with the descriptions ‘NFC’ or ‘Not From Concentrate’ (or similar) and ‘freshly squeezed’ prominent on the respective

⁸ See section 5.2 of the [Merger Assessment Guidelines](#).

products' labels. Finally, while the price of branded NFC is similar to own-label freshly squeezed fruit juice, there is a significant price difference between own-label freshly squeezed and own-label NFC juices.⁹

34. The CMA sought views from third parties, including the Parties' retail and food service customers, in order to understand the extent to which freshly squeezed fruit juice and NFC are substitutes, notwithstanding the differentiation between the two. The large majority of customers indicated that freshly squeezed fruit juice and NFC were very different products (with freshly squeezed fruit juice being a premium product) and a larger than 5 to 10% retail price rise in freshly squeezed fruit juice would be needed to trigger switching to NFC by end-consumers.¹⁰ Some customers also noted that more affluent consumers tend to buy freshly squeezed fruit juice.
35. The majority of Parties' customers said they would not switch to NFC and would continue to purchase freshly squeezed fruit juice if its price increased by 5 to 10%. For example, one customer explained that 'in this instance we would likely be forced to continue buying from the supplier, as we view Freshly Squeezed juice as a separate needs unit to NFC and therefore our data suggests we would lose sales if we removed Freshly Squeezed as a subcategory and instead brought more NFC juice in to the business.'
36. The majority of customers did not consider suppliers of NFC to be an effective competitive constraint on the suppliers of own-label freshly squeezed fruit juice. For instance, one customer responded (in an answer which closely corresponds to their views as reported in paragraph 35 above): 'No – we do not view NFC suppliers as direct competitors to Freshly Squeezed. This is because Freshly Squeezed is a different subcategory of the market, and we view Freshly Squeezed juice as a separate needs unit to NFC. Therefore our data suggests we would lose sales if we removed Freshly Squeezed as a subcategory and as this is the view that is widely taken within retailers and suppliers, NFC suppliers are not an effective competitive constraint.' Another customer explained: 'We consider freshly squeezed juice to be a better quality

⁹ One customer submitted that currently own-label freshly squeezed fruit juice is £1.25 more expensive than own-label NFC, and 20p more expensive than Tropicana (ie branded NFC). Hain has also submitted that in Tesco own-label freshly squeezed orange juice is 1-28p more expensive than branded NFC and £1.09 more expensive than own-label NFC. Similarly, in Sainsbury's own-label freshly squeezed orange juice is 20p more expensive than one branded NFC and 28p cheaper than another branded NFC, however £1.25 more expensive than own-label NFC. Finally, in Waitrose own-label freshly squeezed orange juice is 0 to 18p more expensive than branded NFC and £1.06 more expensive than own-label NFC.

¹⁰ The CMA notes that a 5% retail price rise would tend to represent a considerably higher wholesale price rise, even if the wholesale price is fully passed-through into the retail price by the retailer. This is because there would normally be material retailer costs and a retailer margin which will be added to any wholesale price. This implies that looking at the impact of a 5 to 10% retail price increase is likely to overestimate the degree of switching which might arise with a 5 to 10% increase in wholesale prices.

product so do not consider that the suppliers of NFC would be an effective competitive constraint.’

37. The CMA also sought to gather views from other suppliers of fresh fruit juices. Responses were mixed, with branded NFC producers believing that consumers would switch from freshly squeezed fruit juice to NFC in response to a small increase in the price of freshly squeezed fruit juice, while other suppliers of fresh fruit juices believed consumers would not switch.
38. Hain provided a number of case studies seeking to demonstrate demand-side substitution between freshly squeezed fruit juice and NFC following price, promotion and product changes. Using Kantar World Panel data over 52 weeks ending March 2016 (which shows changes in total spend across the market), Hain submitted that consumers of freshly squeezed fruit juice switched to NFC due to price deflation in NFC. Hain also provided data in relation to volume changes in response to price changes in freshly squeezed fruit juice or NFC, promotions or new product launches at specific retailers. It submitted that these examples also showed substitution between the two products.
39. The CMA considers that there are issues with the analysis. Firstly, the examples provided by Hain of substitution in response to price promotions generally occurred when multiple promotions for different brands or types of fruit juice were occurring at that retailer at that time. The CMA considers that it is very difficult to establish causes in volume changes when there are multiple promotions occurring at the same time.¹¹
40. Second, the CMA also notes that the examples provided by Hain related to relative price changes which are far greater than the relative price changes at which the CMA usually tests whether products are substitutes (ie significantly larger than 5 to 10%).¹² To put significant weight on the results of the case studies provided by Hain, the CMA would need to be confident that the variation in data due to other factors has been controlled for and that the events in question bore relevance to SSNIP analysis. Neither was the case in this instance.
41. Hain also argued that freshly squeezed fruit juice was not a must-have product for retailers and that consumers are not loyal to the product. In

¹¹ Hain itself noted difficulties with collecting data for this analysis.

¹² The CMA also believes there are further issues relevant to particular examples. For instance, the CMA noted many of the changes in volumes of freshly squeezed fruit juice or NFC that the Parties argued were due to price changes were very small. One example also purportedly showed NFC increases in price leading to increased freshly squeezed fruit juice sales. However, this does not necessarily suggest the relationship would be symmetric (ie consumers would switch to NFC following a small but significant price increase in freshly squeezed fruit juice).

particular, Hain submitted that only a very small proportion (0.7%) of the total number of consumers, who consume either freshly squeezed fruit juice or NFC, purchase only freshly squeezed fruit juice. This was seen as indicating that most consumers who purchase these products tend to purchase both.¹³ However, the CMA considers that this evidence does not necessarily indicate close substitutability between the two products due to small changes in their relative prices. Rather, it is plausible that this behaviour is merely indicative of different consumer preferences at different times. It is also plausible that purchases were sometimes made on behalf of others (for example, a consumer may purchase NFC for some family members and freshly squeezed fruit juice for others, or may purchase one type of juice for a particular occasion).

42. Finally, Hain also submitted that Tesco only stocks own-label freshly squeezed fruit juice in [] of its stores and does not stock freshly squeezed fruit juice in its smaller 'express' stores (replacing it with NFC), indicating it is not a must-have product for Tesco.¹⁴ However, it is not clear to the CMA that this is the case for other retailers. Moreover, freshly squeezed fruit juice is a considerably smaller sub-category compared to NFC. Retailers with limited shelf space, particularly in smaller stores, may choose not to stock freshly squeezed fruit juice for reasons which do not indicate that NFC constrains freshly squeezed fruit juice. The relatively low aggregate sales value of freshly squeezed fruit juice may explain why a limited number of retailers may choose not to stock it when there are space constraints.
43. Overall, the CMA therefore considers that there is not sufficient evidence to suggest that NFC should be considered within the same product frame of reference as freshly squeezed fruit juice on the basis of demand-side substitution.
 - *Supply-side substitution*
44. The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone. However, there are circumstances where the CMA may aggregate several narrow relevant markets into one broader market on the basis of considerations about the response of suppliers to changes in prices. The CMA may do so when production assets can be used by firms to supply a range of different products that are not demand-side substitutes, and the firms have the ability and

¹³ Similarly, Hain also provided an estimate of the proportion of consumers of freshly squeezed fruit juice which do not also purchase NFC – 8.5%.

¹⁴ Hain's 27 April 2016 response to the issues letter dated 20 April 2016 and request for further information dated 26 April 2016, p21.

incentive quickly (generally within a year) to shift capacity between these different products depending on demand for each.¹⁵

45. Hain submitted that NFC suppliers could easily switch to the production of freshly squeezed fruit juice given that equipment is rented and mechanised extraction is the same (ie it would be straightforward, at minimal time and cost, to make adjustments to machinery used to produce NFC to instead produce freshly squeezed fruit juice). Hain also submitted that both products require the same raw materials, citrus extractors and the same customer relationships.
46. According to Hain, whilst Tropicana and Innocent currently manufacture NFC and not freshly squeezed fruit juice, either of them could easily expand and commence production of freshly squeezed fruit juice through either: (i) setting up a new business by acquiring the relevant machines and sourcing fruit; or (ii) by transferring some of its existing orange squeezing/pressing equipment to the UK (bottling/packaging equipment is already in the UK) and either transporting fresh oranges (diverted from existing supplies) or sourcing oranges from alternative suppliers.¹⁶
47. The CMA contacted suppliers of NFC to test how easy it would be to start supplying freshly squeezed fruit juice and whether they would be willing to do so. NFC suppliers did not indicate any significant barriers associated with the production of freshly squeezed fruit juice. However, they did note a number of differences between NFC and freshly squeezed fruit juice manufacturing. First, storage space in the UK would be needed for fruit and wastage, which was not something typically required for NFC production, because NFC is produced at (or close to) the harvest source.¹⁷ Secondly, the shorter shelf life of freshly squeezed fruit juice (see paragraph 63 below) may mean suppliers face particular challenges in forecasting demand and ensuring sufficient and timely distribution. One NFC producer also commented on the difficulty of producing freshly squeezed fruit juice at scale due to challenges around ensuring consistency of quality, which would be an important consideration for retailers.
48. None of the NFC suppliers the CMA spoke to were interested in producing freshly squeezed fruit juice (a number had been asked by customers if they produce it and others had considered producing before) and, in particular,

¹⁵ [Merger Assessment Guidelines](#), paragraph 5.2.17.

¹⁶ Merger Notice.

¹⁷ The CMA also understands that the Parties squeeze their juice in factories in the UK, while NFC is primarily squeezed close to where the fruits are grown. Currently very little freshly squeezed fruit juice is imported into the UK.

they noted the limited incentives to do so given the small size of this segment¹⁸ and lack of growth there.¹⁹

49. The CMA therefore considers there is insufficient evidence to suggest that NFC should be considered within the same product frame of reference as freshly squeezed fruit juice on the basis of supply-side substitution.

Own-label and branded freshly squeezed fruit juice

50. Hain submitted that an own-label/branded distinction is not warranted on the basis that, from the demand side, both branded and own-label products are packaged in similar bottles, are positioned in the same section of chilled displays in retail spaces and have similar marketing. According to Hain, branded fruit juices provide a competitive constraint to own-label products insofar as any price increase by own-label products would likely increase the propensity of consumer switching to branded products and any promotions undertaken by branded fruit juices will likely result in consumers switching away from own-label fruit juices.
51. The CMA and its predecessors have previously assessed the distinction between own-label and branded products.²⁰ This decisional practice shows that there is no general rule as to whether own-label and branded products are likely to be considered as forming part of the same product market. Each case needs to be considered on its own facts, and the CMA and its predecessors have reached different conclusions in different cases. However, the CMA and its predecessors have often taken account of the competitive constraint own-label and branded products may impose on each other in the competitive assessment of cases.
52. Responses to the CMA's market testing were mixed on whether branded freshly squeezed fruit juice should be included within the same frame of reference as own-label freshly squeezed fruit juice. The CMA notes, however, that most retailers sell only own-label freshly squeezed fruit juice while food service customers mainly sell branded. Therefore, some customers may have limited insight into the substitutability between branded and own-label freshly squeezed fruit juice. Some competitors felt that loyalty and the significant price differences²¹ between own-label and branded juice would prevent customers from switching between the two.

¹⁸ In retail the freshly squeezed fruit juice segment is approximately 6% of the size of NFC segment.

¹⁹ Internal reports submitted by Hain suggest that the total value of the overall fruit juice market is declining.

²⁰ For example, ME/6472/14 *Pork Farms/Kerry Foods* (17 December 2014).

²¹ See footnote 9.

53. The majority of customers indicated that end-consumers would switch from own-label to branded fruit juice in response to the 5 to 10% price increase in own-label fruit juice, explaining that switching would be driven by promotional activity and would occur if branded product was similar or cheaper to own-label product. Some customers indicated that switching would not occur or be unlikely, noting that they do not sell branded fruit juice. However, the CMA notes that the latter views were expressed in relation to fruit juice in general and were not specific to freshly squeezed fruit juice. The CMA also notes that the only branded freshly squeezed fruit juice present in the retail segment is Hain's own Johnson's Juice,²² which indicates that the competitive constraint from branded freshly squeezed fruit juice in the retail segment is very limited.
54. Given the mixed evidence, on a cautious basis the CMA has considered the impact of the Merger on branded and own-label freshly squeezed fruit juice separately.

Retail and food service customers

55. Hain submitted that whilst the Parties have two broad types of customers, namely retail (eg national supermarket chains) and food service (eg typically franchises of bars, restaurants and cafés) the Parties do not consider it appropriate to segment the frame of reference by customer type as the conditions of supply and production process for each are very similar, if not identical.
56. Hain submitted that retail customers purchase fruit drink in a range of sizes (eg 250 ml, 500 ml, 1l and 1.5l) with the Parties' main food service customers typically purchasing smaller ('on-the-go') formats. While some food service customers will prefer to purchase larger volumes in formats up to 2.27l, there is a substantial overlap in the formats of products supplied to retail and food service customers. Hain also submitted that conditions of supply are largely identical with delivery to retail customers directly into their own national or regional distribution centres and delivery to food service customers either directly to their national or regional distribution centres, or to their distributor appointed to make individual store deliveries.
57. The distinction between retail and food service customers has previously been considered by the CMA and its predecessors. While each case must be examined on its own facts, decisional practice shows that the CMA and its predecessors have often treated retailer and food service customer

²² There are some other branded freshly squeezed or pressed products sold by retailers, including B.Fresh and Savve. However, these are fruit and vegetable based juices/health drinks, and not purely fruit based freshly squeezed juice.

separately, recognising that suppliers may be able to price discriminate between these customer types and that the set of suppliers may differ between retail and food service.²³

58. In the present case, information from third parties was mixed on whether retail and food service customers should be considered together. However, some customers indicated that the requirements of retail and food service customers differ in terms of labelling (with food service customers preferring branded rather than own-label products, as opposed to retail customers who prefer own-label products) and packaging formats (with some food service customers preferring larger 'bulk' formats). Competitors also indicated that retailers tended to care more about quality, while food service customers were more focused on price. The CMA also notes that, as mentioned in paragraph 52 above, most retailers sell only own-label freshly squeezed fruit juice while food service customers mainly sell branded freshly squeezed fruit juice.
59. On a cautious basis, the CMA has considered the impact of the Merger on retail and food service customers both separately and together.

Geographic scope

60. Hain submitted that the Merger should be assessed against a UK geographic frame of reference. This was based on the fact that each of the Parties operate from a single distribution location, ie freshly squeezed fruit juice is manufactured in one site and, once processed, distributed nationally. Similarly, the Parties' customers operate on a national basis.
61. However, Hain also submitted that non-UK suppliers exercise a competitive constraint on the Parties, given that some of those already supply into the UK. Additionally, according to Hain, while currently there might be limited imports of freshly squeezed fruit juice to the UK, there is a credible threat that UK customers will start sourcing freshly squeezed fruit juice from outside the UK. Hain also submitted that it exports freshly squeezed fruit juice to the Netherlands, France and Germany, whereas [X] and [X] use a Portuguese supplier (GL SA) and other non-UK based suppliers have some activity in the UK.
62. The CMA has tested whether it would be credible for customers to source freshly squeezed fruit juice from suppliers located outside the UK. The majority of customers told the CMA that it would either not be possible to source freshly squeezed fruit juice from outside the UK, or it would be

²³ For example, ME/5589/12 *Nakano UK Holding Limited/Premier Foods Group Limited*, (26 September 2012) paragraphs 33 to 35.

challenging, given the limited shelf life of freshly squeezed fruit juice. In addition, as noted at paragraph 33 above, Hain submitted that freshly squeezed fruit juice tends to be produced near to the customer, in contrast to NFC. One customer also told the CMA that it had initially considered supply from a non-UK supplier but that, on further investigation, such supply was not viable.

63. The evidence provided by third parties to the CMA suggests that geographic frame of reference is significantly influenced by the shelf life of freshly squeezed fruit juice. Third parties submitted that the shelf life of freshly squeezed fruit juice is approximately nine to 21 days from manufacture and six to 16 days from receipt,²⁴ whereas the shelf life of NFC is approximately 50 to 60 days from manufacture and 21 to 45 days from receipt.
64. Given the limited presence of non-UK based suppliers of freshly squeezed fruit juice in the UK (and no presence in retail at all) and the short shelf life of freshly squeezed fruit juice, the CMA has considered the impact of the Merger within the UK.

Conclusion

65. For the reasons set out above, the CMA has considered the impact of the Merger in the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers (both separately and together) in the UK.

Own-label prepared fruit

Product scope

66. Hain submitted that the supply chain for prepared fruit consists of whole-head fruit being picked by growers in various locations worldwide, eg Costa Rica, Spain, Brazil, South Africa etc. The fruit is subsequently sourced and selected by buyers and transported to the wholesaler's factory, normally located in the country of ultimate sale. There, fruit is inspected, graded (by size and appearance), cleaned and cut by hand or machine. A quality control assessment is undertaken before the prepared fruit is packaged into cartons, according to the specific customer requirements. Prepared fruit is then transported at a chilled temperature to customers across the UK with the shelf life of the prepared fruit being managed by both the wholesaler and the customer.

²⁴ Differences depend on the exact recipe and specification the customer has, but largely the contributing factor is the amount of pasteurisation (if any) used in the production process.

67. Hain submitted that the product frame of reference should not be further segmented with respect to type of fruit, delivery/storage temperature, customer type (ie retail vs food service) or labelling of products (ie own-label vs branded).
68. The CMA started with the product in which the Parties overlap (ie the wholesale supply of own-label prepared fruit), and then considered whether the product frame of reference could be widened on the basis of demand-side and/or supply-side substitution.²⁵
69. The CMA has therefore considered whether the product frame of reference could be widened to include: (i) branded prepared fruit; and (ii) supply to retail and food service customers together.

Own-label and branded prepared fruit

70. Hain submitted that, in terms of prepared fruit, for the most part this is sold as own-label products by all suppliers. On the basis that Orchard is not active in the branded prepared fruit sector,²⁶ Hain submitted that it is not appropriate to distinguish potential markets for own-label and branded prepared fruit.
71. In the present case, the majority of customers indicated that consumers would not switch to branded prepared fruit in response to a 5-10% price rise in own-label prepared fruit, or could not provide an answer to this question due to low presence of branded prepared fruit (ie customers usually stock only own-label prepared fruit).
72. On a cautious basis, the CMA has considered the impact of the Merger on branded and own-label prepared fruit separately. However, the CMA has taken account of any competitive constraints from individual brands on own-label prepared fruit, and vice-versa, in its competitive assessment.
73. Given that the Parties do not overlap in supply of branded prepared fruit (ie Orchard does not produce any branded prepared fruit and there is no evidence to suggest that it is going to start producing any branded prepared fruit), branded prepared fruit is not considered further in the competitive assessment.

²⁵ [Merger Assessment Guidelines](#), paragraph 5.2.2.

²⁶ See footnote 4.

Retail and food service customers

74. Hain submitted that the production process and conditions of supply for prepared fruit (ie washing, peeling, cutting, etc) are exactly the same for both retail and food service customers, with only a small proportion of food service customers requiring larger 'bulk' formats (in which case the product labelling will be slightly different). Hain noted that majority of the Parties' food service customers purchase products in a single serve customer format (ie single portions of 80g, 90g, 130g, fruit packs), which are the same formats purchased by the Parties' larger retail customers (with some retail customers requiring some larger format products, eg 240g and 300g). A small portion of food service customers will take bulk delivery of products in up to 5 kg buckets. However, Hain considered that, as the production and supply conditions are the same, a distinction between retail and food service customers is not warranted.
75. On a cautious basis, the CMA has considered the impact of the Merger on retail and food service customers both separately and together.

Geographic scope

76. Hain submitted that the geographic frame of reference for prepared fruit is national. The evidence the CMA received, including responses from third parties, consistently supported Hain's submission. Therefore, the CMA assessed the impact of the Merger within the geographic frame of reference of the UK.

Conclusion

77. For the reasons set out above, the CMA has considered the impact of the Merger in the wholesale supply of own-label prepared fruit to retail and food service customers (both separately and together) in the UK.

Conclusion on frame of reference

78. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:
- (a) Wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers (separately and together) in the UK.
 - (b) Wholesale supply of own-label prepared fruit to retail and food service customers (separately and together) in the UK.

Competitive assessment

Horizontal unilateral effects

79. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or degrade quality on its own and without needing to coordinate with its rivals.²⁷ Horizontal unilateral effects are more likely when the merger parties are close competitors. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to:
- (a) horizontal unilateral effects through the loss of actual competition in the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers (separately and together) in the UK;
 - (b) horizontal unilateral effects through the loss of potential competition in the wholesale supply of branded freshly squeezed fruit juice to retail and food service customers (separately and together) in the UK;
 - (c) horizontal unilateral effects in relation to the wholesale supply of own-label prepared fruit to retail and food service customers (separately and together) in the UK; and
 - (d) the wholesale supply of freshly squeezed fruit juice as a result of the increased buyer power of the merged entity enabling it to foreclose inputs to rivals.

Loss of actual competition in the supply of own-label freshly squeezed fruit juice

80. In order to assess the likelihood of the Merger resulting in unilateral effects, the CMA has considered:
- (a) shares of supply;
 - (b) the closeness of competition between the Parties; and
 - (c) competitive constraints from alternative suppliers.

Shares of supply

81. The CMA estimates that the Parties have a combined share of supply of [90–100]% (with an increment of [40–50]%) in the wholesale supply of own-

²⁷ [Merger Assessment Guidelines](#), from paragraph 5.4.1.

label freshly squeezed fruit juice on the basis of value of sales to retail and food service customers (taken together). In relation to retail customers only, the Parties have a combined market share of [90–100]% (with a [40–50]% increment), and to food service customers only a share of [90–100]% (with a [0–5]% increment).²⁸

82. The CMA believes that the Parties' very high combined shares of supply raise *prima facie* competition concerns.

Closeness of competition

83. The CMA has examined the closeness of competition between the Parties and considered within the assessment:
- (a) evidence from internal documents; and
 - (b) third party views on closeness of competition.
84. The internal documents submitted by Hain suggest that it views Orchard as a close competitor in the wholesale supply of the freshly squeezed fruit juice. In particular, the data presented in the Information Memorandum relating to the Merger²⁹ indicates that Hain and Orchard are the two largest suppliers of freshly squeezed fruit juice. It is also notable that the same document does not specifically identify any other suppliers, simply referring to those who comprise the residual market share as 'other'.
85. Customer responses to the CMA's market testing indicate that the Parties are close competitors within the freshly squeezed fruit juice market. The majority of customers that responded to the CMA indicated that the Parties are close competitors in the supply of freshly squeezed fruit juice.
86. Evidence available to the CMA indicates that the majority of retailers do not engage in formal tenders for freshly squeezed fruit juice on a regular/annual basis. Retailers tend to remain with their freshly squeezed fruit juice supplier by rolling over terms or renewing contracts at the end of their term.³⁰ However, the CMA received two examples of recent retail customer tenders for freshly squeezed fruit juice. Hain bid in both these tenders while Orchard

²⁸ Shares of supply were estimated based on the information provided by Hain and third parties.

²⁹ Presentation prepared by Orchard's senior management team aimed to give potential purchasers an overview of the Orchard's business and growth potential.

³⁰ Hain submitted that even though some retailers may not initiate a formal tender process, all suppliers are still required to submit products and pricing details every year for comparison to other actual and/or potential suppliers (ie supply base reviews) (Merger Notice). However, the CMA has received no evidence to suggest that customers have changed their supplier of freshly squeezed fruit juice following a supply base review.

bid in one.³¹ The Parties also submitted information on food service tenders where they had recently bid. Of 12 tenders in which Hain bid,³² Orchard also bid in five tenders.³³

87. Given the Parties' very large combined shares of supply, their relative symmetry in size, and the customer feedback received, the CMA considers that, pre-Merger, Hain and Orchard were the closest competitors to each other.

Competitive constraints from remaining suppliers

88. Unilateral effects are more likely where customers have little choice of alternative supplier. The CMA has considered whether there are alternative suppliers of own-label freshly squeezed fruit juice which would provide a competitive constraint on the merged entity.
89. The Parties named Fruitapeel, London Juice Company, Sundance, Fruityline, Granini, Zumos Palma, Radiance, Moju, Prescription, Squeez'd, Raw Press, Blend & Press, B.Fresh, Imbibery, Juice Warrior, Juice Baby and QUAD as their freshly squeezed fruit juice competitors in supply to retail and food service customers.³⁴ The CMA notes that none of these suppliers currently supply retail customers in the UK with freshly squeezed fruit juice.
90. In the first instance it should be noted that the merged entity's very high share of supply in own-label freshly squeezed fruit juice (to both retail and food service customers) indicates that there are few remaining rivals with significant scale currently serving customers. The CMA has therefore been careful to assess whether there are also suppliers not currently supplying significant quantities of own-label freshly squeezed fruit juice but which nevertheless compete to supply and/or have sufficient capacity to do so.
91. Half of the retail and food service customers that responded to the CMA's market testing were either not aware of any alternative suppliers of freshly squeezed fruit juice apart from the Parties or only indicated one alternative supplier – Fruitapeel. In addition, the CMA saw evidence [X] that only three

³¹ There were no other bidders other than Hain in one tender, and there was only one other bidder besides the Parties in another one.

³² Since 2013.

³³ The Parties believe that across the 12 tenders there were three bidders other than Hain and Orchard.

³⁴ Initially, the Parties named the following competitors in the broad fruit juice market: Britvic, Cawston Press, Pepsico, Don Simon (J Garcia Carrion), Frugo, Fruitapeel, Fruity King, Hoogesteger, Coca Cola, Munoz, PIP, Plenish, Princes, Refresco Gerber, Robinsons, Savse, Ripe Now, and Solfruits Europe Limited. However, the Parties did not identify which of these competitors they compete with in freshly squeezed fruit juice specifically.

players – the Parties and Fruitapeel – realistically contested for contracts with retailers/food service customers.

92. The evidence collected by the CMA shows that Fruitapeel is the third largest supplier of own-label freshly squeezed fruit juice to food service customers, similar in size to Orchard. However, Fruitapeel is still significantly smaller than Hain (with Fruitapeel and Hain having [0–5]% and [90–100]% shares of supply in own-label freshly squeezed fruit juice to food service customers respectively). There is some evidence of Fruitapeel tendering for contracts with retail customers, however no contracts have been won so far. [REDACTED]. The CMA therefore does not believe that Fruitapeel imposes a sufficient competitive constraint on the Parties.
93. Sundance is currently only active in London and supplying (mostly branded) freshly squeezed fruit juice to food service customers. Given the very small scale to which Sundance operates, with no presence in supply to retail customers, the CMA believes that Sundance imposes a weak competitive constraint on the Parties.
94. While Fruityline (supplier based in the Netherlands) sells some freshly squeezed fruit juice to food service customers in the UK, the evidence collected by the CMA shows that it does not have sufficient scale to constrain the Parties.
95. Other (potential) competitors indicated by the Parties (eg Fruity King, Hoogsteiger) are currently only active in the Netherlands with no evidence of a presence in the UK, whereas Zumos Palma produces FC, NFC, nectars, fruit juice drinks and fruit milk, and no freshly squeezed fruit juice. Savse and B.Fresh produce freshly squeezed fruit and vegetable based juice, with B.Fresh only using fruit and vegetables that have been grown in the UK, as their strategy. However, there was no evidence that suppliers of this differentiated product would constrain suppliers of freshly squeezed fruit juice (in particular, no customers indicated that these suppliers were a competitive constraint).
96. Hain has mentioned London Juice Company as one of the Parties' competitors in the supply of freshly squeezed fruit juice. However, this company has not been mentioned by any third party and the CMA therefore does not have sufficient evidence of the competitive constraint from the London Juice Company on the Parties.³⁵

³⁵ The CMA has not been able to contact London Juice Company due to lack of publicly available information about it. The Parties did not provide any contact details for London Juice Company.

97. Finally, as discussed in paragraphs 36 and 47 to 48 above, the CMA considers that suppliers of NFC do not impose a sufficient competitive constraint on suppliers of freshly squeezed fruit juice, and therefore would not be able to mitigate the loss of competitive constraint post-Merger.
98. Therefore, the evidence before the CMA suggests that the Merger would result in a reduction of effective competitors in the supply of own-label freshly squeezed fruit juice to retail customers in the UK from two to one, and to food service customers from three to two. The other remaining rival in food service – Fruitapeel – is considerably smaller than the merged entity and is unlikely to outweigh the loss of competitive constraint as a result of the Merger.

Conclusion

99. For the reasons set out above, the CMA believes that the Parties are the closest competitors for the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers in the UK, and that the constraint from remaining competitors is not sufficient enough to address competition concerns. Accordingly, the Merger gives rise to competition concerns in relation to the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers (separately and together) in the UK.

Loss of potential competition in the supply of branded freshly squeezed fruit juice

100. The Parties do not overlap in the supply of branded freshly squeezed fruit juice. However, considering the size of Orchard in the own-label freshly squeezed fruit juice market, the CMA has assessed the extent to which Orchard would be likely to start producing a branded freshly squeezed fruit juice product in the absence of the Merger and, therefore, competitively constrain Hain. To the extent that the Merger resulted in the loss of such a constraint, it may give rise to competition concerns.
101. The CMA has considered both actual and perceived potential competition. Under the actual potential competition theory of harm, the CMA tested whether, absent the Merger, Orchard may have started to produce a branded product in competition with Hain. Under the perceived potential competition theory of harm, the CMA examined whether, absent the Merger, Hain would have perceived a potential competition threat from Orchard and therefore have been constrained.³⁶

³⁶ [Merger Assessment Guidelines](#), paragraphs 5.4.13–5.4.18.

102. Given the small volumes of branded freshly squeezed fruit juice supplied to retailers relative to the total supply of freshly squeezed fruit juice to retailers, any potential competition concerns about branded freshly squeezed fruit juice supplied to retailers would be very limited in terms of market value. Therefore, the CMA has focused on whether there would be a loss of competition in the supply of branded freshly squeezed fruit juice to food service customers.
103. The Parties submitted that own-label and branded products are produced in exactly the same way with the same storage, delivery and logistics requirements. In order to produce a branded product, Orchard would have to invest in the brand name, marketing, design, etc and convince a customer to stock a brand. While the investment in developing a brand for food service may not be very large, it would require a change in strategic direction and expertise for Orchard, as well as developing relationships with distributors/wholesalers and, potentially, with numerous food service outlets. Therefore, the incentives to enter with a branded product may be limited.
104. The CMA found no evidence in internal documents to suggest that Orchard was considering/planning to start producing branded products. Given the absence of any plans to develop a branded freshly squeezed fruit juice product, and the potentially limited incentives to enter with a branded product, the CMA believes that the Merger does not raise competition concerns as a result of actual potential competition in the supply of freshly squeezed fruit juice in the UK.
105. With regard to perceived potential competition, the CMA found no evidence to suggest that food service customers have used the threat of Orchard in negotiations with Hain. There is no indication in internal documents that Hain considers Orchard to be a potential competitor to Johnson's Juice brand and no evidence that Hain has changed its competitive offer in response to the perceived threat of entry of Orchard. Further, as noted in paragraph 103, there may be some difficulties in establishing a brand, and as such Hain may not see a brand-less Orchard as a constraint until it has a strong reason to believe Orchard is developing a brand. Accordingly, the CMA believes that the Merger does not raise competition concerns as a result of perceived potential competition in the supply of freshly squeezed fruit juice in the UK.

Horizontal unilateral effects in relation to the wholesale supply of own-label prepared fruit

106. In order to assess the likelihood of the Merger resulting in unilateral effects, the CMA has considered:
 - (a) shares of supply;

(b) the closeness of competition between the Parties; and

(c) competitive constraints from alternative suppliers.

Shares of supply

107. Hain submitted that the Parties have a combined share of supply of [30–40]% (with an increment of [10–20]%) in the wholesale supply of own-label prepared fruit on the basis of value of sales to retail and food service customers (taken together) in the UK. In own-label prepared fruit sales to retail customers only, the Parties have a combined market share of [30–40]% (with a [5–10]% increment), and to food service customers a share of [20–30]% (with a [0–5]% increment).³⁷

Closeness of competition

108. The CMA has examined the closeness of competition between the Parties and considered within the assessment:
- (a) evidence from internal documents; and
- (b) third party views on closeness of competition.
109. Internal documents submitted by Hain suggest that it competes with Orchard in the wholesale supply of prepared fruit. In particular, the data presented in the Information Memorandum relating to the Merger indicates that Orchard is the largest supplier of prepared fruit, with seven other suppliers in addition to Orchard and Hain.³⁸ This evidence suggests that the Parties see each other as competitors for the supply of prepared fruit.
110. Customer responses to the CMA's market testing indicate that the Parties competed with each other pre-Merger, although a majority indicated that they are not close competitors within the prepared fruit.
111. The CMA received tender data from customers and competitors of the Parties. Of eight tenders for which the CMA received data on, Hain and Orchard bid against each other in only three. Of 17 further food service tenders (since 2013) that Hain provided information about, they were only aware of Orchard also bidding in one instance.
112. For the reasons set out above, the CMA considers that, pre-Merger, Hain and Orchard were competing for the wholesale supply of own-label prepared fruit

³⁷ Shares of supply estimates provided by Hain.

³⁸ Simply Fruit, Del Monte, In2Foods, Nature's Way, Bakkavor, Prep World and Blue Skies.

to retail and food service customers (separately and together) in the UK, although the evidence does not suggest that they were uniquely close competitors.

Competitive constraints from remaining suppliers

113. The Parties named the following competitors in the wholesale supply of prepared fruit: Bakkavor, Blue Skies, Citrus Star, Del Monte, Jem Fruits, Nature's Way, Orchard County, Paradise Foods, Parallel UK, Prep World, Ripe Now, Solfruits Europe Limited, Travelling Gourmet, Vidafresh, Cawston Press, Frugo, In2Foods, Simply Fruit and Tropical Fresh.
114. The evidence collected by the CMA shows that there are a number of alternative suppliers currently supplying own-label prepared fruit to retail and food service customers in the UK.
115. The tender data received from customers showed that, from a total of seven completed tenders, there were five winners of contracts other than the Parties (in a number of tenders, more than one supplier can be awarded a contract). This included Prep World which succeeded in five of the tenders. Of the seven tenders, in only three cases were contracts only awarded to the incumbent suppliers, suggesting that customers are able and willing to change supplier.
116. In their responses to the CMA's questionnaire customers listed at least 20 alternative suppliers of prepared fruit. Nine of those alternative suppliers were invited to recent tenders and six were shortlisted (however, the CMA notes that not every customer provided a shortlist). This shows that remaining suppliers are competitive and able to win contracts, which in turn suggests that they impose a strong competitive constraint on the Parties. Thirteen out of 16 customers indicated that, should the prices of prepared fruit increase, they would consider switching to other suppliers.
117. Out of thirteen customers that expressed their general views about the Merger, eleven did not raise concerns in relation to prepared fruit. One customer raised concerns about the Merger saying that there are limited alternative suppliers of prepared fruit, which would give the merged entity a stronger negotiating position. Another customer indicated that the Merger would affect its negotiating position and reduce competition. However, the bulk of the evidence collected by the CMA consistently indicates that there will remain several competitors imposing a sufficient constraint on the merged entity.

Conclusion

118. For the reasons set out above, the CMA believes that, while the Parties were competing against each other in the wholesale supply of own-label prepared fruit to retail and food service customers in the UK, there will remain a sufficient number of competitors post-Merger to effectively constrain the merged entity. Accordingly, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in relation to wholesale supply of own-label prepared fruit to retail and food service customers (separately and together) in the UK.

Increased buyer power of the merged entity enabling it to foreclose inputs to rivals

119. A concern was raised by a competitor that the merged entity would be able to exercise increased buyer power and prevent its competitors from procuring enough inbound fruit to produce freshly squeezed fruit juice, eg by requiring suppliers to supply exclusively to the merged entity post-Merger. If this hampered competitors' ability to effectively compete, it could raise competition concerns in the wholesale supply of freshly squeezed fruit juice to retail and food service customers in the UK.³⁹
120. The CMA asked fruit suppliers how they would respond if, following the Merger, the merged entity required them to supply it with inbound fruit exclusively. The vast majority of suppliers said that they would not enter into exclusive supply arrangements with the Parties.
121. On the question of whether either Hain or Orchard had previously sought to restrict the volume of sales which a supplier was able to make to any other UK-based purchasers of products, or whether either of the Parties have ever sought exclusive supply, the vast majority of suppliers answered no. Only one supplier submitted that one of the Parties had previously sought to restrict the volume of sales to one of the Parties' rivals, however the supplier refused to do so.
122. No suppliers that responded to the CMA's questionnaire raised any substantiated concerns about the Merger.
123. The CMA therefore believes that the Merger will not result in the merged entity achieving buyer power such that it will be able to foreclose the supply of fruit to rivals.

³⁹ [Merger Assessment Guidelines](#), paragraphs 5.4.19–5.4.21.

Countervailing constraints

124. Given that competition concerns arise only with respect to the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers (separately and together) in the UK, the following sections focus on this area.

Barriers to entry and expansion

125. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA considers whether such entry or expansion would be timely, likely and sufficient.⁴⁰ In terms of timeliness, the CMA's guidelines indicate that the CMA will look for entry to occur within two years.
126. Hain submitted that, in the last five years, there has been significant expansion in the UK fruit juice market by the likes of Innocent (expanding from smoothies into other juices) following their acquisition by Coca-Cola. According to Hain, other examples of new entry or expansion include Fruitapeel, Naked (owned by Pepsico) and Frugo. Fruitapeel and Naked manufacture chilled fruit juice (ie fruit drink and coconut water) as well as fresh fruit juices (ie NFC, freshly squeezed fruit juice and smoothies), whereas Frugo focuses on FC ambient and chilled fruit flavoured drinks.⁴¹
127. The evidence before the CMA did not indicate that expansion or entry would be timely, likely and sufficient. In paragraphs 44 to 49 above, the CMA set out some of the difficulties of entry into the freshly squeezed fruit juice sector, particularly in reaching significant scale (including the absence of an incentive to expand/enter, difficulties in quality control, establishing credibility with retailers).
128. This picture is consistent with a document received by the CMA which spoke of some of the difficulties of new entry and expansion into the fruit juice sector generally.⁴² It noted that 'larger players will generally have stronger bargaining power, as they purchase larger quantities of fruit and vegetables, and hence are able to purchase inputs at lower costs. In addition, they will also benefit from other economies of scale. This may make it challenging for smaller players to maintain profit margins while remaining price competitive.

⁴⁰ [Merger Assessment Guidelines](#), from paragraph 5.8.1.

⁴¹ Merger Notice.

⁴² Appendix 14, pages 20-21: IBISWorld Industry Report *Fruit Juice Production in the UK* (September 2015).

[...] retailers have limited shelf space, which can make it difficult for new entrants to get their products accepted’.

129. As mentioned in paragraph 48 above, discussions with NFC suppliers revealed no appetite among those suppliers for entry. One supplier currently selling small quantities of freshly squeezed fruit juice told the CMA that it struggled to establish a significant position in the sector due to strong existing relations between suppliers and customers.
130. Hain submitted that customers are able to sponsor entry or expansion by encouraging existing suppliers to produce new products or new suppliers to enter the market.⁴³ The CMA notes that none of the Parties’ customers said they would sponsor entry of a new supplier if their current supplier increased prices.
131. Accordingly, the CMA believes that entry or expansion would not be sufficient, timely or likely to prevent a realistic prospect of an SLC as a result of the Merger.

Countervailing buyer power

132. In some circumstances, an individual customer may be able to use its negotiating strength to limit the ability of a merged firm to raise prices. The existence of countervailing buyer power will be a factor in making an SLC finding less likely. If all customers of the merged firm possess countervailing buyer power post-merger, then an SLC is unlikely to arise. However, often only some – not all – customers of the merged firm possess countervailing buyer power. In such cases, the CMA assesses the extent to which the countervailing buyer power of these customers may be relied upon to protect all customers.⁴⁴
133. The CC’s Groceries Market Investigation (2008) concluded that, based on the size of grocery retailers, wholesalers and buying groups relative to suppliers, together with the evidence on supplier pricing and margins, all large grocery retailers, wholesalers and buying groups have buyer power in relation to at least some of their suppliers. Such buyer power may manifest in conduct such as reducing available shelf-space or refusing to buy other products produced by the supplier. The CMA notes that buyer power is unlikely to protect customers when they lack alternative suppliers.⁴⁵

⁴³ Merger Notice.

⁴⁴ [Merger Assessment Guidelines](#), paragraph 5.9.1.

⁴⁵ [Merger Assessment Guidelines](#), paragraph 5.9.3.

134. Hain submitted that both retail and food service customers are sophisticated buyers that have strong countervailing buyer power and would act as an effective constraint to the merged entity. According to Hain, retail customers maintain pressure on suppliers throughout the term of a supply relationship by increasingly pushing suppliers to offer lower prices and fund promotions, as well as by controlling shelf space with a possibility to delist or reduce purchasing volumes from a supplier. It also said that countervailing buyer power is magnified by the tender process, and customers can source their products from numerous suppliers. Retailers can also initiate supply base reviews and quality control procedures, and terminate contracts with suppliers at any time without having conducting either a formal tender or a supply based review.
135. The CMA tested with customers their ability to multisource freshly squeezed fruit juice. The feedback received indicated that possibilities to multisource freshly squeezed fruit juice are very limited due to quality consistency issues (ie it is difficult to maintain consistent quality of freshly squeezed fruit juice within a single supplier, and would be even more difficult, if possible at all, to do so while using multiple suppliers). The tender data that the CMA has received from third parties also indicates that customers tend to use a single supplier for their freshly squeezed fruit juice requirements. Finally, as noted by Hain itself, 'because freshly squeezed fruit juice is a low volume product, there is no need for a retailer or food service customer to have two own-label suppliers'.⁴⁶
136. The evidence that the CMA has received also shows that most customers have been with their current supplier of freshly squeezed fruit juice for several years and continue on rolling contracts or simply renew a contract at the end of the term rather than going out to tender.
137. In relation to Hain's argument that customers could delist freshly squeezed fruit juice, the information received by the CMA from customers suggested that freshly squeezed fruit juice is a product they need on their shelves to meet consumer demand.
138. Some retailers raised concerns about the number of suppliers available to them after the Merger and, in particular, about the number of suppliers able to provide the volumes they required. The reduction in the number of viable suppliers as a result of the Merger would reduce the ability of these retailers to exercise any buyer power they may have.⁴⁷

⁴⁶ Hain's response to the CMA's Issues Letter dated 20 April 2016.

⁴⁷ [Merger Assessment Guidelines](#), paragraph 5.9.3.

139. The CMA notes the documentary evidence (eg emails) provided by Hain which seek to illustrate concrete instances of customers exercising buyer power to defeat price rises or otherwise seek more favourable terms. A problem with this evidence is that it relates to a period where customers had the potential option of switching between Hain and Orchard, whereas it is difficult to predict whether the exercise of buyer power said to be illustrated in the examples could have been successful in a situation where the Parties have merged. In any case, many of the emails provided by the Parties do not clearly show that a customer resisted a price rise (or achieved a reduction in price) due to its buyer power.
140. Overall, the CMA considers that it does not have enough evidence to conclude that buyer power is sufficient to mitigate its concerns arising from the Merger.

Third party views

141. The CMA contacted customers, competitors and suppliers of the Parties as part of its market testing. Although the majority of customers were not concerned with respect to prepared fruit, some customers expressed concerns with respect to freshly squeezed fruit juice and that the number of suppliers available to them would be much reduced. Some competitors were also concerned.
142. Third party comments have been taken into account where appropriate in the competitive assessment above.

Conclusion on substantial lessening of competition

143. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC as a result of horizontal unilateral effects in relation to the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers in the UK, taken both separately and together.

Decision

144. Consequently, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC within a market or markets in the UK.

145. The CMA therefore believes that it is under a duty to refer under section 22(1) of the Act. However, the duty to refer is not exercised⁴⁸ whilst the CMA is considering whether to accept undertakings⁴⁹ instead of making such a reference. Hain has until 24 May 2016⁵⁰ to offer an undertaking to the CMA.⁵¹ The CMA will refer the Merger for a phase 2 investigation⁵² if Hain does not offer an undertaking by this date; if Hain indicates before this date that it does not wish to offer an undertaking; or if the CMA decides⁵³ by 1 June 2016 that there are no reasonable grounds for believing that it might accept the undertaking offered by Hain, or a modified version of it.

Sheldon Mills
Senior Director, Mergers
Competition and Markets Authority
17 May 2016

⁴⁸ Section 22(3)(b) of the Act.

⁴⁹ Section 73 of the Act.

⁵⁰ Section 73A(1) of the Act.

⁵¹ Section 73(2) of the Act.

⁵² Sections 22(1) and 34ZA(2) of the Act.

⁵³ Section 73A(2) of the Act.