

# Anticipated acquisition by Refresco Group N.V. of the traditional non-alcoholic beverage business of Cott Corporation Inc.

## Decision that undertakings might be accepted

ME/6705/17

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.

### Introduction

1. Refresco Group N.V. (**Refresco**) has agreed to acquire the traditional non-alcoholic beverage business of Cott Corporation Inc. (**Cott**) (the **Merger**). Refresco and Cott are together referred to as the **Parties**.
2. On 3 January 2018, 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 Refresco 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 10 January 2018, Refresco 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 Refresco 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 manufacturing and packaging for FC Juices/juice drinks in APET in the UK.
8. To address this SLC, Refresco has offered to give undertakings in lieu of a reference to divest Cott's APET facility in Nelson, Lancashire, including the freehold for the land and buildings, the APET production line, all associated facilities and personnel responsible for APET production in the UK and all existing APET UK customer contracts and revenues<sup>1</sup> (**the Divestment Business**). Refresco has also committed to undertake immediate investments at the Divestment Business, with an estimated cost of £1.4m, to ensure that the Divestment Business can operate independently of other Cott facilities located near that site. Refresco has also committed to invest an additional £0.83m to upgrade the Divestment Business to enhance performance and reliability(**the Proposed Undertakings**)<sup>1</sup>.
9. Under the Proposed Undertakings, Refresco has 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

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<sup>1</sup> [X]

restores competition to the level that would have prevailed absent the merger.<sup>2</sup>

11. 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 are intended to remove the increment resulting from the merger and that the new owner of Cott's APET facilities will take over existing Cott contracts and therefore continue to provide a similar range of products that are currently offered by Cott and will also have the capacity to take on additional contracts. As such, the Proposed Undertakings may result in replacing the competitive constraint provided by Cott that would otherwise be lost following the Merger.
12. Accordingly 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
13. The Upfront Buyer Condition means that the CMA will only accept the Proposed Undertakings after Refresco 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 the Divestment Business is not currently a standalone business.<sup>3</sup>
14. For this reason, 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.
15. 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 Cott absent the Merger is replaced to a sufficient extent.

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<sup>2</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>3</sup> See *OFT1122*, paragraphs 5.31–5.37, and *CMA2*, paragraph 8.34.

## Consultation process

16. 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.<sup>4</sup>

## Decision

17. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by Refresco, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 14 March 2018 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 14 May 2018 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.

**Rachel Merelie**

**Executive Director, Markets and Mergers**

**Competition and Markets Authority**

**17 January 2018**

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<sup>i</sup> The Divestment Business includes only the existing APET UK customer contracts and revenues associated with this facility

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<sup>4</sup> [CMA2](#), paragraph 8.29.