

REFERENCE RELATING TO THE COMPLETED ACQUISITION BY NUFARM LIMITED OF AH MARKS HOLDINGS LIMITED

Notice of possible remedies under Rule 11 of the Competition Commission Rules of Procedure

Introduction

1. On 29 August 2008, the Office of Fair Trading (OFT) in exercise of its duty under section 22(1) of the Enterprise Act (the Act) referred to the Competition Commission (CC) for investigation and report the completed acquisition by Nufarm Crop Products UK Limited (Nufarm) of AH Marks Holdings Limited (AH Marks).
2. In its provisional findings on the reference announced on 10 December 2008, the CC inquiry group (the Group) concluded provisionally that: (i) the transaction has resulted in the creation of a relevant merger situation; and (ii) the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in the markets for MCPA and MCPP-p in the UK. The Group expects that the merger will lead to prices being higher than would otherwise be the case in each of the above markets.
3. This notice sets out the actions which the Group considers might be taken by the CC, including any recommendations it might make for action on the part of others, for the purpose of remedying the SLC and any resulting adverse effects identified in the provisional findings and invites comments on possible remedies (see note (i)).

Criteria

4. In choosing appropriate remedial action, the Group 'shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'.¹ When deciding on an appropriate remedy, the Group will consider the effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. Between two remedies that the Group considers equally effective, it will choose that which imposes the least cost or is least restrictive. For completed mergers, the CC will not normally take account of the costs or losses that will be incurred by the merged parties as the result of a divestiture remedy.²

Possible remedies on which views are sought

5. The Group invites views on the following remedies and whether they would address the expected SLC effectively, either alone or in combination.

¹Section 35 (4) of the Enterprise Act.

²CC8; Merger Remedies: Competition Commission Guidelines November 2008, paragraph 1.10.

Divestiture

6. In identifying a divestiture package, the CC will take as its starting point divestiture of all or part of the acquired business. In defining the scope of a divestiture package, the CC normally seeks 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. This may comprise a subsidiary or a division or the whole of the business acquired.³
7. The Group believes that the divestiture of the entire assets and operations of AH Marks would be an effective remedy for the SLC, as it would restore the competitive situation absent the merger, it contains all relevant operations and is a viable stand-alone business. The Group will consider whether any other form of divestiture would be effective in remedying the SLC that it has provisionally found. The Group invites views on the following issues:
 - whether the divestiture of the entire phenoxy business of AH Marks, but excluding its inhibitors business, would be an effective remedy and whether this would constitute a viable stand-alone business;
 - whether the divestiture of a smaller package incorporating only AH Marks's assets and operations relating to MCPA and MCPP-p would be an effective remedy. In particular, whether such a package would be of sufficient scale to be a viable stand-alone business and if not, what additional assets or other requirements would need to be included;
 - whether a divestiture package covering only UK sales would be viable or whether such a package would also need to include EU or worldwide sales; and
 - whether any such partial divestiture is practicable given the level of integration of the AH Marks Wyke site.
8. The Group also invites views on possible suitable purchasers for any of the divestiture packages described above. In general, as described in the CC's guidance on remedies,⁴ the CC takes the view that a suitable purchaser should be independent of the main parties, have the resources, expertise and incentive to maintain and develop the divested operation as a viable and active competitor, and would not be likely to create competition concerns as a result of the divestiture.

Enabling measures to facilitate new entry

9. The Group has provisionally concluded that access to protected Annex II data is the main barrier to entry in the product markets in the UK. The Group is considering whether requiring Nufarm to grant access to its Annex II data would be effective in remedying the SLC and invites views in this regard.
10. In relation to MCPP-p the Group notes that it is due to come off data protection in June 2009. The Group also notes that Nufarm and AH Marks are the only members of the MCPP-p Task Force. The Group considers that, if the granting of data access is found to be an effective remedy (either alone or with other remedies), it would need to take effect immediately following the Group's final decision to have a practical benefit.

³Ibid, paragraphs 3.6–3.7.

⁴Ibid, paragraphs 3.15–3.17.

11. In relation to MCPA the Group notes that the protected data is currently owned by the MCPA Task Force, the members of which are AH Marks, Nufarm and Dow AgroSciences, and that the data protection period expires in May 2011.
12. In relation to both MCPA and MCPP-p the Group invites views on whether access to Annex II protected data alone is sufficient to remedy the SLC or whether there are other assets which would need to be divested (eg formulated product registrations) and/or behavioural undertakings (eg toll manufacturing or supply agreements, or informational requirements) that would also need to be given to ensure that granting data access was effective in facilitating entry and restoring the competition that has been lost as a result of the merger.

Behavioural remedies to control outcomes

13. Price controls, or undertakings to enter into supply and wholesale toll manufacturing agreements on specific terms are also potential remedies. Though these would not address the SLC directly, they could, in principle, mitigate its adverse effects.
14. Price controls are subject to several significant disadvantages in relation to their effectiveness and costs.⁵ The Group recognizes the difficulties in implementing a price control in this context, including:
 - the difficulty in specifying and achieving an appropriate price level, given that prices are typically negotiated, differ between customers and may vary over time as costs change;
 - the different levels at which prices would need to be controlled, ie technical acid, manufacturing concentrate and formulated product; and
 - the potential complexity of such a remedy, the market distortions it may create and the costs and practical difficulties of monitoring compliance and enforcement.

Other measures

15. The Group will consider any other practicable remedies—structural or behavioural—that are proposed in order to address the expected SLC and any resulting adverse effects.

Relevant customer benefits

16. The Group will have regard to the effects of remedial action on any relevant customer benefits within the meaning of section 30 of the Act arising from the merger situation. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services. A benefit is only a relevant customer benefit if the CC believes that: (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
17. The Group welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits.

⁵[Ibid, paragraph 4.30.](#)

Next steps

18. The main parties are requested to provide any views in writing, including any practical alternative remedies they wish the Group to consider, by 22 December 2008 (see note (i)).
19. A copy of this notice will be posted on the CC website. Other interested parties are requested to provide any views in writing, including any other practical remedies they wish the Group to consider, by 22 December 2008.

Peter Freeman
Group Chairman
10 December 2008

Note

- (i) This notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the provisional findings announced on 10 December 2008. The Group's findings may alter in response to the comments it receives on its provisional findings, in which case the Group may consider other possible remedies, if appropriate.