

Anticipated Acquisition by Hain Frozen Foods UK Limited of The Yorkshire Provender Limited

Decision on relevant merger situation and substantial lessening of competition

ME/6675/17

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 20 April 2017. Full text of the decision published on 16 May 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. Hain Frozen Foods UKⁱ (**Hain**) has agreed to acquire The Yorkshire Provender Limited (**Yorkshire Provender**) (the **Merger**). Hain and Yorkshire Provender 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 will cease to be distinct as a result of the Merger, that the share of supply test is met and that accordingly arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
3. In the UK, the Parties overlap (1) in the supply of chilled soup to retail customers and (2) in the supply of chilled soup to food service customers, ie providers of 'out-of-home' eating and institutional catering. The CMA has therefore assessed the impact of the Merger in these two frames of reference. However, it did not need to conclude on the second product frame of reference.
4. The CMA found that the Parties' share of supply is modest with only a small increment in each of the two product areas set out in paragraph 3. The CMA received evidence that suggested that the Parties are not close competitors in

the supply of chilled soups to retail customers, and found that the Parties' products within that frame compete against several other products, both branded and private label. Finally, no third parties raised competition concerns as regards the supply of chilled soup to food service customers.

5. The CMA believes that these constraints, taken together, are sufficient to ensure that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects.
6. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties

7. Hain is a subsidiary of Hain Celestial Group, Incⁱⁱ, a company based in the United States. The Hain Celestial Group, Inc is a producer and distributor of organic and natural food products, such as chilled soups and juices. In the UK, Hain sells chilled soup under its own brands (New Covent Gardenⁱⁱⁱ, Cully & Sully) and private label soup to both retail customers and food service customers. The turnover of Hain Celestial in financial year ending 30 June 2015 was around USD2.7 billion worldwide and around USD735.9 million in the UK.
8. Yorkshire Provender produces and distributes a range of fresh soups, sold under the Yorkshire Provender Brand, and porridge to retail customers and food service customers in the UK. The turnover of Yorkshire Provender in the period of April 2015 to April 2016 was [below £70m] in the UK.

Transaction

9. Hain and the owners of Yorkshire Provender, Terrence^{iv} and Belinda Williams, concluded a share sale agreement on 23 December 2016. Pursuant to this agreement, Hain will acquire all the issued share capital in Yorkshire Provender for a total consideration of around £[~~70m~~].

Jurisdiction

10. As a result of the Merger, the enterprises of Hain and Yorkshire Provender will cease to be distinct.
11. The Parties overlap in the supply of chilled soups to retail customers in the UK, with a combined share of supply of [20-30] % (increment [0-5] %) in

value.¹ The CMA therefore believes that the share of supply test in section 23 of the Act is met.

12. The CMA therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
13. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 13 March 2017 and the statutory 40 working day deadline for a decision is therefore 10 May 2017.

Counterfactual

14. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For anticipated mergers the CMA generally adopts the prevailing 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
15. In this case, there is no evidence supporting a different counterfactual, and the Parties and third parties have not put forward arguments in this respect. Therefore, the CMA believes the prevailing conditions of competition to be the relevant counterfactual.

Frame of reference

16. 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

¹ See Table 1, paragraph 31 below.

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.

Product scope

17. Soups are sold in various forms in the UK including:
- wet ambient soup (e.g. tinned soup, kept in the unrefrigerated section of grocery stores);
 - dry/instant soup (dry ingredients requiring the addition of hot water);
 - chilled soup (e.g. in pots or cartons, kept in the refrigerated section of grocery stores); and
 - frozen soup (requiring thawing and typically the addition of small amounts of water during the heating process).
18. The Parties overlap in the supply of chilled soups to retailers and to food service customers in the UK. The CMA's approach to assessing the product frame of reference is to begin with the overlapping products of the Parties in the narrowest plausible candidate product frame of reference and then to investigate whether this should be widened on the basis, primarily, of demand-side considerations.⁴
19. The Parties have argued that branded and private label chilled soups are in the same product frame of reference, and that food service customers may consider other types of soups, such as ambient soups, as alternatives to chilled soups.

The supply of branded and private label chilled soup

20. In considering the constraint provided by private label chilled soup on branded chilled soup, the CMA has taken into account the following factors⁵:
- (a) **Product characteristics:** photographic evidence provided by the Parties shows that private label soups are sold alongside branded soups, in similar sizes and in similar packaging. The CMA's own research has confirmed this.

⁴ While the boundaries of the relevant product market are generally determined by reference to demand-side substitution alone, the CMA may widen the scope of the market where there is evidence of supply-side substitution, see [Merger Assessment Guidelines](#), paragraph 5.2.17.

⁵ This is consistent with the approach taken in British Foods/Dorset Cereals (ME/6452/14 [Anticipated acquisition by Associated British Foods Plc of Dorset Cereals Limited](#), 2014).

- (b) **Strength of the constraint from private labels across the large retailers:** IRI data provided by the Parties shows that private label has the largest share of supply across the six largest grocery multiples^{6,7}
 - (c) **Consumer preferences:** the Parties provided evidence indicating that customers switch between private label and branded chilled soup.⁸
 - (d) **Pricing:** The Parties also provided evidence that shows private label soup is sold at a range of price points, similar to those offered by branded soups. This is supported by evidence from third parties that indicates that different branded soups compete with different private label soups.
 - (e) **Third party evidence:** several third parties have stated that private label and branded chilled soups compete and that their customers will switch between private label and branded chilled soups, particularly during promotions.
 - (f) **Internal documents:** internal documents provided by the Parties indicate that they consider private label chilled soups as a threat and key competitors.⁹
21. On the basis of the above, the CMA considers private label and branded chilled soups to be in the same frame of reference.

The supply of chilled soup to food service customers

22. The Parties have noted that soup eaten 'out of home' is served ready to eat and the end customer is not aware whether the soup was purchased chilled or ambient. The Parties argue that given this lack of distinction to the end customer, food service customers are free to choose between chilled and ambient providers of soup.
23. The CMA received replies from a number of food service customers, all of whom stated that they only purchase chilled soup. The CMA was unable to gather further evidence in relation to the constraint provided by other types of soup.
24. On a cautious basis, the CMA will consider the supply of chilled soup to food service customers. However, the CMA did not need to conclude on the product frame of reference because it identified no concerns on any basis.

⁶ Tesco, Sainsbury's, Waitrose, Asda, Morrisons and Coop.

⁷ Figure 11.1 in the Merger Notice.

⁸ See below paragraph 36 for a more detailed description of this evidence.

⁹ See for example Annexes 6.4 and 6.5 of the Merger Notice

Geographic scope

25. The Parties argued that markets for consumer food products are generally considered to be national, and that this is the case in the supply of chilled soup to retail and food service customers.
26. The Parties supply to a number of national customers such as Tesco.
27. Retail and food service customers have noted that they purchase chilled soup on a national, and in some cases regional basis. One third party noted that it had previously stocked Yorkshire Provender on a regional basis, before adopting it nationally.
28. Given the above, the CMA considers the geographic frame of reference to be national for both retail and food service customers.

Conclusion on frame of reference

29. For the reasons set out above, the CMA has considered the impact of the Merger in the following frames of reference:
 - The supply of chilled soup to retail customers in the UK
 - The supply of chilled soup to food service customers in the UK

Competitive assessment

Horizontal unilateral effects

30. 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.¹⁰ 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 a substantial lessening of competition in relation to unilateral horizontal effects in the supply of chilled soup to retail customers and to food service customers.

¹⁰ [Merger Assessment Guidelines](#) from paragraph 5.4.1.

The supply of chilled soup to retail customers

Shares of supply

31. The Parties provided estimated shares of supply for the retail supply of chilled soup using IRI and Kantar data. The CMA considers the approach taken by the Parties to be reasonable. These shares of supply are set out in the below table.

Table 1: Shares of supply in chilled soup to retail customers, 2016

Supplier	Value of sales, £, m	Share of supply, %
Private label	[REDACTED]	[60-70]
Hain	[REDACTED]	[20-30]
Yorkshire Provender	[REDACTED]	[0-5]
<i>Parties combined</i>	[REDACTED]	[20-30]
Glorious	[REDACTED]	[5-10]
Other brands	[REDACTED]	[0-5]
<i>Total</i>	[REDACTED]	<i>100.0</i>

Source: Parties' estimates based on IRI and Kantar data

32. The CMA notes that Hain also supplies chilled soups to [retailer] and to [retailer] for their private label ranges. Based on the sales of [retailer] and [retailer] private label chilled soups, the Parties estimate that these sales increase Hain's share of supply by an additional [0-5]%.

Closeness of competition

33. The Parties argued that their brands do not compete closely because they are targeted at different segments: Yorkshire Provender is considered to be a premium brand and New Covent Garden is targeted at the mid-level of the market. The Parties also submitted that each of their products compete more closely with private label chilled soups.
34. Several third parties that responded to the CMA's merger investigation, confirmed that the Yorkshire Provender and Hain brands (New Covent Garden in particular) target different customer groups. New Covent Garden is seen as the market leader whilst Yorkshire Provender is a higher quality

brand, focussed on loyal end customers. In some circumstances, Yorkshire Provender was seen as more of a regional brand by third parties.

35. On the basis of the above, the CMA believes that the Parties' product are differentiated to a certain extent.

Competitive constraints

36. The CMA found that the constraint that private label chilled soups pose on the Parties brands is demonstrated by data submitted by the Parties. This evidence showed that:
- (a) De-listing of branded soups led to customer switching to private label soups. For example, [evidence of delisting event] and the Kantar sales data shows that customers switched to [retailer] private label soups. The Parties provided other similar evidence in relation to the delisting of branded soup by [retailer].
 - (b) Customers switched between private label and branded soups when one product was on promotion.
37. Third party evidence largely supports the Parties' evidence. Several retail customers observed that customers switch between private label and branded chilled soups depending on what product is on promotion. One retail customer noted that it removed one of the Parties' brands in order to expand its private label offering.
38. A competitor provided a contrasting opinion stating that it supplies both private label and branded soups to a supermarket retailer. It submitted that when one type of chilled soup was on promotion it did not witness a cannibalisation in sales of the other. The CMA notes that the supplied supermarket offers many different branded and private label soups sourced from several producers. The CMA considers it is likely that the above mentioned third party competitor's branded soup is a closer alternative to the more premium own labels of the supermarket (supplied by another producer) and as such that competitor may not witness significant switching between its own brand and the supermarket's own label soup. The CMA also notes that that particular supermarket stated that customers will switch between private label and branded soups.
39. In addition, other third parties (both suppliers and retail customers) that responded to the CMA's merger investigation also said that their private labels compete with the Parties. One retail customer noted that its private label competes with Yorkshire Provender (it does not carry Hain products) and two other retail customers stated that Yorkshire Provender competes with their

premium own label and New Covent Garden competes with their own core private label products. This constraint may also be increasing, as a number of retail customers intend to expand their private label chilled soup business.

40. Retail customers also noted a constraint from other branded suppliers of chilled soups, although these third parties differed in their views as to the strength of these alternative brands. A number of retail customers noted that Glorious is a medium strength competitor, with a recognised brand due to strong promotional activity. Soupologie was generally seen as weaker brand, with little brand awareness, although two third parties believed it to be a stronger competitor with a high degree of brand awareness amongst their customers.
41. Three suppliers and two retail customers raised concerns about the impact of the Merger on competition and all of them noted that the loss of Yorkshire Provender would remove a competitor and leave Hain in control of three brands of chilled soup.
42. The majority of third parties that responded to the CMA's merger investigation did not raise concerns and one customer submitted that it does not believe the Merger will affect its ability to source branded chilled soups.
43. The CMA notes that whilst Hain would control three brands, the Cully & Sully brand is generally seen as weak by customers, as there is little awareness of this brand among customers. This is evidenced by low sales of this brand relative to others (£[REDACTED] in the last year). In relation to the New Covent Garden and Yorkshire Provender brands, the CMA notes a degree of differentiation in these two brands (see paragraph 35 above).
44. On the basis of the above, the CMA believes that the Parties face significant competitive constraints from branded and private label chilled soups, and are not each other's closest competitors.

Conclusion on the supply of chilled soup to retail customers

45. As set out above, the CMA believes that the Parties' products do not compete closely, have a relatively low combined share of supply with a small increment post-Merger, that the Parties face a strong, and possibly growing (see paragraph 39 above), constraint from private label chilled soup and face constraints from other suppliers of branded chilled soup.
46. Therefore, the CMA believes that the Merger will not give rise to a realistic prospect of an SLC in the supply of chilled soup to retail customers.

Chilled soup to food service customers

47. The Parties provided evidence from Euromonitor that estimates that 10,100 tonnes of chilled soup was provided to food service customers in the UK in 2016.¹¹
48. Hain estimated that it supplies [X] tonnes of soup to food service customers, either directly or via a distributor, and Yorkshire Provender estimates that it supplies [X] tonnes of soup to food service customers either directly or via a distributor.
49. The CMA estimates this gives the Parties a combined share of supply of [10-20]% with an increment of [0-5]%.
50. Food service customers that responded to the CMA's merger investigation did not raise any competition concerns in relation to the Merger. Food service customers also noted a number of alternative suppliers such as Zorba and The Soup Company.

Conclusion on the supply of chilled soup to food service customers

51. Given the low combined shares and small increment, and lack of customer concerns, the CMA believes that the Merger will not give rise to a realistic prospect of an SLC in the supply of chilled soup to food service customers.

Conclusion on horizontal unilateral effects

52. As set out above, the CMA believes that, in all frames of reference, the Parties have a low combined share of supply and that other competitors will continue to provide a sufficient constraint on the Parties post-Merger.
53. Accordingly, the CMA believes that the Merger does not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in relation to the supply of chilled soup to retail customers and food service customers.

Barriers to entry and expansion

54. 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 substantial lessening of competition. In assessing whether entry or expansion might

¹¹ Annex 1.1(b) of the Merger Notice.

prevent a substantial lessening of competition, the CMA considers whether such entry or expansion would be timely, likely and sufficient.¹²

55. However, the CMA has not had to conclude on barriers to entry or expansion as the Merger does not give rise to competition concerns on any basis.

Countervailing buyer power

56. The Parties submitted that most of their customers possess significant countervailing buyer power.
57. The CMA notes that third party customers have explained as to how they can manage supplier relationships in the event of a price increase, by for example, by reducing promotion support, and placing time and energy into supporting and sourcing alternative brands.
58. However, given the conclusions above, the CMA did not consider it necessary to conclude on countervailing buyer power.

Third party views

59. The CMA contacted customers and competitors of the Parties. Several customers raised concerns regarding the reduction in the number of suppliers of branded chilled soup.
60. Third party comments have been taken into account where appropriate in the competitive assessment above save for the concerns discussed below.
61. A number of customers raised concerns in relation to the future direction of the Yorkshire Provender business. These customers noted the strong Yorkshire provenance of the business, the strength of the brand, and their good relationships with the business. These customers were concerned these aspects of the business may be lost with Merger. The CMA does not consider these to be competition concerns as it does not expect the merger to change the business's incentives to maintain these distinctive strengths.

Decision

62. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

¹² [Merger Assessment Guidelines](#), from paragraph 5.8.1.

63. The Merger will therefore **not be referred** under section 33(1) of the Act.

Stephanie Canet
Director Mergers
Competition and Markets Authority
20 April 2017

ⁱ Paragraph 1, the reference to 'Hain Frozen Foods UK' should read 'Hain Frozen Foods UK Limited'.

ⁱⁱ Paragraph 7, first sentence, the reference to 'Hain Celestial Group, Inc' should read 'The Hain Celestial Group, Inc.'.

ⁱⁱⁱ Paragraph 7, third sentence, the reference to 'New Covent Garden' should read 'New Covent Garden Soup Co.'.

^{iv} Paragraph 11, first, the reference to 'Terrence' should read 'Terrance'.