

ANTICIPATED ACQUISITION BY CELESIO AG OF SAINSBURY'S SUPERMARKETS LIMITED UK PHARMACY BUSINESS

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups

Introduction

1. On 29 December 2015, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition by Celesio AG (Celesio) of Sainsbury's Supermarkets Limited UK Pharmacy Business (Sainsbury's), for further investigation and report by a group of CMA panel members (the inquiry group).
2. In its provisional findings on the reference notified to Celesio and Sainsbury's (the main parties) on Friday 29 April 2016, the CMA, *inter alia*, provisionally concluded that the anticipated acquisition would result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in 13 local pharmacy markets in the UK.
3. It was expected that if the anticipated acquisition were to go ahead this would lead to adverse effects, for example in the form of lower quality of service than would otherwise have been the case, absent the merger in those local areas.
4. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying the SLC and any resulting adverse effects identified in the provisional findings. The CMA invites comments on possible remedies by **Monday 16 May 2016**.

Criteria

5. In choosing appropriate remedial action, the CMA shall have regard 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.¹ When deciding on an appropriate remedy, the CMA will consider the

¹ Section 36(3) of the Act.

effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.²

The provisional SLC(s)

6. We have provisionally found that the merger may be expected to result in an SLC in the following areas:
 - (a) Beaconsfield
 - (b) Bracknell
 - (c) Cardiff
 - (d) Christchurch
 - (e) Kempston
 - (f) Kidlington
 - (g) Leeds
 - (h) Liverpool
 - (i) Luton
 - (j) Reading (Calcot)/Theale
 - (k) Sandy/Potton/Biggleswade area
 - (l) Sutton Coldfield
 - (m) Warlingham

Possible remedies on which views are sought

7. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;

² [Merger Remedies: CC8](#) (November 2008), paragraph 1.9. This has been adopted by the CMA board.

- (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
 - (c) structural remedies do not normally require monitoring and enforcement once implemented.
- 8. At this stage the CMA has provisionally identified the following potential structural remedies:
 - (a) Requiring the divestiture of one or more Lloyds pharmacy or pharmacies (licence with premises) in each local market where we have provisionally found that the merger may be expected to result in an SLC as a result of the transaction.
 - (b) Prohibition of the merger.
- 9. The inquiry group's current view is that a behavioural remedy is very unlikely to be an effective remedy to the SLC that it has provisionally identified. However, the inquiry group will consider any behavioural remedies put forward as part of this consultation and will have regard to whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies.
- 10. The inquiry group will consider any other practicable remedies that the main parties, or any interested third parties, may propose in order to address the SLC and any resulting adverse effects.
- 11. In determining an appropriate remedy, the inquiry group will consider the extent to which different remedy options would be effective in remedying the SLC that has been provisionally identified. The inquiry group will also consider whether a combination of measures is required to achieve a comprehensive solution, and will evaluate the cumulative impact of any such combination of measures on the SLC.

Divestiture

- 12. In evaluating possible divestitures as a remedy to the provisional SLC we have found, the inquiry group will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the inquiry group will have regard to the following critical elements of the design of divestiture remedies:

The scope of the divestiture package

13. The inquiry group's current view is that, to be effective in remedying the provisional SLC in each area, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor.
14. The inquiry group's current view is that the appropriate pharmacy in each area would be one or more of the Lloyds pharmacies (both the licence and the store).
15. The inquiry group invites views on whether Celesio should be given the choice of which pharmacy it is required to divest in each of the relevant areas. The inquiry group would in this case specify which divestments would address the SLC in each area and Celesio would be able to select from that list. There may be some areas in which only the divestment of one (or more) specific Lloyds stores would effectively remedy the SLC.

Identification of a suitable purchaser

16. The inquiry group will wish to satisfy itself that a prospective purchaser is independent of the main parties, has the necessary capability to compete, is committed to competing in the pharmacy market and that divestiture to the purchaser will not create further competition concerns.
17. The inquiry group will also wish to satisfy itself that the prospective purchaser satisfies the necessary regulatory requirements.

Effective divestiture process

18. The inquiry group will consider the appropriate timescale for achieving a divestiture and what procedural safeguards may be required to minimise the risks associated with this remedy option.
19. At this stage, the inquiry group expects that it would not be necessary to require that any divestiture(s) is completed before the merger would be allowed to complete.
20. The inquiry group invites views on whether Celesio should be required to appoint a divestment trustee and/or a monitoring trustee to oversee the divestitures and to ensure that the stores to be divested are maintained during the course of the process.

Prohibition

21. Prohibition of the acquisition would prevent an SLC from arising in any relevant local market. It would therefore represent a comprehensive solution to all aspects of the SLC which the inquiry group has provisionally found and has very few risks in terms of effectiveness.
22. However, at this stage the inquiry group's provisional view is that divestiture(s) in the SLC areas alone may also be effective in remedying the SLC and would therefore represent a more proportionate remedy to the provisional SLC as the number of markets in which we have provisionally found that the merger may be expected to result in an SLC is small in relation to the total number of stores to be acquired.

Relevant customer benefits

23. The inquiry group will have regard to the effects of remedial action on any relevant customer benefits within the meaning of section 30 of the Act arising from the merger situation. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services. A benefit is only a relevant customer benefit if the CMA believes that: (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
24. The inquiry group welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent to which these are preserved by the different remedy options we are considering.

Next steps

25. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the inquiry group to consider, by **Monday 16 May 2016** (see note (i)).
26. A copy of this notice will be posted on the [CMA website](#).

Note

- (i) This notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the provisional findings announced on Friday

29 April 2016. The main parties have until Monday 23 May 2016 to respond to the provisional findings. The inquiry group's findings may alter in response to comments it receives on its provisional findings, in which case the inquiry group may consider other possible remedies, if appropriate.