Anticipated acquisition by Barry Callebaut AG of certain business assets of Burton’s Foods Limited

Decision on relevant merger situation and substantial lessening of competition

ME/6771/18

The CMA’s decision on reference under section 33(1) of the Enterprise Act 2002 given on 8 November 2018. Full text of the decision published on 27 November 2018.

Please note that [✄] indicates figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

SUMMARY

1. Barry Callebaut AG (**Barry Callebaut**) has agreed to acquire certain assets of the industrial chocolate production business (the **Target Business**) of Burton’s Foods Limited (**Burton’s**) (the **Merger**). Barry Callebaut and Burton’s are together referred to as the **Parties**.

2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of Barry Callebaut and the Target Business is an enterprise; that these enterprises will cease to be distinct as a result of the Merger; and that the share of supply test is met. Accordingly, arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

3. The Parties both buy semi-finished cocoa products (cocoa liquor, cocoa butter and cocoa powder) in the EEA. The Parties also both supply industrial chocolate to UK customers, typically food manufacturers that produce finished chocolate products.

4. Regarding the purchase of semi-finished cocoa products in the EEA, the Parties’ combined shares are below 20% and the CMA has identified no basis for competition concerns.

5. Regarding the supply of industrial chocolate in the UK, the CMA has found that the Parties do not compete closely. For [✂], Burton's has not actively competed to supply industrial chocolate. Barry Callebaut's customers confirmed that they did not generally consider Burton's to be a viable alternative.

6. Accordingly, the CMA believes that the Merger does not give rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects in (i) the purchase of semi-finished cocoa products in the EEA, or (ii) the supply of industrial chocolate in the UK.

7. The Merger will therefore **not be referred** under section 33(1) of the Enterprise Act 2002 (the **Act**).

ASSESSMENT

Parties

8. Barry Callebaut is the Swiss-based holding company of the Barry Callebaut Group. It manufactures cocoa and industrial chocolate products. It does not produce chocolate for consumption by end users. Barry Callebaut's turnover in 2017 was £5.4 billion, of which approximately £[✂] was generated in the UK.

9. Burton's is a UK-headquartered manufacturer and distributor of sweet and savoury biscuits and baked snacks. Burton's brands include Maryland, Jammie Dodgers, Wagon Wheels and Fish 'n' chips. Burton's operates three biscuit production facilities, located in Edinburgh, Blackpool, and Llantarnam. It also operates a chocolate refinery in Moreton, Merseyside.

10. In 2017, Burton's used [✂]% of the industrial chocolate it produced to make Burton's biscuits. A further [✂]% was used to make [✂], which Burton's manufactures for [✂], the owner of the [✂] brand. Burton's internal sales of industrial chocolate (including for use in [✂]) amounted to £[✂] in 2017. [✂].

11. The Target Business comprises all the assets and records required by Burton's to carry on its industrial chocolate production business, including machinery, engineering spares, IP, and the relevant customer records.

Transaction

12. Under the Merger, Barry Callebaut will buy the Target Business for £[✂], including the employees directly engaged in the Target Business (excluding any corporate employees of Burton's currently located at the Moreton facility).

13. The Parties will also enter into a long-term frame supply agreement (**FSA**). Under the FSA, Barry Callebaut will supply 12,000 metric tons (**MT**) of industrial chocolate and chocolate compound (a lower-cost form of industrial chocolate that contains vegetable oil) to Burton's each year. This quantity of industrial chocolate and chocolate compound is close to the amount Burton's used to make Burton's biscuits (excluding [✂]) in 2017.

14. Barry Callebaut's rationale for the Merger is to secure UK demand for industrial chocolate and [✂]. Burton's said that the Merger will allow it to focus on the manufacture and sale of biscuits, while also securing its long-term supply of industrial chocolate.

Jurisdiction

15. The Parties submitted that each of Barry Callebaut and the Target Business is an enterprise, and that these enterprises will cease to be distinct as a result of the Merger.

16. The CMA believes that the Target Business constitutes an enterprise because it comprises the assets (physical or otherwise), customer records and employees associated with Burton's activities to supply industrial chocolate.[1] For these reasons, the CMA believes that the Merger will result in two enterprises ceasing to be distinct.

17. The Parties primarily overlap in supplying industrial chocolate in the UK, with a combined share of supply (by MT) of [60-70]% (with an increment of [0-5]% from Burton's).[2]

18. 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.

19. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 24 September 2018. The statutory 40 working day deadline for a decision is therefore 16 November 2018.

[1] *Merger Assessment Guidelines* (OFT1254/CC2), September 2010, Section 3.2. 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).
[2] The CMA has considered Burton's sales of industrial chocolate for the purposes of manufacturing [✂] to be part of Burton's supply to the merchant market (see paragraph 52) rather than internal self supply. This is because [✂].

Counterfactual

20. 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.[3]

21. [✄] Burton's to consider two options besides the Merger: (i) supplying additional customers in the merchant market, and (ii) selling the Target Business.

22. The CMA does not consider the first option as realistic. Since [✄], Burton's had not pursued any additional industrial chocolate customers, [✄]. Moreover, most customers that responded to the CMA's questionnaire did not consider Burton's as an alternative supplier of industrial chocolate.

23. With regard to the second option, Burton's said that it had engaged in discussions with another industrial chocolate supplier about a possible sale, but that these discussions were only at a very early stage. The CMA did not find any evidence that this alternative buyer would have created a more competitive situation than the prevailing conditions of competition.

24. The CMA therefore believes that the appropriate counterfactual against which to assess the effects of the Merger is the prevailing conditions of competition.

Frame of reference

25. Market definition provides a framework for assessing the competitive effects of a merger. It 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. There can be constraints on merging 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.[4]

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[3] *Merger Assessment Guidelines*, from paragraph 4.3.5.
[4] *Merger Assessment Guidelines*, paragraph 5.2.2.

26. The Parties both buy semi-finished cocoa products (comprising cocoa powder, cocoa butter and cocoa liquor). Semi-finished cocoa products are made by grinding and processing cocoa beans. They are one of the main ingredients for making industrial chocolate.

27. As well as buying semi-finished cocoa products, Barry Callebaut produces semi-finished cocoa products: (i) for its downstream industrial chocolate production; and (ii) to sell to the merchant market.[5] Burton's does not produce any semi-finished cocoa products, whether for internal use or to sell to the merchant market.

28. The Parties both supply industrial chocolate and chocolate compound in the UK.

29. Barry Callebaut sells all the industrial chocolate it produces to the merchant market. Burton's supplies most of the industrial chocolate it produces internally for its downstream biscuit production business. It sells a small quantity to the merchant market.

30. Barry Callebaut produces approximately [✂] MT of chocolate compound (a lower-cost form of industrial chocolate that contains vegetable oil) per year, all of which it supplies to the merchant market. Burton's produces a small amount of chocolate compound, which it supplies entirely to its downstream business. It does not sell chocolate compound on the merchant market. Given the small quantities produced by Burton's, and given that there is no overlap on the merchant market, the CMA has identified no basis for competition concerns in relation to the supply of chocolate compound. For this reason, the supply of this product is not discussed further in this Decision.

31. Accordingly, the Parties' activities overlap in: (i) the purchase of semi-finished cocoa products; and (ii) the supply of industrial chocolate. The product and geographic scope of these overlaps are considered in the sections below.

Purchase of semi-finished cocoa products

Product frame of reference

32. In *Barry Callebaut/Petra*, *Cargill/ADM*, *ADM/Schokinag*, and *Cargill/KVB*, the European Commission (**EC**) concluded that each of the three semi-finished cocoa products (cocoa powder, cocoa butter and cocoa liquor) constitutes a

[5] Burton's is one of Barry Callebaut's customers for semi-finished cocoa products. It bought [✂] MT of cocoa powder from Barry Callebaut in 2017. Given the small volume involved, the CMA does not believe this could lead to vertical competition concerns, and this limited relationship is not discussed further in this Decision.

separate relevant product market.[6] The Parties have not contested this segmentation.

33. In *Cargill/ADM* and *Ecom/Armajaro*, the EC also considered a potential segmentation between standard and non-standard[7] semi-finished cocoa products – but left that question open because competition concerns did not arise on that basis.[8] In the present case, Burton's does not buy non-standard semi-finished cocoa products, so the CMA has also found it unnecessary to conclude on this possible segmentation.

34. The Parties told the CMA that they do not consider the captive market (ie internal self-supply) to be within the frame of reference for the supply (or purchase) of semi-finished cocoa products. This is consistent with the EC's assessment in *ADM/Schokinag, Barry Callebaut/Petra*, *and Cargill/KVB*.[9]

Geographic frame of reference

35. The Parties submitted that the market for the purchase of semi-finished cocoa products is EEA-wide. In *ADM/Schokinag* and *Ecom/Schokinag,* the EC concluded that the geographic markets for semi-finished cocoa products are not narrower than the EEA. This was because sourcing patterns for most customers are EEA-wide and there are no significant price differences within the EEA.[10]

36. Both Barry Callebaut and its primary competitor (Cargill) confirmed that they source a considerable proportion of the semi-finished cocoa products used in their UK operations from countries in the EEA other than the UK.

Conclusion on frame of reference for the purchase of semi-finished cocoa products

37. For the reasons set out above, the CMA has assessed the impact of the Merger in separate frames of reference for the purchase of each of cocoa liquor, cocoa butter, and cocoa powder, in each case in the EEA.

[6] EC decision of 17 July 2015 on the case M.7408 – Cargill/ADM Chocolate Business (Cargill/ADM), paragraph 45; EC decision of 6 June 2013 on the case COMP/M.6872 – Barry Callebaut/Petra Foods – Cocoa Ingredients Division (Barry Callebaut/Petra), paragraph 21; EC decision of 29 April 2011 on the case COMP/M.6132 – Cargill/KVB, paragraph 24; EC decision of 27 May 2009 on the case COMP/M.5431 - ADM/Schokinag, paragraph 31.
[7] Non-standard cocoa products are made with cocoa beans grown under additional conditions to standard cocoa beans.
[8] Cargill/ADM, paragraph 45; EC decision of 23 May 2014 on the case COMP/M.7120 – Ecom Agroindustrial Corporation/Armajaro Trading (Ecom/Armajaro), paragraph 50.
[9] ADM/Schokinag, paragraph 36; and Cargill/KVB, paragraph 32.
[10] ADM/Schokinag, paragraphs 35-38; Ecom/Armajaro, paragraphs 60-66.

38. The Parties' combined shares in each of these frames of reference do not exceed 20%, and the increment from the Target Business is less than [5]%. The CMA has identified no basis for competition concerns in these frames of reference. As a result, the CMA does not believe that the Merger will give rise to an SLC as a result of horizontal unilateral effects in the purchase of any semi-finished cocoa product in the EEA. Accordingly, the purchase of semi-finished cocoa products is not considered further in this Decision.

Supply of industrial chocolate

Product frame of reference

39. The Parties submitted that no segmentation of the supply of industrial chocolate is necessary because no competition concerns arise from the Merger under any possible segmentation. They also submitted that captive supply should be excluded.

40. In *Cargill/ADM*, the EC considered that the market for industrial chocolate could be segmented as follows: (i) liquid/solid; (ii) dark/white/milk; and (iii) standard/non-standard.[11] On both the demand and supply sides, the EC found that there is limited substitutability between solid and liquid industrial chocolate, as well as between dark, white, and milk industrial chocolate. However, the EC did not conclude on either segmentation because it did not change the outcome of its competitive assessment.[12]

41. In the present case, the CMA has similarly left open the question of whether the frame of reference for the supply of industrial chocolate should be narrowed according to these possible segmentations because no competition concerns arise on any basis (as set out below).

42. In *Cargill/ADM*, the EC also assessed whether captive supply should be included. The EC found that insourcing and market entry by vertically integrated chocolate producers did not impose a significant competitive constraint on the parties. It therefore considered only supply to the merchant market in its competitive assessment.[13]

43. The CMA will generally include self-supply if it would be profitable for such supply to be diverted into the merchant market in response to a small but significant non-transitory increase in prices.[14] However, in the present case, the CMA did not find evidence that this would be the case. A large majority of

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[11] Cargill/ADM, paragraphs 38-42 and 283.
[12] Cargill/ADM, paragraph 42.
[13] Cargill/ADM, paragraph 283.
[14] *Merger Assessment Guidelines*, paragraph 5.2.20.

industrial chocolate competitors and customers indicated that they would be unlikely to increase or start in-house production in response to a 5% rise in the price of merchant supplies. Therefore, for the purposes of this case, the CMA did not include captive supply in the frame of reference for industrial chocolate.

Geographic frame of reference

44. The EC has not assessed the impact of any merger related to the supply of industrial chocolate using a market definition narrower than national.

45. The Parties submitted that the impact of the Merger should be assessed using a UK-wide frame of reference.

46. The CMA did not see any reason to adopt a geographic frame of reference wider than the UK. Customers and competitors generally said that not having production facilities in the UK rendered a potential supplier less attractive because of transport costs and the importance of prompt deliveries.

47. The CMA also did not find evidence to support a geographic frame of reference narrower than the UK. No customer indicated that a supplier was unsuitable because of the location of its UK facilities.

Conclusion on frame of reference for the supply of industrial chocolate

48. For the reasons set out above, the CMA has assessed the impact of the Merger in the supply of industrial chocolate in the UK.

Competitive assessment

49. 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 to degrade quality on its own and without needing to coordinate with its rivals.[15] Horizontal unilateral effects are more likely when the merging parties are close competitors.

50. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to horizontal unilateral effects in the supply of industrial chocolate in the UK. In doing so, the CMA considered the Parties' shares of supply, the closeness of competition between the Parties, and the remaining competitive constraints.

[15] *Merger Assessment Guidelines*, from paragraph 5.4.1.

Shares of supply

51. The Parties submitted that their combined 2017 share of supply of industrial chocolate in the merchant market is [60-70]%, with an increment of [0-5]% arising from the Merger (from the Target Business).

52. However, in contrast to the estimates provided by the Parties, the CMA believes that [✄]. Following this adjustment, the Parties have a combined share of supply of [60-70]%, with a small increment from the Merger of [0-5]%.[16]

53. Barry Callebaut's main competitor is Cargill, which has a share of supply of [10-20]%. The remaining competitors all have individual shares of supply below [10]%.

Closeness of competition

54. In assessing the closeness of competition between the Parties, the CMA has considered: (i) the degree to which the Parties have historically competed for customers; (ii) third-party evidence; and (iii) the Parties' internal documents.

Competition for customers

55. As noted in paragraph 10 above, [✄]% of Burton's production of industrial chocolate is used to produce (i) its own biscuits, and (ii) [✄] for [✄]. Burton's sells a small proportion of its industrial chocolate output to [✄] – [✄] legacy customers that it has supplied for a long time (approximately 20 years in the case of [✄]).

56. Since [✄], Burton's has not sought new customers and has not actively competed in the supply of industrial chocolate, [✄].

57. The CMA identified two instances of industrial chocolate customers switching from Burton's to Barry Callebaut. But in neither case did the CMA see evidence that Burton's has been constraining Barry Callebaut:

    a) [✄].

    b) [✄].

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[16] When the captive market is included, the Parties have a combined share of supply of [20-30]% (with an increment of [0-5]%).

Third-party evidence

58. The majority of Barry Callebaut customers that responded to the CMA's questionnaire said that the Parties do not compete in the supply of industrial chocolate. Most said that they would not consider Burton's an alternative supplier to Barry Callebaut. Two of these customers did not know that Burton's supplied the merchant market and other customers questioned Burton's ability to supply sufficient volumes or types of industrial chocolate. Illustrative comments included:

- *'do they [Burton's] sell industrial chocolate?'*;
- '*'Burton's would not be considered an alternative supplier as it does not supply the open market'*; and
- *'Burton's would not be considered an alternative supplier because of unknown capacity. It's never been approved by […], nor approached as a potential supplier.'*

59. With one exception, none of Barry Callebaut's customers stated that they had been in contact with Burton's regarding the supply of industrial chocolate. The one exception stated that it had found Burton's price uncompetitive.

60. A minority of customers said that they considered the Parties to compete. However, these customers generally did not provide evidence of the Parties competing with each other to win customers. For example:

a) Although one customer said that the Parties were competitors, it also said it would not consider Burton's as an alternative supplier because it was not aware it sold industrial chocolate.

b) Another customer said it considered Burton's as a viable competitor only if it increased its scale. The customer also noted that it did not have concerns with the Merger.

c) One customer explained that the Parties may compete, but that they did not have the same scale.

61. Barry Callebaut's customers unanimously considered Cargill to be Barry Callebaut's closest competitor.

62. Cargill told the CMA that it did not view Burton's as a close competitor.

Internal documents

63. Barry Callebaut's internal documents show that it has not tracked the activities of Burton's as a supplier of industrial chocolate. Burton's is not mentioned in any Barry Callebaut internal document relating to the competitive landscape for the supply of industrial chocolate. [✂].

Conclusion on closeness of competition

64. Overall, the CMA has found that the Parties do not compete closely in the supply of industrial chocolate in the UK. For [✂] Burton's has not actively competed to supply industrial chocolate and Barry Callebaut's customers confirmed that they did not generally consider Burton's to be a viable alternative.

Remaining competitive constraints

65. The Parties submitted that Burton's industrial chocolate customers will have sufficient alternative suppliers post-Merger who could meet their industrial chocolate demands. Alternative UK-based suppliers include Cargill and Britannia Superfine, while a number of large suppliers located in Northern Europe also supply the UK market, including Cémoi, Puratos Group (Belcolade), and Schokinag.

66. Customers and competitors consistently indicated that Cargill and Barry Callebaut are each other's closest competitors, while other competitors, like Puratos and Britannia Superfine, exert a more limited constraint on Barry Callebaut.

67. Some Barry Callebaut customers expressed concern that some of the alternatives to Cargill and Barry Callebaut may not be able to supply the volumes needed at their required quality standards. However, these concerns were not affected by the Merger. None of Burton's industrial chocolate customers expressed any concerns with the Merger.

Conclusion on horizontal unilateral effects

68. For the reasons set out above, the CMA believes that the Merger does not give rise to a realistic prospect of an SLC as a result of horizontal unilateral effects in the supply of industrial chocolate in the UK.

Barriers to entry and expansion

69. Entry, or the expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC.

70. In the present case, 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.

Decision

71. Consequently, the CMA does not believe that it is or may be the case that the Merger may be expected to result in an SLC within a market or markets in the UK.

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

Andrew Wright
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Competition and Markets Authority
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