

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

Notice to consider undertakings offered

ME/6585/16

Introduction

1. On 21 December 2015, Hain Frozen Foods UK Limited (**Hain**) acquired Orchard House Foods Limited (**Orchard**) (the **Merger**).
2. On 17 May 2016, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger constitutes a relevant merger situation that has resulted or 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 the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to Hain of the SLC Decision. However, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 22(3)(b) on the date of the SLC Decision in order to allow Hain the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act. On 23 May 2016 the CMA extended the statutory four-month period mentioned in section 24(1) of the Act by notice pursuant to section 25(4) of the Act.
4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. Accordingly, on 24 May 2016, Hain offered undertakings to the CMA for the purposes of section 73(2) of the Act.
5. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to Hain that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the offer.

The undertakings offered

6. 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.
7. The SLC Decision found that the Merger gives rise to 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. To address this SLC, Hain has offered to divest its UK own-label freshly squeezed fruit juice business (the **Divestment Business**), including manufacturing assets, key staff, know-how and customer contracts, as a going concern (the **Proposed Undertakings**).
8. Hain currently operates the Divestment Business from the site at Headcorn, Biddenden Road, Ashford, Kent, TN27 9LW (**Headcorn site**), which is a freehold property owned by the Hain group. Hain currently produces both branded and own-label freshly squeezed fruit juice, as well as smoothies and ingredients, at the Headcorn site. The Proposed Undertakings therefore provide a prospective buyer with an option to either:
 - (a) re-locate the Divestment Business's manufacturing assets to the buyer's existing site (if the buyer has an existing site), such that production of own-label freshly squeezed fruit juice would be shifted to the buyer's existing site; or
 - (b) keep the Divestment Business's manufacturing assets at the Headcorn site and acquire a lease or freehold interest in the site, such that production of own-label freshly squeezed fruit juice would continue at the Headcorn site. Under this option, Hain would transfer its production of branded freshly squeezed fruit juice and smoothies to Orchard's manufacturing site, and leave its ingredients business operation at the Headcorn site.¹ If the buyer acquired a leasehold interest in the Headcorn site, Hain would sell the corresponding freehold interest to a person independent of and unconnected to Hain and the group of interconnected

¹ For avoidance of doubt, Hain submitted that the Divestment Business and Hain's ingredients business were built as separate businesses, ie its ingredients business is currently run from a building that is adjacent to the freshly squeezed fruit juice business building. The buildings are served by different site entrances and are stand-alone operations with independent staff changing facilities.

bodies corporate to which Hain belongs and any associated person or affiliate of Hain.

9. Under the Proposed Undertakings, Hain has also offered to enter into a purchase agreement with a buyer approved by the CMA before the CMA finally accepts the Proposed Undertakings (**Upfront Buyer Condition**).

The CMA's provisional views

10. The CMA considers that undertakings in lieu of a reference are appropriate when they are clear-cut and capable of ready implementation. The CMA's starting point when assessing undertakings is to seek an outcome that restores competition to the level that would have prevailed absent the merger.²
11. The CMA considers that the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA, given that it would enable a third party to compete effectively in the supply of own-label freshly squeezed fruit juice to retail and food service customers in the UK by purchasing the Divestment Business. As such, the Proposed Undertakings may result in replacing the competitive constraint that would otherwise be lost following the Merger.
12. The CMA also believes at this stage that the Proposed Undertakings may be capable of ready implementation, in particular as the Divestment Businesses is a stand-alone business that is capable of being sold.
13. The Upfront Buyer Condition means that the CMA will only accept the Proposed Undertakings after Hain has entered into an agreement with a nominated buyer that the CMA considers to be suitable. It also means that, before acceptance, the CMA will consult publicly on the suitability of the nominated buyer, as well as other aspects of the Proposed Undertakings. The CMA considers that an Upfront Buyer Condition is necessary because there are only a small number of suitable candidate purchasers.³
14. For these reasons, the CMA currently considers that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.

² *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7–5.8 and 5.11). This guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

³ See *OFT1122*, paragraphs 5.31–5.37, and *CMA2*, paragraph 8.34.

Consultation process

15. Full details of the undertakings offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.⁴

Decision

16. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by Hain, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 27 July 2016 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 22 September 2016 if it considers that there are special reasons for doing so. If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 22(1) and 34ZA(2) of the Act.

Sheldon Mills
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1 June 2016

⁴ [CMA2](#), paragraph 8.29.