

Morrison's / McColl's Undertakings Review

Provisional findings report

25 September 2023



© Crown copyright 2023

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Contents

	<i>Page</i>
1. Background.....	3
The SLC Decision in Pewsey.....	4
The Pewsey UILs	5
Decision to launch a review of the UILs.....	8
CMA's legal powers.....	9
Powers to accept undertakings in lieu of a reference	9
Varying undertakings in lieu of a reference	11
2. Consideration of a change of circumstances	12
Introduction	12
Nature of the change in circumstances	12
The CMA's assessment of whether circumstances have changed	13
When Morrisons became aware of the Landlord's position	14
Alternative options for remedying the Pewsey SLCs	14
Whether Morrisons could have averted this change of circumstances	15
Consequential change to the CMA's counterfactual assessment.....	15
The CMA's approach to the counterfactual assessment	15
How the CMA would have altered the counterfactual	16
3. Provisional decision on change of circumstance	17

Provisional findings

1. Background

- 1.1 On 6 May 2022, 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 (together **McColl's**) entered into a pre-pack administration after McColl's lenders withdrew their support for the business. Under a pre-pack administration process, the sale of the business in administration is agreed before appointing the administrators.¹
- 1.2 On 8 May 2022, Alliance Property Holdings Limited (**Alliance**), a wholly owned subsidiary of WM Morrison Supermarkets Limited (**Morrisons**), and EG Group Limited (**EG**) both submitted final offers for McColl's. That same day, McColl's creditors accepted Alliance's offer.
- 1.3 On 9 May 2022, Alliance acquired the assets and business of McColl's (the **Merger**). Morrisons and McColl's submitted that the Merger was entirely independent of McColl's administration.
- 1.4 On 8 September 2022, the 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**) 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**).
- 1.5 On 27 October 2022, the CMA accepted undertakings in lieu (**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.² 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**).

¹ 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 \(pwc.co.uk\)](#)

² See [Morrisons / McColl's UILs acceptance decision](#)

- 1.6 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**).
- 1.7 On 20 April 2023, the CMA approved the Proposed Purchaser to buy the Pewsey Site and five other Divestment Sites. This approval was conditional on the CMA being satisfied with the relevant transaction documents.
- 1.8 Between March and May 2023 (see paragraph 1.18 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. This was because the landlord of the Pewsey Site (the **Landlord**) had decided to convert the Pewsey Site for residential use and refused to grant or transfer the lease to any new purchaser despite various efforts by Morrisons to induce the Landlord.
- 1.9 On 23 June 2023, Morrisons requested that the CMA vary the UILs³ 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.⁴
- 1.10 This paper sets out the CMA's provisional decision with respect to the UIL Variation Request under the following structure:
 - (a) an overview of the SLC Decision;
 - (b) an overview of the UILs;
 - (c) the CMA's assessment of a change of circumstances; and
 - (d) the CMA's provisional decision on change of circumstance and remedies.

The SLC Decision in Pewsey

- 1.11 Morrisons is a British supermarket active in the retail and wholesale supply of groceries, as well as the retail supply of apparel and general merchandise products throughout the UK. It operates stores of different sizes, typically mid-size and large grocery stores. Its ultimate parent company is Clayton, Dubilier & Rice (**CD&R**), a private equity group that controls the Motor Fuel Group

³ 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.

⁴ See [Summary of Morrisons' UIL variation request](#) available at: [Morrisons / McColl's merger Inquiry: Review of undertakings](#).

(MFG). MFG owns and operates over 800 petrol filling stations (PFS), which usually have a convenience store attached to them.

- 1.12 McColl's operates over 1,100 convenience stores and newsagents across England, Scotland, and Wales. The convenience stores operate under the trading name 'McColl's', and its newsagents are typically branded 'Martin's' in England and Wales and 'RS McColl' in Scotland.
- 1.13 Given that McColl's operates convenience stores, the CMA assessed the impact of the merger on the retail supply of convenience groceries in the UK at a national and local level. In line with previous cases, the CMA found that convenience grocery stores face competition from other convenience stores, as well as from larger grocery stores (ie, mid-size and large grocery stores).
- 1.14 At the national level, the CMA found no competition concerns. At the local level, the CMA considered the impact of the Merger in the areas surrounding each of McColl's and MFG's convenience stores (a 5-minute drive time for all stores, as well as a 1-mile radius for standalone stores not attached to a PFS, in line with the approach in previous cases such as CD&R/Morrisons). The CMA counted the competitors in each area, giving each a 'weight' according to their competitive strength (for example, large supermarket chains like Tesco and Asda were given a higher weight than symbol group stores like Spar or independent stores). The CMA found a concern in any local area where, as a result of the Merger, the weighted number of competitors would be three or fewer.
- 1.15 On this basis, the CMA found that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC as a result of horizontal unilateral effects in relation to the retail supply of convenience groceries in 35 local areas, including those local areas surrounding McColl's Pewsey High Street (a Martin's-branded store located in SN9 5AQ) and MFG Pewsey (a Spar-branded store located in SN9 5HH) (together the **Pewsey SLCs**). Each of the Pewsey SLCs resulted from the overlap between McColl's Pewsey High Street and MFG Pewsey; neither Party operated a second shop within the relevant catchment areas.

The Pewsey UILs

- 1.16 As set out in the UILs,⁵ Morrisons offered to divest McColl's Pewsey High Street (ie the Pewsey Site, or **McColl's Pewsey**) to remedy both Pewsey SLCs. This divestment would have meant that neither of the areas

⁵ See [Final Undertakings](#) available at: [Morrisons / McColl's merger inquiry](#).

surrounding McColl's Pewsey and MFG Pewsey would fail the CMA's decision rule (applied by the CMA in its SLC Decision) following the divestment. The CMA agreed that no upfront buyer would be required for the Pewsey Site or for any of the other Divestment Sites and accepted the UILs on that basis.

- 1.17 Under the UILs, the CMA can direct Morrisons to appoint a monitoring trustee. However, it has not been necessary to do so in these specific circumstances. The UILs also provide for the appointment of a divestiture trustee should Morrisons not comply with its obligations. It has not been necessary or appropriate for the CMA to use this power in light of the facts of this case (see paragraph 2.11 for a further explanation).
- 1.18 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 that:
- (a) Morrisons is unable to divest the Pewsey Site due to the Landlord refusing to renew and transfer the lease to any prospective purchaser. This is because the Landlord intends to convert the Pewsey Site for residential use and does not want the premises to be used for the retail supply of groceries;
 - (b) Morrisons has made various unsuccessful attempts to induce the Landlord to renew and transfer the lease to the Proposed Purchaser;
 - (c) [REDACTED]; and
 - (d) The Landlord's stance was not known by Morrisons at the time that it offered the UILs. If the Landlord's stance had been known by the CMA at the time of its SLC Decision, this would have meant that:
 - (i) the counterfactual adopted by the CMA for the local areas surrounding McColl's Pewsey and MFG Pewsey would have been different to reflect the imminent exit of the Pewsey Site from the local markets; and
 - (ii) the outcome of the CMA's SLC Decision would have been different and the CMA would not have concluded that there was an SLC in the local areas surrounding McColl's Pewsey and MFG Pewsey. Consequently, the UILs that were offered by Morrisons would also have been different and a remedy for the Pewsey SLCs would not have been needed.

1.19 To support the above position, Morrisons submitted to the CMA that:⁶

- (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 the [REDACTED], Morrisons made several offers to the Landlord in an effort to induce him to change his stance:
 - (i) On 16 February 2023, Morrisons offered to [REDACTED].
 - (ii) On 16 February 2023, Morrisons also agreed to [REDACTED].
 - (iii) On 1 March 2023, the Proposed Purchaser offered [REDACTED].
 - (iv) On 12 April 2023, in addition to reiterating its offer [REDACTED].
 - (v) 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].
- (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

⁶ 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.

does not want anyone operating a store from the Pewsey Site. Initially, the Landlord gave Morrisons a deadline of [REDACTED] to vacate the property. 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 (on the basis that Morrisons would vacate the site if the CMA agreed to vary the UILs).

- 1.20 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 [REDACTED].

Decision to launch a review of the UILs

- 1.21 The CMA reviewed and assessed the information and evidence provided by Morrisons in support of its position that there had been a material change of circumstances in relation to the Pewsey Site. On the basis of its review and assessment, the CMA concluded that there was a realistic prospect of finding a change of circumstances in relation to the Pewsey Site and that it would therefore be appropriate to conduct a review of the UILs.⁷
- 1.22 Accordingly, on 20 July 2023 the CMA decided to launch a review of the UILs to consider whether there has been any change of circumstances, such that the undertaking contained in the UILs to divest the Pewsey Site is no longer appropriate and the UILs therefore need to be varied or superseded by a new enforcement undertaking.⁸
- 1.23 When launching a review of the UILs, the CMA had not, at that stage, decided 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. This document sets out the CMA's provisional decision on that question.

⁷ See [Decision on whether to conduct a review of the undertakings in lieu](#) available at: [Morrisons / McColl's merger Inquiry: Review of undertakings](#), paragraphs 23, 24 and 27.

⁸ See [Decision on whether to conduct a review of the undertakings in lieu](#) available at: [Morrisons / McColl's merger Inquiry: Review of undertakings](#)

CMA's legal powers

Powers to accept undertakings in lieu of a reference

- 1.24 Section 73(1) of the Act gives the CMA the power to accept undertakings in lieu of a reference only where the CMA has concluded that the duty to refer is met and the CMA has decided not to apply any available exceptions to the duty to refer.⁹ Any undertakings in lieu of a reference accepted by the CMA must be for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effects identified. In deciding to accept undertakings in lieu of a reference, the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.¹⁰
- 1.25 Any remedy accepted by the CMA at Phase 1 must meet the clear cut standard set out in its Remedies Guidance and must be capable of ready implementation.¹¹ This means that in order to accept undertakings in lieu of a reference, the CMA must be confident that all of the potential competition concerns that have been identified at Phase 1 would be resolved by means of the undertakings without the need for further investigation. The need for confidence reflects the fact that, once undertakings in lieu of a reference have been accepted, section 74(1) of the Act precludes a reference after that point.
- 1.26 It is always at the parties' discretion whether to offer undertakings in lieu of a reference. However, in choosing to offer undertakings in lieu of a reference, the merger parties avoid the burden of a phase 2 investigation but also forego the possibility of the phase 2 investigation leading to a different outcome. The CMA cannot impose a remedy via an Order at Phase 1 unless the CMA has previously accepted undertakings in lieu of a reference and those undertakings are not being or will not be fulfilled, in which case the CMA has Order-making powers under section 75 of the Act.
- 1.27 Where the CMA decides that undertakings in lieu of a reference will be accepted only where the merger parties have identified an upfront buyer, the CMA will not accept the undertakings unless a divestiture agreement, generally conditional from the buyer's perspective only on acceptance of the UILs by the CMA (and the completion of the main transaction if it remains

⁹ The CMA's approach to applying the exceptions from the duty to refer is set out in the [Mergers: Exceptions to the duty to refer \(CMA64\)](#), 13 December 2018.

¹⁰ Section 73(3) of the Act.

¹¹ [Merger remedies \(publishing.service.gov.uk\)](#) paragraph 3.27.

anticipated), has been agreed with a buyer for the divestiture business and the CMA considers that the buyer would be acceptable.

- 1.28 The CMA will assess on a case-by-case basis whether a monitoring trustee should be appointed to oversee and report on the divestiture process.¹²
- 1.29 In other cases, where no upfront buyer provision is required, the CMA will continue to have an active role to play after it has formally accepted the undertakings from the parties. Thus, where the undertakings are structural in nature, they will provide for a divestiture period within which the merger parties must identify a suitable purchaser for the divestiture business and conclude a divestiture agreement with that buyer. And if the merger parties are unable to find a suitable purchaser capable of being approved by the CMA within the time period specified within the undertakings, the undertakings will typically provide for the CMA to be able to appoint a divestiture trustee to sell the divestiture business on behalf of the merger parties at no minimum price, or for the CMA to direct the parties to sell at no minimum price.
- 1.30 Once undertakings in lieu of a reference have been accepted, the CMA is released from its duty to refer by section 74(1) of the Act and indeed is prohibited from making a reference. The undertakings therefore become the definitive solution to any SLC found at Phase 1. Section 74(1) of the Act precludes a reference to Phase 2¹³ even where undertakings in lieu of a reference are not fulfilled. In that situation, the CMA can rely on its order-making power under section 75 of the Act and, if necessary, bring civil proceedings, under section 94 of the Act, to enforce the undertakings and/or the section 75 order.
- 1.31 Section 75 of the Act gives the CMA the power to issue an order against the merger parties to ensure fulfilment of the undertakings in lieu of a reference. Such orders may be made for the purposes listed in section 73(2) of the Act (namely to remedy, mitigate or prevent the SLC and any adverse effects resulting from it)¹⁴ and may contain provision which is different from the provision contained in the undertaking concerned.^{15,16}

¹² Monitoring Trustees are appointed to ensure that Undertakings are complied with.

¹³ Unless material facts about the relevant arrangements or transactions in consequence of which the enterprises subject to the merger have or will cease to be distinct (or relevant proposed arrangements or transactions) were not notified to the CMA, or made public before the UILs were accepted (sections 74(2) to (4) of the Act).

¹⁴ Section 75(3) of the Act

¹⁵ Section 75(5)(b).

¹⁶ The OFT/CMA has made an order under section 75 to give effect to an undertaking only once, in Completed acquisition by Greene King plc of Laurel Pub Holdings Limited. On 6 October 2004, the OFT accepted UILs from Greene King to divest 13 pubs to a buyer/ buyers approved by the OFT by 5 April 2005. By this deadline, Greene King had disposed of all but one of these pubs, with the remaining pub being in the PSD of Oxford. The OFT

Varying undertakings in lieu of a reference¹⁷

- 1.32 Under section 73(5)(b) of the Act, an undertaking accepted in lieu of a reference, *'may be varied or superseded by another undertaking'*. Alternatively, it may be entirely released by the CMA under section 73(5)(c).
- 1.33 Under section 92(2)(b) of the Act, the CMA has a duty to keep undertakings under review and consider, from time to time, whether *'by reason of any change of circumstances, an enforcement undertaking is no longer appropriate'*¹⁸ and if it needs to be "varied or superseded by a new enforcement undertaking". This is the legal standard of proof that needs to be met before the CMA's consent to any variation is granted.
- 1.34 What constitutes a change of circumstances will vary case by case. However, the change of circumstances must be such that the undertaking is no longer appropriate in dealing with the competition problems and/or adverse effects which it was designed to remedy. Examples of such circumstances include where the undertaking has become clearly obsolete, changes in legislation or changes in market conditions.¹⁹
- 1.35 In this case, the CMA will therefore need to be satisfied that:
- (a) there has been a change of circumstances in relation to the Pewsey Site (by reason of the Landlord's unwillingness to grant a lease despite Morrisons' best efforts) meaning that it is not possible for Morrisons to divest the Pewsey Site; and
 - (b) as a result of this change in circumstances, there is no longer an SLC in the local areas surrounding McColl's Pewsey and MFG Pewsey. If the CMA had known of the Landlord's stance at the time of its SLC Decision, it would not have found the Pewsey SLCs and, consequently, the undertaking contained in the UILs requiring Morrisons to divest the Pewsey Site would not have been required and that this undertaking is therefore now obsolete.
- 1.36 Whilst section 73(5) envisages undertakings in lieu of a reference being varied, released or superseded by a new enforcement undertaking, section

extended its deadline, but Greene King was still unable to comply. As a result, the OFT ordered Greene King to reduce its share of full publican on-licenses in the Oxford PSD to 25% or less within a three month period or to the level held by Greene King or Laurel immediately prior to the acquisition.

¹⁷ The CMA's approach to the review of remedies is set out in [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#), 13 December 2018.

¹⁸ Section 89(2) of the Act clarifies that the term "enforcement undertaking" includes an undertaking in lieu of a reference accepted under section 73 of the Act.

¹⁹ Paragraphs 2.4 to 2.6 of the CMA11.

92(4) makes clear that the CMA shall take such action as it considers appropriate in relation to any enforcement undertaking accepted by it and this includes any possible enforcement order to be made by it instead of an enforcement undertaking (section 92(4)(d) of the Act). In the context of undertakings in lieu of a reference this would apply to the use of the CMA's order making power under section 75 of the Act in circumstances where the undertakings have not been fulfilled.

- 1.37 For completeness, the CMA has also had regard to its published guidance, which sets out that the process for reviews of undertakings consists of two stages: (i) an initial screening, where the CMA decides whether to conduct a review; and (ii) the review itself.

2. Consideration of a change of circumstances

Introduction

- 2.1 In this section, the CMA considers whether there has been a change of circumstances such that the current UILs are no longer appropriate. In this instance, Morrisons has told the CMA that, despite best endeavours, it has been unable to divest the Pewsey Site to the Proposed Purchaser or any other purchaser.

Nature of the change in circumstances

- 2.2 Morrisons submitted that its inability to divest the Pewsey Site is due to the Landlord's decision to revert the premises where the Pewsey Site is located back to residential use.
- 2.3 In turn, Morrisons submitted that the Landlord's decision is unrelated to the Merger or to the identity of the Proposed Purchaser, and that this decision would therefore have led to the Pewsey Site's imminent exit from the relevant markets. The Landlord is not willing to let the Pewsey Site to any occupant intending to use the premises for the retail supply of convenience groceries. Had Morrisons or McColl's been aware of this material fact before the SLC Decision, they would have submitted as evidence during the CMA's phase 1 Merger investigation that the Landlord's decision to repossess the Pewsey Site constitutes an imminent exit from the market and should be taken into account as a relevant factor when applying the CMA's decision rule to the local areas surrounding McColl's Pewsey and MFG Pewsey and that it should have been taken into account as part of the counterfactual.
- 2.4 Had the CMA considered this factor, Morrisons submitted that the CMA is likely to have reached a different conclusion with respect to the Pewsey SLCs

which would have meant that the UILs would not have contained an obligation to divest the Pewsey Site.

The CMA's assessment of whether circumstances have changed

- 2.5 In this section the CMA assesses the evidence as to whether there has been a change of circumstance such that the UILs, as they relate to the Pewsey Site, are no longer appropriate.
- 2.6 In assessing whether there has been a relevant change of circumstances for the purposes of section 92, the CMA assesses whether the circumstances that led to the SLC finding no longer apply and/or whether the circumstances that led to the acceptance of the UILs as being as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it no longer apply. This review of the UILs is focused on whether there have been changes since the CMA's SLC Decision and acceptance of the UILs that were not factored into the CMA's analysis or thinking at the time.
- 2.7 In order to carry out this assessment, the CMA has reviewed 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 effect the divestment of the Pewsey Site in accordance with paragraphs 2.1 and 2.4(a) of the UILs,²⁰ and (ii) taken into account the potential difficulty faced by Morrisons in [redacted]; and

²⁰ 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 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.

- (d) The consequential change to the CMA's counterfactual assessment of, and the decision rule applied to, the local areas surrounding McColl's Pewsey and MFG Pewsey in its SLC Decision and whether the undertaking contained in the UILs to divest the Pewsey Site is no longer appropriate.

When Morrisons became aware of the Landlord's position

- 2.8 The Landlord's intention to repossess the Pewsey Site was communicated to Morrisons for the first time 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] Morrisons did not specify that there was a risk it may be unable to divest the Pewsey Site [redacted].
- 2.9 Based on the information and evidence it has received, the CMA's provisional view is that Morrisons could not have known about the Landlord's position before the SLC Decision. Moreover, the CMA accepts Morrisons' submission that it had not appreciated before the SLC Decision the full implications of the lease for the Pewsey Site having expired, and of this expired lease not having been vested in Morrisons. The CMA notes that the site had been operating with an expired lease for a significant period of time and that Morrisons successfully transferred other Divestment Sites that had similarly been operating with expired leases.

Alternative options for remedying the Pewsey SLCs

- 2.10 There is not any other Morrisons-owned site in the local area surrounding McColl's Pewsey and MFG Pewsey that can be, or could have been, divested to effectively address the Pewsey SLCs.
- 2.11 The UILs provide for the CMA to be able to appoint a divestiture trustee to sell the Pewsey Site on behalf of Morrisons at no minimum price or for the CMA to direct Morrisons to sell at no minimum price. However, as the Landlord is not willing to transfer the lease to any prospective purchaser, the CMA has provisionally concluded that the appointment of a divestiture trustee would not have any success in divesting the Pewsey Site and would not be a viable alternative remedy option.
- 2.12 We do not consider there to be any behavioural remedies that would be effective in remedying the Pewsey SLCs.

Whether Morrisons could have averted this change of circumstances

- 2.13 The CMA considers that the evidence put forward by Morrisons supports its submission that it has used its best endeavours and good faith to effect the divestment of the Pewsey Site in accordance with paragraphs 2.1 and 2.4(a) of the UILs, and that the only avenue Morrisons could possibly pursue at this stage is litigation.
- 2.14 The Landlord has [X]. It is not clear whether Morrisons is able to [X] divest the Pewsey Site in accordance with the UILs.
- 2.15 Moreover, were Morrisons to pursue litigation, it would have to do so via the Administrator. Given that the Administrator is not subject to the UILs, Morrisons would have no means of forcing the Administrator to [X]. The CMA also accepts Morrisons' submission that [X].
- 2.16 Accordingly, based on the information and evidence it has received, the CMA's provisional view is that there are no reasonable actions which Morrisons can pursue, or could have pursued, in order to effect the divestment of the Pewsey Site in accordance with paragraphs 2.1 and 2.4(a) of the UILs.

Consequential change to the CMA's counterfactual assessment

The CMA's approach to the counterfactual assessment

- 2.17 The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For completed mergers, the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.²¹
- 2.18 When the CMA conducted its Phase 1 analysis, it did not have any information and evidence available to support a counterfactual other than one where each of McColl's' stores continue operating as they did pre-Merger.

²¹ See [Merger Assessment Guidelines \(CMA 129\)](#), March 2021, from paragraph 3.12.

How the CMA would have altered the counterfactual

2.19 The CMA considers that the information and evidence it has received since the SLC Decision, had it been available to the CMA before the SLC Decision, would have led the CMA to conclude that the counterfactual should include the Pewsey Site exiting the local markets imminently. Consequently, the CMA would have assessed the impact of the Merger in the areas surrounding MFG Pewsey and McColl's Pewsey against a counterfactual where McColl's exits the relevant local markets absent the Merger. The CMA considers that it would have reached this view on the basis that:

- (a) The Landlord's decision to repossess the Pewsey Site is unrelated to the identity of the commercial entity occupying the Pewsey Site.
- (b) The CMA would have taken into account that the [redacted] Pewsey Site are a consequence of how the pre-pack administration was structured, rather than the specific Merger proposal put forward by Morrisons. McColl's has confirmed that EG, had it been the successful purchaser, would have had [redacted].
- (c) The Landlord would have sought to repossess the Pewsey Site from McColl's, or any alternative purchaser of McColl's from administration; and there are no reasonable endeavours which McColl's, or any alternative purchaser of McColl's from administration, could have pursued in order to continue operating a convenience store from the Pewsey Site.

2.20 The CMA would have also considered the possibility of McColl's opening a convenience store in the areas surrounding McColl's Pewsey and MFG Pewsey, thereby retaining McColl's presence in those areas and preserving an SLC. Given the fact that the landlord served notice to terminate the lease when McColl's was in administration, the CMA considers it highly unlikely that McColl's would have opened a new store in those areas in the immediate future. In this regard, Morrisons has confirmed that (i) at the time of the Merger McColl's had no immediate plans to open another store within the areas surrounding McColl's Pewsey and MFG Pewsey, and (ii) prior to the Merger, McColl's had not opened any new stores since 2019.

2.21 Accordingly, the evidence above leads the CMA to provisionally conclude that there has been a change in circumstance. Further, the CMA's provisional view is that if it had taken into account the above information and evidence in applying the decision rule and in its counterfactual, the CMA would have concluded that the Merger does not give rise to a realistic prospect of an SLC arising from horizontal unilateral effects in the retail supply of convenience groceries in the areas surrounding MFG Pewsey or McColl's Pewsey.

3. Provisional decision on change of circumstance

- 3.1 Based on the above assessment, the CMA has provisionally concluded that there has been a change of circumstance allowing the CMA to vary the UILs.
- 3.2 The CMA has also provisionally concluded that the UILs should be varied to remove the obligation to divest the Pewsey Site.
- 3.3 Implementation of this remedy would occur by the UILs being superseded by Morrison's offering and the CMA accepting UILs that remove the obligation to divest the Pewsey Site. All other provisions of the UILs, including the Effective Date of the UILs which is 27 October 2022, remain the same
- 3.4 This decision is provisional and the CMA will consider further representations and evidence from Morrisons, McColl's and relevant third parties.