Anticipated acquisition by David Lloyd Clubs of 16 Virgin Active gyms

Decision that undertakings might be accepted

ME/6679/17

The CMA's decision under section 73A(2) of the Enterprise Act 2002 that undertakings might be accepted, given on 26 May 2017. Full text of the decision published on 26 May 2017.

Introduction

1. David Lloyd Clubs Limited (**David Lloyd**) has agreed to acquire the business and assets of 16 gyms (together the **Target Gyms**) from Virgin Active Limited (**Virgin Active**) (the **Merger**). David Lloyd and the Target Gyms are together referred to as the **Parties**.

2. On 19 May 2017, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).

3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision in order to allow the Parties the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act.

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act. Accordingly, on 22 May 2017, the Parties offered undertakings to the CMA for the purposes of section 73(2) of the Act.

5. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to the Parties that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the offer.

The undertakings offered

6. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the merger parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.

7. The SLC Decision found that the Merger gives rise to a realistic prospect of an SLC in the supply of gyms in the local areas around Virgin Active Brighton and Virgin Active Clearview in Brentwood (ie between Virgin Active Clearview and David Lloyd Gidea Park) (the **SLC Gyms**). The CMA did not find competition concerns in relation to any of the other gyms to be acquired.

8. To address this SLC, the Parties have offered to give undertakings that David Lloyd will not acquire the SLC Gyms for a period of 10 years in lieu of a reference (the **Proposed Undertakings**).

The CMA's provisional views

9. The CMA considers that undertakings in lieu of a reference are appropriate when they are clear-cut and capable of ready implementation. The CMA's starting point when assessing undertakings is to seek an outcome that restores competition to the level that would have prevailed absent the merger.[1]

10. The CMA believes that the Proposed Undertakings, or a modified version of them, might be acceptable under section 73(2) of the Act as a suitable remedy to the SLC identified by the CMA, since by ensuring that the SLC Gyms will not be acquired by David Lloyd, the Proposed Undertakings will ensure that competition continues at the level that would have prevailed absent the Merger.

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[1] *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT1122)*, December 2010, Chapter 5 (in particular paragraphs 5.7–5.8 and 5.11). This guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, January 2014, Annex D).

11. The Proposed Undertakings are capable of amounting to a sufficiently clear-cut and effective resolution of the CMA's competition concerns. The CMA also believes at this stage that the Proposed Undertakings may be capable of ready implementation, in particular in light of the fact that the scope of the Proposed Undertakings is limited to the SLC Gyms, there are no conditions for the implementation of the Proposed Undertakings and the Proposed Undertakings can be effected by David Lloyd giving notice to Virgin Active in accordance with the business purchase agreement, signed between the Parties on 19 January 2017, that the SLC Gyms will be excluded from the Merger.

12. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things, any third party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA.

Consultation process

13. Full details of the undertakings offered and the CMA's Notice of Consultation have also been published today[2] (26 May 2017) in accordance with Schedule 10 of the Act.[3]

Decision

14. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by the Parties, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 31 July 2017 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 26 September 2017 if it considers that there are special reasons for doing so. If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

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[2] See the David Lloyd Clubs / Virgin Active gyms merger inquiry case page.
[3] *CMA2*, paragraph 8.29.