

Completed acquisition by CD&R Fund IX of MRH (GB) Limited

Decision that undertakings might be accepted

The CMA's decision under section 73A(2) of the Enterprise Act 2002 that undertakings might be accepted, given on 14 September 2018. Full text of the decision published on 5 October 2018.

ME/6750/18

Introduction

1. On 21 June 2018, Clayton Dubilier & Rice Fund IX, L.P. (**CD&R Fund IX**), a private equity fund which exercises indirect control over Motor Fuel Group (**MFG**) via a number of companies, including CD&R Firefly Holdco Limited, acquired MRH (GB) Limited, through the acquisition of MRH's holding company, LSF9 Robin Topco Limited (**MRH**) (the **Merger**). MFG and MRH are together referred to as the **Parties**.
2. On 31 August 2018, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger constitutes a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the UK (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 CD&R Fund IX of the SLC Decision. However, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 22(3)(b) on the date of the SLC Decision in order to allow the parties concerned 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 7 September 2018, CD&R Firefly Holdco Limited, Clayton Dubilier & Rice, LLC (which manages CD&R Fund IX), and CD&R Associates IX, L.P. (the general

partner of CF&R Fund IX) (together **CD&R**), 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 CD&R 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 road fuel in the 29 overlap areas listed in Annex 1 (**SLC areas**). In its assessment, the CMA identified catchment areas defined by drive-time isochrones centred on each of the MFG and MRH sites. Where the Parties' sites overlapped, the Parties then applied primary filters agreed with the CMA to identify local areas of potential concern. Through this filtering, 84 overlap areas 'failed' one or more of the primary filters. The Parties conceded that the test for reference was met in 23 of these overlap areas. Following further assessment of the local conditions of competition, the CMA concluded that the test for reference was also met in relation to a further 6 of the 'failing' overlap areas.
8. The SLC Decision also found that the Merger resulted in one area failing filters as regards the retail supply of auto-LPG (MFG Sparkford/MRH Podimore), and two areas failing filters as regards the retail supply of groceries (MFG Sparkford/MRH Hazelgrove, and MRH Newbridge). These areas form part of local overlap areas in which the CMA found a realistic prospect of an SLC in relation to the retail supply of road fuel. On the basis of evidence received from the Parties, the CMA believed that undertakings in lieu of a reference which satisfactorily addressed the CMA's concerns with regard to the retail supply of road fuel in these areas would also address any concerns the CMA may have in these areas in relation to the retail supply of auto-LPG and/or groceries. Accordingly, the CMA did not conclude on whether the test for reference was met with regard to the retail supply of auto-LPG or the retail supply of groceries in these local areas.

9. To address the competition concerns set out in the SLC Decision, CD&R has offered to divest in each SLC area listed in Annex 1 a site, or sites, which resolve the CMA's primary filters such that none of the sites remaining in a given SLC area fail the CMA's filters. However, recognising that on further inspection by the CMA, certain proposed sites could be deemed by the CMA to be unsuitable or insufficient, in particular following discussions with potential purchasers, CD&R has offered in the alternative to divest in each SLC area such other site or sites to address effectively the SLC up to and including the increment caused by the Merger. The relevant site or sites would include the auto-LPG facilities and/or grocery outlets, where applicable.
10. The divestment will occur by way of a sale of the freehold or, subject to the CMA's approval, the grant of a leasehold title with a minimum 25-year term (which may be subject to a break clause at 15 years exercisable at the option of the purchaser) (where either MFG or MHR holds the freehold interest in the site), or by way of an assignment of a leasehold interest (the **Proposed Undertakings**).
11. Pursuant to the Proposed Undertakings, CD&R may, in some areas, divest more than one site and may divest more sites than are needed to ensure that the remaining sites no longer fail the CMA's filters.

The CMA's provisional views

12. The CMA considers that undertakings in lieu of a reference are appropriate when they are clear-cut and capable of ready implementation.
13. 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 However, it is open to the parties to persuade the CMA that a proposed remedy that does not directly restore competition to pre-merger levels nevertheless clearly and comprehensively removes the SLC identified.²
14. Divestment of a site or sites to ensure that none of the remaining sites in an SLC area fail the CMA's filters does not restore the pre-Merger situation in all areas since it does not necessarily represent the divestment of the entire increment in the local area. However, the Parties submitted that the cautious

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). See also *Co-operative Group (CWS) Limited v OFT* (2007) CAT 24, paragraphs 149-151.

² *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*, paragraph 5.11.

nature of the filters ensures that, for each SLC area, the proposed divestment or divestments will fully and comprehensively address any concerns that the Merger may give rise to a realistic prospect of an SLC.

15. The CMA notes that in a previous case involving petrol stations,³ as well as in previous cases in other sectors,⁴ the CMA and the Office of Fair Trading have accepted divestments falling short of the entire increment as sufficient to address local competition concerns.
16. In this case, the primary filters were applied to identify local areas which warranted further assessment. The filters were applied to each MRH and MFG site that overlapped. If no sites failed the filters then a given overlap area was not assessed further, thereby determining that there was no realistic prospect of an SLC in that area. The CMA therefore considers that, in this case, to the extent that the Proposed Undertakings ensure that none of the sites remaining in a given SLC area fail the filters, this is likely to provide a clear-cut and effective remedy for the SLCs identified. The option to divest alternative and, if needed, additional sites further ensures that the Proposed Undertakings may be clear-cut and effective in terms of addressing the competition concern identified.
17. The CMA also believes, at this stage, that the Proposed Undertakings may be capable of ready implementation, in particular in light of the option to divest alternative and, if needed, additional sites. Moreover, the divestment sites are stand-alone businesses and the Parties have provided evidence that there are several potential suitable purchasers for all their divestment sites. For this reason, and consistent with the CMA's practice in previous cases involving the divestment of petrol stations, the CMA does not consider that it is necessary for the CMA to approve the identity of the purchaser or purchasers prior to final acceptance of the undertakings.⁵
18. 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.
19. The CMA's decision on whether ultimately to accept the Proposed Undertakings or to refer the Merger for a phase 2 investigation will be informed by, among other things, third party views on whether the Proposed

³ ME/5191/22 Completed acquisition by Shell UK Limited of 253 petrol stations from Consortium Rontec Investments LLP, July 2012.

⁴ See ME/4609/10 Anticipated acquisition by Travis Perkins Plc of the BSS Group Plc, October 2010; ME/6501/14 Anticipated acquisition by Greene King plc of Spirit Pub Company plc, May 2015.

⁵ *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*, paragraph 8.34.

Undertakings are suitable to address the competition concerns identified by the CMA.

Consultation process

20. 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.⁶

Decision

21. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by CD&R, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 9 November 2018 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 9 January 2019 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 22(1) and 34ZA(2) of the Act.

Sheldon Mills
Senior Director
Competition and Markets Authority
14 September 2018

⁶ [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#), paragraph 8.29.

Annex 1

SLC areas
MFG Ashford/MFG East Stour/MRH Beaver/MRH Hothfield
MFG Barnet/MFG New Barnet/MFG Potters Bar/MRH Whetstone/MRH Cockfosters/MRH Southgate
MFG Bawbee/MRH Leven
MFG Bear Cross/MFG Hamworthy/MFG Bournemouth Road/MRH Wallisdown/MRH Oakdale/MRH East Howe/MRH Longfleet
MFG Beaumont/MRH Kings Norton
MFH Brighton Road/MRH Whitgift/MRH Hayling Down
MFG Calne/MRH Pippin
MFG Canvey Island/MFG Kents Hill/MRH Canvey Island/MRH Long Road/MRH Manor
MFG Carlton Square/MFG Sportsman/MRH East Lane/MRH Pierrepont
MFG Fairfield/MRH Newbridge
MFG Finsbury Park/MFG Stamford Hill/MFG Ambassador/MRH Hornsey Road/MRH Hornsey Rise/MRH Stamford Hill
MFG Hanwell/MRH Studley Grange/MRH Southall
MFG Hastings/MFG Bexhill/MRH Glyne Gap/MRH Sidley
MFG Kenilworth/MRH Warwick Road

MFG Killay/MRH Dunvant
MFG Lymm/ MRH Cheshireways
MFG Mid-Cornwall/MRH Cornish Gateway
MFG New John Street/MRH Key Hill
MFG Northwick/MFG St Stephens/MRH Castle/MRH Blackpole
MFG Pwllmeyric/MFG Almondsbury/MRH Chepstow/MRH Patchway
MFG Riviera/MRH Riviera
MFG Sparkford/MFG Fosse Way Garage/MRH Hazelgrove/MRH Podimore/MRH Lydford
MFG Styal Road/MRH Civic Centre
MFG Swallow/MRH Felling/MRH Gateshead
MRH Runnymede/MFG Egham
MFG Walton House/MFG Parkhurst/MRH Moleside/MRH Palace/MRH Shepperton
MFG Thamesmead/MRH Lakedale
MFG Grays/MRH Chafford/MRH Daneholes
MFG Romford/MRH Collier Row