

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

### **Notice under paragraph 2(1) of Schedule 10 to the Enterprise Act 2002 (the Act) – consultation on proposed undertakings in lieu of reference pursuant to section 73 of the Act**

**ME/6585/16**

#### **Introduction**

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. 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 UK (the **SLC Decision**).
3. On 24 May 2016, Hain offered undertakings in lieu (**UILs**) of reference to the CMA for the purposes of section 73(2) of the Act.
4. The CMA gave notice to Hain on 1 June 2016, pursuant to section 73A(2)(b) of the Act, that it considered that there were reasonable grounds for believing that the undertakings offered (the **UILs Notice**), or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering Hain's offer. A copy of that decision is available on the CMA's webpage.<sup>1</sup> As set out in the SLC Decision, the CMA believes that, in the absence of appropriate undertakings, it would be under a duty to refer the Merger for a phase 2 investigation.

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<sup>1</sup> See <https://www.gov.uk/cma-cases/hain-frozen-foods-orchard-house-foods-merger-inquiry>.

5. The text of the SLC Decision is available on the CMA webpage.<sup>2</sup>

## The undertakings offered

6. As set out in the SLC Decision, the CMA 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 (separately and together) in the UK.
7. As set out in the UILs Notice and as subsequently modified, to address the SLC identified by the CMA Hain has offered undertakings to divest its trades and assets in the manufacture and supply of own-label freshly squeezed fruit juice to retail and food service customers, as well as the trades and assets of Hain's other activities, including its branded freshly squeezed fruit juice (but not the Johnson's Juice), own-label non-carbonated citrus drinks and own-label smoothies (the **Divestment Business**), including manufacturing assets, key staff, know-how and customer contracts, as a going concern. The text of the undertakings is available on the CMA webpage (the **Proposed Undertakings**).<sup>3</sup>
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 include the Divestment Business's manufacturing assets at the Headcorn site and a freehold interest in the site.
9. Hain has offered to enter into an agreement for the sale and purchase of the Divestment Business with an upfront buyer, before the CMA finally accepts the Proposed Undertakings. Hain has proposed Multiple Marketing Limited (**MM**) as the potential upfront buyer. This agreement will be conditional on acceptance by the CMA of the Proposed Undertakings, including approval of MM as the buyer of the Divestment Business.
10. In addition to the sale of the Divestment Business, Hain has offered to enter into two manufacturing agreements with the proposed purchaser. The first is an agreement whereby the proposed purchaser will continue to manufacture Hain's ingredients products on a contractual basis for an agreed period on the site of the Divestment Business according to contractual requirements. The second is an agreement whereby the proposed purchaser will continue to

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

manufacture the Hain Johnson's branded freshly squeezed fruit juice and New Covent Garden branded smoothies for an agreed limited period on the site of, and using the equipment of, the Divestment Business according to contractual requirements.

11. The CMA notes that ingredients products and branded freshly squeezed fruit juice may share inputs with own-label freshly squeezed fruit juice. Therefore, in order to prevent Hain from acquiring information about the proposed purchaser's input costs in markets in which Hain and the proposed purchaser compete, these manufacturing agreements will be subject to CMA approval. These agreements will include sufficient safeguards to satisfy the CMA that they will not lead to the transfer of competitively sensitive information between HFF and the Proposed Purchaser. The CMA is considering the suitability of several versions of these agreements, including:
  - (a) toll-manufacturing agreements, in which Hain would supply the fruit raw materials (and potentially other raw materials) necessary for the manufacturing of the toll-manufactured products;
  - (b) co-manufacturing agreements with a fixed initial price, which might be subject to certain automatic price adjustments; and
  - (c) co-manufacturing agreements with a price variation mechanism which would operate through an independent auditor.
12. Finally, Hain has offered, under a transitional services agreement, to provide certain central functions or services for an agreed (short-term) period following completion of the disposal of the Divestment Business to the proposed purchaser to enable a smooth transition of the Divestment Business.

## **CMA assessment**

### ***Suitability of the proposed UILs***

13. The CMA currently believes, subject to responses to the consultation required by Schedule 10 of the Act that the Proposed Undertakings will resolve the SLC identified in the SLC Decision in a clear-cut manner, ie without giving rise

to material doubts about the overall effectiveness of the Proposed Undertakings or concerns about their implementation.<sup>4</sup>

14. The Proposed Undertakings remove the Parties' overlap in the wholesale supply of own-label freshly squeezed fruit juice to retail and food service customers in the UK, and will place MM in an equivalent competitive position in the supply of own-label freshly squeezed fruit juice to that of Hain currently. The CMA also considers that the Proposed Undertakings would be capable of ready implementation, because the Divestment Business is a viable stand-alone business that is capable of being sold.

### ***Suitability of the proposed purchaser***

15. In approving a purchaser, the CMA's starting position is that it must be confident without undertaking a detailed investigation that the proposed purchaser will restore pre-merger levels of competition. The CMA therefore seeks to ensure that:
  - (a) the acquisition by the purchaser remedies, mitigates or prevents the SLC concerned and any adverse effect resulting from it;
  - (b) the proposed purchaser is independent of, and unconnected to, the merging parties;
  - (c) the proposed purchaser has the necessary financial resources, expertise, incentive and intention to maintain and operate the divested business as an effective competitor in the marketplace;
  - (d) the proposed purchaser is reasonably expected to obtain all necessary approvals, licences and consents from any regulatory or other authority; and
  - (e) the acquisition by the proposed purchaser does not itself create an SLC within any market or markets in the UK.<sup>5</sup>
16. MM is based in the UK and has over 30 years of experience in the UK fruit juice industry, initially as an import agent for fruit juice manufacturers in Holland and Belgium, and now as a manufacturer. For its financial year ended 31 December 2014, it generated total revenues of around £43 million. It primarily sells 'From Concentrate' (**FC**) and 'Not From Concentrate' (**NFC**)

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<sup>4</sup> *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).

<sup>5</sup> *OFT1122*, paragraphs 5.25–5.30.

juices through its own brand 'Sunmagic', which it has supplied for over 25 years, and customers' own-labels. MM also has links to a fruit juice bottling plant in Yaxley (Peterborough), which produces ambient stable bottled fruit juice and juice drinks. MM's sister companies include RM Curtis Limited and Eat Natural Limited, which combined supply a portfolio of products targeting healthy living/lifestyles (eg Eat Natural bars and nut and fruit snack packs) to an extensive UK customer base, including both retail and food service customers. It told us that it planned to transfer the distribution and warehousing capabilities of the Divestment Business from Hain to its own existing third-party logistics supplier within a short timeframe.

17. As regards independence, MM does not currently have any structural or financial links with Hain or Orchard. In relation to the ingredients' and branded juice co-manufacturing agreements, which form part of the Divestment Business, the CMA does not consider that these would undermine the independence of MM.
18. As regards financial resources, MM has confirmed to the CMA that it is able to finance the acquisition and had received confirmation from its bank that it had sufficient funds to commit to an acquisition.
19. Given that MM is currently active in the manufacturing and supply of fruit juices and related products, the CMA believes that it is reasonable to expect it to possess already all necessary approvals, licences and consents from any regulatory or other authority.
20. Finally, the CMA considers that the acquisition by MM does not itself create an SLC within any market or markets in the UK.
21. Therefore, subject to responses to this consultation, the CMA currently considers MM to be a suitable purchaser of the Divestment Business.

### **Proposed decision and next steps**

22. For the reasons set out above, the CMA currently considers that the Proposed Undertakings and the purchase of the Divestment Business by MM are, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision and form as comprehensive a solution to these concerns as is reasonable and practicable.
23. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings in lieu of a reference of the Merger for a phase 2 investigation.

The text of the Proposed Undertakings is available on the CMA case page.<sup>6</sup> The Parties will then have to enter into the sales and purchase agreement with MM, conditional only on the CMA's final approval. The final date for a decision is 22 September 2016.

24. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views known to it. The CMA will have regard to any representations made in response to this consultation and may make modifications to the Proposed Undertakings as a result. If the CMA considers that any representation necessitates any material change to the Proposed Undertakings, the CMA will give notice of the proposed modifications and publish a further consultation.<sup>7</sup>
25. Representations should be made in writing to the CMA and be addressed to:

Maxwell Harris  
Mergers Group  
Competition and Markets Authority  
Victoria House  
37 Southampton Row  
London  
WC1B 4AD

Email: [maxwell.harris@cma.gsi.gov.uk](mailto:maxwell.harris@cma.gsi.gov.uk)  
Telephone: 020 3738 6730

**Deadline for comments: 2 September 2016**

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<sup>6</sup> See <https://www.gov.uk/cma-cases/hain-frozen-foods-orchard-house-foods-merger-inquiry>.

<sup>7</sup> Under paragraph 2(4) of Schedule 10 to the Act.