

Completed acquisition by Boparan Holdings Limited of R F Brookes Chilled Food and Avana Bakeries

ME/5322/12

The OFT's decision on reference under section 22 given on 25 October 2012. Full text of decision published 1 November 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. **Boparan Holdings Limited's ('BHL')** primary activities relate to the supply of primary and processed chicken products to retailers, food service companies and other industrial processors through its 2 Sisters Food Group Limited ('2SFG') division. BHL also owns Five Star Fish Limited ('FSF') which supplies a range of fish products (primarily coated frozen fish products) to food service customers, and to a lesser extent retail customers. BHL also recently purchased Northern Foods plc¹ which supplies branded and retailer own brand chilled ready meals, sandwiches and salads, pizza, biscuits and puddings (including Christmas puddings through its Matthew Walker business). BHL estimates that the UK turnover of 2SFG and the companies within the BHL group ending 31 July 2010 was £747 million (£1.7 billion including Northern Foods).²
2. **The R F Brookes chilled food and Avana bakeries businesses** (the '**Target businesses**') were previously owned by Premier Foods Limited. R F Brookes (the '**Brookes business**'), which has factories in South Wales and Leicester,

¹ OFT Decision ME/4900/11 '*Anticipated acquisition by BH Acquisitions Limited of Northern Foods plc.*' 6 April 2011.

² BHL also owns Amber Foods Limited which processes poultry waste and by-products which had a turnover of £42 million for the year ending 26 December 2010.

supplies own label chilled ready meals (CRM), pizzas and savouries to the main UK grocery retailers. Avana Bakeries ('the Avana business') operates from a factory in South Wales supplying own label ambient and chilled bakery and dessert products (including Christmas puddings) to the main UK grocery retailers. The Target businesses made a loss of £0.01 million in 2010 on sales of £200 million.

JURISDICTION

3. BHL, through its wholly-owned subsidiary, Solway Foods Limited, acquired the Target businesses on 30 December 2011, for a consideration of £30 million.
4. The OFT believes that as a result of this transaction BHL and the Target businesses have ceased to be distinct. The annual UK turnover associated with the Target businesses exceeds £70 million so the turnover test in section 23(1)(b) 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.

RATIONALE

5. The parties submit that the rationale for the transaction is for BHL to supply the major UK grocery retailers across a number of food sectors and that this will provide it with an opportunity to leverage multi-site sourcing for defined product ranges which will benefit retailers and consumers alike.

BACKGROUND

6. In its decision of 19 March 2012 (the Decision), the OFT announced that the merger created a realistic prospect of a substantial lessening of competition in the supply of Christmas puddings in the UK.³
7. To address the OFT's competition concerns, BHL offered to divest either the Avana Christmas puddings business or the Matthew Walker business, thereby remedying the competition concerns arising from the merger. In March 2012, BHL began marketing Avana to potential purchasers.

³ Completed acquisition by Boparan Holdings Limited of R F Brookes and Avana Bakeries, ME/5322/12, 19 March 2012.

8. The OFT considers that the remedy offered by the parties to be sufficiently clear cut to remedy the competition concerns arising from the merger. The OFT considered that the requirement for an up-front buyer was both reasonable and proportionate in seeking to ensure that the competition concerns were remedied.
9. Following the suspension of the OFT's duty to refer, BHL entered into an asset sale agreement (conditional upon OFT's acceptance of the undertakings in lieu and completion of the merger) for the Avana Christmas puddings business with Sargents Bakeries Limited (Sargents).

CONSULTATION

10. On 20 September 2012, pursuant to schedule 10, paragraph 2(1) of the Act, the OFT published the proposed undertakings in lieu of a reference which it was minded to accept, inviting interested parties to give their views on the proposed remedy by 17.00 Thursday 11 October 2012. The consultation text published on the OFT's website with the proposed UILs is included in the Annex to this decision.
11. The OFT did not receive any responses to its consultation.

Purchaser approval

12. The parties' UIL offer in this case was subject to an upfront buyer requirement. This means the OFT suspended its duty to refer on the basis that it would only accept the undertakings in lieu once divestments have been agreed with an upfront buyer provisionally approved by the OFT.
13. The prospective purchaser of the Avana Christmas puddings business is Sargents. The OFT did not receive any concerns in response to its public consultation regarding the purchaser. The OFT's assessment of the suitability of the purchaser is set out below.
14. Sargents is independent of and unconnected to BHL and can be reasonably expected to obtain the necessary manufacturing and supply contracts required to effectively compete with BHL in the supply of Christmas puddings in the UK. Sargents will acquire the production assets of the Avana Christmas puddings business and relocate them to its facility in Doncaster in January 2013 where the assets will be used to produce Christmas puddings. Sargents forecasts that the Avana production assets

combined with the additional investments that Sargents is making in the manufacturing facilities will mean that it will be producing around 20,000 puddings per day.

15. Sargents has the financial resource and expertise to operate the divestment business in competition with BHL. It currently supplies branded bakery products to the food service industry and supplies own-label products to some UK supermarkets. Sargents has recently recruited a number of commercial and technical staff with significant experience of the production and supply of Christmas puddings. Sargents also provided internal documents as evidence of its commitment to significant expansion at its Doncaster site.
16. Finally, the OFT does not consider that the divestment of the Avana Christmas puddings business will give rise to a realistic prospect of a substantial lessening of competition within the UK as Sargents is not currently active in the supply of Christmas puddings in the UK.
17. The OFT is satisfied that Sargents meets the criteria to be approved as a purchaser of the Avana Christmas puddings business.

DECISION

18. The OFT's decision on 19 March 2012 concluded that the merger would be referred to the Competition Commission if BHL 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.
19. The OFT considers that the undertakings offered by BHL are clear cut and appropriate to remedy, mitigate or prevent the substantial lessening of competition and any adverse effects resulting from it. The OFT has therefore decided to accept the undertakings in lieu of reference offered by BHL.
20. The merger will therefore not be referred to the Competition Commission and the undertakings, which have been signed by BHL, will come into effect from this date.

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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 19 March 2012, the OFT announced its decision to suspend its duty to refer the completed acquisition by Boparan Holdings Limited (BHL) of R F Brookes and Avana Bakeries to the Competition Commission under section 22 of the Enterprise Act 2002 because the OFT was considering whether to accept appropriate undertakings in lieu of reference from BHL.

The OFT believes that the merger gives rise to a realistic prospect of a substantial lessening of competition in the supply of Christmas puddings in the UK because of the loss of a strong competitive constraint on BHL's Matthew Walker business. The text of the OFT's decision, published on 28 May 2012 (the Decision), provides details on the OFT's findings.⁴

Accordingly, the OFT found itself under a duty to refer the merger to the Competition Commission.

Divestment undertakings offered by BHL

To address the OFT's competition concerns, BHL offered to divest either the Avana Christmas puddings business (Avana) or the Matthew Walker business, thereby remedying the competition concerns arising from the merger. In March 2012, BHL began marketing Avana to potential purchasers.

Up-front buyer for the Avana Christmas puddings business

The OFT is aware that there has been little entry or expansion in relation to Christmas puddings in recent years suggesting that there may be a limited number of potential purchasers for the divestment business. The OFT also

⁴ The decision can be found on the OFT website at:
www.offt.gov.uk/OFTwork/mergers/decisions/2012/Solway

considered that on the basis that the parties' offer may not include the transfer of the actual site and/or key staff, then the identity of the purchaser would be important to the success of the remedy. The OFT therefore considered that the requirement for an up-front buyer was both reasonable and proportionate in seeking to ensure that the competition concerns were remedied in this case.

The proposed buyer for Avana, Sargents Bakeries Limited (Sargents), is identified in the undertakings in lieu on which the OFT is consulting, and has entered into an asset sale agreement with BHL to transfer the business to them only upon OFT acceptance of the undertakings in lieu and completion of the transaction.

Sargents will acquire the production assets of Avana and relocate them to its facility in Doncaster in January 2013 where the assets will be used to produce Christmas puddings. Sargents has recently recruited a number of experienced commercial and technical staff and therefore it is not anticipated that any Avana staff will transfer as part of the transaction. BHL also confirmed that Avana will be servicing its existing contracts for Christmas 2012 prior to the transfer of assets to Sargents in January 2013 and seasonal stock is expected to be run down to nil. Therefore it is not anticipated that any customer contracts or stock will be transferred as part of the transaction.

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. As such, the proposed purchaser must not raise prima facie competition concerns.

The purchaser, Sargents, currently supplies branded bakery products such as fruit tarts and pies and mince pies to the food service industry. Sargents also supplies own-label products to some UK supermarkets, namely, Morrisons, Aldi and Lidl. Sargents is committed to significant expansion at its Doncaster site in terms of production capability and storage capacity. Based on the financial data presented and its current expansion plans, the OFT considers that Sargents is a credible buyer of the Avana assets while it builds up its business.

The OFT understands that market reviews and range planning for Christmas 2013 start in October 2012 and that negotiations can continue until late spring 2013.

The OFT is minded to accept the proposed undertakings in lieu

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

The OFT considers that the proposed undertakings offered by BHL are clear cut and appropriate to remedy, mitigate or prevent the competition concerns identified in the decision.

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

Download the proposed undertakings in lieu at [website link].

Before reaching a decision as to whether to accept the proposed undertakings, interested parties are invited to make their views known.

Representations should be made in writing to:

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Deadline for comments: 17.00 Thursday 11 October 2012