

ACQUISITION BY HENDERSON RETAIL LIMITED OF PART OF THE MARTIN MCCOLL LIMITED PORTFOLIO

Variation to an Initial Enforcement Order made by the Competition and Markets Authority pursuant to section 72(2) of the Enterprise Act 2002 (the Act)

Whereas:

- (a) the Competition and Markets Authority (CMA), having reasonable grounds for suspecting that it is or may be the case that Henderson Retail Limited and a portfolio of stores owned by Martin McColl Limited (the Target Stores) have ceased to be distinct, made an Initial Enforcement Order dated 7 December 2017 (the Initial Enforcement Order);
- (b) the CMA is still considering, pursuant to section 22 of the Act, whether it is or may be the case that a relevant merger situation has been created and whether the creation of that situation has resulted or may be expected to result in a substantial lessening of competition in any market or markets in the United Kingdom (UK);
- (c) the CMA wishes to ensure that no action is taken pending final determination of any reference under section 22 of the Act which might prejudice that reference or impede the taking of any action by the CMA under Part 3 of the Act which might be justified by the CMA's decisions on the reference; and
- (d) the circumstances set out in section 72(6) of the Act do not apply and the reference has not been finally determined in accordance with section 79(1) of the Act.

Now CMA makes the following variation to its Initial Enforcement Order for the purposes of preventing pre-emptive action in accordance with section 72(2) of the Act. This variation is addressed to Henderson Wholesale Limited and Henderson Retail Limited (Henderson) (the Variation) and supersedes the Initial Enforcement Order.

Commencement, application and scope

1. This Variation commences on the commencement date: 14 December 2017.

2. This Variation applies to Henderson.
3. Notwithstanding any other provision of this Variation, no act or omission shall constitute a breach of this Variation, and nothing in this Variation shall oblige Henderson to reverse any act or omission, in each case to the extent that it occurred or was completed prior to the commencement date of the Initial Enforcement Order.

Management of the relevant Henderson and the Target Stores' businesses until determination of proceedings

4. Except with the prior written consent of the CMA, Henderson shall not, during the specified period, take any action which might prejudice a reference of the transaction under section 22 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might transfer the ownership or control of the relevant Henderson business or the Target Stores' business or any of their subsidiaries.
5. Further and without prejudice to the generality of paragraph 4 and subject to paragraph 3, Henderson shall at all times during the specified period procure that, except with the prior written consent of the CMA:
 - (a) the Target Stores' business and the relevant Henderson business are maintained as a going concern and sufficient resources are made available for the development of the Target Stores' business and the relevant Henderson business, on the basis of their respective business plans;
 - (b) the nature, description, range and quality of goods and/or services supplied in the UK by each of the two relevant businesses are maintained and preserved;
 - (c) except in the ordinary course of business for the separate operation of the two relevant businesses:
 - (i) all of the assets of the Target Stores' business and the relevant Henderson business are maintained and preserved, including facilities and goodwill;
 - (ii) none of the assets of the Target Stores' business or the relevant Henderson business are disposed of; and
 - (iii) no interest in the assets of the Target Stores' business or the relevant Henderson business is created or disposed of;

- (iv) all existing contracts of Henderson which relate to supplying independent stores within a five-mile radius of any of the Target Stores as part of the relevant Henderson business continue to be serviced on broadly the same terms; and
- (d) all reasonable steps are taken to encourage all key staff to remain with the Target Stores' business;

Compliance

6. Henderson shall procure that, where applicable, each of their subsidiaries complies with this Variation as if the Variation had been issued to each of them.
7. Henderson shall provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by Henderson and its subsidiaries with this Variation. In particular, on 21 December 2017 and subsequently every two weeks (or, where this does not fall on a working day, the first working day thereafter) the Chief Executive Officer(s) of Henderson or other persons of Henderson as agreed with the CMA shall, on behalf of Henderson, provide statements to the CMA in the form set out in the Annex to this Variation confirming compliance with this Variation.
8. At all times, Henderson shall, or shall procure that the Target Stores shall, actively keep the CMA informed of any material developments relating to the Target Stores' business or the relevant Henderson business, which includes but is not limited to:
 - (a) details of key staff who leave or join the Target Stores' business or the relevant Henderson business;
 - (b) any interruption of the Target Stores' or relevant Henderson business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for more than 24 hours;
 - (c) all substantial customer volumes won or lost or substantial changes to the customer contracts for the Target Stores' or relevant Henderson business including any substantial changes in customers' demand; and
 - (d) substantial changes in the Target Stores' or relevant Henderson business's contractual arrangements or relationships with key suppliers.

9. If Henderson has any reason to suspect that this Variation might have been breached it shall immediately notify the CMA and any monitoring trustee that Henderson may be directed to appoint under paragraph 10.
10. The CMA may give directions to a specified person or to a holder of a specified office in any body of persons (corporate or unincorporated) to take specified steps for the purpose of carrying out, or ensuring compliance with, this Variation, or do or refrain from doing any specified action in order to ensure compliance with the Variation. The CMA may vary or revoke any directions so given.
11. Henderson shall comply in so far as it is able with such directions as the CMA may from time to time give to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with this Variation.

Interpretation

12. The Interpretation Act 1978 shall apply to this Variation as it does to Acts of Parliament.

13. For the purposes of this Variation:

'the Act' means the Enterprise Act 2002;

'an affiliate' of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on from time to time and any enterprise that the second person carries on from time to time would be regarded as being under common control for the purposes of section 26 of the Act;

'business' has the meaning given by section 129(1) and (3) of the Act;

'commencement date' means 14 December 2017;

'control' includes the ability directly or indirectly to control or materially to influence the policy of a body corporate or the policy of any person in carrying on an enterprise;

'the decisions' means the decisions of the CMA on the questions which it is required to answer by virtue of section 35 of the Act;

'Henderson' means Henderson Wholesale Limited, company number NI000068 and Henderson Retail Limited, company number R0000035;

‘the Henderson business’ means the business of Henderson and its subsidiaries but excluding the Target Stores’ business as carried on at the commencement date;

‘key staff’ means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business;

‘McColl’ means Martin Mccoll Limited, company number 298945

‘the ordinary course of business’ means matters connected to the day-to-day supply of goods and/or services by the Target Stores or Henderson and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of the Target Stores into Henderson;

‘the relevant Henderson business’ means the business of Henderson and its subsidiaries (excluding the Target Stores’ business) as carried on at the commencement date within a five-mile radius of any of the Target Stores;

‘specified period’ means the period beginning on the commencement date and terminating in accordance with section 72(6) of the Act;

‘subsidiary’, unless otherwise stated, has the meaning given by section 1159 of the Companies Act 2006;

‘the Target stores’ means the stores operated at the following addresses, together with all assets purchased pursuant to the Sale and Purchase Agreement between Henderson and McColl dated 16 November 2017:

- 35 Main Street, Bangor, County Down;
- Unit 5, The Throne Centre, 252 Whitewell Road, Newtownabbey, County Antrim;
- 2-5 Abbots Cross, Doagh Road, Newtownabbey, County Antrim;
- 39-42 Church Street, Tandragee, Craigavon, County Armagh;
- 5 Dunclug Shopping Centre, Ballymena, County Antrim;

‘the Target Stores’ business’ means the business carried on at the Target Stores as at the commencement date;

‘the transaction’ means the transaction by which the activities of the Henderson business and the activities of the Target Stores business have ceased to be distinct within the meaning of section 23 of the Act;

'the two relevant businesses' means the relevant Henderson business and the Target Stores' business;

unless the context requires otherwise, the singular shall include the plural and vice versa.

Alba Ziso, Assistant Director, Mergers

Compliance statement for Henderson Wholesale Limited and Henderson Retail Limited

I, [insert name], confirm on behalf of Henderson Wholesale Limited and Henderson Retail Limited (Henderson) that:

Compliance in the Relevant Period

1. In the period from [insert date] to [insert date] (the Relevant Period):
 - (a) Henderson has complied with the Variation to the Initial Enforcement Order made by the CMA on 14 December 2017 (the Variation).
 - (b) Henderson's subsidiaries have also complied with this Variation.
2. Subject to paragraph 3 of the Variation, and except with the prior written consent of the CMA:
 - (a) No action has been taken by Henderson that might prejudice a reference of the transaction under section 22 of the Act or impede the taking of any action by the CMA which may be justified by its decision on such a reference, including any action which might transfer the ownership or control of the relevant Henderson business or the Target Stores' business or any of their subsidiaries.
 - (b) The Target Stores' business and the relevant Henderson business have been maintained as a going concern and sufficient resources have been made available for the development of the Target Stores' business and the relevant Henderson business, on the basis of their respective business plans.
 - (c) The nature, description, range and quality of goods and/or services supplied in the UK by the Target Stores' business and the relevant Henderson business have been maintained and preserved.
 - (d) Except in the ordinary course of business for the separate operation of the two relevant businesses:
 - (i) all of the assets of the Target Stores' business and the relevant Henderson business, including facilities and goodwill, have been maintained and preserved as at the start of the Relevant Period;

- (ii) none of the assets of the Target Stores' business or the relevant Henderson business have been disposed of; and
 - (iii) no interest in the assets of the Target Stores' business or the relevant Henderson business has been created or disposed of.
- (e) All existing contracts of Henderson that serve independent stores within a five-mile radius of any of the Target Stores as part of the relevant Henderson business continue to be serviced on broadly the same terms, except to the extent novated, assigned or subcontracted prior to the commencement date.
- (f) All reasonable steps have been taken to encourage all key staff to remain with the Target Stores' business and the relevant Henderson business.
- (g) Except as listed in paragraph (h) below, there have been no:
- (i) key staff that have left or joined the Target Stores' business;
 - (ii) interruptions of the Target Stores' business or the relevant Henderson business (including without limitation procurement, production, logistics, sales and employee relations arrangements) that have prevented it from operating in the ordinary course of business for more than 24 hours;
 - (iii) substantial customer volumes won or lost or substantial changes to the customer contracts for the Target Stores' business or the relevant Henderson business; or
 - (iv) substantial changes in the Target Stores' or relevant Henderson business's contractual arrangements or relationships with key suppliers.
- (h) *[list of material developments]*

3. Henderson and its subsidiaries remain in full compliance with the Variation and will, or will procure that the Target Stores, continue actively to keep the CMA informed of any material developments relating to the Target Stores or the relevant Henderson business in accordance with paragraph 8 of the Variation.

Interpretation

4. Terms defined in the Variation have the same meaning in this compliance statement.

FOR AND ON BEHALF OF HENDERSON

Signature

Name

Title

Date