Case M.7721 Celesio/ Sainsbury's
UK pharmacy business

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 4(4)
Date: 8.09.2015
To the notifying party:

To the Competition and Markets Authority

Dear Sirs,

Subject: Case M.7721—Celesio/Sainsbury's UK pharmacy business
Commission decision following a reasoned submission pursuant to Article 4(4) of Regulation No 139/2004 for referral of the case to the United Kingdom and Article 57 of the Agreement on the European Economic Area.

Date of filing: 04.08.2015
Legal deadline for response of Member States: 25.08.2015
Legal deadline for the Commission decision under Article 4(4): 08.09.2015

I. INTRODUCTION

1. On 04.08.2015, the Commission received by means of a Reasoned Submission a referral request pursuant to Article 4(4) of the Merger Regulation with respect to the transaction cited above. The parties request the operation to be examined in its entirety by the competent authorities of the United Kingdom.

2. According to Article 4(4) of the Merger Regulation, before a formal notification has been made to the Commission, the parties to the transaction may request that their transaction be referred in whole or in part from the Commission to the Member State

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1 OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

2 OJ L 1, 3.1.1994, p. 3 ("the EEA Agreement").
where the concentration may significantly affect competition and which present all the characteristics of a distinct market.

3. A copy of this Reasoned Submission was transmitted to all Member States on 04.08.2015.

4. By letter of 17.08.2015, the Competition and Markets Authority as the competent authority of the United Kingdom ("CMA") informed the Commission that the United Kingdom agrees with the proposed referral.

II. THE PARTIES

5. Celesio AG Group ("Celesio" or the "Notifying Party", Germany) supplies pharmaceuticals and other healthcare related products in the United Kingdom through its pharmaceutical wholesale and retail businesses, operated respectively by AAH Pharmaceuticals Limited ("AAH") and Lloyds Pharmacy Limited ("Lloyds"). As regards retail of pharmaceutical products, Celesio (through Lloyds) operates a number of community pharmacies and [20-30] contracts providing pharmacy services to [30-40] hospitals. Celesio is ultimately controlled by the McKesson Corporation ("McKesson", United States), active in the distribution and delivery of ethical and proprietary drugs and equipment, health and beauty care products and clinical solutions to healthcare organisations.

6. Sainsbury's pharmacy business in the United Kingdom ("the Target Business") operates 277 pharmacy stores located within or next door to Sainsbury's supermarkets and provides pharmacy services within four hospitals under contracts with three hospital trusts, namely South Tees Hospitals NHS Foundation Trust, King's College Hospital NHS Foundation Trust and Guy's and St Thomas' Hospital NHS Trust. In the retail stores, the Target Business sells prescription and over-the-counter (OTC) medicines. General Sales List (GSL) products, which do not need to be sold through pharmacies, will be retained by Sainsbury.

7. Celesio and the Target Business are hereinafter together referred to as the Parties.

III. THE OPERATION AND CONCENTRATION

8. The proposed transaction in question involves the acquisition of sole control over the Target Business by McKesson through Celesio's subsidiary Lloyds, by way of purchase of assets and contracts (the "Transaction"), and therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. EU DIMENSION

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million3 (Celesio (the McKesson group): EUR 141 207 million, the Target Business: EUR [>250] million). Each of them has an EU-wide turnover in excess of EUR 250 million (Celesio (the McKesson group): EUR [>250] million, the

3 Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).
Target Business: EUR [>250] million), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

10. Therefore, the Transaction has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

V. ASSESSMENT

11. Depending on the market definition the transaction gives rise to a number of affected markets within the meaning of the Merger Regulation in relation to the market for the wholesale of medical products in the United Kingdom and the market for the retail sale of pharmaceuticals in the United Kingdom.

12. The transaction does not give rise to any affected market outside of the United Kingdom.

A Relevant markets

A.1 Product markets

(i) Wholesale of medical products

13. In previous decisions, the Commission considered that the wholesale market of medical products may be subdivided on the basis of i) categories of wholesalers ('full line' and 'short line' wholesalers due to the difference in product range offered, price and number of deliveries), ii) categories of customers (retail pharmacies, doctors and hospitals due to different purchasing and delivery patterns) and iii) categories of products (prescription medicine – branded or generic – and OTC products, depending on whether the medicine may be sold with or without prescription).

14. The Office of Fair Trading (the "OFT") considered a similar segmentation of the wholesale market of medical products in the United Kingdom, depending on the category of wholesalers, the type of customers and products.

(ii) Retail sale of pharmaceutical products

15. In accordance with previous decisions of the Commission, the market for retail sale of pharmaceutical products may be segmented according to the type of products sold, with a distinction between prescription and OTC medicines.

16. This is in line with the approach of the OFT, which considered the product scope of retail sale of pharmaceuticals in the United Kingdom by segmenting between "ethical" (prescription only medicines), "P medicines" (pharmacy only medicines that

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5 As the OFT closed on 1 April 2014, its responsibilities in merger control passed to the Competition and Markets Authority (the "CMA").

6 OFT - case Boots plc of Alliance UniChem plc, paras 19 – 21.

7 Case COMP/M.4301 Alliance Boots/Cardinal Health, paras 19 – 22, Case COMP/M.7494 Brocacef/Mediq Netherlands, para 16.
do not require a prescription but can only be dispensed by a pharmacist) and "GLS medicines" (medicines which do not need to be sold in pharmacies and can therefore be found in supermarkets).  

17. The Notifying Party also submits that the provision of pharmacy services to hospitals present distinct features from community retail pharmacies. Indeed, the provision of pharmacy services to hospitals is based on publicly tendered Out-Patient Dispensing (OPD) pharmacy contracts of limited duration, usually available through public procurement tendering process. Also, OPD pharmacy contracts awarded for hospital located pharmacies allow pharmacies to dispense prescription medicines only to patients of that hospital, but do not generally allow that pharmacy to fulfil any other prescriptions. Finally, as to billing and pricing, manufacturers would tend to agree prices with hospitals distinct from the prices agreed for community pharmacy reimbursement.

A.2 Geographic markets

(i) Wholesale of medical products

18. In previous decisions, the Commission consistently considered that pharmaceutical wholesaling is either national or regional (sub-national) in scope, due to the emphasis placed by customers on the frequency and speed of delivery of medical products.

19. This is in line with the approach of the OFT in the United Kingdom, which considered that pharmaceutical wholesaling is either national, as national customers require national wholesale coverage, or regional (sub-national) in scope, as the pharmacy sector is fragmented with many independent pharmacies (and individual dispensing doctors) on the demand side with a number of regional and national wholesalers competing to supply them.

(ii) Retail sale of pharmaceutical products

20. As regards the geographic market definition for retail sales of pharmaceutical products, the Commission considered that the market is national (from a supply side) or local (from a demand side). The national character of the market derives from the existence of national chains of pharmacies, national advertising and promoting campaigns as well as from the fact that pricing decisions are usually taken on a national basis. Most importantly, the regulatory framework regarding the retail sale of pharmaceutical products has a national dimension. However, from the demand side,

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8 OFT - case Boots plc of Alliance UniChem plc, paras 8 – 13.
9 Some OPD pharmacies may also have obtained a community pharmacy contract (allowing them to fulfil other prescriptions), but that is not common. The Target Business has a separate community pharmacy licence for the Guy’s Hospital and St Thomas’ hospital sites, which allows it to dispense other prescriptions in the OPD pharmacy.
11 OFT - case Boots plc of Alliance UniChem plc, para 22.
12 Case COMP/M.4301 Alliance Boots/Cardinal Health, paras 26 – 27, Case COMP/M.7494 Brocacef / Mediq Netherlands, para 19.
retail pharmacy markets were considered as fundamentally local in nature, e.g. limited to a certain radius around each pharmacy.

21. This is in line with the approach of the OFT, which previously considered, taking into consideration the predominantly local demand for retail pharmacies, that the geographic scope of the retail pharmacies market would be a one-mile radius.  

22. As to provision of pharmacy services to hospitals, the Notifying Party submits that the geographic dimension would be national, since competition takes place for the market before the National Health Service trust commissioning the service provision, rather than in the market since individuals in the hospital have no choice but to collect their prescription in the pharmacy located within the hospital.

B Assessment

23. The Transaction concerns the markets for the wholesale of medical products and retail sale of pharmaceutical products in the United Kingdom, where the activities of the Parties overlap as also confirmed by the CMA.

24. On the basis of the information provided by the Parties in the Reasoned Submission, the Transaction is an appropriate candidate for pre-filing referral from the Commission to the United Kingdom in accordance with Article 4(4) of the EC Merger Regulation.

Legal requirements for Article 4(4) referral

25. According to Article 4(4) of the Merger Regulation, a concentration may be referred to a Member State if it may significantly affect competition in a market or markets and where the markets in question are within a Member State and present all characteristics of distinct markets.

(i) **The Transaction may significantly affect competition in a market or markets**

26. According to paragraph 17 of the Commission notice on case referral, the existence of an affected market is generally considered to be sufficient to meet the requirements set forth in Article 4(4) of the Merger Regulation.

27. In this case, the Transaction gives rise to horizontally and vertically affected markets in the United Kingdom depending on the exact product and geographic markets definitions.

28. As to horizontally affected markets, in the overall retail pharmacy market, the combined market share of the Parties will reach up to 100% in certain localities, if the radius of one mile around the Lloyds' pharmacies is applied. Indeed, the Notifying Party identified 12 local areas within the United Kingdom where post-Transaction there will be no competitor (reduction from 2 to 1 pharmacy) or only 1 competitor (reduction from 3 to 2 pharmacies) in the retail sale of pharmaceutical products. In

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13 **OFT - Boots plc of Alliance UniChem plc**, paras 14 - 16.

14 This preliminary analysis is based on local areas defined within one mile radius around each Lloyds stores and 10 minute drive time around each Target Business store.
line with previous decisions of the Commission and the OFT\textsuperscript{15}, the Transaction may significantly impede competition in these local areas.

29. If the provision of pharmacy services to hospitals was to be considered separately, the Transaction also leads to an affected market in relation to hospital pharmacy services provided by third parties in the United Kingdom. Indeed, the merged entity will have [20-30] out of 58 ODP pharmacy hospital contracts concluded with third parties in the United Kingdom, giving rise to a combined market share of [40-50]\% in terms of number of contracts at national level.

30. As to vertically affected markets, Celesio, through its subsidiary AAH, is active in the upstream market for wholesale of medical products in the United Kingdom. AAH's market share is above 30\% in the market for the wholesale of all types of medicines at national level. Based on data in value and volume from May 2014 to April 2015, AAH's market share was above [30-40]\% in a wholesale market limited to full-line wholesalers.

31. In the light of above, the first legal requirement set forth by article 4(4) of the Merger Regulation is met.

(ii) The markets in question are within a member state and present all the characteristics of distinct markets

32. According to paragraph 18 of the Commission Notice on case referral, the second requirement set forth by article 4(4) of the Merger Regulation is satisfied if the geographic scope of the markets where competition is affected is national or narrower than national.

33. As indicated above, the markets for the retail sale of pharmaceuticals, for the supply of hospital pharmacy services and for the wholesale of medical products contain strong local elements and have been defined as national or narrower in scope.

34. Therefore, the second legal requirement set forth by article 4(4) of the Merger Regulation is met.

(iii) Conclusion on the legal requirements

35. In view of the foregoing, the principal effects of the Transaction would be restricted to the United Kingdom. Further, the markets in question present all the characteristics of a distinct market.

Additional factors

36. According to paragraphs 9 to 14 of the Commission Notice on case referral, jurisdiction should only be re-attributed to another authority where the latter is more appropriate for dealing with the concentration, and taking into account the benefit of one-stop-shop and legal certainty.

\textsuperscript{15} COMP/M.3990 – Boots/Alliance UniChem, para 14 and OFT - case Boots plc of Alliance UniChem plc, paras 43 – 46.
37. The CMA has specific expertise in the assessment of the markets in the sector concerned. By way of example, in 2006, its predecessor, the OFT, dealt with a merger (Boots plc of Alliance UniChem plc of 22 February 2006) concerning both the wholesale and retail of medical (pharmaceutical) products.

38. In previous similar cases regarding the wholesale and retail of medical (pharmaceutical) products\textsuperscript{16}, the Commission took the step of referring the matters to the United Kingdom.

39. In addition, given the infra-national scope of some of the affected markets, the case may require investigative efforts at local level for what the CMA seems best placed. Specifically, the customers in the concerned market are either pharmacies, hospitals or end-consumers in the United Kingdom, and therefore a market investigation carried out by the CMA appear to be better suited to properly reach the demand side of the market, to understand its main characteristics and to deal with possible concerns.

40. Finally, a referral of the proposed transaction to the CMA satisfies the need to preserve the benefit of a "one-stop-shop" as there are no affected markets outside the United Kingdom. Accordingly, even in case of a referral of the proposed transaction, the benefit of the "one-stop-shop" would be preserved.

VI. REFERRAL

41. On the basis of the information provided by the Parties in the Reasoned Submission, the case meets the legal requirements set out in Article 4(4) of the Merger Regulation in that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market. The Commission considers, on the basis of the information submitted in the Reasoned Submission, that the main impact on competition of the concentration is liable to take place on distinct markets in the United Kingdom, and that the requested referral would be consistent with point 20 of the Commission Notice on case referral.

VII. CONCLUSION

42. For the above reasons, and given that the United Kingdom has expressed its agreement, the Commission has decided to refer the transaction in its entirety to be examined by the United Kingdom. This decision is adopted in application of Article 4(4) of the Merger Regulation and Article 57 of the EEA Agreement.

\textit{For the Commission}

\textit{(Signed)}

\textit{Johannes LAITENBERGER}

\textit{Director-General}

\textsuperscript{16} COMP/M.3990 – Boots/Alliance UniChem, COMP No. IV/M.716 – Gehe / Lloyds.