

Completed acquisition by Alliance Property Holdings Limited, a wholly owned subsidiary of Wm Morrison Supermarkets Limited, of the assets and business of McColl's Retail Group Plc (in administration)

Decision on whether to conduct a review of undertakings in lieu of a reference

ME/7002/22

Summary

1. On 23 June 2023, Wm Morrison Supermarkets Limited (**Morrisons**) wrote to the Competition and Markets Authority (**CMA**) requesting that the CMA varies the undertakings in lieu of a reference (**UILs**) that were accepted on 27 October 2022 in connection with the completed acquisition by Alliance Property Holdings Limited (**Alliance**), a wholly owned subsidiary of Morrisons, of the assets and business of McColl's Retail Group plc, Martin McColl Limited, Clark Retail Limited, Dillons Stores Limited, Smile Stores Limited, Charnwait Management Limited, and Martin Retail Group Limited (these assets are collectively referred to as **McColl's**) (the **Merger**).¹ Morrisons is seeking a variation of the UILs in light of a change of circumstances.
2. The evidence the CMA has received from Morrisons indicates that there is a realistic prospect of a review of the UILs finding a change in circumstances and that a review would be in line with the CMA's published prioritisation principles. The CMA has therefore decided to conduct a review of the UILs.
3. The CMA is not, at this stage, required to decide on the statutory question under section 92(2)(b) of the Enterprise Act 2002 (the **Act**) of whether there has been a change of circumstances, such that the UILs are no longer appropriate and need to be varied or superseded by a new enforcement undertaking. This decision is limited to whether to conduct a review of the UILs and is independent of, and without prejudice to, the future outcome of the CMA's assessment and review of the UILs.²

¹ The final UILs are available on the CMA's website at <https://www.gov.uk/cma-cases/morrisons-slash-mccolls-merger-inquiry>

² See also [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders](#) (CMA11), section 3.

Background

4. On 6 May 2022, McColl's entered into administration.³ Morrisons and McColl's submitted that McColl's administration was entirely independent of the Merger.
5. On 9 May 2022, Alliance, a wholly owned subsidiary of Morrisons, acquired the assets and business of McColl's.
6. On 8 September 2022, the CMA decided under section 22(1) of 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**) in relation to the retail supply of convenience groceries in 35 local areas (the **SLC Areas**) as a result of horizontal unilateral effects (the **SLC Decision**).
7. On 27 October 2022, the CMA accepted UILs from Morrisons under section 73(2) of the Act, pursuant to which Morrisons agreed to divest a site or sites in each of the SLC Areas (the **Divestment Sites**) to a purchaser or purchasers approved by the CMA by the end of the Divestment Period (as defined in the UILs), such that no areas would fail the CMA's decision rule (applied by the CMA in its SLC Decision) following the divestment. The Divestment Sites offered by Morrisons are listed in Annex 1 of the UILs Acceptance Decision.⁴ Each of these sites is a McColl's site. One of the Divestment Sites is a Martin's-branded McColl's store, a leasehold property located in 36 High Street, Pewsey, SN9 5AQ (the **Pewsey Site**).
8. On 2 February 2023, Morrisons submitted Smart Convenience Ltd (Companies House number 14549505) for the CMA's approval as a proposed purchaser of the Pewsey Site and five other Divestment Sites (the **Proposed Purchaser**).
9. On 20 April 2023, the CMA approved the Proposed Purchaser as a buyer of the Pewsey Site and five other Divestment Sites. This approval was conditional on the CMA being satisfied with the relevant transaction documents.
10. Between March and May 2023 (see 'Summary of Morrisons' submissions and UIL Variation Request' section below for more details), Morrisons made various submissions to the CMA, including in response to a request issued by the CMA under s109 of the Act, that it was unable to divest the Pewsey Site to the Proposed Purchaser, or to any other hypothetical purchaser, because the landlord of the Pewsey Site (the **Landlord**) decided to convert the Pewsey Site for residential use

³ PwC was appointed as the administrator for McColl's Retail Group Plc. All the entities included in the definition of McColl's used in this decision entered administration. See [McColl's Retail Group plc and subsidiaries \(pwc.co.uk\)](https://www.pwc.co.uk)

⁴ See [Morrisons / McColl's UILs acceptance decision](#)

and refused to transfer the lease to any new purchaser despite various efforts by Morrisons to induce the Landlord.

11. On 23 June 2023, Morrisons requested that the CMA vary the UILs⁵ so that Morrisons is released from its obligation to divest the Pewsey Site (**UIL Variation Request**). A summary of this request is available on the CMA's case page.⁶

Legal framework

12. Under clause 18.1 of the UILs, the UILs shall remain in force until such a time as they are varied, released or superseded under the Act. Under the Act, an undertaking in lieu of a reference accepted under section 73(2) of the Act may be varied or superseded by another undertaking⁷ or released by the CMA.⁸
13. The CMA has a statutory duty to keep enforcement undertakings under review.⁹ In considering Morrisons' request to vary the UILs the CMA must examine whether, by reason of any change of circumstances the UILs relating to the Pewsey Site are no longer appropriate and need to be varied or superseded by a new enforcement undertaking, or if Morrisons can be released from the UILs.¹⁰
14. The CMA has also had regard to its published guidance¹¹ that sets out that the review of undertakings consists of two stages: (i) an initial screening, where the CMA decides whether to conduct a review; and (ii) the review itself.¹² The scope of this decision is limited to whether to conduct a review of the UILs (ie the initial screening only).
15. In deciding whether to conduct a review, the CMA will consider its published prioritisation principles and whether there is a realistic prospect of finding a change of circumstances.¹³ The precise nature of the CMA's consideration of any change of circumstances depends entirely on the individual circumstances affecting a particular undertaking.¹⁴

⁵ Prior to submitting the UIL Variation Request, Morrisons also provided the CMA with various updates on the Pewsey divestment process, both via emails and on calls.

⁶ See Summary of Morrisons' UIL variation request.

⁷ Section 73(5)(b) of the Act.

⁸ Section 73(5)(c) of the Act.

⁹ Section 92(1)(a) of the Act. Section 89(2) of the Act sets out that the term "enforcement undertaking" includes an undertaking in lieu of a reference accepted under section 73(2) of the Act.

¹⁰ Section 92(2)(b) of the Act.

¹¹ [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders](#) (CMA11), revised August 2015

¹² See CMA 11, part 3.

¹³ CMA 11, paragraph 3.10

¹⁴ CMA 11, paragraph 2.5.

16. The CMA is not required to conclude, at this stage, on the statutory question of whether there has been a change of circumstances since the UILs came into force, such that the UILs are no longer appropriate and should be varied or superseded by a new undertaking.¹⁵ The CMA will issue a final decision addressing the statutory question after its review of the UILs is complete.
17. The CMA has decided, in this case, to proceed directly to carrying out its review of the UILs without issuing an invitation to comment on whether to carry out a review. The CMA considers that the change of circumstances claimed by Morrisons and evidence advanced in support (in particular, evidence relating to commercial negotiations between Morrisons including the Landlord and the steps Morrisons took to induce the Landlord to grant a lease to the Proposed Purchaser) in and of itself constitutes specified information which needs to be excluded from disclosure under Part 9 of the Act.¹⁶

Morrisons' UIL Variation Request and Submissions

18. Morrisons' UIL Variation Request states that the circumstances with regard to the Pewsey Site have materially changed since the UILs came into force on the basis of:
 - (a) Morrisons being unable to divest the Pewsey Site due to the Landlord refusing to transfer the lease to any prospective purchaser;
 - (b) Morrisons having made various unsuccessful attempts to induce the Landlord, [redacted]; and
 - (c) The Landlord's stance altering:
 - (i) the counterfactual adopted by the CMA for the local area surrounding the Pewsey Site, due to the imminent exit of the Pewsey Site from the local market; and
 - (ii) the outcome of the CMA's SLC Decision thereby changing the UILs that were offered by Morrisons such that a remedy for the local area surrounding the Pewsey Site would not have been needed.
19. Morrisons submitted that it was unable to divest the Pewsey Site due to a change of circumstances whereby the Landlord had decided that he did not wish to renew and transfer the lease for the Pewsey Site to any new tenant. This was because the

¹⁵ Section 92(2)(b) of the Act.

¹⁶ CMA 11, paragraph 3.6.

Landlord intends to convert the Pewsey Site for residential use. To support the above position, Morrisons submitted that:¹⁷

- (a) The lease required to operate the Pewsey Site expired in July 2020. Since then, McColl's had been operating the Pewsey Site through a licence granted to it by the Landlord (the **Licence**). When McColl's entered administration, in May 2022, the expired lease vested in the administrators of McColl's (the **Administrators**). Under the Merger, Morrisons acquired only the Licence.
- (b) In February 2023, Morrisons began negotiating with the Landlord to reach an agreement for the Landlord to grant tenancy of the Pewsey Site to the Proposed Purchaser. However in the same month, [REDACTED]. Morrisons was subsequently informed that the Landlord intended to reclaim the property and redevelop it for residential use.
- (c) Following receipt of [REDACTED], Morrisons made several offers to the Landlord in an effort to induce him to change his stance:
 - On 16 February 2023, Morrisons offered to [REDACTED].
 - On 16 February 2023, Morrisons also agreed to [REDACTED].
 - On 1 March 2023, the Proposed Purchaser offered [REDACTED].
 - On 12 April 2023, in addition to reiterating its offer of [REDACTED], Morrisons offered to [REDACTED].
 - On [REDACTED], Morrisons made enquiries [REDACTED] as to whether [REDACTED]. In addition, Morrisons explained that [REDACTED].
- (d) Morrisons also sought to [REDACTED] with a view to engaging with the Landlord in relation to a new lease. This included engagement with [REDACTED]. A section 26 notice was served on the Landlord on 27 March 2023, which gave the Landlord a statutory period of two months to oppose the grant of a new lease.
- (e) On 23 May 2023, the Landlord served a counter-notice to Morrisons' section 26 notice. The Landlord also confirmed that he intended to [REDACTED].
- (f) Morrisons sought legal advice from [REDACTED].

¹⁷ Morrisons made the submissions summarised in this decision to the CMA between March and June 2023. One submission was made in response to a request for information issued by the CMA under s109 of the Act.

(g) The Landlord told Morrisons that he wanted the property returned to him so that it could be converted for residential use and that, on that basis, he does not want anyone operating a store from the Pewsey Site. Initially, the Landlord gave Morrisons a deadline of [✂]. However, the Landlord has agreed to put any legal action on hold dependent on the outcome of the CMA's decision on whether to release Morrisons from the UILs as they relate to the Pewsey Site.

20. In light of the above, Morrisons submitted to the CMA that in order to divest the Pewsey Site, its only remaining option would be to force through a divestment of the Pewsey Site. Morrisons stated that in order to do so, it would have to induce the Administrators to commence legal proceedings against the Landlord. Morrisons submitted that [✂].
21. In addition to the above, Morrisons submitted that there are no other sites controlled by Morrisons in the local area where the Pewsey Site is located that could be divested to effectively address the SLC in that local area caused by the Merger.

Change of circumstances and the CMA's assessment

22. In considering whether there is a realistic prospect of finding a change in circumstances, the CMA has assessed the evidence gathered from Morrisons including Morrisons' communications and negotiations with the Landlord. The CMA has considered in particular:
- (a) The information provided by Morrisons in its Remedies Form, the draft UILs offer and when Morrisons became aware of the Landlord's intention to repossess the Pewsey Site;
 - (b) The provisions of the UILs with respect to Morrisons' obligations to divest the Pewsey Site or any other Morrisons site(s) and whether Morrisons owns and operates other stores in the local area surrounding the Pewsey Site;
 - (c) The extent to which the change in circumstances was unavoidable including the fact that Morrisons does not hold the lease for the Pewsey Site. As part of this assessment, the CMA has (i) reviewed the steps Morrisons took to induce the Landlord and whether Morrisons has used its best endeavours and good faith to affect the divestment of the Pewsey Site in accordance with paragraphs 2.1 and 2.4(a) of the UILs,¹⁸ and (ii) taken into account the potential difficulty faced by Morrisons in [✂]; and

¹⁸ Paragraph 2.1 of the UILs has a general requirement for Morrisons to use its best endeavours and act in good faith to effect the divestment of the Divestment Sites as soon as reasonably practicable. Paragraph

- (d) The consequential change to the CMA's counterfactual assessment of, and the decision rule applied to, the local area surrounding the Pewsey Site in its SLC Decision.

23. Based on the evidence currently available and set out in paragraphs 19-21 above, the CMA considers that since the acceptance of the UILs there has been a change relating to the Pewsey Site which gives rise to a realistic prospect of a change in circumstances that would merit conducting a review of the UILs. This is on the basis that:

- (a) The Landlord's intention to repossess the Pewsey Site was communicated to Morrisons in February 2023. This was after the CMA had issued its SLC decision and after the CMA had accepted the UILs from Morrisons. Although Morrisons mentioned in its Remedies Form [REDACTED];
- (b) There is not any other Morrisons site in the local area surrounding the Pewsey Site that can be divested to effectively address the SLC in the local area;
- (c) The Landlord has [REDACTED]. It is not clear whether [REDACTED]; and
- (d) As regards the change to the counterfactual in the CMA's SLC Decision, the result of the Landlord's decision to repossess the Pewsey Site is that there will be an imminent exit from the local area surrounding the Pewsey Site. This information was not previously available to the CMA during its investigation of the Merger. The CMA's current view is that it would have taken such information into account as part of its assessment of the counterfactual. In particular, the financial position of McColl's pre-Merger would likely have been relevant in the context of such an altered counterfactual. The CMA's view is that, given McColl's administration, there may be a realistic prospect that McColl's would not have sought to acquire and operate a different store in the local area if McColl's had been told by the Landlord that it could no longer operate the Pewsey Site. Further, the CMA would have taken the situation regarding the Pewsey Site into account when applying its decision rule to that local area. This change in circumstances may have resulted in the CMA finding no SLC in the local area surrounding the Pewsey Site.

24. The CMA therefore believes that there is a realistic prospect of finding a change of circumstances in relation to the Pewsey Site. The CMA has therefore decided that it would be appropriate to conduct a review of the UILs.

2.4(a) requires Morrisons to use its best endeavours to procure the assignment of the lease from McColl's Retail Group where the leasehold for the relevant Divestment Site is vested with McColl's Retail Group.

25. This decision is limited to whether to conduct a review of the UILs. The CMA is not, at this stage, required to decide on the statutory question under section 92(2)(b) of the Act of whether there has been a change of circumstances, such that the UILs relating to the Pewsey Site are no longer appropriate and need to be varied or superseded by a new enforcement undertaking.

Prioritisation Principles

26. With regard to the CMA's [prioritisation principles](#), the CMA considers that a review of the UILs should be considered a priority for the CMA for the following reasons:

- (a) **Strategic significance:** The review of the UILs is a good fit with the CMA's objectives and strategy and it reflects the CMA's statutory duties to achieve an effective and clear cut solution to phase 1 mergers that give rise to a realistic prospect of an SLC and to keep enforcement undertakings under review. Further, in the context of this case, Morrisons' variation request relates to undertakings which have not yet been implemented.
- (b) **Impact:** Varying the UILs would prevent a situation where considerable economic resources are allocated by Morrisons, the Administrators and the Landlord to what could be protracted litigation [✂]. If the change of circumstances means that the Merger will not result in a loss of competition in the local area surrounding the Pewsey Site, such litigation would constitute a misallocation of economic resources.
- (c) **Risk.** Conducting a review will give market participants a thorough opportunity to comment and submit any further evidence to the CMA, in line with the CMA's published guidance and the public consultation requirements of Schedule 10 of the Act, maximising the likelihood of a successful outcome.
- (d) **Resources:** The CMA considers, in the light of the evidence provided, that there is a realistic prospect of finding a change of circumstances which justifies CMA action and that this project can be delivered with proportionate resources.

Decision to conduct a review

27. For the reasons set out above, the CMA considers that there is a realistic prospect of finding a change in circumstances relating to the Pewsey Site. Moreover, the CMA has assessed the need to launch the review of the UILs against its published prioritisation principles and found its launch to be consistent with these principles. The CMA has therefore decided to conduct a review of the UILs, pursuant to section 92(2)(b) of the Act.

28. As the UILs have not yet been fully implemented by Morrisons at the date of this decision (particularly insofar as they relate to the Pewsey Site), the CMA considers it appropriate for the review of the UILs to be undertaken by Sorcha O'Carroll, Senior Director of Mergers.¹⁹

Adam Land

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Competition and Markets Authority

20 July 2023

¹⁹ CMA 11, paragraph 3.12 and footnote 14.