Anticipated joint venture between ForFarmers N.V. and Boparan Private Office Limited

DECISION TO REFER

ME/7007/22

The CMA's decision to refer under section 33 of the Enterprise Act 2002 given on 9 January 2023. Full text of the decision published on 15 February 2023.

Please note that [✂] 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. On 30 June 2022, ForFarmers N.V. (together with its subsidiaries, **ForFarmers**), via ForFarmers UK Holdings Limited, and Boparan Private Office Limited (part of **Boparan**, the group of companies operated by, and under the common ownership of, Ranjit Boparan and his family interests, through Boparan Private Office Limited and Boparan Holdco Limited), via Amber REI Holdings Limited entered into a series of agreements to establish a joint venture (the **JV**) with the purpose of merging their respective businesses and operations in the production of animal nutrition products, namely ForFarmers UK Limited and 2 Agriculture Limited (the **Merger**). ForFarmers and Boparan are together referred to as the **Parties**.

2. On 21 December 2022, 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 arrangements 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**).[1]

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, in order to allow

[1] See ForFarmers/Boparan JV merger inquiry.

the Parties the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, 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.

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 before the end of the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for a Phase 2 investigation pursuant to sections 33(1), and in accordance with section 34ZA(2) of the Act, if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 30 December 2022); if the Parties indicated before this deadline that they did not wish to offer such undertakings; or if the undertakings offered were not accepted.

5. On 30 December 2022, the Parties offered the CMA the following undertakings (the **Proposed Undertakings**):

   (a) The divestment of [✂] mill, including all equipment currently located at the [✂] mill that is necessary to operate the mill with the current production lines, any vehicles required to deliver the volumes of feed being divested (see below), and dedicated employees, together with:

      (i) third-party meat poultry feed volumes supplied from [✂];

      (ii) at the option of the purchaser, additional [✂] feed volumes currently supplied from [✂] mill;

      (iii) if required by the CMA, the JV would enter in a toll milling agreement with the divestment purchaser, under which the divestment purchaser would provide toll milling services in relation to the supply to the JV of [✂]; and

      (iv) the working capital associated with the volumes being divested (the **East Anglia Divestment**).

   (b) The divestment of [✂] mill, including all equipment currently located at the [✂] mill that is necessary to operate the mill with the current production lines, any vehicles required to deliver the volumes of feed being divested (see below), and dedicated employees, together with:

      (i) all third-party meat poultry feed volumes supplied from [✂];

      (ii) if required by the CMA, additional third-party meat poultry feed volumes currently supplied from [✂]; and

(iii) the working capital associated with the volumes being divested, (the **NE&NW Divestment**).

(c) The East Anglia and the NE&NW Divestments could be sold to a single divestment purchaser or to two separate divestment purchasers.

(d) As part of the NE&NW Divestment, the divestment purchaser would enter a toll milling agreement with the JV for an initial [✂] period (extendable by a further [✂] years), under which the divestment purchaser would provide toll milling services in relation to the supply to the JV of [✂] feed volumes.

(e) The Parties would, at the option of the divestment purchaser(s), also enter into certain transitional arrangements with the divestment purchaser(s) to provide:

(i) cover for any employees that support multiple mills including the [✂] and who do not form part of the East Anglia and NE&NW Divestments;

(ii) supply arrangements (including in relation to raw materials, energy and fuel); and

(iii) access to back-office functions (eg corporate services and IT systems).

Assessment of the Proposed Undertakings

6. The CMA concluded in the SLC Decision that it is or may be the case that the Merger may be expected to result in an SLC as a result of:

(a) Horizontal unilateral effects in the supply of meat poultry feed at a local level within the catchments centred on the Parties' Burston, Bury, Llay and Preston mills (the **SLC Areas**); and

(b) Vertical effects in the downstream supply of chicken in the UK arising from the foreclosure by the JV of poultry meat producers (including growers) competing with Boparan at a local level within the SLC Areas.

7. Section 73(2) of the Act states that 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 may be expected to result from it, accept undertakings in lieu of a reference (**UILs**) to take such action as it considers appropriate. When considering whether to accept UILs in Phase 1 of its investigation, the CMA has an obligation under the Act to have regard to the need to achieve as comprehensive a

solution as is reasonable and practicable to the SLC and any resulting adverse effects (section 73(3) of the Act).[2]

8. Accordingly, in order to accept UILs, the CMA must be confident that all of the potential competition concerns that have been identified in its Phase 1 investigation would be resolved by means of the UILs without the need for further investigation.[3] The need for confidence reflects the fact that, once UILs have been accepted, section 74(1) of the Act precludes a reference after that point. UILs are therefore appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear-cut and capable of ready implementation.[4] This clear-cut requirement has two separate dimensions:

   (a) in relation to the substantive competition assessment, the clear-cut requirement means that there must not be material doubts about the overall effectiveness of the remedy; and

   (b) in practical terms, the requirement for remedies to be capable of ready implementation means that any UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted.[5]

9. The CMA's starting point in deciding whether to accept UILs offered is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).[6]

10. The CMA generally prefers structural remedies, such as divestiture, over behavioural remedies in part because structural remedies rarely require monitoring and enforcement once implemented.[7] In identifying a divestiture package, the CMA will take, as its starting point, divestiture of all or part of the acquired business, because restoration of the pre-merger situation in a market or markets subject to an SLC will generally represent a straightforward remedy.[8] For a divestment package, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap.[9] The CMA may consider a

[2] Mergers remedies (CMA87), December 2018, paragraph 3.30.
[3] CMA87, December 2018, paragraph 3.27
[4] CMA87, December 2018, paragraph 3.27.
[5] CMA87, December 2018, paragraph 3.28.
[6] CMA87, December 2018, paragraph 3.30.
[7] CMA87, December 2018, paragraph 3.46.
[8] CMA87, December 2018, paragraph 5.6.
[9] CMA87, December 2018, paragraph 5.7.

divestiture drawn from the acquiring business if this is not subject to greater risk in addressing the SLC.[10] The CMA will generally prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, independently of the merger parties, to the divestiture of part of a business or a collection of assets. This is because the divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.[11]

11. In the present case, the CMA has material doubts that the Proposed Undertakings would effectively remedy the competition concerns identified in the SLC Decision. The CMA considers that the Proposed Undertakings do not offer a clear-cut solution to the competition concerns identified in the SLC Decision, for reasons including the following:

    (a) The Parties have not offered to divest all the relevant operations pertinent to the SLC Areas. That is, the Parties have not offered to divest all the overlapping mills (including all of the operations of those mills) of either Party in the SLC Areas, which would have been a clear-cut solution. This may not be of concern if the proposed divestiture package can, to the satisfaction of the CMA, address the SLC.[12]

    (b) However, the CMA is concerned that the scope of the Proposed Undertakings may not allow the divestment purchaser(s) to operate as effective competitor(s) in the market. Each of the mills currently proposed for divestment produces [✂], with such volumes [✂] contributing to the viability and efficiency of these mills at present. [✂]. The Proposed Undertakings include only some of the [✂] volumes currently supplied from [✂] mill and a time-limited toll milling agreement in relation to the [✂] mill. The CMA recognises that, as part of the Proposed Undertakings, third-party meat poultry feed volumes currently produced at [✂] mills would be moved to [✂] (ie the divestment mills), respectively. However, the CMA is concerned that the feed volumes offered to be divested as part of the East Anglia and NE&NW Divestments (excluding those attached to the toll milling agreement discussed separately below) would not fill a sufficient proportion of the divestment mills' capacity to ensure that these continue to operate as efficiently as they would if retained [✂] (ie absent the Merger). In relation to the East Anglia Divestment, the CMA further notes that there would be the additional risk considering that [✂] would account for a significant proportion of the feed volumes divested with [✂] mill.

[10] CMA87, December 2018, paragraph 5.6.
[11] CMA87, December 2018, paragraph 5.12.
[12] CMA87, December 2018, paragraph 5.7.

(c) The CMA considers the toll milling agreement that comprises a significant component of the NE&NW Divestment to be a behavioural remedy. The CMA observes that the meat poultry feed volumes offered to be divested together with the [✂] and those volumes would fill less than [✂]% of the mill's capacity (even including the additional third-party meat poultry feed volumes currently supplied from [✂]). As a result, the profitability and viability of the [✂] mill would be heavily dependent on the volumes produced for the JV under the toll milling agreement, while the [✂] mill would also be competing with the JV in the supply of meat poultry feed. This dependence presents a risk to the effectiveness of the Proposed Undertakings, as the JV may have an incentive adversely to affect this competition through its conduct in relation to the toll milling agreement. In particular, the CMA considers that there are material risks relating to the specification of the agreement, such as the terms not being able to account either for future market changes or all potential means of circumvention. Based on the Parties' submissions, it remains unclear to the CMA whether such risks could effectively be managed as part of the commercial negotiations between the JV and the divestment purchaser and, irrespective of this, the CMA is concerned that it may not be in a position to monitor or directly enforce against the toll milling agreement. Furthermore, the time-limited nature of the toll milling agreement does not match the enduring nature of the SLC.

(d) In addition, the CMA notes that it has some concerns around the willingness of customers to transfer from [✂] to the divestment purchaser(s). In particular, it is unclear to the CMA that national customers (which source feed [✂] on a multi-mill basis) would be willing to split their volumes across two or more separate suppliers in the local areas around the mills. It is also unclear that customers of [✂] mill would be willing to be served from a mill materially further away (the [✂]) and there is a risk that they could be worse off as a result (eg owing to transport costs increasing). The CMA therefore considers that there is a risk that the divested customers would not have the incentive to remain with the divestment purchaser(s). The CMA also considers that the complexity of obtaining customers' consent to transfer their business presents a risk to the practical implementation of the Proposed Undertakings.

12. The CMA therefore considers there is a significant risk that the Proposed Undertakings would not effectively restore competition to the level that would have prevailed absent the Merger. The CMA considers the Proposed Undertakings are not clear-cut and would not fully address the competition concerns identified in the SLC Decision. The CMA does not consider that these issues could be addressed

through further modifications of the Proposed Undertakings as part of the Phase 1 process.

Decision

13. For the reasons set out above, after examination of the Proposed Undertakings, the CMA does not believe that they would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.

14. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept UILs.

15. Therefore, pursuant to sections 33(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a Phase 2 investigation.

Sorcha O'Carroll
Competition and Markets Authority
9 January 2023