

Anticipated acquisition by BH Acquisitions Limited of Northern Foods plc

ME/4900/11

The OFT's decision on reference under section 33(1) given on 6 April 2011. Full text of decision published 14 April 2011.

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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. **BH Acquisitions Limited** is a subsidiary of Boparan Holdings Limited. Boparan Holdings Limited or its shareholders, Ranjit and Baljinder Boparan, own a group of companies (jointly '**Boparan**') that includes the 2 Sisters Food Group ('**2SFG**'), which supplies primary and processed chicken products, Five Star Fish Limited ('**FSF**'), which supplies frozen fish products, and Amber Foods Limited, which processes poultry waste and by-products. The UK turnover of Boparan was around £789 million for the year ending 31 July 2010.
2. **Northern Foods plc ('Northern')** supplies a range of branded and own-label food products, including ready meals, sandwiches, salads, pizzas and biscuits. It is listed on the London Stock Exchange. Its turnover in the UK was around £867 million for the 53 weeks to 3 April 2010.

## **TRANSACTION**

3. On 21 January 2011 it was announced that the Boards of BH Acquisitions Limited and Northern had reached agreement on the terms of a recommended cash offer by BH Acquisitions Limited for the entire issued ordinary share capital of Northern. On 9 February 2011 BH Acquisitions Limited made a formal offer to acquire Northern's shares. On 23 March

2011 BH Acquisitions Limited announced that it had acquired 18.39 per cent of the existing issued ordinary share capital of Northern and that it had further agreed to acquire or received valid acceptances in respect of a combined total of 79.52 per cent of the existing issued ordinary share capital of Northern. It also announced that it had declared its offer unconditional as to acceptances.

## **JURISDICTION**

4. As a result of this transaction Boparan and Northern will cease to be distinct. The UK turnover of Northern exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 ('**the Act**') is met. Therefore, the OFT believes that it is or may be the case that arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation.
5. Boparan notified the merger to the OFT by means of a Merger Notice under section 96 of the Act on 7 March 2011. The statutory deadline for the OFT to decide whether to refer the merger to the Competition Commission, as extended by 10 working days under section 97(2) of the Act, expires on 18 April 2011. The merger has also been notified in Ireland.

## **MARKET DEFINITION**

6. The only overlap between the parties in the UK is in the processing of fish products and the supply of processed fish products to retailers. There is also a vertical link between the parties, as Boparan (through FSF) supplies processed fish to Northern. Some of this fish was first supplied by Northern to Boparan for processing and some was bought by Boparan on the open market. Further, there is a vertical link between the parties in primary chicken and processed chicken products, as Boparan supplies these products to Northern.<sup>1</sup>

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<sup>1</sup> The OFT also considered whether some of Boparan's prepared chicken products (such as rotisserie chicken) may overlap horizontally with Northern's ready meals or ready-to-cook meals but concluded that this was likely not to be the case.

## Fish products

### Product scope

7. Boparan submitted that, in line with the market definition for chicken products (see paragraph 14 below), a distinction should be made between (i) chilled and frozen fish that has been subject only to primary processing (filleting, skinning and/or de-boning), and (ii) chilled and frozen fish that, in addition to primary processing, has also been subject to secondary processing (such as breading, battering and adding sauces). In a market report provided by Boparan a somewhat different distinction was made between fresh fish, frozen fish and canned and other fish. Boparan further noted that unprocessed or canned fish products could be considered separate markets but that neither party supplies such products.
8. Boparan submitted that different types of chilled and frozen secondary-processed fish products, such as battered fish, breaded fish, fish fingers, fish croquettes and fishcakes, are substitutable from both a supply side and a demand side perspective.
9. In previous decisions the OFT considered the supply of fresh fish and ready-to-eat and ready-to-cook fish products as well as the supply of canned tuna, but the OFT did not reach a final view on the scope of the market.<sup>2</sup>
10. The OFT has also considered whether different customer groups – retailers, food service customers and industrial processors – could constitute separate markets. The OFT did not receive sufficient information to determine whether such a distinction would be appropriate but taking a cautious approach, the OFT has separately considered the parties' position in the supply of fish products to retail customers as opposed to other groups of customers, given that this is the only customer group for which the parties' activities overlap.
11. However, it was not necessary for the OFT to reach a conclusion on the exact scope of the relevant product market given that no competition concerns arise on any plausible narrow product market.

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<sup>2</sup> OFT decisions of 27 September 2004 (anticipated acquisition by Young's Bluecrest Seafood Ltd of Macrae Food Group Ltd and Pan European Seafoods UK Ltd) and 4 October 2010 (anticipated acquisition by Thai Union Frozen Products Public Company Limited of MW Brands Holdings SAS).

## Geographic scope

12. Boparan submitted that the market is at least EEA-wide, not least because the secondary processing of fish is at the intermediate stage of the supply chain rather than involving sales to end consumers. However, in previous cases regarding fish products the OFT could not exclude the possibility that the market, at least at the wholesale level, was national.<sup>3</sup> The OFT received no evidence that the geographic market may be narrower than national.
13. However, in this case, it was not necessary for the OFT to reach a conclusion on the exact scope of the relevant geographic market as no competition concerns arise on a UK basis.

## Chicken products

### Product scope

14. Boparan submitted that the relevant markets are (i) the supply of fresh or frozen primary (that is, raw) chicken meat, and (ii) the supply of fresh or frozen processed chicken meat. This is in line with the OFT's decision regarding the acquisition by 2SFG of Storteboom Group BV in 2010 (the '**Storteboom decision**').<sup>4</sup>
15. In the Storteboom decision, the OFT also considered whether the supply of chicken could form part of a wider market for the supply of other poultry products such as turkey and duck products and, conversely, whether the supply of chicken could be segmented by customer group as regards supply to (i) retailers, (ii) food service customers and (iii) industrial processors. In the Storteboom decision, the OFT did not need to reach a conclusion on the precise market definition. Similarly, in the present case, it was not necessary for the OFT to reach a conclusion, as no competition issues arise on the narrowest possible product market.

### Geographic scope

16. Boparan submitted that the markets for the supply of chicken products are wider than the UK and could be as wide as the EEA.

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<sup>3</sup> See footnote 2.

<sup>4</sup> OFT decision of 28 June 2010 regarding the anticipated acquisition by 2 Sisters Property BV of Storteboom Group BV.

17. Consistent with the Storteboom decision, given the lack of competitive concerns the OFT does not find it not necessary to conclude on the precise scope of the geographic market and has, taking a cautious approach, considered the merger on a UK basis. The OFT received no evidence that the market was narrower than national.

## **HORIZONTAL ISSUES**

18. On the basis of the above, there is no overlap between the parties in any plausible narrow candidate market for chicken products. Chicken products are therefore not considered further in this section.
19. The parties overlap in the supply of processed fish products (mainly secondary-processed products but also primary-processed products) to retailers. Boparan, through FSF, supplies own-label processed fish products to [retail sector]. Northern supplies own-label chilled processed fish products (fishcakes) to [retail sector] and has limited sales of processed fish products under its 'Donegal Catch' brand to various retailers. Northern mainly sells products under this brand in Ireland and launched this brand in the UK only in 2008.
20. Boparan estimated that the value of the supply of processed fish products (that is, both primary- and secondary-processed) to retailers in the UK is around £[500-1000] million per year, giving the parties a combined share of around [0-10] per cent, with an increment of around [0-10] per cent. Boparan also supplies processed fish products to food service customers and industrial processors. If these sales are taken into account, then in a wider market of at least £[1-1.5] billion in value, Boparan estimated that the parties' combined share is less than [0-10] per cent with an increment of less than [0-10] per cent. Boparan further referred to a market report that estimates the value of the sale of fresh, chilled and frozen fish and seafood (excluding canned fish and seafood) at around £2.5 billion.<sup>5</sup> This would give the parties a combined share of less than [0-10] per cent.
21. Boparan was unable to supply separate estimates for primary-processed and secondary-processed fish products, but the OFT did not receive any indication that the parties' combined shares for such separate markets would be significantly higher than the shares referred to above.

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<sup>5</sup> KeyNote, *Fish & Fish Products*, August 2010.

22. Boparan submitted that the parties face significant competition from a range of other suppliers of fish products, including Young's, Cumbrian, Bird's Eye, Coldwater and Thistle, most of which have a larger presence than the parties.
23. Third parties broadly confirmed that the parties' shares are small and that there are a significant number of alternative suppliers (more than 10 alternative suppliers were mentioned).
24. Given that the OFT has considered narrow candidate markets, a combined market share of this level would not normally give the OFT cause for concern over unilateral effects, even though the markets considered are not necessarily the narrowest satisfying the hypothetical monopolist test.
25. Further, no customers and virtually no other third parties considered the parties to be any closer competitors than these small market shares imply.
26. Given its findings on unilateral effects, it was not necessary for the OFT to conclude on buyer power or the threat of entry.

## **VERTICAL ISSUES**

27. As noted at paragraph 6 above, there are vertical links between the parties in respect of fish products and chicken products. For both types of product, Boparan is the upstream supplier. One of Northern's competitors raised a concern that Northern could gain an advantage because Boparan could transfer processed chicken to Northern at advantageous prices.
28. The OFT's approach when assessing the risk of input foreclosure is to consider (i) whether the merged firm would have the ability to harm rivals by raising prices or refusing to supply them, (ii) whether the merged firm would find it profitable to do so and (iii) whether the effect of any such foreclosure would be sufficient to reduce competition in the downstream market enough to give rise to a realistic prospect of a substantial lessening of competition.
29. For fish, in respect of (i) and as set out above, Boparan's share of supply is limited and there are several alternative suppliers.
30. For chicken, in respect of (i) Boparan estimated that its share is below [10-20] per cent for both the supply of primary chicken products and the

supply of processed chicken products, with shares for individual customer groups (retailers, food service customers and industrial processors) also below [10-20] per cent. In particular, Boparan estimated that its share in the supply of primary chicken products to industrial processors such as Northern is only around [five-15] per cent. Third parties, including the party that raised the concern referred to at paragraph 27, also named several alternative suppliers of primary and processed chicken products.

31. There is therefore no indication that the merged firm will have the ability to engage in input foreclosure.
32. In respect of (ii), the OFT has not received any evidence that Northern's share in any downstream market is such that the merged firm would be likely to be able to recoup—through sales diverted to it from potentially foreclosed rivals—the profits lost on sales of fish or chicken products foregone.
33. On this basis, it does not appear likely that the merged firm would have the ability or incentive to engage in input foreclosure. The OFT has therefore not needed to conclude on whether any such foreclosure may have an anticompetitive effect.

### **THIRD-PARTY VIEWS**

34. Third-party views have been discussed above where relevant. Other than the concern from a competitor of Northern addressed above (see from paragraph 27), no third parties expressed any significant concerns about the merger to the OFT.

### **ASSESSMENT**

35. The parties overlap in the supply of processed fish products to retailers. Following the merger, the parties will have limited shares of supply, with combined shares of under [0-10] per cent at most and an increment of around [0-10] per cent at most. There are several alternative suppliers of processed fish products.
36. There are also limited vertical links between the parties, but in view of the parties' limited shares there is no indication that the merged firm will have the ability and/or incentive to engage in input foreclosure.

37. Consequently, the OFT does not believe that it is or may be the case that the merger 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 33(1) of the Act.