

Anticipated acquisition by Mole Valley Farmers Limited of the retail business of Countrywide Farmers plc

Decision to refer

ME/6714/17

The CMA's decision to refer under section 33 of the Enterprise Act 2002 given on 6 March 2018. Full text of the decision published on 9 March 2018.

Introduction

1. Mole Valley Farmers Limited (**Mole Valley**) has agreed to acquire the retail business (the **Retail Business**) of Countrywide Farmers plc (**Countrywide**) (the **Merger**). Mole Valley and Countrywide are together referred to as the **Parties**. They overlap in the supply of country store retail and the supply of bulk agricultural products in multiple local areas of the United Kingdom.
2. On 21 February 2018, 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**).¹
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, in order to allow the Parties the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, 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.
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 before the end of

¹ See <https://www.gov.uk/cma-cases/mole-valley-farmers-countrywide-farmers-merger-inquiry>.

the five working day period specified in section 73A(1)(a) of the Act. The SLC decision stated that the CMA would refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act if the Parties did not offer UILs by the end of this period, ie by 28 February 2018; or if the Parties offered UILs and the CMA decided by 7 March 2018 pursuant to section 73A(2) of the Act that there were no reasonable grounds for believing that it might accept these UILs or a modified version of them.

5. Pursuant to section 34ZA(2) of the Act the CMA is not prevented from making a reference under section 33 of the Act in the event that it decides that the duty to refer does not apply because it is considering whether to accept undertakings under section 73 of the Act but no such undertakings are offered or accepted.
6. The Parties each operate country stores in rural areas. In the SLC Decision, the CMA decided that it is or may be the case that the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in relation to country store retail in the catchment areas of 25 Countrywide stores and their overlapping Mole Valley stores and in relation to the supply of bulk agricultural products in the catchment areas of 45 Countrywide stores and their overlapping Mole Valley stores.

The undertakings offered

7. On 28 February 2018, the Parties offered the CMA the following undertakings (the **Proposed Undertakings**) consisting of a combination of:
 - (a) A structural remedy consisting of (i) an amendment of the Parties' sale and purchase agreement (the **SPA**) to exclude 25 stores of the Retail Business,² and (ii) an undertaking from Mole Valley not to directly or indirectly exert any control over these stores for a period of five years from the date of the undertaking (the **Proposed Structural Undertaking**);
 - (b) A behavioural remedy in relation to 20 stores of the Retail Business,³ consisting of establishing maximum list prices for each overlapping SKU

² These 25 stores comprise those stores listed in the CMA's SLC decision at Annex 2 table 1 and those stores listed as failing in column 7 (*Result after filtering out stores >50 mins apart that have only one overlap between Countrywide and Mole Valley*) of Annex 3 Table 2. In the SLC decision, the CMA found that the Merger would create a realistic prospect of an SLC in country store retail in relation to these 25 stores. See a list of the relevant stores in Annex 1 to this decision. The undertaking also contained a provision requiring the Parties to amend the SPA to provide such transitional services as Countrywide may reasonably require in order to continue to operate those 25 stores for a period of 6 months from the completion date.

³ These 20 stores comprise all stores which Mole Valley originally planned to acquire as a part of the Merger other than (i) the 3 stores which the CMA identified as not overlapping with Mole Valley's stores, and (ii) the 25 stores which are part of the Proposed Structural Undertaking. See a list of these stores in Annex 1 to this decision.

of bulk agricultural products, for a period of 12 months following the date of completion, based on the lowest list price offered by the Parties (excluding special offers) at the date of completion of the Merger (the **Proposed Behavioural Undertaking**).

Assessment of the Proposed Undertakings

8. The CMA has an obligation under the Act in the phase 1 stage of its review to have regard, when accepting UILs, to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it (section 73(3) of the Act). Accordingly, the remedies proposed must be clear-cut and capable of ready implementation.⁴ This means, amongst other things, that the CMA must be confident that, if the UILs are accepted, there is no material doubt about their overall effectiveness; and that the UILs must not be of such magnitude and complexity that their assessment and implementation would require unworkable resources at phase 1.
9. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).⁵ In view of the possibility to refer the Merger for an in-depth investigation, following which the CMA has significant remedy powers, the CMA will be extremely cautious before accepting a remedy that simply mitigates the competition concerns.⁶
10. In the SLC Decision, the CMA identified competition concerns in relation to 45 out of the 48 stores which Mole Valley planned to acquire from Countrywide. The CMA notes that it is likely to be very difficult to put in place a remedy that meets the clear-cut requirement at phase 1 where the problematic overlaps represent such a large proportion of the transaction.⁷

The Proposed Structural Undertaking

11. The Parties submitted that the Proposed Structural Undertaking will ensure that Mole Valley does not acquire the 25 relevant stores, and will maintain the

⁴ *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122, December 2010) (**Exceptions Guidance**), adopted by the CMA as set out in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), Annex D), paragraphs 5.6-7.

⁵ Exceptions Guidance, paragraph 5.11.

⁶ Exceptions Guidance, paragraph 5.12.

⁷ Exceptions Guidance, paragraph 5.8; CMA2, paragraph 8.4.

state of competition that would have existed but for the Merger in the geographic areas affected.

12. The CMA considered whether the Proposed Structural Undertaking would return the affected geographic areas to the state of competition that would have existed absent the merger. The CMA notes that under the Proposed Behavioural Undertaking, the Retail Business would reduce by 20 stores. The Parties provided no assurances to the CMA that Countrywide would continue to trade from the remaining 28 stores. The CMA is concerned that the remaining Retail Business could be less capable of competing with the Parties in the relevant geographic areas than Countrywide would have been, absent the Merger.
13. In addition, the CMA notes that there has been no attempt to offer one or more suitable purchasers who might have been interested in acquiring those stores, and nor do the offered UILs include any provisions in relation to an upfront buyer. As stated in the Exceptions Guidance, the CMA will seek an upfront buyer where the risk profile of the remedy requires it, for example where the CMA has reasonable doubts with regard to the ongoing viability of the divestment package and/or there is only a small number of candidate suitable purchasers for the divestment business. Such doubts may arise, for example, because there are questions about the commercial attractiveness of the divestment business or its financial viability. In this case, the CMA believes that further fragmentation of the portfolio of Countrywide stores, while strengthening the position of Mole Valley in some local areas, as noted in paragraph 12, might weaken the commercial position of these stores, making it more necessary to ensure any acquirer is suitable to restore the level of competition in those local areas.
14. The Parties also proposed that the amendments to the SPA could include transitional services to support the continued operation of the relevant stores for a period of 6 months from the completion of the SPA. The Parties did not describe the nature or extent of these transitional services, and the CMA considers that the uncertainty surrounding these transitional services reduces the extent to which the Proposed Undertakings are clear-cut and capable of ready implementation.
15. Compared to a straightforward divestment, the CMA considers that in this case the Proposed Structural Undertaking raises serious risks around the continued operation and competitive effectiveness of the relevant stores, as described above. The CMA is not confident that the Proposed Structural Undertaking would resolve its competition concerns in both country store retail and the supply of bulk agricultural products in the geographical areas around these 25 stores.

The Proposed Behavioural Undertaking

16. The Parties submitted that the Proposed Behavioural Undertaking, under which maximum list prices would be set for each overlapping SKU of bulk agricultural products, would ensure that Mole Valley lowers the prices of its business and the relevant 20 stores to the same level, preventing any price rises as a result of the Merger.
17. At phase 1, the CMA is generally unlikely to consider that behavioural undertakings will be sufficiently clear cut to address the identified competition concerns, as they bring a number of risks which can reduce their effectiveness or create competition concerns elsewhere, and can be difficult to monitor and enforce.⁸
18. Despite its preference for structural remedies, the CMA does not inevitably refuse behavioural remedies offers. In particular, the CMA will consider behavioural undertakings where it considers that divestment would be clearly impractical or is otherwise unavailable. However in this case, these constraints do not apply.
19. Moreover, the CMA considers that the Proposed Behavioural Undertaking demonstrates many of the features which typically make behavioural undertakings unappealing. Price is merely one dimension on which the Parties compete, and the Proposed Behavioural Undertaking would not prevent a deterioration of their range, service or other aspects of their offer.
20. Furthermore, as set out in the SLC Decision, there is substantial scope for individual negotiation of the prices of bulk agricultural products, which a price cap on list prices would not address.
21. A price cap can also quickly become obsolete. The range of products sold by the Parties may change over time in the ordinary course of business, and in this instance, the CMA notes in particular that the Parties have only offered a price cap for a period of 12 months, and that the CMA's competition concerns extend beyond this period.
22. The CMA is therefore not confident for the reasons above that the Proposed Behavioural Undertaking would resolve its competition concerns in the supply of bulk agricultural products in the geographical areas around the relevant stores.

⁸ Exception Guidance, paragraphs 5.39 to 5.41.

Decision

23. For the reasons set out above, after examination of the Proposed Undertakings, the CMA does not believe that it would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.
24. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.
25. Therefore, pursuant to sections 33(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

Rachel Merelie
Executive Director
Competition and Markets Authority
6 March 2018

ANNEX 1

Countrywide stores subject to the Proposed Structural Undertaking

Ashbourne
Bideford
Chepstow
Cirencester
Crewkerne
Dartington
Gloucester
Hatherleigh
Helston
Kingsbridge
Launceston
Liphook
Liskeard
Melksham
Newmarket
Nuneaton
Otterham
Penzance
Taunton
Tavistock
Thornbury
Tredington
Twyford
Upton
Wadebridge

Countrywide stores subject to the Proposed Behavioural Undertaking

Abergavenny
Bearley
Bourton
Bridgend
Bridgnorth
Bromsgrove
Bromyard
Chipping Norton
Evesham
Gower
Hereford
Ledbury
Malvern
Market Drayton
Raglan
Stockton
Thame
Wardle
Whitchurch
Witney