

Anticipated acquisition by Vision Express (UK) Limited of Tesco Opticians

Decision that undertakings might be accepted

ME/6696/17

The CMA's decision under section 73A(2) of the Enterprise Act 2002 that undertakings might be accepted, given on 11 October 2017. Full text of the decision published on 20 October 2017.

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Introduction

1. Vision Express (UK) Limited (**Vision Express**) has agreed to acquire 209 Tesco Opticians optical retail outlets located within Tesco stores in the UK and Ireland (**Tesco Opticians**) from Tesco Stores Limited and Tesco Ireland Limited (the **Merger**). Vision Express and Tesco Opticians are together referred to as the **Parties**.
2. On 28 September 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 28 September 2017, 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 5 October 2017, Vision Express 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 Vision Express 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 relation to the retail supply of optical products and services in bricks-and-mortar stores in three local areas (Barrow-in-Furness, Helston and Ryde)¹ as a result of horizontal unilateral effects.
8. To address this SLC, Vision Express has offered to divest the Vision Express store in each of the three local areas in which the SLC Decision identified competition concerns (the **Proposed Undertakings**), which will remove the increment arising from the Merger in each of those local areas.
9. The divestment will occur by way of an asset transfer, involving the transfer of staff, ophthalmic equipment, fixtures and fittings, customer databases and the assignment of the applicable lease [X].

The CMA's provisional views

10. 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

¹ Barrow-in-Furness is located in Cumbria, North West England. Helston is located in Cornwall, England. Ryde is located in Isle of Wight, England.

restores competition to the level that would have prevailed absent the merger.²

11. The CMA believes that the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA. This is because the Proposed Undertakings are intended to result in a new owner of the three sites that will continue to provide a similar range of products and services to that currently offered by the business to be divested. As such, the Proposed Undertakings may replace the competitive constraint in each of these local areas that would otherwise be lost following the Merger.
12. The CMA currently believes that 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, given that the Proposed Undertakings are limited to only three local areas.
13. For these reasons, the CMA currently believes that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.

Upfront buyer

14. The CMA's guidance states that "the CMA will normally seek an upfront buyer where the divestiture package is not an existing standalone business and/or where the risk profile of the remedy requires it [...]".³
15. The CMA has carefully assessed whether an upfront buyer provision would be appropriate in the present case. Based on the available evidence, the CMA considers that each of the divestment stores are viable and stand-alone businesses (ie they operate relatively independently) that are readily capable of being sold. The CMA has, in particular, reviewed and placed reliance on evidence, including financial information (eg past, current and estimated revenues and profitability), indicating that the stores that Vision Express proposed to divest are saleable and likely to be able to continue to operate as a going concern.

² *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).

³ *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, paragraph 8.34.

16. The CMA has also been provided with evidence of a number of potentially suitable purchasers who have expressed an interest in purchasing the Vision Express stores in the relevant local areas.
17. For these reasons, the CMA does not consider at present that an upfront buyer is necessary in this case.

Consultation process

18. 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 factors, third party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA.
19. Full details of the undertakings offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.⁴

Decision

20. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by Vision Express, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 7 December 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 6 February 2018 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.

Adam Land
Senior Director, RBFA
Competition and Markets Authority
11 October 2017

⁴ *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, paragraph 8.29.