

## **COMPLETED ACQUISITION OF A CONTROLLING INTEREST IN 247 HOME FURNISHINGS LTD BY HUNTER DOUGLAS N.V.**

### **Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups<sup>1</sup>**

#### **Introduction**

1. On 1 April 2020, the Competition and Markets Authority (**CMA**), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the **Act**), referred the completed acquisition of a controlling interest in 247 Home Furnishings Ltd by Hunter Douglas NV (the **2019 Transaction**), for further investigation and report by a group of CMA panel members (the **Inquiry Group**).
2. In its provisional findings on the reference notified to Hunter Douglas N.V. (**Hunter Douglas**) and 247 Home Furnishings Ltd (**247**) (together the **Parties**) on 16 July 2020, the Inquiry Group, among other things, provisionally concluded that the 2019 Transaction has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (**SLC**) in online retail supply of made-to-measure blinds in the UK.
3. Our analysis provisionally indicates that this SLC has resulted in adverse effects, for example in the form of the Merged Entity increasing retail prices, lowering the quality of its products or customer services, and/or reducing the range of its products/services compared to what would otherwise have been the case absent the 2019 Transaction.
4. This Notice sets out the actions which the Inquiry Group considers it might take for the purpose of remedying the SLC and/or any resulting adverse effects identified in the Provisional Findings Report.
5. We invite comments on possible remedies by 30 July 2020.<sup>2</sup>

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<sup>1</sup> CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17, 2014).

<sup>2</sup> Date: Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of the Notice (and in any event, no less than seven days) so that they can be considered before response hearings (CMA 2 Mergers: guidance on the CMA's jurisdiction and procedure, paragraph 13.1)

## Interim measures

6. On 20 November 2019, the CMA imposed an Initial Enforcement Order (IEO) for the purpose of preventing pre-emptive action<sup>3</sup> in accordance with section 72(2) of the Act. On 27 April 2020, the CMA issued directions under the IEO for the appointment of a monitoring trustee (Monitoring Trustee) in order to monitor and ensure compliance with the IEO.

## Criteria

7. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.<sup>4</sup>
8. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
9. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>5</sup>

## Possible remedies on which views are sought

10. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
  - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring the rivalry that would be lost as a result of the merger;
  - (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
  - (c) structural remedies do not normally require ongoing monitoring and enforcement once implemented.<sup>6</sup>
11. At this stage, we have identified the following potential structural remedies:

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<sup>3</sup> Interim measures are designed to ensure that the viability and competitive capability of each of the merging parties are not undermined pending the outcome of the CMA's investigation, as this would risk prejudicing the ability of the CMA to achieve an effective remedy if it were to find that the merger gives rise to a substantial lessening of competition (see also [Interim measures in merger investigations: CMA108](#) (28 June 2019)).

<sup>4</sup> Sections 35(4) and 36(3) of the Act.

<sup>5</sup> [Merger Remedies: CC8](#) (November 2008), paragraph 1.7. This has been adopted by the CMA board.

<sup>6</sup> [Merger Remedies: CC8](#) (November 2008), paragraph 2.14. This has been adopted by the CMA board.

- (a) Requiring the divestiture of 100% of the ordinary share capital of 247; and
  - (b) Requiring the divestiture of 51% of the ordinary share capital of 247.
12. Our current view is that a behavioural remedy on its own is very unlikely to be an effective remedy to the SLC or any resulting adverse effect that it has provisionally identified. However, we will consider any behavioural remedies put forward as part of this consultation.
  13. We will consider any other practicable remedies that the main parties, or any interested third parties, may propose that could be effective in addressing the SLC and/or any resulting adverse effects.
  14. In determining an appropriate remedy, we will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that have been provisionally identified.
  15. We will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the SLC or any resulting adverse effects.

### ***Divestiture***

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

#### *The scope of the divestiture package*

17. To be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor.
18. We invite views on:
  - (a) whether the divestiture of 100% of the ordinary share capital of 247 will provide a comprehensive solution to remedy the provisional SLC;
  - (b) whether the divestiture of 51% of the ordinary share capital of 247 will provide a comprehensive solution to remedy the provisional SLC;

- (c) whether any other divestiture would provide a comprehensive solution to remedy the provisional SLC;
- (d) whether there are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market;
- (e) whether there are risks that a suitable purchaser is not available or that the merger parties will divest to a weak or otherwise inappropriate purchaser;
- (f) whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture;
- (g) whether there are any risks to the effectiveness and comprehensiveness of the above option were Hunter Douglas permitted to also hold some or all of the rights set out in the Annex to this Notice; and
- (h) any other elements that may be required.

*Identification of a suitable purchaser*

19. We will wish to be satisfied that a prospective purchaser:
- (a) is independent of the main parties;
  - (b) has the necessary capability to compete;
  - (c) is committed to competing in the relevant market; and
  - (d) will not create further competition concerns.<sup>7</sup>
20. We invite views on whether there are:
- (a) any other specific factors or requirements to which we should pay particular regard in assessing purchaser suitability;
  - (b) any specific purchasers or types of purchasers which should be ruled out as potentially suitable purchasers (eg other UK and non-UK retailers, manufacturers, or financial buyers);

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<sup>7</sup> [Merger Remedies: CC8](#) (November 2008), paragraph 3.15 ff.

- (c) risks that a suitable purchaser is not available or that the Parties will divest to a weak or otherwise inappropriate purchaser;
- (d) risks that identification of a suitable purchaser will be more difficult if only 51% of the ordinary share capital of 247 is being divested; and
- (e) whether and the extent to which the above risks will be increased were Hunter Douglas permitted to also hold some or all of the rights set out in the Annex to this Notice.

### *Effective divestiture process*

- 21. We will consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture.
- 22. We invite views on:
  - (a) the appropriate timescale for achieving a divestiture (the initial divestiture period);<sup>8</sup> and
  - (b) the risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, and whether the functions of the monitoring trustee (see paragraph 6 above) should be expanded to oversee the divestiture process and to ensure that the operations and assets to be divested are maintained and properly supported during the course of the process.
- 23. The CMA has the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
  - (a) the merger parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or
  - (b) the CMA has reason to expect that the merger parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
- 24. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. We invite views on whether the circumstances of this merger necessitate such an approach.

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<sup>8</sup> The initial divestiture period will normally commence once the CMA has accepted final undertakings or made a final order (up to 12 weeks after the final report) in relation to the required remedy in the CMA's final report. The length of this initial divestiture period will depend on the circumstances of the merger, but will normally be a maximum period of six months (see also [Merger Remedies: CMA87](#) (13 December 2018), paragraph 5.41).

## Cost of remedies and proportionality

25. In order to be reasonable and proportionate, we will seek to select the least costly remedy, or package of remedies, that we consider will be effective. We will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that we consider equally effective, we will choose that which imposes the least cost or restriction. In relation to completed mergers, we will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.<sup>9</sup>
26. We invite views on what costs are likely to arise in implementing each remedy option.

## Relevant customer benefits

27. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.<sup>10</sup>
28. Relevant customer benefits are limited by the Act to benefits to customers in the form of:
  - (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
  - (b) greater innovation in relation to such goods or services.'<sup>11</sup>
29. The Act provides that a benefit is only a relevant customer benefit if:
  - (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and
  - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.<sup>12</sup>
30. We welcome views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

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<sup>9</sup> [Merger Remedies: CC8](#) (November 2008), paragraph 1.10. This has been adopted by the CMA board.

<sup>10</sup> Section 36(4) of the Act, see also [Merger Remedies: CC8](#) (November 2008), paragraph 1.14.

<sup>11</sup> Section 30(1)(a) of the Act, see also [Merger Remedies: CC8](#) (November 2008), paragraph 1.14.

<sup>12</sup> Section 30(3) of the Act, see also [Merger Remedies: CC8](#) (November 2008), paragraph 1.16.

## Next steps

31. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the Inquiry Group to consider, by 30 July 2020 (see Note (i)).
32. A copy of this notice will be posted on the CMA [case page](https://www.gov.uk/cma-cases/celesio-sainsbury-s-pharmacy-business-merger-inquiry)<https://www.gov.uk/cma-cases/celesio-sainsbury-s-pharmacy-business-merger-inquiry>.

(signed)

Kirstin Baker  
Group Chair  
16 July 2020

## Note

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is made having regard to the Provisional Findings announced on 16 July 2020. The main parties have until 6 August 2020 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.

## **Annex – Potential additional rights in 247**

Veto rights in 247 over the following matters:

1. Appointment of additional directors;
2. Approval of the annual budget;
3. Acquisitions;
4. Entering into new lines of business
5. Geographic expansion into new countries;
6. Any backward integration into assembly or production of any of the products sold by 247;
7. Long term agreements (exceeding one year in duration);
8. Financing arrangements with banks or other parties;
9. Dividends in excess of 35% of profit after tax; and/or
10. Offers on 247's website at less than 15% gross profit.