# Anticipated acquisition by Origin UK Operations Limited of assets comprising the business of Bunn Fertiliser Limited

# Decision that undertakings might be accepted

**ME/6667/17**

The CMA's decision under section 73A(2) of the Enterprise Act 2002 that undertakings might be accepted, given on 28 July 2017. Full text of the decision published on 10 August 2017.

## Introduction

1. Origin UK Operations Limited (**Origin)** has agreed to acquire assets comprising the business of Bunn Fertiliser Limited (**Bunn**) (the **Merger**). Origin and Bunn are together referred to as the **Parties**.

2. On 14 July 2017, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this 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 the Parties of the SLC Decision. However, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision in order to allow the Parties the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) 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 21 July 2017, the Parties 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 the Parties 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 supply of nitrogen, phosphorus, potassium and complex fertilisers within 150 miles of the Parties' Montrose depots. To address this SLC, Origin has offered to give undertakings in lieu of a reference to divest the assets and transfer the staff and customer and supply contracts that comprise the operations of Bunn in Montrose (the **Proposed Undertakings**). Under the Proposed Undertakings, the Parties have 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

8. 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.[1]

9. The CMA believes 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 the Proposed Undertakings will result in the divestment of the entirety of Bunn's operations in Montrose to a purchaser to be approved by the CMA which may thereby enable a new competitor to begin blending and supplying fertiliser to customers in competition with Origin's pre-existing

[1] *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).

operations in Montrose. As such, the Proposed Undertakings may result in replacing the competitive constraint provided by Bunn in Montrose that would otherwise be lost following the Merger.

10. The CMA currently believes that the Proposed Undertakings are capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns. The CMA also believes at this stage that the Proposed Undertakings may be capable of ready implementation, in particular because the assets comprising the operations of Bunn in Montrose will include its blending and warehousing facilities, the transfer of staff and its customer and supplier contracts.

11. The Upfront Buyer Condition means that the CMA will only accept the Proposed Undertakings after the Parties have 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 the assets comprising the divestiture package do not constitute an existing standalone business since certain functions (including sales and marketing) of Bunn's business in Montrose are conducted centrally by Bunn and these functions are not currently included in the proposed divestment package. The suitability of the Proposed Undertakings is therefore likely to depend on the ability of the nominated buyer to carry out those central functions for the divested Montrose assets in order to compete effectively in central/eastern Scotland.[2]

12. For these reasons, the CMA currently thinks 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.

13. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things, third party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA. In particular, before ultimately accepting the Proposed Undertakings, the CMA must be confident that the nominated buyer is effective and credible such that the competitive constraint provided by Bunn in Montrose absent the Merger is replaced to a sufficient extent.

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[2] See *OFT1122*, paragraphs 5.31–5.37, and *CMA2*, paragraph 8.34.

## Consultation process

14. 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.[3]

## Decision

15. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by the Parties, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 25 September 2017 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 20 November 2017 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 33(1) and 34ZA(2) of the Act.

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[3] *CMA2*, paragraph 8.29.