Completed acquisition by Nakano UK Holding Limited of the vinegar and pickles in vinegar businesses of Premier Foods Group Limited

ME/5589/12

The OFT's decision on reference under section 22 was given on 26 September 2012. The full text of that decision was published 23 October 2012

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. **Nakano UK Holding Limited (Nakano)** is a supplier of own label and branded vinegar, under the 'Mizkan' brand, in the United Kingdom (**UK**). Nakano manufactures malt and spirit vinegar at its plant in Burntwood. Nakano is part of Mizkan Group Corporation, a privately held, global food manufacturer with headquarters in Japan. The Mizkan Group's turnover for the year ending February 2012 was 160.1 billion yen (approximately £1.26 billion). Mizkan Europe Limited, a wholly owned subsidiary of Nakano, had turnover for the year ended 28 February 2011 of approximately £[ ].

2. **The vinegar and pickles in vinegar businesses of Premier Foods Group Limited (the Target)** manufacture and sell branded (under the 'Sarson's' brand) and unbranded malt and spirit vinegar as well as pickles in vinegar (under the 'Haywards' brand). The Target also sells unbranded and branded red wine, white wine and cider vinegar, under the 'Dufrais' brand. The Target owned and operated manufacturing facilities in Middleton and Bury St Edmunds. The Target's turnover in 2011 was £[ ].[1]

TRANSACTION

[1] £[ ] attributable to vinegar and £[ ] attributable to pickles. The merged parties submitted that the vast majority of the revenue was generated in the UK.

3. Nakano, through its subsidiary Nakano UK Vinegar Limited, acquired the vinegar and pickles in vinegar businesses including a manufacturing plant[2] with equipment, employees, the related customer and supply agreements, as well as the Sarson's and Dufrais vinegar brands and the Haywards pickles brand of Premier Foods Group Limited (the **Premier Assets**) for consideration of £41 million (the **Transaction**).

JURISDICTION

4. As a result of the Transaction, Nakano and the Premier Assets have ceased to be distinct. The Office of Fair Trading (**OFT**) believes that the combination of assets acquired by Nakano (paragraph 3) is sufficient to constitute an 'enterprise' for the purposes of section 23 of the Enterprise Act 2002 (the **Act**).[3]

5. The share of supply test in section 23(3) of the Act is met since the merged parties' combined share of supply, involving an increment, in unbranded malt vinegar to the retail sector in 2011 was [90-100] per cent and therefore exceeds 25 per cent.

6. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

BACKGROUND

7. In its decision of 26 September 2012 with regard to the Transaction (the **Decision**), the OFT stated its belief 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 (**SLC**) in relation to the supply of unbranded malt vinegar to food ingredient customers, food service customers and retailers and the supply of unbranded spirit vinegar to food ingredient customers and retailers in the UK. Accordingly, the OFT found itself under a duty to refer the merger to the Competition Commission.

8. The OFT did not find it necessary to conclude as to whether there is a realistic prospect of a SLC in the supply of unbranded wine vinegar (red and white) to food ingredient customers or retailers in the UK.

[2] The Bury St Edmunds manufacturing site did not transfer as part of the merger.
[3] 'Mergers – Jurisdictional and Procedural Guidance', OFT527, paragraph 3.10.

DIVESTMENT UNDETAKINGS OFFERED BY NAKANO

9. To address the OFT's competition concerns, Nakano offered undertakings in lieu of a reference to divest Nakano's Burntwood plant and facility as a going concern and include all facilities and assets for the manufacture, processing and supply of malt and spirit vinegar (with the exception of the assets used solely for processing imported Asian products) (the **Divestment Business)** to an upfront buyer.

10. The OFT stated in the Decision that it considered that the undertakings in lieu of a reference proposed by Nakano, as a structural remedy that will remove the overlap between the merged parties in unbranded malt and spirit vinegar and restore pre-transaction competition were sufficient, in principle, to act as a clear-cut and comprehensive remedy to the competition concerns identified by the OFT. Moreover, the OFT considers that the proposed remedy would remedy, in a clear-cut manner, any competition concerns over which there is some doubt. As set out in the Decision, the OFT further considered that it had sufficient residual concerns for it to seek an upfront buyer on a cautious basis in respect of the Divestment Business.

11. In the Decision the OFT therefore stated that it was suspending its duty to refer the Transaction to the Competition Commission under section 22 of the Act, because the OFT was considering whether to accept appropriate undertakings from Nakano in lieu of a reference under section 73 of the Act. Subsequently, Nakano and Mizkan Europe Limited entered into a sale and purchase agreement with Baxters Food Group Limited (**Baxters**) to transfer the Divestment Business, conditional only upon the OFT's acceptance of the undertakings.

CONSULTATION

12. On 1 February 2013, pursuant to paragraph 2(1) of Schedule 10 of the Act, the OFT published the proposed undertakings in lieu of a reference that it was minded to accept, inviting interested parties to give their views in relation to the proposed undertakings, including Baxters as purchaser of the Divestment Business. The consultation text published on the OFT's

website alongside the proposed undertakings is set out in the Annex to this decision.

13. The OFT received no concerns from third parties during the consultation period.[4]

DECISION

14. The Decision concluded that the Transaction would be referred to the Competition Commission if Nakano failed to give suitable undertakings in lieu of reference pursuant to section 73 of the Act to address the competition concerns identified in the Decision.

15. For the reasons set out in the consultation text, the OFT considers that Baxters is a suitable purchaser of the Divestment Business and that the undertakings in lieu of a reference provided by Nakano are clear cut and, in the circumstances of this case, appropriate to remedy, mitigate or prevent the SLC identified in the Decision and any adverse effects resulting from it as well as any competition concerns over which there is some doubt. The OFT has therefore decided to accept the undertakings offered by Nakano, including Baxters as the purchaser of the Divestment Business.

16. The Transaction will therefore not be referred to the Competition Commission and the undertakings in lieu of a reference, which have been signed by Nakano,[5] will come into effect from the date of this decision.

[4] One third party indicated that it had no further comments having told the OFT prior to consultation that it considered the sale of the Burntwood plant to Baxters to be a suitable outcome.
[5] Nakano UK Vinegar Limited and Nakano Sumise Co. Limited.

Annex – consultation text issued on 1 February 2013

COMPLETED ACQUISITION BY NAKANO UK HOLDING LIMITED OF THE VINEGAR AND PICKLES IN VINEGAR BUSINESSES OF PREMIER FOODS GROUP LIMITED

Notice under Paragraph 2(1) Schedule 10 of the Enterprise Act 2002 of proposed undertakings in lieu of reference pursuant to section 73 of the Enterprise Act 2002

OFT's duty to refer

On 26 September 2012 the OFT announced its decision to suspend its duty to refer the completed acquisition by Nakano UK Holding Limited (Nakano) of the vinegar and pickles in vinegar businesses of Premier Foods Group Limited to the Competition Commission under section 22 of the Enterprise Act 2002 because the OFT is considering whether to accept appropriate undertakings from Nakano in lieu of reference.

The OFT believes 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 (SLC) in relation to the supply of unbranded malt vinegar to food processor customers (who use it in the manufacture of pickles and sauces), food service customers (including wholesalers and fish and chip shops) and supermarkets and the supply of unbranded spirit vinegar to food processor customers and supermarkets in the UK. Accordingly, the OFT found itself under a duty to refer the merger to the Competition Commission.

The OFT did not find it necessary to conclude as to whether there is a realistic prospect of a SLC in the supply of unbranded wine vinegar (red and white) to the food processors or supermarkets in the UK.

The text of the OFT's decision (the Decision), published on 23 October 2012, provides details of the OFT's findings.

Divestment undertakings offered by Nakano

To address the OFT's concerns, Nakano offered to divest its Burntwood vinegar plant and business, which manufactures malt and spirit vinegar, (including all tangible and intangible assets, the 'Manor Vinegar' trade name, supplier and

customer contracts and record), with the exception of all tangible and intangible assets used to manufacture Japanese products (the Divestment Business). The OFT notes that it did not identify any competition concerns with respect to the Japanese products during its investigation. In addition, the excluded assets are used exclusively to manufacture these Japanese products. All employees except for two, which the proposed purchaser considered to be replaceable, will transfer with the Divestment Business.

As set out in the Decision (paragraphs 243 to 245), the OFT has sufficient residual concerns to seek an upfront buyer in respect of the Divestment Business to ensure that the competition concerns were remedied in this case.

Upfront buyer for the Divestment Business

Nakano has proposed Baxters Food Group Limited (Baxters) as the purchaser of the Divestment Business. Nakano and Baxters have entered into a sale and purchase agreement to transfer the Divestment Business, conditional only upon formal OFT approval of Baxters as purchaser of the Divestment Business.

Suitability of the proposed purchaser

In approving a purchaser, the OFT's starting position is that it must be confident without undertaking a detailed investigation that the proposed purchaser will restore pre-merger levels of competition. The OFT therefore seeks to ensure that the proposed buyer is independent of and unconnected to the merged parties and has the necessary expertise, financial resources, incentive and intention to maintain and operate the divested business as an effective competitor in the marketplace.[1] In addition, the purchaser must be reasonably expected to obtain all necessary approvals, licences and consents and the acquisition must not create a realistic prospect of a SLC on any market in the UK.

Baxters is a profitable food ingredient company with sufficient finances to undertake the acquisition. Baxters has experience in supplying each of the relevant customer segments where concerns were identified in the UK and currently supplies unbranded as well as branded products. Baxters has some experience of brewing albeit not in the vinegar sector but, in any event, the relevant skilled personnel would transfer as part of the acquisition. Baxters also

[1] The approach and criteria followed by the OFT to approve a purchaser are set out in further detail in the OFT's Mergers – exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT 1122, December 2010, in particular from paragraph 5.25)

has expertise in operating and managing a food ingredient plant in the UK, including production and bottling, given it already owns two UK plants.

Baxters has provided the OFT with well developed business plans, suggesting it has the intention and incentive to compete with Nakano and other vinegar suppliers in the UK post-acquisition. The OFT notes that Baxters would become vertically integrated as a result of the acquisition but does not consider that Baxters will have the ability or incentive to foreclose customers (either partially or totally), given the low cost of vinegar as a percentage of total cost in the products Baxters supplies and the spare capacity available at the Burntwood plant. The OFT therefore considers that the acquisition would not create a realistic prospect of a SLC in the UK.

Finally, the OFT did not identify any connection between Nakano and Baxters, which would affect their independence and no consents or approvals, other than OFT approval, are required to complete the acquisition and commence trading.

Therefore, subject to the outcome of this consultation, the OFT considers Baxters to be a suitable purchaser of the Divestment Business.

Proposed decision and process going forward

The acceptance by the OFT of the proposed undertakings in lieu is dependent on this public consultation.

The OFT considers that the proposed undertakings offered by Nakano and the purchase of the Divestment Business by Baxters are clear cut and, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concern identified in the Decision, including any competition concerns over which there is some doubt.

The OFT therefore gives notice that it proposes to accept undertakings in lieu in the form of the proposed undertakings.

Before reaching a decision as to whether to accept the proposed undertakings, including Baxters as purchaser of the Divestment Business, interested parties are invited to make their views known.

Representations should be made in writing to the Office of Fair Trading by and be addressed to:

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Mergers Group
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London
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Email: sophie.perrussel@oft.gsi.gov.uk
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Deadline for comments: by the end of 22 February 2013