

## Summary

1. On 12 October 2004, the Office of Fair Trading (OFT) referred the completed acquisition by Napier Brown Foods PLC (NBF) of James Budgett Sugars Ltd (JBS) to the Competition Commission (CC) for investigation and report. The reference was made under section 22 of the Enterprise Act 2002 (the Act). We are required to publish our final report by 28 March 2005.
2. NBF is the largest distributor of sugar in the UK that is not also a sugar producer. It was incorporated on 18 July 2003 as a holding company, initially to acquire Napier Brown & Company Limited, a distributor of sugar in the UK, Garret Ingredients Ltd, a supplier of sugar, dairy products blends and associated ingredients to the food industry, and Sefcol Ingredients Ltd, a supplier of value-added sugar and nut products. JBS is the second largest non-producing distributor of sugar in the UK. On 7 July 2004 NBF acquired from ED&F Man Holdings Limited (ED&F Man) and Greencore Group plc (Greencore) the entire issued share capital of JBS.
3. As a result of the transaction, NBF and JBS ceased to be distinct. The UK turnover of JBS exceeded £70 million, so the turnover test set out in section 23(1)(b) of the Act was satisfied. We therefore conclude that a relevant merger situation had been created.
4. The supply of sugar within the UK takes place within the context of the EU sugar regime, established in 1968 as part of the Common Agricultural Policy. This involves a system of national quotas and price support that has been extensively criticized for a lack of competition, distortions in the market, high prices for the consumers and users, and its effect on the world market, particularly in relation to developing countries. British Sugar plc (British Sugar) holds the UK quota for production of

sugar from beet, and Tate & Lyle PLC (Tate & Lyle) is the sole UK producer of preferential sugar from cane.

5. The current European Council Regulation<sup>1</sup> governing the sugar regime covers the period until 30 June 2006, and on 23 November 2004 the European Commission announced that it would bring forward proposals for future legislation in May or June 2005. These proposals are expected to incorporate significant reforms, although there remains uncertainty over the details of the new regime and its timetable for implementation, and considerable divergence of view on the eventual implications for different EU countries and companies within individual countries. We therefore assessed the implications of the merger under existing circumstances, whilst taking into account changes already occurring in anticipation of reform.
6. Sugar is sold in various forms which, for convenience, can be divided into three broad categories: white granulated sugar, liquid sugar and speciality sugars. Differences in packaging and branding for supply to industrial users and for retail appear to be sufficient to enable different prices to be charged to the two groups, and so constitute separate product markets. JBS supplies sugar to industrial users only. Supply-side substitutability led us to conclude that different types of sugar do not constitute separate product markets for industrial users. Problems with technical feasibility of substitution, economic viability of substitution and regulatory restrictions on substitution, led us to conclude that other sweeteners do not form part of the same product market.
7. Imports of sugar sold into Great Britain by suppliers in other EU member states comprise around 5 per cent of sugar in the British industrial market and have shown no discernible trend over recent years. It appears that imports from other EU

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<sup>1</sup>Council Regulation (EC) No 1260/2001 of 19 June 2001. 32001R1260.

countries are subject to a variety of constraints, of which the most important is the strategy of British Sugar in pricing to ensure that no sustainable financial incentive exists for the import of material volumes of sugar into its domestic market. British Sugar is acknowledged as the price leader, and under this strategy the threat of imports essentially imposes an upper bound on sugar prices in Great Britain. It appears to us that sugar prices in Great Britain are higher than those prevailing on the Continent, and that this pricing position has been sustainable over a period of time without causing imports to grow beyond their observed low level. This led us to conclude that imports of sugar to Great Britain by other EU sugar producers have so far exerted an insufficient constraint on sugar suppliers in Great Britain for us to conclude that the geographic market is wider than Great Britain. We noted recent attempts by some Continental sugar producers to increase sales in Great Britain. But, in view of the success so far of British Sugar's pricing strategy, we decided that it is too soon to say whether such attempts will be successful in practice, and/or be sufficient to force prices in Great Britain down to those prevailing in neighbouring Continental countries.

8. We concur with the view in previous decisions by the European Commission that Northern Ireland is not part of the same geographic market as Great Britain, due to different supply conditions which reflect transport costs and the role of sugar imported from the Republic of Ireland.
9. These considerations on the product market and the geographic market lead us to the view that the relevant market is the supply of sugar products to industrial users in Great Britain.
10. Prior to the acquisition, NBF accounted for 17 per cent of the supply of sugar products to industrial users in Great Britain by volume and JBS accounted for 8 per

cent. They compete with the only two UK sugar producers, British Sugar and Tate & Lyle, with some overseas producers of sugar and their agents, and with numerous smaller resellers of sugar. The market is highly concentrated with British Sugar, Tate & Lyle, NBF and JBS collectively having a market share of over 90 per cent by volume.

11. Competition in this market is significantly affected by the operation of the EU sugar regime, with the extent and nature of competition between the UK sugar producers and the resellers strongly influenced by the decisions of the producers, on whom the resellers are largely dependent for supplies. The market appears to be characterized by a high degree of price discrimination in which the UK sugar producers can, and do, target particular customers and exert considerable influence over the ability of NBF, JBS and the other resellers to compete both with the producers themselves and with each other. NBF, JBS and other resellers that are reliant, either directly or indirectly, upon the UK producers for supply are able to exercise little constraint on the prices to sugar users charged by the UK producers beyond the limited amount arising from their potential to sell imported sugar to industrial sugar users which otherwise would not be in a position to obtain imported sugar, or do so only at a higher price.
  
12. The market is characterized by extended and complex negotiation processes in which NBF, JBS and other resellers of sugar often negotiate with customers in competition with their suppliers and, around the same time, with those suppliers for the sugar they need. Analysis of data from our customer survey and information on negotiations supplied by British Sugar, NBF and JBS showed that annual contracts account for the majority of transactions in terms of volume, with NBF bidding against JBS in a relatively small proportion of cases. It also revealed considerable differences in the price paid for sugar by different customers, which could not be

explained by factors such as volume purchased, for which the relationship to price appeared weak. Our analysis indicated that the final price paid decreased as the number of bidders increased, but did not suggest that the outcome of the negotiation process is significantly affected by the presence of JBS as opposed to another supplier. Nor did it suggest that JBS is consistently more competitive on price than other suppliers.

13. Considerations such as volume of sugar purchased and transport costs are taken into account in these negotiations, but the terms of supply agreed with each customer are determined by a process of bilateral negotiation in which the relative strength and skill of the parties involved are important factors. There is considerable inertia in the market, with customers switching supplier infrequently but when they do so, price is the most significant factor.
14. JBS was not a failing firm. We accept that it would have been likely to continue to suffer from declining volumes in the absence of the merger, but we conclude that for the timescale relevant to our inquiry, this would not have threatened its ability to compete. We conclude that, in the absence of the merger, the relevant counterfactual is that JBS would have continued to compete in the supply of sugar to industrial users in Great Britain with its existing strategy and under the ownership of ED&F Man and Greencore.
15. The acquisition of JBS by NBF reduces the choice of supplier available to users of industrial sugar in Great Britain, and may, in some cases, adversely affect their negotiating position. This is most likely to occur in the small number of cases where JBS was the main competitor to NBF and suitable alternative suppliers are not brought into the negotiating process. However, where the merged company is in competition with British Sugar and Tate & Lyle, it will have limited unilateral ability to

raise prices. In other cases, particularly in relation to customers requiring amounts of sugar below 100 tonnes a year and where sugar is purchased alongside other ingredients, its ability to raise prices will be constrained by competition from other resellers and importers. If it were to raise prices to particular types of customer, making those customers increasingly profitable to supply, British Sugar and Tate & Lyle would have an increased incentive to compete, strengthened by their desire to avoid prices becoming out of line with those elsewhere in the market, thereby creating an opportunity for imports. These considerations lead us to conclude that any impact from the acquisition of JBS by NBF will be limited in terms of the overall market, and we would not expect any general rise in prices. Accordingly, we do not expect that the acquisition of JBS by NBF will, in the absence of any impact on coordinated effects, lead to prices being higher than would otherwise have been the case. Nor do we expect that it will lead to a reduction in service, support, product choice or innovation.

16. We considered carefully the effect of the merger on coordinated effects. We conclude that it is likely that coordinated effects were present prior to the merger, but that the merger does not make coordinated effects significantly more sustainable or effective.
17. On this basis, we provisionally conclude that the acquisition of JBS by NBF has not resulted, and may not be expected to result, in a substantial lessening of competition.