Anticipated acquisition by Fenland Laundries Limited of the cleanroom laundry business of Fishers Services Limited

Decision on reference

ME/6557/15

The CMA's decision on reference under section 33(1) of the Enterprise Act 2002 given on 4 January 2016. Full text of the decision published on 12 January 2016.

Please note that [✂] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Background

1. Fenland Laundries Limited (**Fenland**) provides cleanroom laundry services of high and low classifications, namely Class 4 and 5 (hereafter referred to as **full cleanroom**) and Class 6, 7 and 8 (hereafter referred to as **intermediate cleanroom**). Fenland operates under a joint venture agreement with Berendsen plc (**Berendsen**) under which Fenland and Berendsen jointly control Micronclean Limited, which licenses the use of the Micronclean trademark to Fenland and Berendsen for allocated territories in Great Britain (the **JV agreement**).

2. Under the terms of the JV agreement, Fenland serves an area north of a line broadly between London and Anglesey (the **North**). Berendsen provides full and intermediate cleanroom services to customers located to the south of that line (the **South**).

3. Fishers Services Limited (**Fishers Cleanroom**) provides full and intermediate cleanroom laundry services throughout Great Britain from its cleanroom laundry in Livingston, Scotland. Fenland and Fishers Cleanroom are together referred to as the **Parties**.

4. Fenland has agreed to acquire Fishers Cleanroom and as a condition precedent to the closing of this acquisition, it will terminate the JV agreement with Berendsen (the **Merger**) such that following the Merger Fenland and

Berendsen will become two independent competitors for cleanroom laundry services in Great Britain, with Fenland retaining the Micronclean trademark.

5. On 16 December 2015, 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, 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**), namely in relation to the supply of full cleanroom laundry services Great Britain.

6. In the SLC Decision, the CMA found that Fishers Cleanroom is Fenland's closest competitor and that Fenland, operating under the Micronclean trademark, is Fishers Cleanroom's closest competitor in the North, with a combined share of supply of [70–80]% in Great Britain and currently a combined share of [90–100]% in the North. The CMA assessed whether Berendsen, following the termination of the JV agreement, would have the ability, incentive and intention to expand its supply of full cleanroom laundry services into the North in a timely, likely and sufficient manner. Whilst the CMA believed that Berendsen would have the ability to expand into the North, based in particular on Berendsen's spare capacity, strong brand and existing transport network, it considered that there was insufficient evidence of Berendsen's incentive and intention to do so within a two-year time period.

7. On the date of the SLC Decision, the CMA gave the Parties notice of the SLC Decision pursuant to section 34ZA(1)(b) of the Act. However, in order to allow the Parties the opportunity to offer undertakings in lieu of a reference (**UILs**) to the CMA in accordance with 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.

8. Pursuant to section 73A(1) of the Act, if a party wishes to offer UILs, it must do so within 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 23 December 2015), or if the Parties offered UILs and the CMA decided 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.

9. Pursuant to section 34ZA(2) of the Act, the CMA is not prevented from making a reference under section 33 of the Act if it is considering whether to accept UILs under section 73 of the Act but no such UILs are offered or accepted.

The UILs offered

10. On 23 December 2015, the Parties offered UILs to the CMA (the **Proposed UILs**) which the Parties submitted would remedy, mitigate or prevent the identified SLC and any adverse effects arising from it.

11. The Parties submitted a package of undertakings that they believe will significantly enhance Berendsen's incentive and intention to compete for the supply of full cleanroom laundry services in the North. Fenland offered to undertake to:

(a) Inform its full cleanroom customers in the North that the JV agreement has been terminated and that customers can buy from Berendsen as an alternative to buying from Fenland (which will continue to operate as Microclean). This would be done on the following occasions:

(i) on termination of the JV agreement;

(ii) thereafter every six months for a period of three years; and

(iii) each time when Fenland is invited to bid for a contract or is approached by a customer of full cleanroom laundry services to renew and/or re-negotiate terms of supply within a three-year period (together referred to as **Customer Notification**).

(b) Place advertisements in the trade press announcing that the JV agreement has been terminated and that customers can also buy from Berendsen (**Trade Press Announcement**).

(c) Provide in writing to Berendsen the names and contact details of:

(i) all [✂] customers of full cleanroom laundry services in the North, including over [✂] customers that represent around [20–30]% of full cleanroom laundry services in the North; and/or

(ii) all of the Parties' customers of full cleanroom laundry services in [✂], including over [✂] customers that represent around [20–30]% of full cleanroom laundry services in the North.

The Parties submitted that this would enable Berendsen to readily target these customers for supplies, removing the cost and difficulty to Berendsen of having to establish such contact details for itself. The Parties submitted that it is enough to disclose the customers under (i) above but that it is prepared to disclose the customers under (ii) above as well if the CMA believes that this is required. This combined disclosure would in effect give Berendsen a contact list for customers representing

around [50–60]% of all full cleanroom laundry services in the North (**Customer Disclosure**).

(d) Assign [✂] customers of full cleanroom laundry services in the North to Berendsen (**Customer Assignment**). The Parties submitted that this is not intended to replicate a divestment-type undertaking but is aimed at enhancing Berendsen's incentive to compete by giving it a volume of business that will contribute to covering its likely investment costs.

12. The Parties proposed the following monitoring and auditing process to verify compliance:

(a) Fenland will confirm to the CMA on a quarterly basis (for a period of three years) that it has complied with the terms of the Proposed UILs, and will provide the CMA, on request, with copies of relevant documents;

(b) Fenland's auditors will provide an annual audit of Fenland's compliance with the Proposed UILs;

(c) Fenland will appoint (at its own expense) an independent adjudicator in the event that any third party were to raise concerns regarding potential non-compliance with the Proposed UILs; and

(d) if Fenland failed to comply with the terms of the Proposed UILs, the CMA (or an independent adjudicator) may require Fenland to disclose to Berendsen the names and contact details of all of Fenland's customers for full cleanroom laundry services in the North.

Assessment of the Proposed UILs

13. The CMA has an obligation under the Act at 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 remedy the SLC and any adverse effects resulting from it (section 73(3) of the Act).

14. The CMA considers that UILs are appropriate only where they are clear-cut. This clear-cut standard has two dimensions:[1]

(a) first, the CMA must be satisfied that, if the UILs are accepted, there is no material doubt about their overall effectiveness; and

[1] *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122, December 2010 (**UILs Guidance**), paragraphs 5.7 and 5.8. The UILs Guidance was adopted by the CMA (see *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex D).

(b) second, the UILs must not be of such magnitude and complexity that their assessment and implementation would require unworkable resources at phase 1.

15. The CMA's starting point in deciding whether to accept UILs is to seek an outcome that, following the implementation of the remedy, restores competition to the level that would have prevailed absent the merger, although the CMA may also accept UILs that do not directly restore competition to pre-merger levels but nevertheless clearly and comprehensively remove the identified SLC. 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.[2] Further, the more extensive the competition concerns in question in terms of magnitude of potential customer harm, the more significant the error costs of an ineffective remedy may be, and hence the greater the belief must be on the part of the CMA that the UILs comprehensively resolve those concerns, following implementation. Hence, in those cases where the potential magnitude of harm is especially large (in absolute terms), the CMA will be particularly cautious in its approach to accepting UILs.[3]

16. In the SLC Decision, the CMA found that Berendsen would have the ability to expand in the North, but that there was insufficient evidence that it would also have the incentive and/or intention to strongly compete against the merged entity in the North, so its expansion could not prevent the Merger giving rise to a realistic prospect of an SLC. The CMA has therefore considered whether the Proposed UILs are sufficient to clearly and comprehensively remedy the SLC such that competition for full cleanroom laundry services in the North will be restored.

Behavioural nature of the Proposed UILs

17. The Proposed UILs are behavioural. Since a merger involves a structural change to a market, the UILs Guidance states that structural UILs will normally be the most appropriate remedy.[4] The CMA is highly unlikely to accept behavioural UILs,[5] ie UILs aimed at moderating the scope for a merged company to behave anti-competitively by controlling outcomes, but without directly addressing the structural consequences of the merger. Behavioural UILs are generally unlikely to be sufficiently clear-cut to address

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[2] UILs Guidance, paragraphs 5.11-5.12.
[3] UILs Guidance, paragraph 5.8.
[4] UILs Guidance, paragraph 5.20.
[5] *Mergers: Guidance on the CMA's jurisdiction and procedure*, paragraph 8.4.

the identified SLC, since they often give rise to a number of risks that can reduce their effectiveness or create competition concerns elsewhere. These concerns relate to monitoring, enforceability and a number of other risks they may bring which can reduce their effectiveness or create competition concerns.[6]

18. The Parties submitted that the Proposed UILs do not carry the risks normally inherent in behavioural remedies, since they form a set of one-off steps to be taken shortly after the UILs are accepted and would not require ongoing monitoring. They stated that therefore the Proposed UILs offer the level of certainty usually associated with structural undertakings.

19. Whilst the CMA will consider behavioural undertakings where a divestment would be clearly impractical or is otherwise unavailable,[7] the CMA considers that in this case, a structural remedy would not have been impractical, as shown by the (very limited) customer contract assignment offered by the Parties. The Parties could have offered to assign significantly more customer contracts such that Berendsen would have immediately become a substantial supplier of full cleanroom laundry services in the North. Further, while under the principle of proportionality the CMA is required to accept the least intrusive effective remedy, which may in certain specific circumstances involve a behavioural rather than a structural remedy,[8] the CMA considers that in the present case there are material doubts about the effectiveness of the Proposed UILs, as set out below.

Customer Notification and Trade Press Announcement undertakings

20. The Parties submitted that the Customer Notification and the Trade Press Announcement undertakings, by ensuring that customers of full cleanroom laundry services in the North will be aware of Berendsen as an alternative supplier, will remove the cost and difficulty to Berendsen of identifying potential customers and remove any time and financial disincentives that Berendsen may perceive. However, the CMA considers that whether this would result in any constraint on the merged entity depends on the reaction of customers of full cleanroom laundry services in the North, in particular whether they would act upon such notification and consider switching to a new supplier, merely on the basis of having been informed of an alternative supplier in the market. The effectiveness of these undertakings would also depend on the number of contracts coming up for renegotiation and on

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[6] UILs Guidance, paragraphs 5.38-5.41.
[7] UILs Guidance, paragraph 5.43.
[8] See the CMA's decision of 19 October 2015 to accept UILs in relation to the acquisition by Muller UK & Ireland Group LLP of the dairies operations of Dairy Crest Group plc, for example at paragraph 50.

whether Berendsen would bid to supply these customers. Therefore, the CMA considers that material doubt remains as to whether these undertakings would comprehensively remove the identified SLC.

21. In addition, the CMA believes that there is some risk associated with the ongoing monitoring of the Customer Notification undertaking and the punishment for Fenland if it were not to adhere to this undertaking. It is not clear that Berendsen would detect all or even some breaches of the undertakings, and there could be a significant delay before any such detection takes place. Punishment of a material breach would involve only disclosure of contact details for Fenland's customers for full cleanroom laundry services in the North. While the CMA has no reason to believe Fenland has not offered the Proposed UILs in good faith, it considers that this punishment mechanism does not necessarily translate into significant harm for Fenland such that it is sufficiently deterred from a breach.

Customer Disclosure undertaking

22. The Parties submitted that the Customer Disclosure undertaking will present Berendsen with a customer list that would otherwise require considerable effort to produce, including, for example, the names of the individuals responsible within customer organisations. The CMA considers that this remedy is likely to reduce the cost of Berendsen's expansion in the North, which may affect Berendsen's incentive to expand. However, the effect of this remedy in restoring competition in the North to the pre-Merger level is uncertain and would depend on whether Berendsen would make use of the customer details provided by actively competing for their contracts.

Customer Assignment undertaking

23. In relation to Berendsen's incentive to compete in the North, the Parties submitted that the Customer Assignment undertaking will provide Berendsen with a starting point to serve customers in the North and would also cover some of Berendsen's expansion cost. However, the CMA notes that the assigned customers only amount to a very small percentage of [✂] customers (ie around [✂]% of [✂] full cleanroom laundry customers and around [✂]% of its full cleanroom laundry revenues). The CMA considers that it is not clear that this is sufficient to restore pre-Merger conditions.

Conclusion

24. Whilst the CMA considers that the Proposed UILs could assist Berendsen to compete in the North, they would not put Berendsen in a position where it would replicate the pre-Merger constraint exerted by Fishers Cleanroom at

the time of the implementation of the remedy. The likely effect of the Proposed UILs is that customers of full cleanroom laundry services would be informed of an alternative supplier in the market and that Berendsen would have contact details to target customers in the North (if it wished to do so). However, the CMA considers that the effect of these behavioural remedies would depend on Berendsen's incentive and the behaviour of the Parties' customers and the number of contracts coming up for renegotiation. The Proposed UILs on their own are not sufficient to comprehensively remedy the SLC in a way that competition in the North will be as effective as it was pre-Merger. In addition, the Proposed UILs would not immediately replace the lost pre-Merger constraint imposed by Fishers Cleanroom, but would require Berendsen and customers of full cleanroom laundry services to take further steps. In relation to the Customer Assignment, the CMA considers that whilst this remedy could have been implemented immediately, the [✂] customer contracts that would have been assigned to Berendsen are too few to replicate Fisher Cleanroom's pre-Merger constraint.

25. Therefore, compared to the pre-Merger situation, where Fishers Cleanroom has been competing in the North for a considerable period of time, is well-known to customers, and is therefore tried and tested in a way that Berendsen is not, the CMA considers that Berendsen would not be in a position to immediately replicate the pre-Merger constraint in the North. Whilst the Proposed UILs may enhance Berendsen's incentive to expand, the CMA considers that sufficient uncertainty remains to give rise to material doubts about the effectiveness of the Proposed UILs in restoring competition to its pre-Merger level.

26. The Parties submitted that the CMA could not reject the Proposed UILs without first consulting with Berendsen (and other third parties) on the impact of the Proposed UILs on Berendsen's incentive and intention to expand in the North. However, the CMA considers that its material doubts about the effectiveness of the Proposed UILs would remain even if Berendsen responded positively. As set out at paragraph 14 above, the CMA's threshold for acceptance of UILs at phase 1 is high. The CMA must be satisfied that there is no material doubt about the overall effectiveness of the Proposed UILs.

Decision

27. For the reasons set out above, after examination of the Proposed UILs, 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, following the implementation of the

remedy. Accordingly, the CMA does not have reasonable grounds for believing that the Proposed UILs or a modified version of them might be accepted by the CMA under section 73(2) of the Act.

28. 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.

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