

Anticipated acquisition by Thai Union Frozen Products Public Company Limited of MW Brands Holdings SAS

**CR/46/10**

The OFT's decision on reference under section 33(1) given on 4 October 2010. Full text of decision published 19 October 2010.

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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. **Thai Union Frozen Products Public Company Limited (TUF)** is a public company listed on the Stock Exchange in Thailand. One of its shareholders is the Mitsubishi Corporation (MC) – the owner of the 'Princes' brand - which holds eight per cent of TUF. TUF is active in the processing and supply of ambient and frozen seafood products. Its sales into the UK are limited to the wholesale supply of commodity canned tuna and sardines as well as frozen shrimp, shellfish and canned pet food. The raw materials for these products are sourced from the Indian and Pacific Oceans and processed at TUF's facilities in Thailand, Vietnam and Indonesia. TUF achieved turnover of €1.6 billion in its last financial year of which approximately [ ] was achieved in the UK.
2. **MW Brands Holdings SAS (MWB)** is owned by Trilantic Capital Partners, an independent private equity fund based in Guernsey, London and New York. MWB is active in the manufacture and supply of ambient seafood product. It procures raw materials through local production, ownership of a fishing fleet in Ghana and supply contracts in the Seychelles. MWB owns production and processing facilities in these countries and also in Portugal and France. Its product range comprises: canned ambient seafood products (including tuna, mackerel, sardines, salmon, herrings and kippers); ready-to-eat lunch products; and speciality fish products (including anchovies, baby

clams, caviar, dressed crab and dressed lobster). In the UK, MWB owns and supplies under the 'John West' brand. MWB also holds a [ ] interest, and [ ] board seats, in La Doria Limited (LDH) through which it distributes all of its canned seafood products destined for retailers as private label in the UK. MWB achieved a turnover of around [ ] in its last financial year in the UK.

## **TRANSACTION**

3. TUF proposes to acquire 100 per cent of MWB from Trilantic Capital Partners for an enterprise value of [ ] payable in cash.
4. The parties notified the proposed transaction to the Office of Fair Trading (OFT) on 6 August 2010; accordingly the administrative target date for the OFT to announce its decision in this case is Monday 4 October 2010.

## **JURISDICTION**

5. As a result of this transaction TUF and MWB will cease to be distinct. The UK turnover of MWB exceeds £70 million, so the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is satisfied. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

## **BACKGROUND**

### **Channels of wholesale supply of canned tuna in the UK**

6. There are different channels through which wholesale canned tuna passes to reach the consumer in the UK.

The supply of branded tuna

7. The supply of branded canned tuna is primarily direct to retailers (for example, supermarkets) and is essentially a straightforward supplier/retailer relationship. The branded manufacturer enters into a supply agreement with the retailer to retail its branded canned tuna. Contracts are usually for a twelve-month duration.

8. MWB's business model focuses on this channel, as approximately [ ] of its sales of canned tuna in the UK are (John West) branded sales via direct supply contracts to retailers. TUF supplies none of its own branded canned tuna in the UK.

The supply of unbranded canned tuna to retailers and the food service sector

9. As well as branded canned tuna major retailers also sometimes stock own-brand ranges of tuna. The supply of unbranded canned tuna to retailers for this purpose is sourced from canneries throughout the world either directly or via brokers and importers. This is also the channel through which the food service sector usually sources its unbranded product.
10. Retailers will generally source their canned tuna from approved canneries, processors who meet hygiene and other standards accredited by the European Commission and by the British Retail Consortium (BRC). Some retailers have their own standards inspectors and only approve canneries who they have independently audited themselves.
11. Once the retailer has identified a number of approved canneries, they will contract with the canneries either directly or via broker/dealer to supply wholesale canned tuna.
12. All of MWB's sales of wholesale unbranded canned tuna to retailers in the UK are negotiated and distributed via LDH. All of TUF's sales of unbranded canned tuna in the UK are conducted with [ ].

The supply of unbranded tuna to branded manufacturers

13. Manufacturers of branded tuna cannot always source their full requirements from their own vertically integrated operations and they need to source wholesale canned tuna from third parties. Such supplies are sourced via a spot market either from the canneries directly or via a third party broker. These supply contracts are entirely non-exclusive and short-term in nature.

## **MARKET DEFINITION**

14. The parties' activities overlap in the supply of canned tuna and sardines in the UK.

15. Regarding the supply of sardines in the UK, the parties estimated that TUF's sales are relatively negligible, amounting to less than [zero-10] per cent of the market. Therefore, considering the minimal overlap of the parties in this segment and the lack of any third party comments and concerns the OFT did not consider the impact of the merger on the supply of sardines in the UK any further.

### **Product scope**

#### Ambient seafood versus canned tuna

16. The parties are unaware of any decisions by the European Commission or the UK competition authorities that conclusively define the product market in relation to ambient seafood products.
17. Furthermore, the parties stated that it was not necessary to define the precise market in which the Parties overlap, since on any given segment the merger does not raise any competition concerns.
18. No third parties commented on any of the parties' overlaps besides canned tuna.
19. Therefore, the OFT considered the impact of the merger on the narrowest plausible frame of reference, namely the supply of canned tuna. Given that the merger does not cause competition concerns even on this narrow basis, it is not necessary to conclude on the precise scope of the relevant product market.

#### Private label canned tuna versus branded canned tuna

20. The parties believe that there exist compelling arguments in favour of an overall canned tuna market in the UK considering the pricing between branded and private label tuna and the fact that both private label and branded tuna are frequently stacked next to each other in supermarkets. However, the parties considered that it would be disproportionate to carry out any detailed review, as the parties believe that the transaction will not give rise to any competition concerns, regardless of whether or not private label and branded tuna are considered as distinct markets.

21. The OFT examined the supply of private label and branded canned tuna to separate customer groups in order to consider whether there is a distinct market between private label and branded tuna.
22. Based on evidence available to the OFT, many supermarkets supply both branded and private label tuna. One supermarket considered that though some customers would be loyal to branded tuna and some to unbranded tuna, that there would be a degree of consumer switching between them in the event of a relative price change. Two supermarkets stated that they would not consider replacing branded or unbranded entirely in the event of a SSNIP.<sup>1</sup> In particular one supermarket stated that – in the interest of consumer choice – they would continue to stock both types even if it meant that they made a loss on the product line.
23. For those products where the end-consumer does not see the brand (for example, where the tuna is an input to a ready-meal or a sandwich) responses suggested that branding was not important. One third party that supplies food manufacturers stated that their customers do not care about the brand of tuna used. Similarly, another third party who has its own brand and supplies the food service sector stated that brand isn't that important in food service.
24. Furthermore, at the highest level of the supply chain, that is, the supply of tuna from processing factories to importers, third parties focused less on any branded/private label distinction at this stage of supply, to instead highlight differences in the choice of processing factories that are available when supplying major supermarkets compared to other downstream customers.
25. There have been several cases where the European Commission, the Competition Commission and the OFT had the opportunity to closely scrutinise the relationship between branded and private label products both at the wholesale and retail levels and reached conclusion where branded and private label products were considered together and separately.
26. Based on the evidence available to it, the OFT has assessed the impact of the merger on the supply of private label and branded canned tuna together and separately. However, as the merger does not raise any competition

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<sup>1</sup> Small but Significant (five per cent) non-transitory Increase in Price

concerns on either possible delineation, the OFT did not consider it necessary to conclude on a precise market definition.

#### Pole and line caught tuna versus purse seining caught tuna

27. The parties stated that the tuna market may be delineated according to the method by which the tuna was caught. In particular, whether tuna was caught by 'pole-and-line' or by 'purse seining' (that is, by net).
28. Several third parties highlighted the price premium of pole-and-line tuna (one third party estimated the price premium to be around 25 per cent) although considered more ethical and less harmful to other fish stocks. This cost differential was attributed to the relative inefficiency of fishing by pole and line and that such tuna is available in relatively limited supplies. One third party claimed that several retailers have turned down pole and line tuna as being too expensive.
29. The OFT does not normally segment the product scope downstream between otherwise substitutable products according to the various upstream methods of production. However, in this case, the OFT investigated whether the majority of pole-and-line caught tuna is supplied as branded canned tuna whereas the majority of net caught tuna is supplied as unbranded. If so, when considered with the substantial differences in prices and profit margins for the two,<sup>2</sup> this could have suggested that branded and unbranded tuna are in separate product markets. However, in this case, branded tuna does not appear to be synonymous with line caught and unbranded tuna does not appear to be synonymous with purse seining caught tuna. Therefore, the OFT did not consider it necessary to conclude on the precise product market, as the merger does not raise any competition concerns on any possible market definition.

#### **Geographic scope**

30. The parties concur with the European Commission's view in the food sector cases that the relevant geographic market is likely to be national in scope on the demand side, based on the fact that the consumption habits appear to vary between Member States.

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<sup>2</sup> TUF supplied margin data showing that margins on pole and line caught tuna were [ ] on pole and line tuna but just [ ] on other tuna.

31. However, the parties asserted that the geographic market is likely to be global in nature since the major buyers source tuna from a range of regions. Some third parties made reference to the tuna market being global. One retailer agreed that it was a global market, and that the wholesale market is driven by how much tuna is caught from the sea. In addition, the OFT received limited evidence on whether major buyers also purchase canned tuna outside the UK.
32. On the basis of the evidence available to the OFT, it appears plausible that the geographic market is wider than national for the manufacturing and processing of canned tuna. This merger affects the wholesale level, however, and at that level the OFT did not receive sufficient evidence to conclude on the precise geographic scope for the supply of canned tuna. In any event, the OFT does not consider it necessary to conclude on a precise geographic market definition given that no concerns arise on the narrowest - UK definition for any level of the supply chain.

## HORIZONTAL ISSUES

### Market shares

33. The parties overlap in the supply of canned tuna in the UK. The parties only overlap in the supply of unbranded tuna in the UK as TUF does not supply its brands in the UK.<sup>3</sup>

| Category                   | MWB      | TUF      | Total    |
|----------------------------|----------|----------|----------|
| <b>Overall canned tuna</b> | [35-45]% | [5-15]%  | [45-55]% |
| <b>Branded tuna</b>        | [50-60]% | [0-10]%  | [50-60]% |
| <b>Private label tuna</b>  | [5-15]%  | [15-25]% | [30-40]% |

*Source: parties*

<sup>3</sup> The OFT also considered any unilateral effects that the merger could have from the minority shareholding (approximately eight per cent) that Princes will have post-merger in MWB, who is the owner of the other main tuna brand in the UK – John West. In particular, the OFT considered whether MC/Princes may face an incentive to raise its price given that it could expect to recoup a proportion of the profits (by way of increased dividend) from customers who switched away to John West. However, the combination of relatively low margins in this industry, together with the low shareholding suggest that such an incentive is unlikely to be significant in this case. One alternative would be for MC to encourage TUF to increase its prices and so benefit from any diversion to Princes. However, it is difficult to believe that TUF's other shareholders would support such a strategy.

34. In particular, for the supply of all canned tuna in the UK, the parties' combined market share is an estimated [45-55] per cent with an increment of approximately [five-15] per cent based on value and an estimated [40-50] per cent with an increment of [five-15] per cent based on volume. In addition, for the supply of unbranded canned tuna to retailers the parties' combined market share is [30-40] per cent with an increment of [five-15] per cent based on value and [35-45] per cent with an increment of [five-15] per cent based on volume.<sup>4</sup>
35. Although, the OFT draws no conclusion on the precise market definition, the market shares submitted by the parties for these possible delineations are high enough to raise prima facie competition concerns.
36. Therefore, the OFT examined whether the parties are close competitors in the supply of canned tuna in the UK and whether there are other factors that could impose a competitive constraint to the merged entity.

#### **Closeness of competition**

37. The parties argue that MWB and TUF are not close competitors in the supply of tuna. While MWB focuses on the supply of John West branded tuna accounting for [ ] of its sales in the UK, TUF does not sell its own brand in the UK. Instead, [ ] of TUF sales in the UK are sold indirectly through contracts with [ ] via a third party broker. Consequently it is only in the remainder of each party's sales, outside of these core activities, that they more directly overlap with one another. In addition, the parties argue that they only directly overlap in relation to sales of purse seine (that is, non-pole-and-line) caught tuna to retailers for use as private label product.
38. Since many of these remaining sales are through slightly different channels (MWB supplies to 'distributors', TUF to 'brokers') the parties claim that they actually only directly overlap in the sale of canned tuna for retailers for their private label products. In addition, even in this limited overlap the parties argue that TUF is at a material disadvantage in the supply of tuna since it sources from countries which are more expensive (it is therefore only used as a back-up supplier). However, the OFT is of the view that the fact that TUF is considered a back-up supplier does not mean that it does

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<sup>4</sup> For completeness, for the supply of branded canned tuna the parties estimated that MWB had a market share of [50-60] per cent.

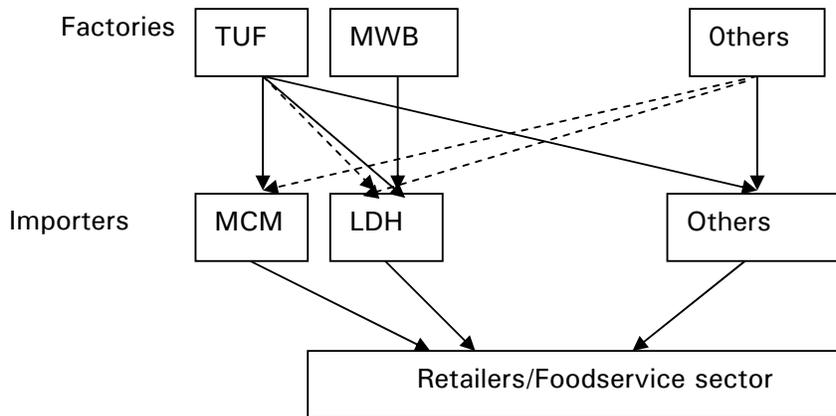
not constrain MWB, as MWB could still raise its prices at the level of TUF prices before any of its customers switched to TUF.

39. The OFT asked a range of market participants whether they considered the parties to be close competitors to one another.
40. One retailer observed that the parties do not compete in the supply of branded tuna and indeed thought that they operated at different levels of the supply chain to one another. Another retailer did not consider that the parties competed in the wholesale supply of canned tuna. In addition both retailers did not refer to TUF as a major supplier of unbranded canned tuna. Another third party similarly considered that the activities of the parties are 'far removed from one another'. As one third party commented, they were not that aware of TUF prior to the merger and indeed had no idea if the imported brand that they purchase originates from TUF or another manufacturer. Based on evidence before it, the OFT understands that retailers in particular may not be expected to anticipate any merger impact given that their dealings are often not with the parties directly but with their agents/distributors.
41. Conversely, other market participants recognised that the parties did compete in the unbranded market. One third party told the OFT that they purchase from both parties though only indirectly from TUF.
42. Based on the evidence available before it, the OFT understands that opinions of third parties on overall closeness of competition between MWB and TUF were mixed. Several third parties (in particular supermarkets) did not consider that the parties competed with one another at all. On the other side, some third parties highlighted, that the parties do compete (either directly or indirectly) in the supply of unbranded tuna.
43. The OFT is of the view that the level of differentiation within the parties offerings does suggest that the high market shares in the supply of all canned tuna in the UK may overstate the closeness of competition between the parties. This is most apparent in the fact that TUF does not supply a branded product to the UK and its market share in the supply of unbranded tuna is [15-25] per cent whereas the majority of MWB sales are of John West branded tuna and it has a market share of approximately [5-15] per cent in the supply of unbranded tuna.

44. However on the basis of the relatively high combined share of supply and the mixed third party views on closeness of competition between the parties, the OFT has examined below whether there are other actual or potential suppliers that are capable of constraining the merged entity.

**Supply of unbranded canned tuna to retailers**

Processing factories of canned tuna



45. As mentioned above retailers source unbranded canned tuna from the processing factories via brokers and importers. Both parties own processing factories which supply canned tuna in the UK. Therefore, the OFT examined the impact of the merger on the supply of canned tuna to importers who purchase directly from processing factories. Based on evidence available to it, the OFT understands that the merger may result in a reduction from three to two of major suppliers of tuna in the UK who also operate their own tuna factories (Princes, MWB and TUF).

46. A reduction in fascia of this magnitude would normally raise prima facie competition concerns. However, the OFT's market investigation and comments from third parties revealed a number of alternative factories that supply tuna in the UK.

47. The parties provided details of 53 production and processing factories that have been approved by DG Sanco<sup>5</sup> for import to the EU. Only six of these

<sup>5</sup> The European Commission's Directorate-General for Health and Consumer Protection (DG SANCO) is responsible for food safety in the EU. Imports of fishery products into the EU are subject to official certification and all EU Member States share the same market access rules for seafood products. The EU import rules for fishery products seek to guarantee that all imports

are owned by either of the merging parties (two are owned by MWB and four are owned by TUF). The OFT is unaware of how many of these 53 also have BRC<sup>6</sup> accreditation which at least some third parties indicated was essential to supply to the UK.

48. Comments from some third parties imply that the choice of processing factories faced by importers is much wider than those operated by Princes, MWB or TUF. For instance, one importer purchases directly from factories around the world (mentioning the operators Alliance, Ocean and Sinarin). Another importer purchases only a small amount from TUF and the rest from 'multiple' suppliers, including MISCO (Maldives), Alliance (Phillipines), RS Cannery (Thailand). Finally another importer also only purchases a small proportion of their tuna from TUF and they told the OFT that they buy directly from Ecuador, Columbia, Thailand, Phillipines and Indonesia.
49. More generally, one third party stated that they may be able to secure 100 per cent of output from a factory within the next couple of years who can supply them pole-and-line tuna. Another importer also stated that they were looking at a joint venture with a new factory.
50. However, the OFT understands that for the supply of canned tuna to certain customers (retailers) in the UK, the number of processing factories is limited, as they need to be pre-approved by the retailer. In particular, two third parties raised the issue of having limited choice available to them to secure supplies of tuna since they can only use factories pre-approved by retailers. Therefore, the OFT considered whether the merger represents a significant consolidation in those factories that an importer could source from to supply certain customers (retailers)
51. One retailer confirmed that they only purchase from any of five approved factories. However, they explained that they considered that they had lots of options when purchasing fish. They would generally purchase indirectly from factories through importers or brokers but consider that there are no problems with them purchasing from different fisheries around the world. In particular, they did not think that there were any difficulties for them in switching between processing factories as long as they are approved and have the relevant packaging artwork. They supplied details of three

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fulfil the same high standards as products from the EU Member States, with respect to hygiene and consumer safety.

<sup>6</sup> British Retail Consortium (BRC).

different suppliers of unbranded tuna over the last three years. One retailer stated that details of its technical standards were public and that its technical staff were able to fly out to assess candidate factories. Finally, another retailer stated that they expected new entry to occur in 2011.

52. One third party stated that retailers set their own policy but generally they require a factory to achieve at least a grade B BRC rating. Another third party similarly told the OFT that they require own-label suppliers to be approved to BRC standards. Two third parties told the OFT that they both had technical staff who worked with overseas factories to advise them in how to meet the required technical standards to supply a major supermarket. In particular, the OFT received evidence that several importers have been successful in getting new factories approved to supply major retailers. One importer told the OFT that they were involved in the process of getting a new supplier recently approved by a supermarket. Finally one importer stated that retailers may distribute a tender to several importers (like themselves) who in turn then get indicative prices from approved factories.
53. Finally in relation to the supply of unbranded tuna to them, no retailer raised any competition concerns as a result of the merger.
54. In light of the evidence provided by the parties and third parties, the OFT considers that there is a large number of factories which can provide a degree of competitive constraint to the parties and at least enough viable alternatives for supermarkets who purchase from their approved factories.

#### Importers of canned tuna

55. The OFT examined whether the merger would raise any competition concerns by reducing the number of importers/intermediaries of canned tuna in the UK. In particular, the OFT examined whether supermarkets would have a reduced choice of importers/intermediaries, from whom they could place orders for unbranded tuna.
56. The OFT asked a range of customers who they considered to be the major suppliers of tuna in the UK – responses were limited to between two and four suppliers. In particular, customers mentioned Princes, MWB, LDH, TUF, MCM, Loverings. Both LDH and [ ] were named individually, but are considered together here with the merging parties due to their business

associations – that is, the OFT considers that they are not fully fledged competitors to the merging parties. As explained by the parties, all of MWB's sales of unbranded tuna in the UK are to LDH, which on-sells to the relevant retailers under its own title and subject to its own risk. Similarly, the parties stated that all TUF's sales of unbranded tuna to UK retailers occurred until very recently on an arms' length basis via third party broker [ ], who then on-sold to the relevant UK retailers.<sup>7</sup> Furthermore, evidence before the OFT, showed that [ ]. On this basis, the OFT concluded that on a cautious approach the merger would reduce the number of large importers/intermediaries of canned tuna in the UK from three to two.

57. However, some third parties referred to a number of other importers/intermediaries of unbranded tuna in the UK. One third party though mentioned that with respect to large contracts for supermarkets, these orders were typically only contested by Princes, [ ]/TUF and LDH/MWB.
58. None of the major supermarkets raised any concerns with respect to the number of available importers/intermediaries for unbranded tuna. More specifically, one third party felt that the wholesale market is driven by how much tuna is available and caught in the sea with prices determined by availability of raw material. In addition, one retailer explained that they considered that they had lots of options when purchasing canned tuna. Furthermore, one third party stated that large orders were continuously tendered and evidence available to the OFT showed that a retailer had switched suppliers regularly. Finally, one retailer confirmed that barriers to entry in the supply of canned tuna were very low and further evidence showed that a smaller importer had supplied core lines of tuna to large retailers previously.
59. Therefore, in relation to the supply of unbranded tuna to retailers via importers/intermediaries, the OFT understands that supermarkets have no concerns whatsoever, as they have the option to source unbranded tuna from a number of importers who can easily enter the market and source canned tuna from the pre-approved factories. In addition, the OFT understands that there is evidence of a number of smaller importers and of existing importers expanding. Furthermore, the OFT understand that a new entry, [ ], could be a viable alternative for customers.

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<sup>7</sup> [ ]

### **Wholesale supply of unbranded tuna to the foodservice sector**

60. In relation to the food service sector, the OFT considered that the merger impact might be greater for those firms who are reliant on UK importers of tuna, and for whom importing directly from processing factories is not an option.
61. Evidence before the OFT showed that a large number of importers (including the parties) were supplying canned tuna to the food service sector. These importers include Loverings, Shafer-Haggert, CKS, Hobarts, CBD Meats, Martin Matthews, Food Network, Caterers Choice. The OFT received comments from two firms who rely on UK importers neither of whom raised concerns about the merger. In addition, the OFT contacted four other 'food service' firms, but received no response.
62. In addition, the value of the parties' sales in the food service sector is actually quite small compared to other importers. One third party made the point that MWB are 'not that strong' in the food service sector.
63. Therefore, based on the evidence before it, the OFT does not believe that the merger will raise any competition concerns in the foodservice sector in the UK.

### **Conclusion**

64. Based on the evidence before it, the OFT understands that, although market shares may indicate prima facie concerns, the parties seem to concentrate on different segments of the UK market (MWB mainly supplies branded tuna while TUF supplies unbranded canned tuna). The market investigation has revealed that there are a number of processing factories available to retailers and importers to purchase tuna from. Furthermore, there is evidence that retailers can easily switch between importers and intermediaries, while barriers to enter or expand are low. Finally there appear to be a greater number of smaller importers supplying the food service sector. Among smaller importers, there is some evidence of both entry into importing and of such importers entering into agreements with factories to obtain new sources of supply. Therefore, the OFT concludes that there is no realistic prospect of a substantial lessening of competition in the supply of canned tuna in the UK.

## COORDINATED EFFECTS

65. The OFT considered whether the merger creates or increases the prospect of co-ordination, in particular in relation to the supply of branded canned tuna to retailers. This is because, as mentioned above, MC, the owner of the Princes brand, holds an eight per cent stake in TUF. Therefore, as a result of the merger, Princes will acquire a minority interest in MWB,<sup>8</sup> who is the owner of the other main tuna brand in the UK – John West. It is relevant in this respect to note that internal documents from the parties indicate that MWB considers [ ]. In addition, it is relevant to state that the merger does not reduce the number of actual suppliers of branded canned tuna in the UK.
66. For coordination to be possible firms need to reach and monitor the terms of coordination, which also needs to be internally and externally sustainable.<sup>9</sup> The OFT's guidance acknowledges that, in relation to the ability to reach and monitor the terms of coordination, 'the existence of significant structural links between firms in the market (such as ... holding cross-shareholdings ...) may also assist in reaching and monitoring the terms of coordination'.<sup>10</sup>
67. The parties argued that the minority shareholding held by MC in the merged group does not materially increase the ability of the parties and MC to reach and monitor the terms of coordination. MC has only a minority stake and one representative on the TUF board. MC has no veto or other contractual rights in relation to TUF's ongoing business operations.
68. The OFT considered whether the market for the supply of branded canned tuna to retailers could currently be considered to be conducive to coordination. There is evidence that showed that there is no symmetry in the market, as the costs of supplying different lines of tuna are not the same (pole-and-line is more expensive than purse seine tuna) and there is a degree of buyer power exercised by the retailers. Internal documents from the parties show large swings in market share between [ ]. MWB's strategic plan for 2009-2011 refers to [ ]. In addition, there is evidence of

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<sup>8</sup> The OFT accepts that the eight per cent shareholding does not confer on MC material influence over TUF/MWB.

<sup>9</sup> See paragraphs 5.5.9ff of the *OFT/CC Merger Assessment Guidelines* (OFT1254).

<sup>10</sup> *Ibid*, paragraph 5.5.14.

large degrees of switching of retailers between suppliers of canned tuna, and third party views above, suggest strong competition between the two competing brands. The one retailer that commented to the OFT on this issue stated that they did not believe that there was any potential for coordination in branded tuna. That retailer played off the two brands against each other and switched between John West and Princes products and across different lines besides tuna. They believed they would continue to be able to do so after the merger.

69. Overall, while the OFT believes that such a cross-shareholding can in some circumstances increase the potential for co-ordination by facilitating reaching and monitoring terms of coordination, the evidence available suggests that, in this case, the market for the supply of branded tuna is not conducive to coordination and is unlikely to become so on the basis of this transaction. Therefore the merger does not create or strengthen the prospect for co-ordinated effects.

### **THIRD PARTY VIEWS**

70. The OFT received comments and views about the merger from a large number of third parties, including competitors and customers of the merging parties.
71. None of the major supermarkets raised any concerns in relation to the merger. More specifically, one retailer felt that the wholesale market is driven by how much tuna is available and caught in the sea with prices determined by availability of raw material.
72. One importer was concerned only that John West might become more aggressive in the food service sector. In addition, another importer raised concerns that the merged party would control two out of three of the 'major' tuna brands. However, the OFT concluded that as long as the parties' activities did not overlap in the supply of branded tuna in the UK, such concerns were not merger specific.
73. One importer ([ ]) felt that the buying strength of the merged party will allow it to manipulate the fish wholesale price and that UK retailers will not be in a strong position on price and that this would remain the case until alternate manufacturing sites can achieve necessary approvals. The

concerns expressed by this third party have been dealt with where appropriate above.

74. One third party raised that the concern that there will be limited choice of processing factories to purchase tuna from, considering that large retailers need to pre-approve the relevant factories. These concerns have been dealt with where appropriate above.
75. Finally two third parties active in the food service sector raised no concerns about the merger. In addition, the OFT contacted several other 'food service' customers of which the OFT received no response.

## **ASSESSMENT**

76. TUF and MWB overlap in the supply of canned tuna in the UK. They are both vertically integrated and overlap at several stages of the supply chain: processing factories, supply of unbranded canned tuna to importers, retailers and food service sectors.
77. The parties provided some market share estimates for the supply of branded and unbranded canned tuna in the UK. Considering all canned tuna into the UK, the parties estimated that they will supply [45-55] per cent of total UK supply (increment [five-15] per cent). Such a share raised some prima facie competition concerns and the OFT examined further whether the parties are each others closest competitors in the UK and whether there were other factors that could impose a competitive constraint on the merged entity.
78. Opinions on overall closeness of competition among third parties were mixed. Several third parties did not consider that the parties competed with one another at all. Conversely, evidence before the OFT highlighted, that the parties do compete (either directly or indirectly) in the supply of unbranded tuna in the UK. While insufficient evidence was submitted to suggest that an overall market for tuna would not be appropriate, the level of differentiation within the parties' offerings suggested that the market shares of all canned tuna overstated the level of competition lost through the merger. This is most apparent in the fact that TUF does not supply a branded product to the UK whereas the majority of MWB sales are of John West tuna (in direct competition with the other major brands).

79. The OFT examined the impact of the merger on the number of integrated suppliers of canned tuna in the UK who also operate their own processing factories. With regards to their ownership of processing factories, the parties operate six worldwide out of 53 that are approved by DG Sanco to supply tuna into the EU.<sup>11</sup> However, even if their effective share of processing factories reflected their overall market share, several importers considered that they have many choices of factories worldwide besides those operated by the parties and Princes.
80. A couple of third parties raised concerns about their limited choice of processing factories from the more limited pool that are approved to supply the major supermarkets. The OFT received no concerns raised by other importers on this point (including some who supply the major supermarkets) and further evidence suggested that importers had lots of options when purchasing canned tuna. In particular, the OFT received evidence that several importers have been successful in getting new factories approved to supply major retailers.
81. Furthermore, the OFT examined whether the merger would result in the reduction in the number of large importers of tuna to the UK from three to two. There is a fringe of smaller importers though their level of sales appeared materially lower than TUF/[ ], MWB/LDH and Princes.
82. A reduction in fascia to this level would normally raise prima facie concerns. However, those customers who purchase in large volumes and who rely on these large importers raised no concerns. In particular the OFT received evidence indicating that switching costs were low, and there is evidence of switching by supermarkets between branded suppliers and between unbranded suppliers. The large contracts for which only these large importers might typically contest are auctioned continuously. Further evidence suggested that barriers for an importer to supply a large retailer were low aside from some technical requirements.
83. The OFT also considered the impact of the merger on the supply of canned tuna to the food service sector. There appear to be a greater number of smaller importers supplying the food service sector. Among those importers, there is some evidence of both entry into importing and of such

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<sup>11</sup> The 53 figure is an understatement of the number of processing factories available since it excludes processing factories within the EU.

importers entering into agreements with factories to obtain new sources of supply. The OFT received comments from two firms who rely on UK importers neither of whom raised concerns about the merger.

84. Finally, as a result of the merger, MC the owner of the Princes brand will acquire an eight per cent interest in MWB the owner of the John West brand. While the OFT considered, based on evidence available to it, that this does not represent material influence it did consider whether the shareholding might (i) increase the risk of co-ordinated behaviour; or (ii) whether Princes would face an incentive to raise prices by internalising the partial recapturing of profits it would receive from customers switching to John West. On both counts the OFT consider that concerns do not arise in this case.
85. 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**

86. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.