COMPLETED ACQUISITION BY NUFARM CROP PRODUCTS UK LIMITED OF AH MARKS HOLDINGS LIMITED

Statement of issues

The reference

1. Our terms of reference require the Competition Commission (CC) to consider the completed acquisition of all the shares of AH Marks Holdings Ltd (AH Marks) by Nufarm Crop Products UK Limited, a wholly-owned subsidiary of Nufarm UK Limited whose ultimate parent company is Nufarm Limited, a company listed on the Australian Stock Exchange (together, Nufarm).

2. Before the transaction, both parties supplied 2,4-D and MCPA phenoxy acids in the form of technical acids, manufacturing concentrates and formulated herbicides. They also supplied manufacturing concentrates and formulated herbicides based on other phenoxy acids (ie, MCPP-p, 2,4DP-p, MCPB and 2,4DB).

3. The inquiry group (the Group) must decide:

   (a) whether a relevant merger situation has been created; and

   (b) if so, whether the creation of that situation has resulted in or may be expected to result in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.

4. While this is a relatively small merger, small mergers can do considerable harm to consumers. Accordingly, the CC intends to focus on the key issues (which it currently sees principally as the supply of 2,4-D and MCPA) in a proportionate way, and only extend its investigation if it finds evidence of other problems. The Group will consider the following issues.

Market definition

5. The herbicide supply chain comprises: (i) the production of technical acids, which are (ii) processed into manufacturing concentrates. These are then (iii) further processed into formulated products (by formulators or mixers). The formulated product is then (iv) distributed to the end-users, who are principally farmers.

Technical acids

6. With regard to MCPA and 2,4-D technical acids, the Group will determine: whether the relevant product markets are no wider than each single technical acid, ie MCPA and 2,4-D; whether indirect constraints from substitute products at the formulated product stage are sufficient to widen the product market(s); whether there is scope for supply-side substitution from manufacturers of other technical acids or other related products; and whether the appropriate geographic market for the supply of technical acids to UK customers is wider than the UK.

Manufacturing concentrates

7. With regard to manufacturing concentrates, the Group will determine: whether the relevant product markets are no wider than each single manufacturing concentrate, ie MCPA, 2,4-D etc; whether indirect constraints from substitute products at the formulated product stage are sufficient to widen the product market(s); whether there is scope for supply-side substitution from manufacturers of other manufacturing concentrates or other related products; and whether the appropriate geographic market for the supply of manufacturing concentrates to UK customers is wider than the UK.

Formulated products (herbicides)

8. With regard to formulated products, the Group aims to decide if the relevant product markets are no wider than each single ‘straight’ herbicide (ie MCPA straight herbicide, 2,4-D straight herbicide etc) and whether any segmentation amounts to distinct product markets for the supply of formulated products. Possible segmentations include: by format of supply (ie bulk/packaged); by customer (ie mixer/distributor); by end customer’s use (ie agricultural (cereals/grassland/linseed)/lawn and gardens); by spectrum of weeds treated; or by effectiveness of product.

9. The Group will consider whether there is scope for supply-side substitution from manufacturers of other formulated products or other related products and whether the appropriate geographic market for the supply of formulated products to UK customers is wider than the UK.

Assessment of the competitive effects of the merger

10. The Group will consider the possible competitive effects of the merger within each of the relevant markets it identifies, compared with the counterfactual situation (ie the situation that would have arisen in the short to medium term, had the merger not occurred).

Counterfactual

11. To determine the appropriate counterfactual against which to assess the merger, the Group will consider what is likely to have happened in the relevant market(s) absent the merger. Options include: AH Marks remaining an independent and viable business, being acquired by another party, or ceasing trading. If the Group thinks that AH Marks would have ceased trading, it will consider what would have happened to AH Marks’s assets and customer relationships.

Theories of harm

12. To focus analysis of the competitive effects of the merger, the Group has so far identified two possible ways in which the merger might result in an SLC that could apply to the supply of each phenoxy-based product which it will investigate further. Its main interest is currently in 2,4-D and MCPA.

13. These theories of harm are not mutually exclusive, and their identification does not mean that the Group has reached any conclusions.

14. The theories of harm identified by the Group to date are:

(a) *Unilateral horizontal effects.* The Group will consider whether the reduction in the number of suppliers of each of MCPA and 2,4-D technical acids as a result of the merger might be expected to create or increase market power at the technical acid level of the supply chain. It may extend its inquiry to other technical acids if there is evidence of strong potential competition. It will also consider the downstream levels of the supply chain (ie each of the phenoxy manufacturing concentrates and formulated products). Its concern is that an increase in market power could lead to higher prices, or lower levels of service or innovation in the UK than would otherwise be the case.

(b) *Unilateral vertical effects.* The Group will consider whether the merger might lead to the foreclosure of any downstream competing business (ie mixers and intermediaries) for any phenoxy-based formulated product, thereby creating or increasing market power in any relevant market which may also have implications for competition at other levels of the supply chain, ultimately leading to higher prices, or lower levels of service or innovation in the UK than would otherwise be the case.

15. The identification of these theories of harm does not preclude an SLC being identified on another basis following further work by us or the receipt of additional evidence.

Related competition issues

16. Among the issues the Group will consider when deciding whether any of the theories of harm set out above in relation to phenoxy-based products are likely to be realized (and whether the merger may therefore be expected to result in an SLC in any relevant market compared with the counterfactual situation) are:

(a) the extent of competition between Nufarm and AH Marks before the merger;

(b) the ability and incentive of other existing or potential competitors to undermine any price increases or reductions in service levels by Nufarm following the merger;

(c) the extent of barriers to entry or expansion in the relevant market(s) (in particular applicable EC and UK regulation);

(d) customer-related matters such as:

(i) the ease with which customers can switch between suppliers of phenoxy technical acids and manufacturing concentrates;

(ii) the ease with which distributors and end customers can switch between suppliers of phenoxy-based herbicides (formulated products);

(iii) the ease with which distributors and end customers can switch to alternative herbicides (formulated products);

(iv) how prices paid by customers are determined;

(v) the relative importance to customers of price and non-price factors (such as product specification, reliability and speed of supply and equipment compatibility); and

(vi) the extent of buyer power in the relevant market(s);

(e) the effect of any capacity constraints in technical acid and manufacturing concentrate production and packaging; and

(f) whether the merger is likely to give rise to efficiency gains, and if so, whether these will enhance rivalry in the relevant market(s).

Possible remedies and relevant customer benefits

17. Should the Group conclude that the anticipated merger may be expected to result in an SLC, it will consider whether and, if so, what, remedies might be appropriate, and will issue a further statement.

18. In any consideration of possible remedies, the Group will take into account whether any relevant customer benefits might be expected to arise as a result of the merger and, if so, what these benefits are likely to be and which customers would benefit. Customer benefits are benefits to customers at any point in the chain of production and distribution and are therefore not limited to final consumers.