

Request by Morrisons for variation of the UILs in relation to Pewsey High Street

23 June 2023

Introduction

1. Wm Morrison Supermarkets ("**Morrisons**") completed the acquisition of the assets and business of McColl's Retail Group plc ("**MRG**") on 9 May 2022. Following the CMA's review, which identified a significant lessening of competition in 35 local areas, Morrisons offered and the CMA accepted undertakings in lieu of a reference on 27 October 2022 (the "**UILs**"). Under the UILs, Morrisons is required to divest 28 McColl's convenience stores (the "**Divestment Sites**") to a purchaser or purchasers approved by the CMA. Having undertaken a thorough sales process, Morrisons has identified and the CMA has approved suitable purchasers in relation to all of the Divestment Sites.
2. In relation to one of the Divestment Sites, a leasehold property at 36 High Street, Pewsey, SN9 5AQ (the "**Pewsey Site**"), having undertaken a thorough sales process and identified a suitable purchaser that was approved by the CMA, the landlord of the site (the "**Landlord**") has refused consent to transfer the lease to the prospective purchaser on the ground that he wishes to redevelop the property for residential use.
3. Accordingly, and as discussed with the Case Team, Morrisons now submits a request to vary the UILs so that Morrisons is released from its obligation to divest the Pewsey Site.

Summary of the relevant background

4. As explained to the Case Team,¹ Morrisons has used its best endeavours throughout the divestment process to secure the sale of the Pewsey Site. In particular, in October 2022 Morrisons instructed EMF, an experienced sales agent of convenience stores, to market the Pewsey Site as part of a package of Divestment Sites across the South West England and Wales region and attracted interest from regional and local purchasers, including [REDACTED] (the "**Purchaser**").
5. Morrisons and the Purchaser reached Heads of Terms in respect of six Divestment Sites in January 2023, which included the sale of the Pewsey Site for a purchase

¹ Emails from Ashurst to the CMA of 11 and 28 April 2023.

price of [REDACTED]. The rent payable under the lease for the Pewsey Site was £[REDACTED], which the Purchaser confirmed it was willing to pay. EMF also confirmed that the annual rent corresponds to market rates taking into account rents in the local area and the size of the store.

6. As explained in Morrisons' UILs offer, Morrisons does not own the freehold title of the Pewsey Site, which is held by the Landlord. As is standard in relation to the sale of a leasehold commercial property, the Landlord's consent is required to transfer the site to the new purchaser.
7. Morrisons has been actively engaging with the Landlord to obtain consent to the transfer of the property to the Purchaser. However, in February 2023, the Landlord issued a section 24(3) notice (the "**Section 24 Notice**") under the Landlord and Tenant Act 1954 Act (the "**1954 Act**") purporting to end Morrisons' tenancy on 15 May 2023. Morrisons was subsequently informed that the Landlord intends to reclaim the property and redevelop it for residential use.

Material change in circumstances

8. The CMA has the power (under section 73 of the Enterprise Act 2002) to vary an undertaking, or supersede it by another, or alternatively to release an undertaking. The CMA has issued guidance (CMA 11) (the "**Guidance**") which sets out the circumstances in which it will exercise its powers to vary or release undertakings.
9. The Guidance states that in considering a potential variation or termination of undertakings, the CMA will consider whether there has been a change of circumstances. If there has been such a change, the CMA will then consider what action, if any, should be taken. The Guidance states that the change of circumstances must be such that the undertaking is no longer appropriate in dealing with the competition problem and/or adverse effects which it was designed to remedy, if it is to lead to either variation or termination.
10. In this connection, the CMA's Merger Remedies Guidelines state that:

"the CMA's starting point is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC" and that "[t]he objective is to ensure that competition following the implementation of the remedy is as effective as pre-merger competition".²

² Merger Remedies Guidelines (CMA87), paragraph 3.30.

11. Moreover, in cases where the CMA applies a 'decision rule' during phase 1 of its merger assessment, the CMA considers that:

"use of a decision rule is designed to assess all local areas of overlap systematically by reference to the same factors, rather than having regard to different factors in different local areas, unless there is evidence that certain factors are only applicable in certain local areas (eg imminent entry or exit)".³

12. In light of the CMA's Guidelines and practice, the Landlord's decision to issue a Section 24 Notice and reclaim the Pewsey Site for residential use constitutes a material change in circumstances. This is because, had Morrisons or McColl's been aware of this material fact either before or during the CMA's merger investigation, the merging parties would have submitted as evidence during the CMA's phase 1 procedure that the Landlord's decision to repossess the property constitutes an imminent exit from the market and should be taken into account as a relevant factor when applying the CMA's decision rule.
13. Morrisons therefore submits that the CMA would likely have reached a different conclusion in its SLC decision in respect of the Pewsey Site had this information been available at the relevant time. In light of these circumstances, [REDACTED], Morrisons submits that it would be appropriate for the CMA to review whether the UILs should be varied and Morrisons should be released from its obligation to divest the Pewsey Site.

Ashurst LLP

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³ *CD&R/Morrisons* (2022), paragraph 84. See also *Asda/Arthur (Co-op)* (2023), paragraph 69.