



EUROPEAN COMMISSION
DG Competition

PUBLIC VERSION

Case M.10404 - PHOENIX / MCKESSON

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 9(3)
Date: 30/03/2022

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.



EUROPEAN
COMMISSION

Brussels, 30.3.2022
C(2022) 2141 final

COMMISSION DECISION

of 30.3.2022

**relating to Article 9 of Council Regulation (EC) No 139/2004
referring to case M.10404 – Phoenix Pharmahandel GmbH & Co KG / McKesson
Europe Holdings GmbH & Co KGaA**

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (the ‘TFEU’)¹,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No. 139/2004 of 20.1.2004 on the control of concentrations between undertakings² (the ‘Merger Regulation’), and in particular Article 9(3) thereof,

Having regard to the notification made by Phoenix Pharmahandel GmbH & Co KG on 9 February 2022, pursuant to article 4 of the said Regulation,

Having regard to the request of the Autorité de la concurrence of 23 February 2022 (the ‘Referral Request),

Whereas:

- (1) On 9 February 2022, the Commission received notification of a proposed concentration by which Phoenix Pharmahandel GmbH & Co KG (Germany, hereinafter “**Phoenix**” or the “**Notifying Party**”) intends to acquire sole control over a part of McKesson Europe Holdings GmbH & Co. KGaA (Germany), ultimately controlled by McKesson Corporation (USA). (the “**Transaction**”). Phoenix and McKesson Corporation are collectively referred to as the “**Parties**”.
- (2) The Autorité de la concurrence received a copy of the notification on 10 February 2022.
- (3) By letter dated 23 February 2022, France *via* the Autorité de la concurrence requested the referral to its competition authority of the proposed concentration with a view to assessing it under national competition law, pursuant to article 9(2)(a) of the Merger Regulation.

1. THE PARTIES AND THE TRANSACTION

- (4) Phoenix is controlled by Phoenix Pharma SE, the ultimate parent company of Phoenix, which operates as an integrated healthcare provider in Germany and other European countries. Phoenix Pharma SE’s core business is the distribution of

¹ OJ C 115, 9.8.2008, p.47.

² OJ L 24, 29.1.2004, p.1. 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.

pharmaceutical goods in pharmaceutical wholesale and retail.³ It operates, for these purposes, 161 depots and owns around 2 700 pharmacies in 14 European countries.

- (5) **McKesson Corporation** is a pharmaceutical wholesale and retail company providing logistics and services in the healthcare sector. McKesson Corporation is active in 12 European countries, and operates 62 depots and 411 pharmacies in Europe.
- (6) The Transaction concerns the acquisition of sole control of a part of McKesson Corporation by Phoenix. In July 2021, the Parties entered into several agreements⁴ pursuant to which Phoenix intends to acquire McKesson Corporation's businesses in Belgium, France, Ireland, Italy, Portugal and Slovenia, as well as certain businesses in Germany, and a shared service centre in Lithuania⁵ (together the "**Target**" or "**McKesson**") by way of purchase of shares.⁶ The Transaction constitutes a concentration pursuant to Article 3(1)(b) of the Merger Regulation.

2. UNION DIMENSION

- (7) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (Phoenix: EUR 28 209 million; McKesson: EUR [...] million). Each of them has Union-wide turnover in excess of EUR 250 million, (Phoenix: EUR [...] million; McKesson: EUR [...] million), and not each of them achieve more than two-third of their aggregate EU-wide turnover within one and the same Member State. The notified Transaction therefore has a Union dimension.

3. THE ARTICLE 9 REFERRAL REQUEST

- (8) By letter dated 23 February 2022, the Autorité de la concurrence, on behalf of France, requested the Transaction to be partially referred to France with a view to assessing the effects of the Transaction in the markets for the wholesale supply of pharmaceuticals in France under national law, pursuant to Article 9(2)(a) of the Merger Regulation.
- (9) In a preliminary assessment, the Autorité de la concurrence notes that the market for wholesale distribution of pharmaceuticals has been considered national or sub-national in the decisional practice of both the Commission and the Autorité de la concurrence.⁷ Furthermore, the Autorité de la concurrence preliminarily finds that the Transaction threatens to significantly affect competition in the national and/or local markets for wholesale distribution of pharmaceutical goods in France due to horizontal effects, as the Parties' combined market shares would be around [40-50]% at national level, and – according to the Notifying Party's estimates – close to

³ Phoenix's complementary business areas include services for the pharmaceutical industry and the development and sale of merchandise management systems and logistics solutions.

⁴ Option Agreement and Share Purchase Agreement signed on 5 July 2021.

⁵ The agreements also provide for the acquisition of certain McKesson Corporation headquarter functions in Germany, namely IT, finance and tax, controlling, and human resources. McKesson Corporation's activities in Austria, Denmark, Germany (apart from Admenta Deutschland, Recucare, Recusana and WZ GmbH), Norway and the United Kingdom will be carved out and reintegrated with McKesson Corporation.

⁶ The Transaction also includes the acquisition of the remaining 45% shares indirectly held by McKesson Corporation in Brocacef Group N.V. As Phoenix already held 55% of the shares in Brocacef prior to the Transaction, there will be no change of control with respect to this entity.

⁷ The Referral Request, page 2.

[50-60]% in several catchment areas.⁸ The Autorité de la concurrence also notes that conglomerate effects in related markets, such as ancillary services to pharmacies or logistic services for depositories, cannot be excluded.⁹

- (10) The Autorité de la concurrence further submits that it would be the best placed authority to review the competition effects of the Transaction in France, given that it would be better placed to investigate the affected markets.¹⁰ The Autorité de la concurrence has a good knowledge of the markets concerned, gained through a review of the sector that led to the preparation of an opinion of 4 April 2019 that dealt with the pharmaceutical distribution sector¹¹, as well as merger decisions concerning the sector.¹² The Autorité de la concurrence further notes that the Notifying Party regularly refers to the work of the Autorité de la concurrence in the Form CO, and that, in line with the Commission’s practice, a referral can be justified by the need for a local investigation, as in the present case, where small and medium enterprises (i.e. pharmacies) with local presence are involved.¹³

4. RELEVANT MARKETS

- (11) Both Phoenix and McKesson are active as full-line pharmaceutical wholesalers and to a different extent in the pharmaceutical pre-wholesale and retail business. In France, the Transaction primarily concerns pharmaceutical wholesale distribution¹⁴, where the Parties’ activities give rise to horizontally affected markets.
- (12) Pharmaceutical wholesale distribution concerns the delivery of pharmaceutical products to customers such as pharmacies, and – to a lesser extent – other customers such as hospitals and dispensing doctors. It does not include deliveries to end customers (i.e. patients). Pharmaceutical wholesalers are the link between manufacturers of pharmaceutical products and professional customers. Pharmaceutical wholesalers typically operate a network of depots from which they deliver to customers.
- (13) Full-line wholesalers offer the full range of available prescription (“Rx”) and non-prescription (“OTC”) pharmaceutical products as well as the full assortment of other products sold in pharmacies.¹⁵ They typically offer one or two, and occasionally even

⁸ The Referral Request, page 3.

⁹ The Referral Request, page 3.

¹⁰ The Referral Request, page 3.

¹¹ *Avis n° 19-A-08 du 4 avril 2019 relatif aux secteurs de la distribution du médicament en ville et de la biologie médicale privée*, available at the following link:

<https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//19a08.pdf>.

¹² Lettre du ministre de l’économie, de l’industrie et de l’emploi du 20 novembre 2008, au conseil de la société Alliance Santé France, relative à une concentration dans le secteur des produits pharmaceutiques ; Décision de l’Autorité n° 15-DCC-157 du 25 août 2015 relative à la prise de contrôle exclusif de la société IMJ Finance par la société Atrilux; Décision de l’Autorité n° 15-DCC-157 du 3 décembre 2015 relative à la prise de contrôle exclusif de la société GPG par la société Cerp Bretagne Atlantique.

¹³ The Referral Request, pages 3-4.

¹⁴ Phoenix is further active in pre-wholesaling, i.e. contract logistics services for pharmaceutical products, in France, and holds a market share [of 0-5]%. McKesson is not active in pre-wholesaling in France. Second, both Phoenix and McKesson are active in the sale of own-label products, but with a limited turnover (Phoenix EUR [...] million, McKesson EUR [...] million), and combined market shares remain [at 0-5]%. Lastly, both Parties operate PPGs that provide ancillary services, such as group negotiations with manufacturers, IT or marketing support, to pharmacies through own pharma groups in France, which is horizontally non-affected with a market share of [10-20]% in terms of members.

¹⁵ For example, skin care, patches or face masks.

three or more daily deliveries to customers. By contrast, short-line wholesalers offer only part of the product range, and typically do not offer more than one daily delivery. Apart from wholesalers, pharmacies can source products directly from manufacturers (direct deliveries), which typically deliver on a less-than-daily basis, and typically require a certain minimum purchase volume.

4.1. Overview of the French pharmaceutical wholesale distribution landscape and applicable regulation

- (14) Pharmaceutical wholesale in France is highly regulated, especially with respect to the provision of Rx products.
- (15) As intermediaries in the pharmaceutical supply chain, pharmaceutical wholesalers in France are subject to public service obligations under the French Public Health Code (*Code de la Santé Publique*, “CSP”). The CSP, amongst others, obliges pharmaceutical wholesalers to:¹⁶
 - (a) offer a range of medicines comprising at least nine-tenths of pharmaceutical specialties marketed in France;
 - (b) be able to satisfy the consumption of their usual customers for at least two weeks at any moment in time;
 - (c) be able to deliver within 24 hours any order placed for any of the specialties actually marketed;
 - (d) to maintain an inter-company on-call system; and
 - (e) to declare the territory on which pharmaceutical wholesale distribution is exercised.
- (16) Pharmaceutical wholesalers are required to request authorisation for the sales area of each depot (“declared territory”) from the French government agency *Agence nationale de sécurité du médicament et des produits de santé* (“ANSM”). To do so, the wholesaler must demonstrate that it is able to serve the declared territory.
- (17) Pricing for pharmaceutical wholesalers is regulated in France, and restrictions apply to, amongst others, maximum discounts for pharmaceuticals and maximum and minimum wholesaler margins. Exact regulations depend on the product type (e.g. originator or generic) and the product price per box.
- (18) In France, there are two distribution channels for pharmaceutical and para-pharmaceutical products to pharmacies and hospitals in addition to pharmaceutical wholesale distribution:
 - (a) **Direct deliveries** are direct deliveries by manufacturers of pharmaceutical products to pharmacies or hospitals.
 - (b) **Alternative intermediaries:** For OTC and para-pharmaceutical products only, there is an additional indirect distribution channel, namely *centrales d’achat pharmaceutiques* (“CAPs”). CAPs engage in the purchase, storage and distribution of OTC products and para-pharmaceuticals. CAPs can be either independent or part of a wholesaler.¹⁷

¹⁶ CSP, Article R.5124-59.

¹⁷ The Parties have one CAP each. Phoenix owns the CAP “Ivrylab” and McKesson owns the CAP “Depotrade”.

- (19) A large amount of pharmacies in France (c. 90% in terms of value) are affiliated to a pharmaceutical purchasing group (“PPG”). PPGs negotiate the purchase prices of pharmaceuticals and other products on behalf of their members. There are around 150 PPGs in France, including nationally and regionally active PPGs. Some PPGs are owned by wholesalers.¹⁸

4.2. Product market

4.2.1. The Commission’s decisional practice

- (20) The Commission has assessed pharmaceutical wholesale distribution in past decisions, however, it has never assessed the French pharmaceutical wholesaling market in detail.¹⁹
- (21) In a recent decision concerning Germany, the Commission concluded that pharmaceutical wholesale distribution by *full-liners* forms a separate product market from pharmaceutical wholesale distribution by *short-liners*.²⁰ Full-line wholesalers offer the full catalogue of pharmaceutical products, whereas short-line wholesalers only a more limited product range, typically focused on higher margin products. The Commission found that short-liners are not able to provide short-term access to the full pharmacy product portfolio reliably.²¹
- (22) The Commission also considered whether direct deliveries by manufacturers of pharmaceutical products should be considered part of the same product market as pharmaceutical wholesale distribution. In its most recent decision, the Commission found that direct deliveries form a separate product market from full-line pharmaceutical wholesaling, as customers did not consider direct deliveries an effective means of obtaining short-term access to the full product range that they require. Pharmacies identified limited storage space, additional administrative efforts (for instance due to increasing accounting efforts), longer delivery times and the existence of minimum order volumes as hurdles to order directly from manufacturers.²²
- (23) An additional segmentation of the full-line pharmaceutical wholesale distribution market that the Commission considered in its past decision, is (a) a segmentation based on the type of product, including possible segments such as (i) Rx, (ii) OTC, (iii) originator pharmaceuticals, (iv) generic pharmaceuticals (“Gx”) or parallel import pharmaceuticals; as well as (b) a segmentation based on final sales channels between (i) pharmaceuticals that may be sold in pharmacies only and (ii) pharmaceuticals that may be sold through other outlets such as supermarkets.²³ In its most recent decision, the Commission concluded that a segmentation by product type was not needed, as wholesalers typically offer all types of products, customers source all of them, and market shares were broadly similar across each type of product.²⁴

¹⁸ Phoenix owns PPGs Pharmactive, Pharma Reference and Réseau Santé, and Phoenix owns PPG PharmaVie.

¹⁹ For example, see Case M.10141 - *Sanacorp Pharmahandel / Leopold Fiebig and Gerda Nückel* and M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*.

²⁰ See Case M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*, paragraph 19.

²¹ See Case M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*, paragraph 16.

²² See Case M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*, paragraph 15.

²³ See Case M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*, paragraph 9.

²⁴ See Case M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*, paragraph 17.

(24) Finally, the Commission considered a segmentation of the full-line pharmaceutical wholesale distribution market by customer type, namely (i) pharmacies, (ii) hospitals and (iii) doctors.²⁵ In its most recent decisional practice, the Commission found that such segmentation is not required, as sales to customers other than pharmacies only represent a negligible amount of wholesalers' sales.²⁶

4.2.2. *Full-liners vs. short-liners*

4.2.2.1. The Notifying Party's view

(25) The Notifying Party considers that full-line pharmaceutical wholesaling does not form a separate market from pharmaceutical wholesaling by short-liners in France.²⁷ The Notifying Party provides the following arguments in support of this position:

- (a) Full-liners and short-liners exercise a significant competitive constraint on each other, as they sell to the same customer base and are subject to the same regulatory framework.²⁸
- (b) The market shares of short-liners have increased steadily during the past years to the detriment of full-line wholesalers, demonstrating the direct competition between the two.²⁹
- (c) Sogiphar, a former short-line wholesaler, has expanded its geographical footprint and has moved to a full-liner business model, illustrating the existence of supply-side substitutability between full-line and short-line wholesalers.³⁰
- (d) From a demand-side perspective, services and supply offered by short-liners are substitutable with those offered by full-liners, at least with respect to one delivery per day. Pharmacies in France commonly pursue a dual sourcing strategy by entering into supply contracts with two wholesalers in order to minimise the risk of potential product shortages. A short-liner could therefore easily carry out one of the two daily deliveries.³¹
- (e) Delivery frequencies in France (maximum 2 deliveries per day) are significantly lower than in other European countries (*e.g.* Germany: 3 deliveries per day, and Italy: up to 4 deliveries per day). Therefore, the fact that short-line wholesalers usually deliver their customers only once a day or even less frequently, whereas full-line wholesalers offer a twice-a-day delivery, is less significant for French pharmacies when choosing a wholesaler than pharmacies in other Member States.³²

4.2.2.2. The Commission's assessment

(26) In the present case, the market investigation did not provide elements which would justify departing from the Commission's past practice.

(27) Pharmacies source 82% of their Rx products in value from full-line wholesalers and only 3% from short-liners (the remaining 15% is sourced through direct delivery).

²⁵ See Case M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*, paragraph 10.

²⁶ See Case M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*, paragraph 18.

²⁷ Form CO, paragraph 177.

²⁸ Form CO, paragraphs 178-181.

²⁹ Form CO, paragraphs 182-183.

³⁰ Form CO, paragraph 185.

³¹ Form CO, paragraphs 186-187.

³² Form CO, paragraph 188.

For OTC and other products, pharmacies source 21% from full-line wholesalers and only 2% from short-line wholesalers (the remaining 77% is sourced through direct delivery).³³

- (28) Sales by short-liners are therefore negligible, and short-liners do not offer the possibility for pharmacies to purchase the full product range on short notice – a key value proposition of pharmaceutical wholesale distribution. In line with this, the majority of pharmaceutical wholesale competitors that responded to the Commission’s market investigation indicated that while short-liners may exercise some level of competitive constraint on full-liners, they are only able to cover a limited extent of pharmacy demand.³⁴ Similarly, only a minimal fraction of pharmacies that responded to the Commission’s market investigation indicated that they have a short-liner as their secondary supplier, and the large majority of pharmacies source less than 5% of their products via short-liners.³⁵ Pharmacy responses on whether they would be able to significantly increase their purchases from short-liners were inconclusive.³⁶
- (29) Based on the above, the Commission preliminarily considers that the relevant product market is the market for full-line pharmaceutical wholesale distribution, excluding short-liners.

4.2.3. *Direct deliveries by manufacturers and alternative intermediaries*

4.2.3.1. The Notifying Party’s view

- (30) The Notifying Party considers that direct deliveries by manufacturers and sales via other intermediaries such as CAPs belong to the same product market as pharmaceutical wholesale distribution.³⁷ The Notifying Party stresses that the situation in France is not comparable with the situation in Germany, which the Commission reviewed in case M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*:
- (a) France is one of the European countries in which the direct sales channel is most developed, making up 39% of deliveries in terms of value in 2020. This is primarily driven by pharmacies’ right of substitution (of originator and generic pharmaceuticals), the introduction of a minimum wholesale distribution margin of 30 eurocents in 2012, and the absence of integrated chains of pharmacies, which leads manufacturers to control the listing of their products pharmacy by pharmacy, despite the existence of PPGs.³⁸
 - (b) The share of direct deliveries is particularly high for OTC products (77% in terms of value) and other (para-pharmaceutical) products (77% in terms of value). Within Rx products, Gx products are delivered directly by manufacturers more often than originator drugs (20% vs 14% in terms of value).³⁹
 - (c) For OTC products, additional intermediaries to wholesalers exist in France, namely CAPs and SRAs. As CAPs are often owned by wholesalers, and

³³ Form CO, paragraph 204. Data sourced from French pharmaceutical industry association GERS.

³⁴ Replies to questions 9 and 10 of questionnaire Q1 to competitors.

³⁵ Replies to questions 4, 12 and 13 of survey to pharmacies in France.

³⁶ Replies to questions 12 and 13 of survey to pharmacies in France.

³⁷ Form CO, paragraph 200.

³⁸ Form CO, paragraph 202.

³⁹ Form CO, paragraphs 206-208.

therefore lines between the activities of wholesalers and other intermediaries are blurred, the Notifying Party considers that they operate on one overall market.⁴⁰

4.2.3.2. The Commission's assessment

- (31) In the present case, the market investigation did not provide elements which would justify departing from the Commission's past practice.
- (32) Direct deliveries have a limited role for Rx products (15% of total deliveries), and a more prominent role for OTC and other products (77% of total deliveries).
- (33) Crucially however, direct deliveries cannot provide pharmacies with the full range of products at short notice, and are therefore not a substitute for full-line pharmaceutical wholesale distribution.⁴¹ Direct deliveries are far too infrequent (typically less than daily), and can only provide the pharmacy with a limited range of products (namely, the products of the manufacturer in question). Direct deliveries can therefore act at most as a limited competitive constraint on full-line wholesalers. Alternative intermediaries, such as CAPs and SRAs, face the same constraints as direct deliveries.
- (34) In line with the above, the majority of competitors that responded to the Commission's market investigation indicated that while direct deliveries may exercise some level of competitive constraint on full-liners, they are only able to cover a limited proportion of pharmacy demand.⁴² Similarly, pharmacies that responded to the Commission's market investigation indicated that they do not source the full spectrum of products via direct deliveries: while a majority sources a large fraction of OTC and other products via direct deliveries, the majority of pharmacies sources less than 10% of Rx products via direct deliveries.⁴³ Pharmacy responses on whether they would be able to significantly increase their purchases via direct delivery were inconclusive.⁴⁴
- (35) Based on the above, the Commission preliminarily considers that the market for full-line pharmaceutical wholesale distribution excludes direct deliveries.

4.2.4. Product groups

4.2.4.1. The Notifying Party's view

- (36) The Notifying Party considers that a segmentation of the pharmaceutical wholesale distribution market by product group (Rx, OTC and para-pharmaceutical products) is not appropriate.⁴⁵ The Notifying Party submits the following arguments in support of its position:
 - (a) All wholesalers in France generally deliver all types of products to all customers, and nearly all customers source all three types of product groups.

⁴⁰ Form CO, paragraph 207.

⁴¹ The overwhelming majority of French pharmacies responding to the market investigation indicate to receive on average two daily deliveries by their main wholesaler. The clear majority of French pharmacies furthermore receive on average one daily delivery by their secondary wholesaler, and a further non-negligible share of responding pharmacies receive on average two daily deliveries by their secondary wholesaler; replies to questions 5 and 7 of survey to pharmacies in France.

⁴² Replies to questions 7 and 8 of questionnaire Q1 to competitors.

⁴³ Replies to questions 10 and 11 of survey to pharmacies in France.

⁴⁴ Replies to questions 10 and 11 of survey to pharmacies in France.

⁴⁵ Form CO, paragraph 190.

The Notifying Party considers that the Parties' market shares for the three product groups do not differ materially.⁴⁶

- (b) The Notifying Party considers that both wholesalers and manufacturers (through direct deliveries) compete vigorously in all product groups. That direct deliveries are less prevalent for originator Rx products can be explained by the fact that in absence of brand competition, manufacturers and pharmacies have less incentive to use the direct sales channel for these products.⁴⁷

4.2.4.2. The Commission's assessment

(37) In line with the Notifying Party's submission, market feedback suggests that full-line pharmaceutical wholesale distribution comprises all types of products, *i.e.* Rx, OTC and other products. All competitors that responded to the Commission's market investigation considered that there is a single full-line pharmaceutical wholesale market that includes all these products.⁴⁸

(38) As full-line pharmaceutical wholesale distribution market shares are similar for all main product groups, Rx, OTC and para-pharmaceuticals, the Commission has no reason to further segment the market by product group, as it does not affect the competitive assessment. For the purpose of the present Decision, the Commission will perform its assessment on the basis of one market for all three product groups.

4.2.5. Customer groups

4.2.5.1. The Notifying Party's view

(39) The Notifying Party considers that a segmentation of the pharmaceutical wholesale distribution market by customer group (pharmacies and hospitals) is not appropriate. The Notifying Party submits that there is no precedent in this direction, and that competition between the Parties essentially only concerns deliveries to pharmacies. Deliveries to hospitals are negligible and represent less than [...]% of Phoenix's turnover and only approximately [...]% of McKesson's turnover.⁴⁹

4.2.5.2. The Commission's assessment

(40) In the present case, the market investigation did not provide elements which would justify departing from the Commission's past practice.

(41) The lion's share of the Parties' pharmaceutical wholesale activities concern deliveries to pharmacies, and deliveries to hospitals are negligible (deliveries to hospitals amount to [...]% of turnover for Phoenix and [...]% for McKesson). Therefore, a segmentation along those lines has no relevance for the present Decision.

(42) Based on the above, the Commission preliminarily considers that a segmentation of the French market for full-line pharmaceutical wholesale distribution by customer group is not appropriate for the present Decision.

4.2.6. Conclusion

(43) In summary, the Commission will carry out its preliminary competitive assessment on the basis of French markets for full-line pharmaceutical wholesale distribution,

⁴⁶ Form CO, paragraph 191.

⁴⁷ Form CO, paragraphs 192-199.

⁴⁸ Replies to question 12 of questionnaire Q1 to competitors.

⁴⁹ Form CO, paragraph 210.

excluding short-liners and direct deliveries, and without further segmentation by customer or product group.

4.3. Geographic market

4.3.1. The Commission's decisional practice

(44) The Commission did not adopt any recent decisions considering the geographic market definition for pharmaceutical wholesale distribution in France.

(45) In decisions concerning other EEA countries, the Commission typically found that the appropriate geographic market definition for pharmaceutical wholesale distribution was regional.⁵⁰ In two recent precedents concerning Germany, the Commission concluded that the appropriate geographic scope for pharmaceutical wholesale distribution in Germany was 2 hours 14 minutes driving time from a depot.⁵¹

4.3.2. The Notifying Party's view

(46) The Notifying Party considers that the most appropriate geographic market definition for pharmaceutical wholesale distribution in France is national. The Notifying Party submits the following arguments in support of its position:⁵²

(a) Competitive and regulatory conditions, including market access and pricing, are similar across France. Furthermore, direct sales, which make up a meaningful amount of supply in France, are clearly national in nature.

(b) Wholesalers typically compete for PPGs, which can be national in nature. This creates an incentive to supply even remote pharmacies belonging to a given PPG.

(47) In the alternative, the Notifying Party views a regional geographic market definition based on a driving time of 2 hours and 20 minutes from each depot a suitable alternative approach.⁵³ The Notifying Party elaborates that:

(a) French pharmacies are typically supplied twice per day. Being able to meet the afternoon delivery, for which orders are placed at 1 p.m. latest, can be considered a constraint on maximum driving times. To deliver by 5 p.m. at the latest and taking stops and order preparation times into account, the maximum driving time is 2 hours 20 minutes.⁵⁴

(b) The Notifying Party considers that a maximum driving time of 2 hours and 20 minutes is in line with market reality and even conservative, as some depots have maximum driving times in excess of 2 hours 20 minutes. Furthermore, the Notifying Party considers that there is a trend to fewer deliveries per day (1 per day).⁵⁵

(c) The Notifying Party considers that the quantile threshold approach, *i.e.* the catchment area in which 70%, 80% or 90% of a store's or production plant's customers (in sales value) are located, which has been adopted by the

⁵⁰ See, for example, Case M.4301 – *Alliance Boots/Cardinal Health* and case M.2432 – *Angelini/Phoenix/JV*.

⁵¹ See Case M.9711 – *Alliance Healthcare Deutschland/Gehe Pharma Handel*, paragraph 26 and case M.10141 – *Sanacorp Pharmahandel / Leopold Fiebig and Gerda Nüchel*, paragraph 13.

⁵² Form CO, paragraph 214.

⁵³ Form CO, paragraph 215.

⁵⁴ Form CO, paragraphs 219-229.

⁵⁵ Form CO, paragraphs 230-232.

Commission in other cases, is inappropriate for the pharmaceutical wholesale distribution market. The Notifying Party explains that, contrary to some markets such as retail, wholesalers conduct “tours” that deliver multiple customers, and that therefore the marginal cost to deliver an additional customer is limited. Furthermore, address data of pharmacies (the Parties’ customers) are well known so there is less need to eliminate outliers or data anomalies, which the Notifying Party considers a primary aim of the quantile threshold approach.⁵⁶

- (d) The Notifying Party submits that heterogeneity in drive times to distant customers across its depots does not affect the relevance of the proposed geographic market definition, as this only reflects differences in a wholesaler’s network. In the view of the Notifying Party, the geographic market definition should be based on the area where a depot can credibly threaten to compete.⁵⁷
- (e) The Notifying Party considers that the declared territories of depots support the relevance of a geographic market definition based on a 2 hour 20 minute driving time, as the declared territories frequently match a catchment area of this size. However, the Notifying Party considers that a geographic market definition based on declared territories is not appropriate, as declared territories represent a depot’s customer footprint and wholesaler’s existing network, but not a depot’s theoretical reach, wholesalers can compete outside of the declared territory, and wholesalers can easily change a depot’s declared territory.⁵⁸

4.3.3. *The Commission’s assessment*

- (48) In the present case, the results of the market investigation show that the geographic scope of full-line pharmaceutical wholesale markets in France have several competitive characteristics that are narrower than national.
- (49) Even though wholesalers compete in broader regions, and in the case of McKesson in the whole territory of France, through a network of depots, the ability to compete for given customers depends on the location of a depot. McKesson, for example, has market shares of [30-40]% at national level, but market shares between [5-10]% and [60-70]% at the level of individual *départements*. Phoenix, in turn, has market shares of [0-5]% in 16 *départements* in France.⁵⁹ This clearly indicates that competition is not uniform across the territory of France, but that very significant differences exist.
- (50) Concerning the existence of PPGs, the Commission notes that the majority of PPGs are not national in nature, but cover only a single or a number of French regions. Furthermore, most PPGs have supply agreements with multiple wholesalers.⁶⁰
- (51) Concerning the appropriate sub-national geographic scope, the Commission has reviewed several plausible possibilities. In addition to the sub-national market of 2 hours 20 minutes (or 140 minutes) driving time catchment areas proposed by the Notifying Party as an alternative to a national market, the Commission has reviewed the Parties’ driving time distribution in France (see Figure 1). This distribution shows that the Parties make the large majority of their deliveries (by turnover) within

⁵⁶ Form CO, paragraphs 233-255.

⁵⁷ Form CO, paragraphs 256-262.

⁵⁸ Form CO, paragraphs 263-312.

⁵⁹ Response to RFI 6, question 4.

⁶⁰ M.10404_Confidential Annex_RFI 06_Q03_CRA Analysis of PPGs.

100 minutes driving time (McKesson: [90-100]%, Phoenix: [90-100]%). The driving time distribution levels off after that point.

Figure 1: distribution of the Parties' driving times in France⁶¹

[...]

Source: The Notifying Party

- (52) The Commission has also applied the quantile threshold approach, a method that has been applied by the Commission in other cases with local markets.⁶² With this method, the Commission assesses the driving time within which the Parties serve 80% of their customers by turnover. Applying this method results in a catchment area of approximately 60 minutes driving time around each depot – less than half of what the Notifying Party submits.
- (53) Ultimately, the appropriate geographic market definition can be left open for the purpose of assessing the fulfilment of the requirements for a request of a National Competition Authority (Article 9(2)(a) referral), as pharmaceutical wholesale markets are in any event not wider than national, and the Transaction threatens to affect significantly competition under any plausible geographic market definition. For the purpose of its assessment, the Commission will indicate market shares at national level and for all three catchment areas discussed in this Section, *i.e.* 60 minutes, 100 minutes and 140 minutes driving time.

5. COMPETITIVE ASSESSMENT

- (54) In France, the Transaction primarily concerns the markets for the full-line wholesale supply of pharmaceutical products which, as set out above, are likely narrower than national and in the form of catchment areas.⁶³

5.1. Market structure

- (55) At national level, the Parties' combined market share in the full-line wholesale supply of pharmaceuticals would be above [40-50]%, which is significant, notably in comparison to the Parties' next largest competitor, which would at most hold a share of approximately [20-30]%.
- (56) Furthermore, the full-line wholesale supply of pharmaceuticals is relatively concentrated in France as, together with Alliance, the Parties are the only full-line wholesalers active on the whole French territory.⁶⁴ The three main other competitors are CERPs (*Coopérative d'exploitation et de répartition pharmaceutiques*), cooperative organisations which act as full-line wholesalers but within a delineated territory, at regional level (the three geographic territories in which each CERPs

⁶¹ The left graph (titled "OCP National") shows McKesson's data and the right graph (titled "Phoenix Pharma National") shows Phoenix's data.

⁶² Consistent with the approach taken in previous decisions concerning other industries, *e.g.* M.10249 – *Derichebourg Environnement / Groupe Ecore Holding*.

⁶³ For completeness, the Commission also notes that the Parties' activities also horizontally overlap with respect to the supply of ancillary services to pharmacies, as well as the sale of private labels, in France, both markets which are likely to be national in France. Based on the evidence provided by the Notifying Party, those overlaps do not give rise to affected markets.

⁶⁴ The Commission notes that, while Phoenix is not active across all French departments (notably the most remote ones), it is still considered as one of the competitors active at national scale by competitors and customers alike.

operates almost never overlap).⁶⁵ Lastly, Giphar is a small player that may qualify as a full-liner.

Table 1: Pharma wholesale market share in value, 2020, excluding direct sales and short-liners, national, level France

Company	Market share
Phoenix	[5-10]%
McKesson (OCP)	[30-40]%
Combined	[40-50]%
CERP Rouen	[20-30]%
Alliance	[10-20]%
CERP Rhin Rhône Méditerranée	[10-20]%
CERP Bretagne Atlantique	[0-5]%
Giphar	[0-5]%

Source: Form CO, paragraph 354 et seq.

- (57) At sub-national level, the Transaction would give rise to overlaps around all the 59 depots of the Parties, of which 20 depots of Phoenix and 39 depots of McKesson. Considering a potential geographic market of 140 minutes net driving time around each depot, which the Parties propose as a suitable alternative geographic market definition, the Parties' combined market shares would exceed [40-50]% with respect to 43 depots (including 9 depots where the Parties' combined market shares would exceed [50-60]%).⁶⁶ As can be seen in Table 2, the number of catchment areas with market shares above [50-60]% increases materially when applying shorter driving times.

Table 2: Indication of full-line pharmaceutical wholesale distribution market share levels excluding direct deliveries for sub-national markets in France (2020)

Market share level	Driving time 140 min	Driving time 100 min (quantile 97-98%)	Driving time 60 min (quantile 80%) ⁶⁷
[50-60]% or more	9	14	25

Source: Form CO, paragraph 469 et seq; reply to question 3 of RFI 6 and question 13 of RFI 10.

- (58) Table 3 below shows the Parties' combined market shares in 2020 for each catchment area when applying driving times of 140, 100 and 60 minutes.

⁶⁵ The Commission notes that since the 3 CERPs have a largely complementary geographical footprint, they may in some instances team up to respond together to national tenders, and as such, may be perceived by some customers as a single player. However, the CERPs cannot be considered as a single economic unit for the purposes of competition law, as they have limited economic links with each other and act independently on the market.

⁶⁶ The Commission has also considered alternative geographic scopes, as set out in section 4.2.2, and concluded that the competitive assessment would not significantly change if these alternative catchment areas would be considered.

⁶⁷ As explained in footnote 52, the Commission considered alternative geographic markets defined as the catchment area in which 80% or 90% of turnover or of the number of pharmacies are serviced (driving times for each of the quantiles for France are the same based on turnover and number of pharmacies).

Table 3: Parties' combined market shares for full-line pharmaceutical wholesale distribution excluding direct deliveries for each relevant catchment area in France (2020)

Catchment area	Market share 140 mins	Market share 100 mins	Market share 60 mins
OCP Répartition Clermont-Ferrand	[50-60]%	[60-70]%	[70-80]%
Phoenix Pharma Clermont-Ferrand	[50-60]%	[60-70]%	[70-80]%
Phoenix Pharma Moulins	[50-60]%	[60-70]%	[70-80]%
OCP Répartition Nevers	[50-60]%	[60-70]%	[60-70]%
OCP Répartition Montluçon	[50-60]%	[50-60]%	[60-70]%
Phoenix Pharma Pau	[40-50]%	[50-60]%	[50-60]%
Phoenix Pharma Troyes	[50-60]%	[50-60]%	[50-60]%
OCP Répartition Tarbes	[40-50]%	[50-60]%	[50-60]%
OCP Répartition Troyes	[50-60]%	[50-60]%	[50-60]%
OCP Répartition St Étienne	[40-50]%	[50-60]%	[50-60]%
OCP Répartition Bayonne	[40-50]%	[50-60]%	[50-60]%
OCP Répartition St Laurent	[40-50]%	[50-60]%	[40-50]%
OCP Répartition Melun	[40-50]%	[50-60]%	[50-60]%
Phoenix Pharma Auxerre	[50-60]%	[50-60]%	[50-60]%
Phoenix Pharma Créteil	[40-50]%	[40-50]%	[50-60]%
OCP Répartition Créteil	[40-50]%	[40-50]%	[50-60]%
Phoenix Pharma Saint-Étienne	[40-50]%	[40-50]%	[50-60]%
OCP Répartition Plessis Robinson	[40-50]%	[40-50]%	[50-60]%
Phoenix Pharma Reims	[40-50]%	[40-50]%	[50-60]%
OCP Répartition Champagne Ardenne	[40-50]%	[40-50]%	[50-60]%
Phoenix Pharma Puget	[40-50]%	[40-50]%	[40-50]%
OCP Répartition Paris	[40-50]%	[40-50]%	[50-60]%
OCP Répartition Toulon	[40-50]%	[40-50]%	[50-60]%
Phoenix Pharma Les Mureaux	[40-50]%	[40-50]%	[50-60]%
OCP Répartition Metz Nancy Lorraine	[40-50]%	[40-50]%	[40-50]%
Comptoir pharmaceutique méditerranéen	[50-60]%	[40-50]%	[40-50]%
OCP Répartition Toulouse	[30-40]%	[40-50]%	[50-60]%
OCP Répartition Artois-Picardie	[40-50]%	[40-50]%	[30-40]%
Phoenix Pharma Toulouse	[30-40]%	[40-50]%	[50-60]%
Phoenix Pharma Metz	[40-50]%	[40-50]%	[40-50]%
Phoenix Pharma Nancy	[30-40]%	[40-50]%	[40-50]%
OCP Répartition Rouen	[40-50]%	[40-50]%	[30-40]%
OCP Répartition Marseille	[40-50]%	[40-50]%	[40-50]%
Phoenix Pharma Lyon	[40-50]%	[40-50]%	[40-50]%
Phoenix Pharma Toulon	[40-50]%	[40-50]%	[50-60]%
OCP Répartition Lyon	[40-50]%	[40-50]%	[40-50]%
OCP Répartition Valence	[40-50]%	[40-50]%	[30-40]%
OCP Répartition Fusion Blois et Ormes	[40-50]%	[40-50]%	[40-50]%
OCP Répartition Saintes	[30-40]%	[40-50]%	[40-50]%
Phoenix Pharma Blois	[40-50]%	[40-50]%	[40-50]%

Catchment area	Market share 140 mins	Market share 100 mins	Market share 60 mins
Phoenix Pharma Lille	[40-50]%	[40-50]%	[40-50]%
OCP Répartition Lille	[40-50]%	[40-50]%	[40-50]%
OCP Répartition Annecy	[40-50]%	[40-50]%	[30-40]%
OCP Répartition Grenoble	[40-50]%	[40-50]%	[30-40]%
OCP Répartition Périgord Limousin	[40-50]%	[30-40]%	[30-40]%
Phoenix Pharma Niort	[30-40]%	[30-40]%	[40-50]%
OCP Répartition Boulogne	[30-40]%	[30-40]%	[30-40]%
Phoenix Pharma Châtellerauld	[30-40]%	[30-40]%	[40-50]%
OCP Répartition Strasbourg	[30-40]%	[30-40]%	[30-40]%
OCP Répartition Bordeaux	[40-50]%	[30-40]%	[30-40]%
OCP Répartition Dijon	[40-50]%	[30-40]%	[20-30]%
OCP Répartition Nantes	[30-40]%	[30-40]%	[20-30]%
Phoenix Pharma Nantes	[30-40]%	[30-40]%	[20-30]%
OCP Répartition Caen	[30-40]%	[30-40]%	[20-30]%
OCP Répartition Rennes	[20-30]%	[30-40]%	[30-40]%
OCP Répartition Durtal	[30-40]%	[20-30]%	[20-30]%
OCP Répartition Montbeliard	[30-40]%	[20-30]%	[20-30]%
OCP Répartition Montpellier	[30-40]%	[20-30]%	[30-40]%
OCP Répartition Breizh	[20-30]%	[20-30]%	[10-20]%

Source: The Notifying Party

5.2. The Notifying Party's view

- (59) The Notifying Party submits that the Transaction does not result in a significant impediment to effective competition for any affected market for pharmaceutical wholesale distribution in France.⁶⁸
- (60) *First*, the Notifying Party argues that market shares do not reflect actual market power or intensity of competition in France. Instead, it considers the choice of alternative suppliers available post-Transaction more relevant, as this takes into account that supply and availability of products and rivals' capacities considerably exceed pharmacies' actual demand in France due to regulatory conditions including a comprehensive public service obligation for wholesalers.⁶⁹
- (61) *Second*, the Notifying Party argues that a sufficient number of strong and credible competitors remains post-Transaction – namely at least four full-liners in addition to the Parties, as listed in Table 1 above – to which customers can switch easily and quickly. The Notifying Party clarifies that even in the catchment areas or parts therein in which only two alternative independent full-liners would remain, pharmacies would have sufficient choice to select two suppliers to apply a dual sourcing strategy.⁷⁰
- (62) *Third*, in the Notifying Party's view, competitors all have the ability and incentive to supply additional customers, as they have excess capacity, barriers to switch suppliers are low, and many pharmacies adopt a dual sourcing strategy.⁷¹

⁶⁸ Form CO, paragraph 382.

⁶⁹ Form CO, paragraphs 387-395.

⁷⁰ Form CO, paragraphs 396-422.

⁷¹ Form CO, paragraphs 422-440.

- (63) *Fourth*, the Notifying Party submits that the Parties are not close competitors. The Notifying Party explains that while McKesson is the largest wholesaler in France, Phoenix is only number 5 and does not have a geographic coverage that matches that of McKesson.⁷²
- (64) *Fifth*, the Notifying Party argues that pharmacies and PPGs enjoy considerable countervailing buyer power. Over 80% of pharmacies are affiliated to PPGs that can leverage their strong national and multi-regional footprints in their negotiations with wholesalers. In addition, as full-line wholesalers need high capacity utilisation in order to recoup their high fixed costs and given the low margins due to strict regulatory requirements, pharmacies are in a favourable bargaining position.⁷³
- (65) *Sixth*, the Notifying Party considers that direct deliveries by manufacturers and supplies from alternative intermediaries exercise a considerable and direct competitive constraint on wholesalers. The Notifying Party expects the extent of direct deliveries to increase.⁷⁴
- (66) *Seventh*, the Notifying Party argues that the online pharmacy market is expected to grow significantly in the coming years, resulting in additional competitive pressure from customers active in this sales channel stemming from increased purchase volumes.⁷⁵
- (67) *Eighth*, the Notifying Party submits that the Transaction would have no effect on prices of reimbursed pharmaceuticals sold to pharmacies due to price regulation in France, or, in fact, would have a pro-competitive effect. The Notifying Party expects the Transaction to bring about efficiency gains in the distribution of products.⁷⁶

5.3. The Commission's assessment

- (68) *Firstly*, as explained in section 4.3 of this decision, markets for full-line pharmaceutical wholesale in France are likely sub-national in geographic scope, defined by catchment areas around a wholesaler's depot. While the Commission leaves the exact market definition open, it notes that the Parties' combined market shares would be very high in a significant number of sub-national markets under any plausible market definition, as detailed in section 5.1.⁷⁷ Combined market shares in at least nine and up to 25 local markets would reach or exceed 50% (up to circa [60-70]%), which may in itself be evidence of the existence of a dominant market position.⁷⁸ In a further significant number of local markets, namely at least 16 and up to 34,⁷⁹ combined market shares would be high, reaching or exceeding, often

⁷² Form CO, paragraphs 441-452.

⁷³ Form CO, paragraphs 453-462.

⁷⁴ Form CO, paragraphs 468-475.

⁷⁵ Form CO, paragraphs 463-467.

⁷⁶ Form CO, paragraphs 468-485.

⁷⁷ With respect to the ability of pharmacies to switch wholesalers, a significant share, but less than half of responding French pharmacies, indicate that they would be able to switch wholesalers without delay or additional costs. However, another significant share of responding French pharmacies, constituting more than half of all respondents forming an opinion in the market investigation, point at certain delays and/or additional costs that switching wholesaler would entail. The majority of responding French pharmacies have not switched wholesalers in the past 5 years, and the large majority of all other respondents indicate that they have switched to another wholesaler only once in that timeframe (see the replies to questions 9 and 14 of the survey to pharmacies in France).

⁷⁸ Horizontal Merger Guidelines, paragraph 17.

⁷⁹ The total number of markets with market shares reaching or exceeding [40-50]% is 41 for a catchment area of 60 minutes driving time around each depot, 44 for 100 minutes driving time and 43 for 140 minutes.

significantly, [40-50]%. Horizontally affected markets arise under any plausible geographic market definition around almost each of the Parties' depots.

- (69) For completeness, the Commission notes that the market for full-line pharmaceutical wholesaling would be affected even if it was defined at the national level. The Parties' combined market shares would be high with [40-50]% with a significant increment of almost [5-10]%, and the merged entity would be almost double the size in terms of market shares compared to the second-largest competitor.
- (70) *Secondly*, as detailed in section 4.3 of this decision, the market for pharmaceutical full-line wholesaling in France is already concentrated with only a limited number of significant competitors left. Post-Transaction, the merged entity would face competition primarily from Alliance as well as from CERP Rouen, CERP Rhin Rhône Méditerranée and CERP Bretagne Atlantique. The Commission notes that the geographic presence of the three CERPs is largely complementary, as explained in paragraph (56) of this decision, and that they generally do not constitute separate alternatives for pharmacies.⁸⁰ While the competitive landscape and the competitive strengths of wholesalers vary between different sub-national markets, the Transaction would overall reduce the number of available significant full-line wholesalers in France from four to three.⁸¹
- (71) *Thirdly*, the Commission has received considerable concerned feedback from both customers and competitors in the course of the market investigation. The majority of responding wholesalers (including both full-liners and short-liners) indicate that the Transaction would have a negative impact on prices⁸² for pharmacies. A further significant share of responding wholesalers indicate potential negative effects on the number of daily deliveries and the reliability of supply.⁸³ The majority of responding wholesalers that formed an opinion in the market investigation further submit that the Transaction would have a negative impact on their business.⁸⁴
- (72) In line with the views of competitors, a large number of French pharmacies, constituting a significant share of all respondents, indicated that the Transaction would have an overall negative or rather negative impact on their business. A significant number of responding French pharmacies indicated that there would not be sufficient alternative pharmaceutical wholesalers left post-Transaction. Pharmacies that specified their concerns pointed, firstly, to potential price increases, and secondly to a potential reduction of daily deliveries. The Commission notes that the overall responses vary between sub-national markets.⁸⁵

⁸⁰ See non-confidential version of the minutes of a call with a competitor on 1 December 2021, in which the competitor points at limited competition between the CERPs.

⁸¹ Taking into account the complementary geographic footprint of the CERPs at sub-national level. As explained in section 4.2 of this decision, direct sales and short-line wholesalers do not belong to the same product market as full-line wholesalers. While both direct sales and short-liners may exercise some form of out-of-the-market constraint on full-liners, these constraints appear in any event limited, as both services are no full substitute.

⁸² The Commission notes in this context that not all products are subject to regulated margins; Form CO, paragraphs 1823 et seq.

⁸³ The Commission considers that, even in case purchasing groups would have a certain degree of bargaining power *vis-à-vis* wholesalers, the market feedback suggests that this would not be sufficient to prevent potential negative effects on prices and frequency of delivery by the Transaction.

⁸⁴ Questionnaire to competitors in France, questions 38 and 39.

⁸⁵ Replies to questions 16, 17, 18 and 19 of survey to pharmacies in France.

5.4. Conclusion

(73) Based on a preliminary analysis, and specifically the existence of high or very high combined market shares of the merged entity, the overall market structure as well as significant concerned feedback by market participants, the Commission considers that the Transaction threatens to affect significantly competition in the markets for pharmaceutical full-line wholesale in France, which present all the characteristics of distinct markets.

6. ASSESSMENT UNDER ARTICLE 9(3) OF THE MERGER REGULATION

(74) According to Article 9(3) of the Merger Regulation, the Commission may refer the whole or part of the case to the competent authorities of the Member State concerned with a view to applying the Member State's national competition law if, following a request for referral by that Member State pursuant to Article 9(2)(a) of the Merger Regulation, the Commission considers that the Transaction threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market.⁸⁶

(75) In this regard, the requesting Member State is required to demonstrate that, based on a preliminary analysis, there is a real risk that the Transaction may have a significant adverse impact on competition. Such preliminary indications may be in the nature of *prima facie* evidence of such a possible significant adverse impact. Furthermore, the Member State is required to show that the geographic markets in which competition is affected by the Transaction, in the manner described, are national or narrower than national.⁸⁷

(76) Moreover, in deciding whether to refer a case fulfilling the legal requirements for referral, the Commission considers which authority is more appropriate for dealing with the transaction, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority.⁸⁸ In this respect, particular regard is given to the likely locus of any impact on competition resulting from the concentration. Other factors taken into account include legal certainty and the benefits of the 'one-stop-shop' principle. Fragmentation of cases is to be avoided where possible, and it is normally appropriate that, in case of Article 9 referrals, the whole case or at least all connected parts thereof are dealt with by a single authority.

6.1. The Notifying Party's view

(77) On 24 February 2022, the Commission informed the Notifying Party of the Referral Request, and invited it to submit its views.

(78) In two letters, respectively dated 28 February and 1 March 2022, the Notifying Party urged the Commission to refuse France's request for partial referral under Article 9(2)(a) of the Merger Regulation, making use of its discretionary power to assess the request. In support of its request, the Notifying Party submits the arguments set out below.

(79) *First*, the Notifying Party argues that the criteria of Article 9(2)(a) are not met. While the Notifying Party acknowledges that some of the relevant markets, including the

⁸⁶ Article 9(2)(a) of the Merger Regulation.

⁸⁷ Commission Notice on Case Referral in respect of concentration ("Referral Notice"), OJ C 56, 5.3.2005, paragraphs 35 and 36.

⁸⁸ Referral Notice, paragraphs 9 and 37.

pharmaceutical wholesale market, are national in scope and may also to some extent be considered infra-national, it also puts forward that an isolated, national view would ignore (i) the cross-border trade for parallel imports and (ii) that parts of the wholesalers' purchasing activities (including France) also relate to EEA-wide activities.⁸⁹

- (80) In addition and in any event, the Notifying Party considers that the Transaction does not threaten to significantly affect competition in France, relying on the following factors: (i) sales shares are an imperfect metric of market power in the present case and do not give rise to substantive concerns; (ii) PPGs constitute an important constraining factor for wholesalers; (iii) direct sales constrain wholesalers to a large degree and play a major role in France; (iv) wholesalers are bound by stringent regulation which limits any potential scope for upward pricing effects, and (v) customers have a sufficient number of alternative supply sources.⁹⁰
- (81) *Second*, the Notifying Party considers that the general rule of the one-stop-shop should apply, and that there is no reason to depart from it in the present case:⁹¹
- (a) The Notifying Party puts forward that it is important that a coherent and consistent approach be taken in this sector, which the Commission is in the best position to ensure.⁹²
 - (b) According to the Notifying Party, the proposed Transaction not only relates to one Member State, but also has a market impact on several Member States, and the Parties and their competitors are engaged in parallel trade and cross-border activities, so that only the Commission has the ability to conduct a holistic pan-European assessment of the situation.⁹³
 - (c) The Notifying Party further argues that the Commission has an extensive, thorough and recent knowledge of the sector and expertise, which makes it very well placed to deal with the Transaction.⁹⁴
 - (d) The Notifying Party also submits that the Commission has already carried out an extensive market investigation and could keep the case, consistent with some recent precedents.⁹⁵
 - (e) Last, the Notifying Party notes that a referral would entail additional administrative efforts for the Parties, causing some undue delays, a significant administrative burden, and more generally an inefficient way of dealing with the case.⁹⁶

⁸⁹ Letter of the Notifying Party dated 28 February 2022, page 2. See also Letter of the Notifying Party, dated 1 March 2022, page 1.

⁹⁰ Letter of the Notifying Party dated 28 February 2022, pages 2 to 4. See also Letter of the Notifying Party, dated 1 March 2022, page 3.

⁹¹ Letter of the Notifying Party dated 28 February 2022, page 4 et seq. See also Letter of the Notifying Party, dated 1 March 2022, page 2.

⁹² Letter of the Notifying Party dated 28 February 2022, page 5. See also Letter of the Notifying Party, dated 1 March 2022, page 2.

⁹³ Letter of the Notifying Party dated 28 February 2022, pages 6-7. See also Letter of the Notifying Party, dated 1 March 2022, page 2.

⁹⁴ Letter of the Notifying Party dated 28 February 2022, pages 7-8. See also Letter of the Notifying Party, dated 1 March 2022, pages 2-3.

⁹⁵ Letter of the Notifying Party dated 28 February 2022, pages 7-8. See also Letter of the Notifying Party, dated 1 March 2022, page 2.

⁹⁶ Letter of the Notifying Party dated 28 February 2022, pages 8-9. See also Letter of the Notifying Party, dated 1 March 2022, page 2.

6.2. The Commission's assessment

- (82) The Commission considers that the conditions set out in Article 9(2)(a) of the Merger Regulation are met. The information submitted by the Autorité de la concurrence in its Referral Request (as set out above in section 3), and the results of the Commission's market investigation, demonstrate that, in the present case, the Transaction threatens to significantly affect competition in the markets for pharmaceutical wholesale distribution in France, which present all the characteristics of distinct markets.
- (83) *First*, the markets targeted in the Referral Request present the characteristics of distinct markets in France. Based on the elements set out by the Autorité de la concurrence in its Referral Request and Sections 4.2 and 4.3 above, the Commission considers that full-line pharmaceutical wholesale distribution is likely a distinct market, and that its geographic scope is most probably local (i.e. sub-national), or at most national.⁹⁷
- (84) *Second*, for the reasons set out in Sections 3 and 5, the Commission considers that the Transaction threatens to affect significantly competition in these markets in France.⁹⁸ The number of horizontal overlaps in pharmaceutical wholesale distribution in France, together with the high combined market shares of the Parties for a significant number of sub-national markets,⁹⁹ regardless of the exact delineation of the geographic scope, show that the Transaction is likely to have adverse effects on competition primarily in France. In this respect, the results of the market investigation confirmed potentially adverse effects of the Transaction on competition in France, i.e. at national level, and even some specific local markets within France, i.e. smaller than national markets.
- (85) The Commission further notes that, pursuant to Article 9(3) of the Merger Regulation, in the event that the criteria provided for in Article 9(2)(a) are fulfilled with regard to a proposed transaction, the Commission retains a margin of discretion in deciding whether to refer a given case to a national competition authority. In the present case, the Commission takes the view that a partial referral of the case to the Autorité de la concurrence would be appropriate.
- (86) *First*, the Transaction appears to affect primarily full-line pharmaceutical wholesale distribution in France, or specific local markets within France. In parallel, the Commission adopts a decision on the basis of Article 6(1)(b) of the Merger Regulation, since the Commission did not have serious doubts on the compatibility of the Transaction with the internal market for the markets other than the markets subject to the Referral Request. As a consequence, contrary to the Notifying Party's argument,¹⁰⁰ there is no risk of fragmentation of the case and no apparent need of coordination between multiple national competition authorities given that the only significant competition effects from the Transaction appear limited to France. In addition, and in any event, given the national, if not sub-national, nature of the relevant markets, there is no risk of inconsistent outcomes, since the Autorité de la

⁹⁷ See section 4.3 of the present decision.

⁹⁸ See section 5 of the present decision.

⁹⁹ This is in comparison to other markets, notably markets in Italy where the Parties' shares are less significant and the Parties' activities only overlap in the North of the country.

¹⁰⁰ Letter of the Notifying Party dated 28 February 2022, page 5. See also Letter of the Notifying Party, dated 1 March 2022, page 2.

concurrency's and the Commission's investigations would necessarily focus on different national or sub-national markets.

- (87) *Second*, given the geographic scope of the markets considered, the case may require investigative efforts at local level, for which the Autorité de la concurrence would be best equipped. Specifically, the relevant customers in the affected markets are mainly pharmacies, i.e. small and medium enterprises located all over France. In light of the number of players concerned and the local nature of their activities, a thorough investigation carried out by the Autorité de la concurrence appears to be better suited, in particular, to reach the demand-side of the market properly, understand the characteristics of their business activities and deal with potential concerns.¹⁰¹
- (88) *Third*, the Autorité de la concurrence is well-placed to assess the Transaction, as it has previously investigated this sector and has dealt with pharmaceutical distribution cases in its past decisional practice. As it laid out in the Referral Request, in 2019, the Autorité de la concurrence carried out a review of the sector and issued an opinion on its own initiative focussing on pharmaceutical wholesale distribution in France. The Notifying Party references this report in the Form CO.¹⁰² In addition, the Autorité de la concurrence has dealt with merger cases in the area of pharmaceutical distribution.¹⁰³ Contrary to the Parties' contention, the Autorité de la concurrence therefore has recent experience and thorough knowledge and expertise of the sector, the competitive dynamics of the market, as well as the regulatory framework in place.
- (89) Last, while the Notifying Party argues that a partial referral is likely to create an additional administrative burden for the Parties, the Commission observes that this cannot be considered disproportionate, given that, as outlined in its Referral Request, the Autorité de la concurrence had already formed a broad picture of the main characteristics of the case and potential competition concerns prior to the filing of its Referral Request.
- (90) The Autorité de la concurrence therefore seems best placed in the sense of paragraph 37 of the Referral Notice.

7. CONCLUSION

- (91) From the above it follows that the conditions to request a referral under Article 9(2)(a) of the Merger Regulation are met. The Commission also considers that, given the local scope of the markets affected by the transaction, the competent authorities of France are better placed to carry out a thorough investigation of the relevant part of the case. It is therefore appropriate for the Commission to exercise its discretion under Article 9(3)(b) of the Merger Regulation so as to grant the referral.

¹⁰¹ As to the Notifying Party's argument that a referral would cause an unnecessary administrative burden on the Parties and generally be inefficient, the Commission notes that the Notifying Parties was informed of the Autorité de la concurrence's intention to request referral of the relevant part of this case in a timely fashion, at the stage of pre-notification.

¹⁰² *Avis n° 19-A-08 du 4 avril 2019 relatif aux secteurs de la distribution du médicament en ville et de la biologie médicale privée.*

¹⁰³ Lettre du ministre de l'économie, de l'industrie et de l'emploi du 20 novembre 2008, au conseil de la société Alliance Santé France, relative à une concentration dans le secteur des produits pharmaceutiques ; Décision de l'Autorité n° 15-DCC-157 du 25 août 2015 relative à la prise de contrôle exclusif de la société IMJ Finance par la société Atrilux ; Décision de l'Autorité n° 15-DCC-157 du 3 décembre 2015 relative à la prise de contrôle exclusif de la société GPG par la société Cerp Bretagne Atlantique.

(92) On the same date as this decision, the Commission has also adopted a decision on the basis of Article 6(1)(b) of the Merger Regulation with regard to the markets other than the national markets subject to the referral request.

HAS ADOPTED THIS DECISION:

Article 1

The notified concentration is referred, as regards its effects in the markets for the wholesale supply of pharmaceuticals in France, to the competition authority of France, pursuant to Article 9(3)(b) of Council Regulation (EC) No 139/2004.

Article 2

This Decision is addressed to

The French Republic

PHOENIX Pharmahandel GmbH & Co KG

Pfingstweidstraße 10-12

68199 Mannheim

Germany

Done at Brussels, 30.3.2022

For the Commission

(Signed)

Margrethe VESTAGER

Executive Vice-President