

Anticipated Acquisition by Boparan Private Office Limited (via 2 Agriculture Limited) of ForFarmers UK Limited's Burston and Radstock feed mills

Decision to refer

ME/7106/24

The Competition and Markets Authority's decision to refer under section 22 of the Enterprise Act 2002 given on 20 November 2024. Full text of the decision published on 11 December 2024.

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.

1. INTRODUCTION

1. Boparan Private Office Limited (via 2 Agriculture Limited) (together referred to as **Boparan**) has agreed to acquire ForFarmers UK Limited's Burston and Radstock feed mills (**ForFarmers**) (the **Merger**). Boparan and ForFarmers are together referred to as the **Parties** and, for statements relating to the future, the **Merged Entity**.
2. On 6 November 2024, 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**).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

¹ See [Boparan / ForFarmers \(Burston and Radstock mills\) merger inquiry - GOV.UK](#)

allow 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 13 November 2024); 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 13 November 2024, Boparan (via 2 Agriculture Limited) offered to the CMA the following undertaking (the **Proposed Undertaking**):
 - (a) the Stoke Ferry mill will remain operational until the earlier of: (i) 31 December 2034 (ie a period of at least 10 years); or (ii) the date at which Boparan opens a new feed mill at Snetterton; or (iii) if the CMA confirms that, following increases in meat poultry feed production capacity within East Anglia, the commitment is no longer required;
 - (b) Boparan will continue to operate the Stoke Ferry mill as a meat poultry feed mill and will ensure that the Stoke Ferry mill's Universal Feed Assurance Scheme (**UFAS**) status is maintained, which will include being audited at least once a year by independent auditors as well as being subject to unannounced spot audits pursuant to the UFAS. Boparan will as soon as practicable forward to the monitoring trustee the results of the annual UFAS audit, together with reports following any spot audits; and
 - (c) for the period specified at paragraph 5(a), Boparan will ensure that at least £[<] per annum is dedicated to capital expenditure and maintenance at the Stoke Ferry mill.
6. In addition to the above, Boparan (via 2 Agriculture Limited) also offered to commit to use its best endeavours to:
 - (a) produce a minimum volume of [150-200] kilo-tonnes (kT) of meat poultry feed at the Stoke Ferry mill per annum (the **Stoke Ferry Production Commitment**);
 - (b) produce a minimum volume of [600-650]kT of meat poultry feed at the Stoke Ferry, Burston and Bawsey mills (on a combined basis) per annum (the **Total Production Commitment**); and

- (c) supply, at a minimum, the following volumes to third party customers from the Stoke Ferry, Burston and Bawsey mills (on a combined basis) (the **Third-Party Supply Commitment**):
 - (i) In 2025 (Year 1) at least [100-150]kT of meat poultry feed;
 - (ii) In 2026 (Year 2) at least [100-150]kT of meat poultry feed; and
 - (iii) In 2027 (Year 3) and all subsequent years at least [100-150]kT of meat poultry feed.

2. ASSESSMENT OF THE PROPOSED UNDERTAKING

- 7. 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) loss of competition in the supply of meat poultry feed to third-party customers in a number of local areas; and
 - (b) vertical effects in the downstream supply of poultry meat, as the Merger could lead to foreclosure of poultry meat producers (including growers) in the same local areas.
- 8. 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
- 9. Accordingly, in order to accept UILs, the CMA must be confident that all of the potential competition concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation. 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.³ Further:
 - (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

² Merger remedies guidance ([CMA87](#)), December 2018, paragraph 3.30.

³ [CMA87](#), paragraph 3.27.

(b) in practical terms, the requirement for remedies to be capable of ready implementation means that ‘UILs of such complexity that their implementation is not feasible within the constraints of the phase 1 timetable are unlikely to be accepted’.⁴

10. In the present case, the CMA assessed the effectiveness of the Proposed Undertaking to address the SLCs identified in the SLC Decision and whether the Proposed Undertaking is capable of ready implementation. Having carefully considered the Proposed Undertaking, the CMA does not believe that it is a comprehensive and clear-cut solution to the concerns identified in the SLC Decision and that, in addition, the Proposed Undertaking poses significant specification, circumvention, distortion, and monitoring and enforcement risks as set out below.

2.1.1.1 Effectiveness of the Proposed Undertaking to address the SLCs identified in the SLC Decision

11. 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.⁵

12. At phase 1, the CMA is generally unlikely to consider that a behavioural undertaking will be sufficiently clear-cut to address the identified competition concerns as it is less likely to address the SLC at source by restoring rivalry (unlike a structural remedy) and is more likely to create significant costly distortions in market outcomes and requires monitoring and enforcement which can reduce its effectiveness. Moreover, the CMA’s experience (and that of its predecessor, the OFT) is that devising a workable and effective set of behavioural commitments within the context of a short phase 1 timetable is difficult.⁶

13. The CMA will generally only use behavioural remedies as the primary source of remedial action where (i) viable structural options are not available, and / or (ii) the SLC is expected to have a short duration.⁷ In the present case, the CMA considers that structural remedies are available, and that the SLC will not be of a short duration. Despite this, the CMA has assessed whether the Proposed Undertaking would effectively remedy the competition concerns identified in the SLC Decision. Following its assessment, the CMA has significant doubts that the Proposed Undertaking would effectively remedy the competition concerns identified in the SLC Decision.

⁴ [CMA87](#), paragraph 3.28.

⁵ [CMA87](#), paragraphs 3.27 – 3.28 and 3.30 – 3.31.

⁶ [CMA87](#), paragraphs 3.46 and 3.32.

⁷ [CMA87](#): paragraph 7.2.

14. First, because its primary focus is on keeping Stoke Ferry operational, the CMA has doubts that the Proposed Undertaking fully addresses the SLCs identified. The CMA's SLCs result from Boparan taking ownership of Burston (as opposed to an alternative purchaser), in addition to Stoke Ferry closing. As set out in the SLC Decision, the CMA considers that both consequences of the Merger reduce total capacity and spare capacity available to third parties. Therefore, based on the CMA's analysis, the Proposed Undertaking does not restore the level of total and spare capacity for supply to third parties to the level which would occur in the counterfactual.
15. Second, the CMA considers that the Proposed Undertaking is contingent on three material assumptions which the CMA considers to be too uncertain:
- (a) With respect to the commitment of £[redacted] million per annum dedicated to capital expenditure and maintenance at the Stoke Ferry mill, it is not clear to the CMA how effective this proposed expenditure would be at keeping Stoke Ferry operational and sustaining the required capacity, particularly given this figure is significantly lower than the amount historically spent⁸ (and the amount forecast to be needed) to maintain Stoke Ferry. Evidence submitted to the CMA by Boparan during the investigation suggests that Boparan would need to spend £[redacted] million in capital expenditure over three years 'just to keep the [redacted]' at Stoke Ferry.⁹ Moreover, Boparan submitted to the CMA in response to the Issues Letter that the relevant costs in the scenario where output at Stoke Ferry is reduced to [150-200]kT per annum would be c. £[redacted]m per annum.¹⁰
- (b) With respect to the Third-Party Supply Commitment described in paragraph 6(c) above, the CMA considers that it is not clear that this commitment is sufficient. The CMA notes that Boparan submitted in the Proposed Undertaking that it delivered [100-150]kT to third parties in 2023 from Bawsey and Stoke Ferry but failed to include the level of current third-party supply/capacity from Burston. In addition, the CMA considers that it is not clear whether the stated volume commitments are sufficient for the duration of the Proposed Undertaking, given expected increases in demand.¹¹ Moreover, the volume increases for third-party supply under the Proposed Undertaking do not apply after year three.
- (c) With respect to seeking to maintain the UFAS accreditation, the CMA considers that this would be insufficient to guarantee that Boparan will operate Stoke Ferry to industry standards in the absence of sufficient

⁸ Capital expenditure and maintenance at Stoke Ferry has exceeded £[redacted] million in each of the last three years. Parties' response to the Issues Letter, dated 9 October 2024, slide 26.

⁹ Boparan internal document, Annex 8.004 to the FMN, 14 March 2024, page 2.

¹⁰ Parties' response to the Issues Letter, dated 9 October 2024, slide 23.

¹¹ As noted in the SLC Decision at paragraph 157(c), demand for poultry feed is expected to rise year-on-year.

incentives to do so. The CMA notes, in this regard, the Health & Safety Executive notice Boparan received with respect to Stoke Ferry, as well as the [X] at Stoke Ferry experienced during the CMA's phase 1 investigation.

16. Finally, the CMA considered Boparan's submission that the Stoke Ferry break even volume is [150-200]kT, meaning that it would be incentivised to supply at least [50-100]kT to third-party customers for the site to break even. The CMA considers that:
- (a) [50-100]kT is less than the supply at Stoke Ferry for third-party customers today (approximately [100-150]kT);
 - (b) The CMA has not been provided with the methodology or assumptions used to calculate these numbers;
 - (c) Even if the methodology adopted by the Parties is sound, Boparan may be incentivised to produce less than [150-200]kT at Stoke Ferry (and to supply less than [50-100]kT to third parties) if doing so means that it can successfully foreclose poultry meat producers; and
 - (d) The CMA notes also that Boparan's Stoke Ferry Production Commitment is to use its best endeavours to produce such an amount and that its compliance with this commitment may be difficult to enforce.
17. On this basis, the CMA considers there are material doubts about the overall effectiveness of the Proposed Undertaking and whether all of the competition concerns that have been identified in its investigation would be resolved by means of the Proposed Undertaking. Because the CMA does not consider that the Proposed Undertaking is effective at resolving the SLCs, it has not separately considered whether the Proposed Undertaking would be capable of ready implementation. However, it notes that remedies of this complexity are typically difficult to implement readily.

2.1.1.2 Key risks

18. Behavioural remedies seek to change aspects of business conduct from what may be expected, based on businesses' incentives and resources.¹² In the present case, the CMA has identified a number of risks that may further limit the effectiveness of the Proposed Undertaking:
- (a) **Specification risk.** As set out above, the Proposed Undertaking, to have any chance of being effective, relies on several assumptions (eg regarding future demand and the capital expenditure and maintenance). The CMA considers

¹² [CMA87](#), paragraph 7.4.

that these assumptions are inherently very uncertain, meaning that the Proposed Undertaking necessarily lacks specificity.

- (b) **Circumvention risk.** The lack of specificity described above also means that the Proposed Undertaking poses a significant circumvention risk. For instance, and as mentioned above, the CMA considers it unlikely that there could be a clear framework for assessing whether Boparan has indeed pursued best endeavours to supply the required volumes to third-party customers. This means that there is an inherent risk that Boparan could circumvent the Proposed Undertaking by deliberately falling below its volume commitments if it was in its best commercial interests to do so, or by altering the price or degrading the quality of its service to third parties.
- (c) **Enforcement and monitoring risks.** As a consequence of the circumvention and specification risks set out above, the CMA is concerned that it would be difficult for the CMA to determine that a breach has occurred. Moreover, the CMA notes that the Proposed Undertaking is likely to place a considerable monitoring burden on the CMA, notwithstanding the monitoring trustee's assistance. The CMA considers this to be the case because it, alongside the MT, would need to regularly monitor whether Boparan is on track to meet its volume requirements and continuously assess (in the event of a potential shortfall) whether Boparan is indeed pursuing best endeavours to meet its volume requirements, over a significant number of years.
- (d) **Distortion risks.** The CMA considers that the Proposed Undertaking poses a significant distortion risk, particularly where Boparan's incentives and business strategy are concerned. For instance, the Proposed Undertaking is likely to delay Boparan's decision to build the Snetterton facility, which is currently planned to have twice Stoke Ferry's current capacity. Any delay in its construction is likely to adversely impact spare capacity in the market to supply meat poultry feed to independent customers in East Anglia.

2.1.1.3 *Conclusion on Proposed Undertakings*

- 19. The CMA therefore does not believe that the Proposed Undertaking would effectively restore competition to the level that would have prevailed absent the Merger or adequately remedy the SLC's adverse effects.

DECISION

20. For the reasons set out above, after examination of the Proposed Undertaking, the CMA does not believe that it 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.
21. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.
22. 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.

Joel Bamford
Competition and Markets Authority
20 November 2024