

Completed acquisition by Associated British Foods plc of the Elephant Atta Business

ME/5374/12

The OFT's decision on reference under section 22(1) given on 6 September. Full text of decision published 17 September 2012.

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**Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.**

**PARTIES**

1. **Associated British Foods plc** (ABF) is an international supplier of foods and food ingredients and retail group. Its businesses operate in four segments: grocery, primary foods and agriculture, ingredients and retail. The acquisition of the Elephant Atta Business was completed via a subsidiary, ABF Grain Products Limited (trading as Westmill Foods) part of ABF's wider grocery division.
2. ABF's acquisition of the Elephant Atta business creates an overlap in flour products. The relevant ABF companies with activities related to these products are:
  - i. **Allied Mills**, which forms part of ABF's wider milling and baking division, supplying milled flour and semolina to ABF's bakeries, predominantly in the UK, which produce bread sold under the Kingsmill, Sunblest, Burgen and Allinson brands, as well as to external customers.
  - ii. **Westmill Foods**, operating primarily in the sector which ABF refers to as the Ethnic to Ethnic Channel, which supplies flour, rice, noodles and other ethnic food products to retail, foodservice, wholesale and industrial customers in the UK and across Europe. Westmill currently

produces ABF's Asli and Tiger chapatti flour brands, and also supplies plain, self-raising and corn flour.

- iii. **AB World Foods** part of ABF's grocery division, which supplies branded pickles, sauces and ready to eat (RTE) products (including RTE Indian Breads under ABF's Patak's brand) and other ethnic food products through its Patak's, Blue Dragon, Meena's, Levi Roots and Tabasco brands.
  - iv. **Silver Spoon**, part of ABF's grocery division and supplies flour through its Allinson brand.
3. **The Elephant Atta Business** (Elephant) was owned by Premier Foods plc (Premier). Elephant's flour range comprised chapatti flour and self raising flour manufactured and packaged by Premier Foods in Southampton. Elephant branded RTE chapattis are manufactured, marketed and supplied in the UK through a third party supplier, under a licensing agreement with Premier. Elephant generated UK turnover of approximately £18 million for the financial year ending 31 December 2011.

## TRANSACTION

4. ABF, through its subsidiary, ABF Grain Products Limited, has acquired Elephant's intellectual property rights (comprising trademarks, product specifications and artwork) including the Elephant Atta, Elephant Chakki Gold and Fassal brands and associated goodwill; and customer contracts, supply arrangements (where these relate exclusively to Elephant) and licence agreements.
5. ABF has not acquired any manufacturing or production capacity, but has entered into a co-packing agreement with Premier, whereby Premier will continue to manufacture and pack the products supplied under the Elephant brands for a period of [ ].
6. The parties notified the merger on 10 July and following receipt of a satisfactory submission the administrative deadline for a decision is 12 September 2012. The transaction completed on 5 July 2012 and the statutory deadline is therefore 4 November 2012.

## JURISDICTION

7. As a result of this transaction ABF and the Elephant Atta business have ceased to be distinct. The parties overlap in the supply of chapatti flour in the UK with a combined share of supply of approximately [45-55] per cent. The share of supply test in section 23 of the Enterprise Act 2002 (the Act) is met. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

## FRAME OF REFERENCE

### Product scope

#### Flour

8. The parties overlap in the supply of chapatti flour, which they submit is the narrowest candidate market that the hypothetical monopolist test may be applied to. Chapatti flour is used to produce unleavened flat breads including chapatti, paratha and puri breads.
9. 'The relevant product market is identified primarily by considering the response of customers to an increase in the price of one of the products of the merger firms'.<sup>1</sup>
10. The OFT has investigated whether chapatti flour is substitutable for other flour types. It considers that given that chapatti flour is particularly suited to producing certain types of flat breads, it is unlikely that consumers would switch away from it to other flour types which are not functionally suited to baking flat breads in response to a five per cent price increase.
11. Even though chapatti flour may not be constrained by other flour types on the demand-side, the OFT has examined whether there are supply-side reasons why other flour types should be considered alongside chapatti flour in its analysis. While 'the boundaries of the relevant product market are generally determined by reference to demand-side substitution alone,'<sup>2</sup> there are circumstances where it may be appropriate for the OFT to aggregate a number of markets together, based on suppliers responses to

<sup>1</sup> OFT CC Joint Merger Assessment Guidelines, paragraph 5.2.7

<sup>2</sup> OFT CC Joint Merger Assessment Guidelines, paragraph 5.2.17

any change in price. Namely, if products are manufactured in a similar way, such that a manufacturer would switch production to a different market in response to a five per cent price increase in that market, then the two products may be considered to be in the same market due to supply side substitution.

12. The parties submitted that chapatti flour should be considered as part of a wider market for flour due to supply-side substitution. This is because there are no special facilities or machinery required to manufacture chapatti flour; it is simply a case of removing bran from a wholemeal production line or adding bran to a white flour production line. The parties submitted that most flour manufacturers frequently switch between flour production runs in order to satisfy customer demand,<sup>3</sup> and that, there is no requirement to carry out a deep clean before switching production between chapatti flour and other types of flour. Therefore, the parties' information indicates that it is costless for millers to switch between producing different flour types.
13. The OFT also considered whether branded and private label chapatti flour were in different markets. However, the OFT is aware of only one private label chapatti flour, with a negligible market share. Thus, any segmentation between branded and non-branded chapatti flour would not affect the competition analysis, so it has not been necessary for the OFT to conclude on this point.
14. The parties supplied market share information on the basis of a number of different definitions including: total flour production, free flour production, split between wholesale and retail channels and private label flour. On a cautious basis the OFT has assessed the transaction against a market for branded chapatti flour separately from other flour types. However, as no competition concerns arise under any definition, the OFT has not found it necessary to conclude.

### **RTE Indian Breads**

15. The parties are both active in the supply of RTE Indian Breads, with ABF selling RTE Indian breads under its Patak brand, while Premier licensed the Elephant Brand name for RTE chapattis. Private label RTE Indian breads have a significant presence in the market, so the OFT has considered

<sup>3</sup> The parties provide an example of [ ].

whether branded and private label RTE Indian breads are in the same market.

16. The OFT does not have any evidence from third parties that suggests whether consumers would switch between branded and private label RTE Indian breads in response to a five per cent price rise. Therefore, on a cautious basis, the OFT has assessed the transaction against a market for branded RTE Indian breads.

### **Geographic scope**

17. The parties submitted that the relevant geographic market is national in scope; which is consistent with a previous case RHM/Finedon.<sup>4</sup> The majority of third parties indicated that they sourced all their flour from UK companies, with one third party suggesting that the main barrier to foreign imports would be transport costs. The OFT, therefore, has assessed the transaction against a UK market.

## **HORIZONTAL ISSUES**

### **Chapatti flour**

18. ABF provided estimated shares of pre merger total flour production, which gave the parties a combined share of [10-20] per cent, increment [0-10] per cent. However, as mentioned above, ABF has not acquired any flour production capacity; it is purely acquiring Elephant's intellectual property rights, customer contracts, supply arrangements and licence agreements. Under a co-pack agreement, Premier will continue to manufacture and pack the Elephant flour, for a period of [ ]. [ ].<sup>5</sup>
19. ABF estimated that post merger it will have a have a combined market share of around [45-55] per cent (increment [0-10] per cent) of chapatti flour in the UK. These market share estimates are based on an [externally commissioned report] (which used consumer survey reports to estimate market shares) commissioned by ABF's Westmill business in 2011.

<sup>4</sup> Rank Hovis Limited / Finedon Mill - 2005  
[www.offt.gov.uk/OFTwork/mergers/decisions/2005/rank-hovis](http://www.offt.gov.uk/OFTwork/mergers/decisions/2005/rank-hovis)

<sup>5</sup> [ ].

20. In the retail channel, the parties submitted that the merger will result in a combined market share of around [40-50] per cent, (increment around [0-10] per cent).<sup>6</sup> These market share estimates are based on an [externally commissioned report] prepared for Premier Foods dated 28 February 2012 and Westmills' own data.
21. In the wholesale channel, the parties submitted that the merger will result in a combined market share of around [40-50] per cent, (increment around [0-10] per cent) again based on an [externally commissioned report] and ABF's own estimates.
22. Within the chapatti flour sector, customers in general did not consider that the parties were each other's closest competitor. One customer indicated that Elephant and Asli (ABF's brand of chapatti flour) were competitors, and expressed concern that the merger represented a three to two amongst the suppliers offering the strongest branded products to supermarkets. These concerns were not shared by other similar types of customer. The OFT also notes that the retail channel market share figures submitted by the parties suggest that [ ], [ ] and [ ] sales of chapatti flour are all greater than Asli (ABF's branded chapatti flour).
23. One third party commented that, 'placing two big chapatti flour brands under the control of one company could limit customer choice and reduced competition can drive up consumer prices.' Particularly as, they indicated, customers in this sector tended to be loyal. However, the OFT notes that a report commissioned by Premier Food found that brand recognition was highest for [ ], followed by [ ], and [ ].<sup>7</sup> This finding, based on consumer research, is not consistent with Asli being considered one of the top three brands of chapatti flour.
24. On the basis of the evidence above the OFT does not believe that the Elephant and Asli brands are close competitors within the chapatti flour sector.

<sup>6</sup> The parties' may have underestimated the size of the retail channel since third parties indicated that, collectively, they sold a higher volume of chapatti flour than estimated by the parties is sold, in total, in the retail channel

<sup>7</sup> [ ].

## **RTE Indian Breads**

25. Elephant is not active in the production or retail of RTE Indian breads, rather it licenses its brand to Discovery Foods, which manufactures and retails RTE Indian breads under the Elephant brand. The OFT understands that the licensing agreement was entered into in December 2010, [ ]. While Elephant does not have [ ] or the price at which Discovery chose to sell at, [ ]. [ ]. Therefore Elephant has a financial interest in the success of Elephant RTE Indian Bread.
26. The parties submitted that Elephant and ABF will have a combined market share, excluding private label RTE Indian breads, of [25-35] per cent (increment [0-10] per cent). Or a combined market share of [10-20] per cent by volume (increment [0-10] per cent) and [15-25] per cent by value (increment [0-10] per cent) including private label.
27. ABF and Premier Food Group represent the two largest branded suppliers of RTE Indian breads, and will continue to do so post merger. The sale of the Elephant brand will move a [0-10] per cent market increment by volume ([0-10] per cent by value) from Premier to ABF and as such lower the market share of the leading branded supplier and increase the market share of the second supplier, but still leave Premier as the largest supplier of branded RTE Indian breads. Thus, the transaction will lead to a decrease in concentration in the industry.

## **Barriers to Entry**

28. The parties submitted that there has been significant and successful new entry to numerous sectors of the overall flour market. The parties gave the example of Laila, which started producing chapatti flour in 2007, and has since grown to achieve sales of [ ] tonnes in the retail channel (out of total chapatti flour sales of [ ] tonnes), this contrasts with ABF which has sales of [ ] tonnes, despite entering the market in 1996. The parties have submitted that Laila is a strong competitor in the chapatti flour sector and that in 2011 it displaced Elephant branded chapatti flour from Tesco.

## **Buyer Power**

29. The parties submitted that there is significant countervailing buyer power in the chapatti flour market, with sales to the multiples retail channel

accounting for approximately [ ] per cent for each of the merger parties. From evidence available to the OFT, it appears that sales to multiples represents the majority of their sales to the retail channel, with remaining sales in the wholesale channel.

30. Third party views were mixed on the question of buyer power. However, the parties submitted that the existence of numerous sources of supply gave retailers the ability to credibly threaten to delist the parties' products, pointing to Tesco's decision to delist Elephant as a prime example of the effectiveness of buyer power.
31. The parties indicated that [ ] per cent of Elephant's turnover is generated in the wholesale channel, where the top five customers account for [ ] per cent of revenue. The parties submitted that these large customers have significant buyer power, although the OFT had very limited responses from customers of the parties active in the wholesale channel.

### **THIRD PARTY VIEWS**

32. Third-party comments have been discussed above where relevant. The majority of third parties were unconcerned about the merger either in regard to chapatti flour or to RTE Indian breads.

### **ASSESSMENT**

33. As the parties overlap in the supply of chapatti flour, the OFT, on a cautious basis, assessed the transaction against a UK market for branded chapatti flour. ABF and Elephant have a combined market share of around [50-60] per cent, increment of around [0-10] per cent, with the merger representing the combination of the first and the sixth largest chapatti flour brands.
34. Third party views on closeness of competition between the parties were mixed, however, on the basis of the information available, in particular consumer research carried out by Premier Group that indicated that brand recognition was highest for [ ], followed by [ ], and [ ], the OFT does not consider that the parties are close competitors in the chapatti flour sector.

35. In RTE Indian breads, the Elephant brand is licensed to Discovery Foods, which produce the Elephant branded RTE Indian bread, with Elephant having no control over pricing. Post merger, excluding private label RTE Indian breads, the merger transfers a small ([0-10] per cent) increment to ABF from Premier Food Group, which remains the number one branded producer, with ABF remaining number two, reducing concentration in branded RTE Indian breads.
36. The evidence available to the OFT suggests that private label RTE Indian breads have a significant presence in the market, and while the transaction has been assessed on separate markets for branded and private label products, private label products are likely to exert a degree of constraint on branded RTE Indian breads.
37. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

38. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.