

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

Celesio Final Undertakings given by Celesio AG to the Competition and Markets Authority pursuant to Section 82 of the Enterprise Act 2002

1. Background

- 1.1. On 29 July 2015 Lloyds Pharmacy Limited (Lloyds) entered into i) a Business Sale Agreement (which was on 30 June 2016 replaced by an amended Business Sale Agreement) and ii) a Cooperation Agreement to acquire Sainsbury's Supermarkets UK Pharmacy Business (the Target) (the Transaction).
- 1.2. On 29 December 2015, the Competition and Markets Authority (CMA) referred the Transaction for further investigation and report by a Group of CMA Panel Members (the Group) under section 33(1) of the Enterprise Act 2002 (the Act).
- 1.3. On 27 June 2016 the CMA accepted from Lloyds interim undertakings pursuant to section 80 of the Act for the purpose of preventing pre-emptive action prior to the reference being finally determined. It accepted equivalent undertakings from Sainsbury's Supermarkets Limited (Sainsbury's) on 7 July 2016. On 7 July 2016 the CMA also accepted from Celesio AG (Celesio) an undertaking in accordance with section 80 of the Act to refrain from any action that would frustrate Lloyds' ability to comply with its interim undertakings.
- 1.4. On 29 July 2016, the CMA published its final report concluding that the anticipated acquisition may be expected to result in a substantial lessening of competition (SLC) in 12 local areas (the 'Relevant Areas') and that this may be expected to lead to an adverse effect for customers in terms of a reduction in the quality of pharmacy services in the Relevant Areas. The final report stated that, with the exception of Christchurch and Sandy, the divestiture of a particular Lloyds pharmacy in each of the Relevant Areas, as listed in Annex 1 (Divestment Pharmacies), would be an effective and proportionate remedy to address the SLC that had been identified. In Christchurch and Sandy the divestiture of either of two particular Lloyds pharmacies in these areas, as listed in Annex 1 (Divestment Pharmacies), would be an effective and proportionate remedy to address the SLC that had been identified.
- 1.5. The final report further concluded that the Transaction should be allowed to proceed on condition that Lloyds disposes of the pharmacies listed in Table

23 of the Final Report. However, pending the divestiture of the relevant pharmacies, safeguards would be put in place to ensure their continuing viability and the CMA would retain the discretion to require the appointment of a Divestiture Trustee to give effect to the divestitures in the event that Lloyds failed to do so.

- 1.6. Following publication of the Final Report, on 25 August 2016, the CMA accepted interim undertakings from Lloyds under section 80 of the Act for the purpose of preventing pre-emptive action prior to the reference being finally determined (Interim Measures).
- 1.7. On 30 August 2016, a Monitoring Trustee was appointed pursuant to directions given by the CMA on 25 August under the Interim Measures.
- 1.8. The Transaction was completed on 31 August 2016.
- 1.9. Now Celesio hereby gives to the CMA the following Celesio Final Undertakings pursuant to section 82 of the Act for the purpose of remedying the SLC identified in the Final Report and any adverse effects resulting from it.

2. Interpretation

- 2.1. The purpose of these Celesio Final Undertakings is to give effect to the Final Report and they shall be construed accordingly.
- 2.2. Any word or expression used in these Celesio Final Undertakings or the recitals to these Celesio Final Undertakings shall, unless otherwise defined herein and/or the context otherwise requires, have the same meaning as in the Act or the Final Report (as appropriate).
- 2.3. In these Celesio Final Undertakings the word 'including' shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word, and the word 'include' and its derivatives shall be construed accordingly.
- 2.4. The headings used in these Celesio Final Undertakings are for convenience and shall have no legal effect.
- 2.5. References to any statute or statutory provision shall be construed as references to that statute or statutory provision as amended, re-enacted or modified whether by statute or otherwise stated.
- 2.6. References to recitals, paragraphs, subparagraphs, annexes and schedules are references to the recitals to, paragraphs and subparagraphs of, annexes and schedules to, these Celesio Final Undertakings unless otherwise stated.

2.7. Unless the context requires otherwise, the singular shall include the plural and vice versa and references to persons includes bodies of persons whether corporate or incorporate.

2.8. The Interpretation Act 1978 shall apply to these Celesio Final Undertakings as it does to Acts of Parliament.

2.9. Further, in these Celesio Final Undertakings:

‘the Act’ means the Enterprise Act 2002;

‘business’ has the meaning given by section 129(1) and (3) of the Act;

‘Celesio’ means the company incorporated under the laws of Germany, with its business seat at Neckartalstrasse 155, 70376 Stuttgart, registered with the commercial register of the local court of Stuttgart under HRB 9517;

‘the CMA’ means the Competition and Markets Authority;

‘Commencement Date’ means the date on which these Celesio Final Undertakings are accepted by the CMA in accordance with section 82(2)(a) of the Act;

‘control’ includes the ability directly or indirectly to control or materially to influence the policy of a body corporate or the policy of any person in carrying on an enterprise;

‘the Divestment Pharmacies’ means those pharmacies listed in Annex 1;

‘Final Disposal’ means Operational Commencement of a Divestment Pharmacy following the completion of the sale of the Divestment Pharmacies under an Approved Agreement to an Approved Purchaser;

‘Celesio Final Undertakings’ means these final undertakings as given by Celesio;

‘Group of Interconnected Bodies Corporate’ means a group of interconnected bodies within the meaning of section 129(2) of the Act, as constituted from time to time;

‘Interim Measures’ means the interim undertakings given by Lloyds and accepted by the CMA under section 80 of the Act on 25 August 2016;

‘Lloyds’ means the company incorporated and registered in England and Wales with the registration number 00758153, whose registered office is located at Sapphire Court, Walsgrave Triangle, Coventry, Great Britain, CV2 2TX;

‘Lloyds Final Undertakings’ means the undertakings as given by Lloyds on [Date of undertakings] to the CMA pursuant to section 82 of the Act;

‘Operational Commencement’ means the date on which the relevant Approved Purchaser commences operation of the Divestment Pharmacy (described in the Final Report at paragraph 9.77 as the commencement date) or such earlier date on or after completion of the relevant Approved Agreement as the CMA may accept in accordance with paragraph 9.77 of the Final Report;

‘Relevant Areas’ means Beaconsfield; Bracknell; Cardiff; Christchurch; Kempston; Kidlington; Leeds; Liverpool; Luton; Reading/Theale; Sandy; and Warlingham (as in Appendix K of the Final Report);

‘SLC’ means a substantial lessening of competition pursuant to section 33 of the Act;

‘subsidiary’, unless otherwise expressly stated, has the meaning given by section 1159 of the Companies Act 2006;

‘the Target’ means the UK Pharmacy Business of Sainsbury’s Supermarkets Limited, a company incorporated and registered in England and Wales with the registration number 03261722, whose registered office is located at 33 Holborn, London, EC1 2HT;

‘Working Day’ means a day other than a Saturday or Sunday or a public holiday in England, Wales or Scotland, and any reference in these Celesio Final Undertakings to ‘days’ means calendar days;

‘written consent’ shall include consent given by email.

3. Commencement

- 3.1. These Celesio Final Undertakings will come into force on the Commencement Date.

4. Undertakings

- 4.1. Celesio undertakes that it will procure that any related person or any member of any Group of Interconnected Bodies Corporate to which it belongs will not for a period of ten years from the date of the Final Disposal bring under common ownership or control (as defined in section 26 of the Act) in whole or in part the Divestment Pharmacies without the prior written consent of the CMA.

4.2. Except with the prior written consent of the CMA, Celesio undertakes that it will not take any action which may frustrate Lloyds' ability to comply with the Lloyds Final Undertakings as given by Lloyds on [Date of undertakings] to the CMA pursuant to section 82 of the Act.

5. Procedure for consent and notification

- 5.1. Celesio undertakes that any application by it for the CMA's consent or approval shall make full disclosure of every material fact and matter that it reasonably believes is relevant to the CMA's decision.
- 5.2. Celesio recognises that where the CMA grants consent or approval on the basis of materially misleading or incomplete information and such information materially affects its consent or approval, the consent or approval is voidable at the election of the CMA.
- 5.3. In the event that Celesio discovers that an application for consent or approval has been made without full disclosure to the CMA in accordance with paragraph 6.1], Celesio undertakes to:
 - 5.3.1. inform the CMA in writing identifying the information that it omitted to include in the application for consent within two Working Days of becoming aware that the relevant information is misleading or incomplete; and
 - 5.3.2. at the same time or not later than two Working Days starting with the date on which it has informed the CMA of the omission in accordance with paragraph 5.3.1 above, provide to the CMA an application for consent that includes the missing information.
- 5.4. Celesio shall use all reasonable endeavours to make each application or to procure that each application for consent or approval is made so that it is received by the CMA at least five Working Days, or such lesser period as the CMA may allow, before the day on which the CMA's consent or approval is necessary to avoid a breach of the Celesio Final Undertakings.
- 5.5. The CMA will use all reasonable endeavours to grant or refuse any consent or approval within the five-Working-Day period referred to in paragraph 5.4 above. This provision is without prejudice to the CMA's duties under the Act.

6. Variations to these Celesio Final Undertakings

- 6.1. The terms of these Celesio Final Undertakings may be varied with the prior written consent of the CMA in accordance with sections 82(2) and 82(5) of the Act.

6.2. Where a request for consent to vary the Celesio Final Undertakings is made to the CMA, the CMA will consider any such request in light of the Final Report and will respond in writing as soon as is reasonably practicable having regard to the nature of the request and to its statutory duties.

6.3. The consent of the CMA shall not be unreasonably withheld.

7. General obligation to provide information to the CMA

7.1. Celesio undertakes that should it at any time be in breach of any provision of the Celesio Final Undertakings, it will notify the CMA within two Working Days starting with the date it becomes aware of the breach to advise the CMA that there has been a breach and of all the circumstances of that breach.

8. Acceptance of Service

8.1. Celesio hereby authorises Linklaters LLP, One Silk Street, London EC2Y 8HQ to accept on its behalf service of all documents, orders, requests, notifications or other communications connected with the Celesio Final Undertakings (including any such document which falls to be served on or sent to Celesio in connection with proceedings in court in the United Kingdom).

8.2. Unless Celesio informs the CMA that Linklaters LLP has ceased to have authority and has informed the CMA of an alternative to accept and acknowledge service on its behalf, any document, order, request, notification or other communication connected with the Celesio Final Undertakings shall be deemed to have been validly served on Celesio if it is served on Linklaters LLP, One Silk Street, London EC2Y 8HQ (Reference: CMA Celesio Final Undertakings, attention (Simon Pritchard), and service or receipt shall be deemed to be acknowledged by Celesio if it is acknowledged by email from Linklaters to the CMA.

9. Effect of invalidity

9.1. Celesio undertakes that should any provision of the Celesio Final Undertakings be contrary to law or invalid for any reason, Celesio shall continue to observe the remaining provisions.

10. Governing law

10.1. These Celesio Final Undertakings shall be governed by and construed in all respects in accordance with English law.

10.2. Disputes arising concerning these Celesio Final Undertakings shall be subject to the jurisdiction of the courts of England and Wales.

11. Termination and release

11.1. The variation, release or supersession of these Celesio Final Undertakings shall not affect the validity and enforceability of any rights or obligations that arose prior to such variation, release or supersession.

FOR AND ON BEHALF OF CELESIO AG

.....	Signature	Signature
.....	Name	Name
.....	Title	Title
.....	Date	Date

Annex 1

Required divestitures

Area	Lloyds pharmacy		
Beaconsfield	5 The Highway, Beaconsfield, Buckinghamshire HP9 1QD (Lloyds' New Town pharmacy)		
Bracknell	97 Liscombe, Birch Hill Rd, Bracknell, Berkshire RG12 7DE		
Cardiff	44 Station Road, Cardiff CF14 5LT		
Christchurch	344-346 Lymington Road, Christchurch, Dorset BH23 5EY	OR	248 Lymington Road, Christchurch, Dorset BH23 5ET
Kempston	242 Bedford Road, Kempston, Bedfordshire MK42 8PP		
Kidlington	18 The Parade, Kidlington, Oxfordshire OX5 1DB		
Leeds	2 The Avenue, Leeds, West Yorkshire LS17 7BE		
Liverpool	1-3 Rice Lane, Liverpool L9 1AD		
Luton	2 Whitehorse Vale, Luton, Bedfordshire LU3 4AD		
Reading/Theale	27 High Street, Theale, Berkshire RG7 5AH		
Sandy	5 Market Square, Sandy, Bedfordshire SG19 1HU	OR	4 Market Square, Sandy, Bedfordshire SG19 1HU
Warlingham	46-48 The Green, Warlingham, Surrey CR6 9NA		