

Anticipated acquisition by the Coca-Cola Company of an increased shareholding in Fresh Trading Limited

ME/4494/10

The OFT's decision on reference under section 33(1) given on 11 May 2010. Full text of decision published 14 May 2010.

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. **The Coca-Cola Company** (TCCC) is a global manufacturer of non-alcoholic beverages including a range of carbonated soft drinks (its brands include Coca-Cola, Diet Coke, Sprite, Fanta, Dr Pepper and Schweppes branded products including lemonade and tonic water), still drinks (for example, Oasis and Vitamin Water) and fruit juices/nectars (for example, Minute Maid and Five Alive).
2. **Fresh Trading Limited** (Fresh Trading) is a manufacturer and distributor of the non-alcoholic beverages 'Innocent' (a smoothie) and 'This Water' (a fruit juice/nectar).

TRANSACTION

3. In March 2009 TCCC entered into an investment agreement to acquire a minority shareholding in Fresh Trading.¹ The investment agreement included [] put and call options, one of which afforded TCCC the opportunity to purchase further shares in Fresh Trading to take TCCC's

¹ This acquisition was examined by the Office of Fair Trading. See Anticipated acquisition by The Coca-Cola Company of a minority interest in Fresh Trading Limited, Case No. ME/4091/09, OFT decision of 26 May 2009.

overall shareholding in Fresh Trading to [50-60] per cent. TCCC now intends to exercise this option ('the Transaction').

JURISDICTION

4. The Transaction stems from an option exercisable by TCCC in the investment agreement of March 2009. The Office of Fair Trading (OFT) considered that the March 2009 shareholding gave TCCC material influence over Fresh Trading but that the transaction did not give rise to a realistic prospect of a substantial lessening of competition.
5. The Transaction would give TCCC [50-60] per cent of the issued shares in Fresh Trading. The question therefore arises as to whether this increased shareholding leads to a change in the level of control TCCC exercises over Fresh Trading. In most cases, a shareholding of [50-60] per cent would be regarded as conferring a controlling interest for the purposes of section 26(4)(a) of the Enterprise Act 2002 (the Act). In this respect, the OFT guidance states that 'a controlling interest generally means a shareholding giving more than 50 per cent of the voting rights in a company'.² However, this statement refers to the fact that voting rights normally confer certain rights on a company that enable it to exercise control, such as, for example, the ability to appoint the majority of directors. In other cases, the OFT may need to consider the specific rights attaching to the shares in order to assess whether these may lead to a change in the level of control.
6. In this case, according to the evidence supplied by the Parties, there are no additional rights afforded to TCCC as a result of its increased shareholding in Fresh Trading. In particular under the terms of the investment agreement, the share purchase agreement and Fresh Trading's Articles of Association, TCCC will not gain any additional votes or rights over matters of commercial or strategic importance relative to what it already enjoys. TCCC will continue to have the right to only one director on the board of Fresh Trading (which is required to have a minimum of three directors and a maximum of

² Paragraph 3.32, Jurisdictional and procedural guidance, OFT527

seven) and the Transaction will not allow TCCC to appoint or dismiss directors or senior managers.³

7. Therefore, in these specific circumstances, the OFT considers that there has been no change in the level of TCCC's control of Fresh Trading within the meaning of section 26 of the Act as a result of the Transaction.
8. The OFT therefore believes that no relevant merger situation has been created pursuant to section 23 of the Act.

³ To the extent that the position were to change such that TCCC were able to exercise the rights that would normally be associated with a [50-60] per cent shareholding, this might then give rise to a change in the level of control.