

# Provisional conclusion on one Enterprise Act 2002 merger remedy

3 November 2016

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## Introduction

1. In its [2015/16 Annual Plan](#), the Competition and Markets Authority (CMA) committed to commence a programme of work systematically to review our existing remedies to seek to remove measures that are no longer necessary. As part of this, in April 2015, the CMA launched reviews of 71 structural merger remedies that had been put in place before 2005. These reviews resulted in 51 remedies subsequently being removed.
2. In its [2016/17 Annual Plan](#), the CMA noted that it would build on this work in the coming year, launching further reviews of existing mergers or market remedies. On 14 June 2016, the CMA launched further reviews of merger remedies put in place before 1 January 2006.
3. This notice concerns one merger remedy under the Enterprise Act 2002. The CMA has also published the following today:
  - (a) the CMA's final decisions on seven merger remedy reviews under the Enterprise Act 2002.

## Jurisdiction

4. The CMA has a statutory duty in Schedule 24 of the Enterprise Act 2002 to keep under review undertakings and orders. From time to time, the CMA must consider whether, by reason of a change in circumstances:

- (a) undertakings are no longer appropriate and need to be varied, superseded or released; or
  - (b) an order is no longer appropriate and needs to be varied or revoked.
5. Responsibility for deciding on variation or termination of Orders lies with the CMA.

## Provisional decisions on the remedy

6. The CMA’s provisional decision in relation to the relevant merger remedy is set out in the annexe and described in Table 1 below. Our provisional decision is to release the undertakings.

**Table 1: Undertakings on which the CMA has reached provisional decisions**

<i>Purchaser</i>	<i>Target business</i>	<i>Provisional decision</i>	<i>Annex</i>
Robert Wiseman Dairies plc	Scottish Pride Holdings plc	Release	2

## Consultation on the CMA’s provisional decisions

7. The CMA is consulting on its provisional decision, as described above and in the annex below.
8. This consultation will close on **2 December 2016**. If you wish to respond to this consultation, please contact the CMA as follows:

Peter Hill  
 6<sup>th</sup> Floor  
 Competition and Markets Authority  
 Victoria House  
 37 Southampton Row  
 London WC1B 4AD

Email: [remedies.reviews@cma.gsi.gov.uk](mailto:remedies.reviews@cma.gsi.gov.uk)

9. Following this consultation, the CMA will consider the responses received and the evidence and views presented and will assess the impact of these responses on its provisional decisions before reaching its final decision in each case.

## **Annex 1 – Robert Wiseman Dairies plc / Scottish Pride Holdings plc**

### **Undertakings given by**

1. Robert Wiseman Dairies plc (Wiseman).

### **Jurisdiction**

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2004/2181).

### **Details of the transaction**

3. Wiseman acquired Scottish Pride Holdings in 1997.

### **Monopolies and Mergers Commission (MMC) report published**

4. Robert Wiseman Dairies plc and Scottish Pride Holdings plc, Cm 3504, was published on 29 November 1996.

### **The market concerned**

5. The supply of dairy products.
6. Scottish Pride was formed in 1994 to take over the milk processing activities of the former Scottish Milk Marketing Board as part of the deregulation of the raw milk industry. It produced fresh processed milk and cream, ultra-heat treated milk and cream, and cheese. The company made a pre-tax loss of £4 million in 1995/96 on turnover of £138 million. Its sales had been falling and its financial position was weak.
7. Wiseman and Scottish Pride together accounted for about 10% of wholesale sales of fresh liquid milk, in the UK. Specifically in the area of overlap in Scotland, they accounted for around 80% of wholesale sales of fresh liquid milk, and around 70% of fresh liquid milk sold to what the MMC defined at the time as ‘middle-ground customers’.<sup>1</sup> The MMC found a concern regarding the disparity in size between the merged entity and the next biggest dairy company in Scotland, with the merged entity having around 80% of the supply, compared to 2% for the next largest competitor.
8. The MMC found at the time of the original investigation, that there was scope for raw fresh milk to be traded between Scotland and northern England to provide a chain of substitution linking the two, while for fresh processed milk,

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<sup>1</sup> At the time of its inquiry, the MMC considered ‘Middle-ground customers’ to be those retailers other than the largest eight grocery retailers, and excluding home delivery suppliers.

there was relatively little trade between the two and some evidence that higher prices could be maintained to middle-ground customers in Scotland.

### **Theory of harm**

9. The merger was expected to harm competition in the supply of customers in Scotland and was expected to lead to higher wholesale prices and higher retail prices. The MMC judged that the merger's effects on efficiency and employment did not offset this detriment to competition and therefore concluded that the merger was against the public interest.
10. The MMC noted that the best way to address its concerns would be to maintain two substantial fresh milk processors in Scotland. However, it was clear that Scottish Pride could not continue as an independent company and the prospects of finding an alternative buyer were considered to be low. The MMC considered therefore that prohibiting the merger would be likely to cause disruption and most of Scottish Pride's customers would probably switch in any event to Wiseman.
11. The MMC recommended that Wiseman should submit regular audited reports on its prices to the various categories of customer in Scotland and also recommended that Wiseman should undertake not to acquire any other supplier of fresh processed milk in Scotland without the Director General of Fair Trading's consent.

### **Description of the undertakings**

12. The undertakings (given on 28 February 1997) prohibited Wiseman from directly or indirectly acquiring: (a) any interest in a Milk Supplier; or (b) an interest in any company or other undertaking having control of a Milk Supplier; or (c) other than in the ordinary course of a business, the whole or any part of any assets of a Milk Supplier; or (d) the whole or any part of any undertaking of a Milk Supplier. The company need not comply with the above provided that it provides specified information to the Director General of Fair Trading in order to satisfy him that the proposed acquisition does not further dampen competition.

### **History of the companies since the undertakings were given<sup>2</sup>**

13. Wiseman (company number SC0146494) was renamed Robert Wiseman Dairies Limited on 25 May 2012 and subsequently Muller Wiseman Dairies Limited on 2 July 2015.

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<sup>2</sup> Information in this section is sourced from Companies House unless otherwise stated.

14. In 2012 Robert Wiseman was taken over by Muller Dairy and in 2014 Dairy Crest agreed to sell the assets of its Dairies operations to Muller UK & Ireland Group. Following the acquisition, Muller Wiseman changed its name to Muller Milk and Ingredients. At the same time Muller announced plans to close its East Kilbride plant previously the Robert Wiseman plant.
15. Scottish Pride Holdings plc (company number SC0153067) has been dissolved.

### **Change of circumstances**

16. Since the undertakings came into force, there have been a significant number of structural developments within the milk industry, with several mergers and acquisitions subject to regulatory scrutiny by competition authorities in the intervening years.<sup>3</sup> These changes have altered the competitive environment in the supply of milk in the UK.
17. The CMA considers that there are two changes that are most relevant to this review and the undertakings given. First, that there are now other competing suppliers of milk present in Scotland, including suppliers to middle-ground customers; and second, that as a result of these new competitors, the market share of Muller in Scotland is now lower than at the time of the original transaction.
18. The CMA has found that there are now three large suppliers of fresh liquid milk to middle-ground customers in Scotland. In addition to Muller, these are:
  - (a) Arla, the UK's largest producer of fresh liquid milk, which has opened a dairy/creamery in Lockerbie from which it is able to undertake supplies to middle-ground customers and national retailers in Scotland; and
  - (b) Graham's, which has established itself as a significant provider in Scotland, supplying customers including a number of important middle-ground customers as well as a number of the Scottish outlets of large national grocery retailers.

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<sup>3</sup>Transactions in the UK dairy sector that have been considered by competition authorities include: the European Commission's decision of 2012 in case No COMP/M.6611 – Arla / Milk Link; the OFT's decision of 2007 regarding the Anticipated merger between First Milk Limited and Milk Link Limited; the OFT's decision of 2005 regarding the Anticipated acquisition by Robert Wiseman Dairies plc of the fresh milk business of Scottish Milk Dairies Limited (which was abandoned following a reference to the CC); the OFT's decision of 2005 regarding the Completed acquisition by Dairy Crest Group plc of the dairy business of Midlands Cooperative Society Limited; the OFT's decision of 2004 regarding the Completed acquisition by Milk Link Limited, First Milk Limited and Dairy Farmers of Great Britain Limited of assets of United Milk, namely the Westbury Processing Plant; and the CC's decision of 2003 regarding Arla Foods and Express Dairies plc. Most recently, the CMA's decision concerning Muller UK & Ireland Group / Dairy Crest Group merger inquiry in 2015.

19. As a consequence of the presence of these processors, the CMA has found that the share of supply of Muller in Scotland for middle-ground customers has fallen to around 37%, with Arla having a share of around 17%. When considering the supplies to national chain customers, the changes are even more significant, with Arla having a share of around 40%.<sup>4</sup> The CMA finds that this change represents an improvement in the degree of competition in the relevant area.
20. The CMA also notes that in its most recent merger decision concerning this sector,<sup>5</sup> it did not seek to delineate precise regional boundaries, and chose instead to consider that transaction on a GB-wide basis.
21. The CMA considers that the changes highlighted above concerning increased competition represent changes of circumstances that are relevant to the concerns raised in the original investigation and the undertakings accepted. The CMA considers that the effect of these changes is that the undertakings are no longer appropriate, particularly given the CMA's ongoing role in investigating mergers, irrespective of whether they have been pre-notified to the CMA.

### **Provisional decision**

22. Based on the information available, the CMA's provisional decision is that the undertakings should be released.

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<sup>4</sup> Source Muller UK & Ireland Group.

<sup>5</sup> CMA 2015 decision on Muller UK & Ireland Group / Dairy Crest merger inquiry.