

# Completed acquisition by Bestway Panacea Holdings Limited of Lexon UK Holdings Limited and Asurex Limited

## NOTICE UNDER PARAGRAPH 2(1) OF SCHEDULE 10 TO THE ENTERPRISE ACT 2002 (THE ACT) – CONSULTATION ON PROPOSED UNDERTAKINGS IN LIEU OF REFERENCE PURSUANT TO SECTION 73 OF THE ACT

ME/7042/23

### INTRODUCTION

1. On 14 April 2023, Bestway Panacea Holdings Limited (**Well**) acquired Lexon UK Holdings Limited (**Lexon**) and Asurex Limited (**Asurex**) (the **Merger**). Well, Lexon and Asurex are together referred to as the **Parties**.
2. On 15 June 2023, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Act that it is or may be the case that the Merger constituted a relevant merger situation<sup>1</sup> that has resulted or may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**). The text of the SLC Decision is available on the CMA webpage.<sup>2</sup>
3. On 15 June 2023, Well offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act.
4. On 20 June 2023, the CMA gave notice to Well, pursuant to section 73A(2)(b) of the Act, that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering Well's offer (the **UIL Provisional Acceptance Decision**).

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<sup>1</sup> Pursuant to section 25(4) of the Act the four-month period mentioned in section 24 of the Act is extended while the CMA is seeking undertakings in lieu of reference.

<sup>2</sup> See <https://www.gov.uk/cma-cases/bestway-panacea-holdings-limited-slash-lexon-uk-holdings-and-asurex-merger-inquiry>.

## THE UNDERTAKINGS OFFERED

5. As set out in the SLC Decision, the CMA found a realistic prospect of an SLC in relation to the operation of retail pharmacies in 12 local areas in the UK (**SLC areas**) as a result of horizontal unilateral effects. In its assessment, the CMA used an average radius for pharmacies to establish catchment areas.<sup>3</sup> Where the Parties' sites overlapped in a catchment area, the CMA applied a decision rule to establish whether the Merger results in a realistic prospect of an SLC.
6. As set out in the UIL Provisional Acceptance Decision, to address the SLC identified by the CMA, Well has offered undertakings to divest its own pharmacies in each of the SLC areas (the **Divestment Pharmacies**). Given there is some overlap between the SLC areas centred on Well pharmacies and the SLC areas centred on Lexon pharmacies, Well submitted that the divestment of seven specific Well pharmacy stores would achieve a clear solution to the 12 SLCs identified in the SLC Decision. The undertakings are available on the CMA webpage (the **Proposed Undertakings**).<sup>4</sup>
7. Well has also offered to enter into agreements for the sale of the Divestment Pharmacies to upfront buyers, before final acceptance by the CMA of the Proposed Undertakings. Well has proposed the following purchasers:
  - a. Teesside LLP, trading as Riverside Pharmacy, as the upfront buyer of Well Seaham;
  - b. HA Healthcare Ltd as the upfront buyer of Well Bishop Auckland;
  - c. Gorgemead Limited, trading as Cohens Chemist, as the upfront buyer of Well Moreton and Well Pensby;
  - d. S K Pharmacare Limited as the upfront buyer of Well High Howdon;
  - e. Alrahi & Singh Limited as the upfront buyer of Well Kenton; and
  - f. Pyramid Pharma 7 Ltd as the upfront buyer of Well Stockton-on-Tees (together, the **Upfront Buyers**).
8. All of the above agreements will be conditional on acceptance by the CMA of the Proposed Undertakings, including approval of the Upfront Buyers as the buyers of the relevant Divestment Pharmacies.

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<sup>3</sup> Conurbation – 1.4 miles, City and town – 1.4 miles, Rural – 2.3 miles and Very rural – 3.6 miles.

<sup>4</sup> <https://www.gov.uk/cma-cases/bestway-panacea-holdings-limited-slash-lexon-uk-holdings-and-asurex-merger-inquiry>.

9. Annex 1 of this notice contains the list of SLC areas, Divestment Pharmacies and Upfront Buyers.

## CMA ASSESSMENT

10. The CMA currently considers that, subject to responses to the consultation required by Schedule 10 of the Act, the Proposed Undertakings will resolve the SLC identified in the SLC Decision in a clear-cut manner. That is, the CMA currently does not have material doubts about the overall effectiveness of the Proposed Undertakings or concerns about their implementation.<sup>5</sup> This is because the Proposed Undertakings would result in a divestment of the entire horizontal overlap in relation to the operation of retail pharmacies in the SLC areas. As such, the Proposed Undertakings would result in the replacement of the competitive constraint provided by Lexon that would otherwise be lost following the Merger.
11. The CMA also considers that the Proposed Undertakings would be capable of ready implementation. This is because the Divestment Pharmacies are stand-alone businesses that are capable of being sold. The relevant lease, staff, stock, patient data and direct customers will also be transferred. While the Divestment Pharmacies will not include wholesale pharmaceutical supply arrangements, Well is prepared to offer these to the Upfront Buyers on an arm's length basis. Purchasers would be free to put in place their own wholesale supply arrangements, for which the CMA believes there are multiple alternatives.
12. The transfer of the NHS contract to practice<sup>6</sup> to the Upfront Buyers is subject to consent being obtained from the NHS for change of ownership, which includes applicants satisfying NHS fitness to practice requirements, and General Pharmaceutical Council (**GPhC**) agreement. All of the Upfront Buyers have confirmed that they have previously satisfied NHS fitness to practice requirements as a result of owning other pharmacies.
13. It has not been possible for the Upfront Buyers to go through the applicable regulatory approvals before the CMA's consultation on the Proposed Undertakings. The Proposed Undertakings therefore provide that if regulatory approval, which includes approvals, consents or registrations granted by NHS England, the GPhC and/or all other relevant regulatory or other industry bodies, is not obtained within 6 months from the date the Proposed Undertakings take effect, or where the CMA has reasonable grounds for believing that the Upfront Buyers may not obtain these approvals, the CMA may:

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<sup>5</sup> [Merger remedies \(CMA87\)](#), December 2018, Chapter 3, paragraph 3.28.

<sup>6</sup> Under the national Community Pharmacy Contractual Framework.

- a. direct Well to divest the Divestment Pharmacies to an alternative purchaser or purchasers that will first be approved by the CMA; or
  - b. initiate the Divestiture Trustee Functions,<sup>7</sup> meaning that Well would be required to divest the Divestment Pharmacies as a going concern at no minimum price to a purchaser or purchasers approved by the CMA.<sup>8</sup>
14. The Upfront Buyer Condition means that the CMA would accept the Proposed Undertakings only after Well has entered into an agreement with a proposed purchaser that the CMA considers to be suitable, and following public consultation on the suitability of the proposed purchaser.<sup>9</sup> The CMA currently considers that, in this case, an Upfront Buyer Condition is necessary given evidence received that indicates that the pool of potential purchasers may be limited.

### **Suitability of the proposed purchasers**

15. In approving a purchaser, the CMA's starting position is that it must be confident without undertaking a detailed investigation that the proposed purchaser will restore pre-merger levels of competition. The CMA therefore seeks to ensure that:
- a. the acquisition by the purchaser remedies, mitigates or prevents the SLC concerned and any adverse effect resulting from it, achieving as comprehensive a solution as is reasonable and practicable;
  - b. the proposed purchaser is independent from and has no significant connection to the merging parties that may compromise the purchaser's incentives to compete with the merged entity;
  - c. the proposed purchaser has sufficient capability, including access to appropriate financial resources, expertise, and assets to operate the divested business as an effective competitor in the marketplace. The proposed purchaser is expected to obtain all necessary approvals, licences and consents from any regulatory or other authority;
  - d. the purchaser is committed to, and has an appropriate business plan and objectives for competing in the relevant markets, and that the purchaser has the incentive and intention to maintain and operate the invested business as part of a viable and active business in competition with the merged entity and other competitors in the relevant market; and
  - e. divestiture to the purchaser should not create a realistic prospect of competition or regulatory concerns.<sup>10</sup>

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<sup>7</sup> Paragraph 9 of the Proposed Undertakings.

<sup>8</sup> Paragraph 2.4 of the Proposed Undertakings.

<sup>9</sup> [CMA87](#), paragraphs 5.28-5.32.

<sup>10</sup> [CMA87](#), paragraph 5.21.

16. The CMA has assessed the evidence in relation to each of these criteria for each of the Upfront Buyers. Subject to the responses to this consultation, and having regard in particular to the criteria set out in paragraphs 15 above, the CMA currently considers each of the Upfront Buyers to be suitable purchasers of the Divestment Pharmacies based on its initial view that:
- a. the sale of the Divestment Pharmacies to the Upfront Buyers would in each case remedy, mitigate or prevent the SLC(s) concerned and any adverse effect resulting from them, achieving as comprehensive solution as is reasonable and practicable for the SLC(s). This is because divesting the Divestment Pharmacies should result in replacing the competitive constraint provided by Lexon in each of the SLC areas (see Annex 1), that would otherwise be lost following the Merger.
  - b. the evidence available to the CMA indicates that the Upfront Buyers and all other related entities are independent of the Parties and do not have any significant connection to the Parties that may compromise their incentives to compete with the Parties if they were to acquire the Divestment Pharmacies. While some of the Upfront Buyers currently acquire wholesale pharmaceuticals from the Bestway Group's pharmaceutical services businesses (and some of these purchasers also formerly had wholesale supply arrangements with Lexon), the CMA is satisfied with their ability and incentive to compete independently with the Parties, given that these Upfront Buyers are not reliant on Bestway Group's wholesaling (the arrangements are non-exclusive and the pharmacies can readily switch to other wholesalers).
  - c. the evidence available to the CMA indicates that each of the Upfront Buyers has the appropriate financial resources, expertise (including managerial, operational and technical capability) and incentive to acquire, operate, maintain and develop the Divestment Pharmacies as viable effective businesses in competition with the Parties and other competitors on an ongoing basis. In particular, each Upfront Buyer has provided evidence of (i) past experience of setting up or acquiring, owning and operating other pharmacies, and (ii) of the necessary financial resources including evidence of existing cashflows capable of financing the acquisition and supporting the ongoing development of the relevant Divestment Pharmacies and its existing business from its projected turnover.
  - d. each Upfront Buyer discussed its plans for the Divestment Pharmacies with the CMA, which are all profitable. The Upfront Buyers indicated that they intend to maintain the service offering and opening times of the Divestment Pharmacies, and most intend to expand the service offering in the future. The plans and overall strategy indicate that the Upfront Buyers have the necessary understanding of the Divestment Pharmacies' operational

dynamics and are committed to operating each of the Divestment Pharmacies as viable competitors to Well and other competitors in each of the SLC areas.

- e. the evidence available to the CMA indicates that each of the Upfront Buyers is reasonably expected to obtain all necessary approvals, licences and consents from any regulatory or other authority. All the Upfront Buyers are existing pharmacy owners and have experience of setting up or acquiring other pharmacies. All Upfront Buyers have confirmed that they have previously satisfied NHS fitness to practice requirements as a result of owning other pharmacies. Moreover, as set out in paragraph 13, the Proposed Undertakings make provision for the Divestment Pharmacies to be transferred to alternative purchasers in the event that regulatory approval is not given; and
- f. the evidence available to the CMA indicates that the acquisition of the Divestment Pharmacies by the Upfront Buyers should not create a realistic prospect of competition concerns. None of the Upfront Buyers have any existing pharmacies in the catchment areas of the relevant Divestment Pharmacies and as such, there are no local overlaps between the Upfront Buyers and the Divestment Pharmacies. The CMA therefore believes there is no possibility of an SLC as a result of horizontal unilateral effects in any local area.

17. Therefore, subject to responses to this consultation, the CMA currently considers the Upfront Buyers to be suitable purchasers of the Divestment Pharmacies.

### **Proposed decision and next steps**

18. For the reasons set out above, the CMA currently considers that the Proposed Undertakings and the purchase of the Divestment Pharmacies by the Upfront Buyers are, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision and form as comprehensive a solution to these concerns as is reasonable and practicable.

19. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings in lieu of a reference of the Merger for a phase 2 investigation. The Proposed Undertakings are available on the CMA webpage.<sup>11</sup>

20. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views known to it. The CMA will have regard to any representations made in response to this consultation and may make modifications to the Proposed Undertakings as a result. If the CMA considers that

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<sup>11</sup> See <https://www.gov.uk/cma-cases/bestway-panacea-holdings-limited-slash-lexon-uk-holdings-and-asurex-merger-inquiry>.

any representation necessitates any material change to the Proposed Undertakings, the CMA will give notice of the proposed modifications and publish a further consultation.<sup>12</sup>

21. Representations should be made in writing to the CMA and be addressed to:

Lavinia de Havilland  
Mergers Group  
Competition and Markets Authority  
The Cabot  
25 Cabot Square  
London  
E14 4QZ

Email: [lavinia.dehavilland@cma.gov.uk](mailto:lavinia.dehavilland@cma.gov.uk)

Telephone: 020 3738 6385

**Deadline for comments: 11 August 2023**

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<sup>12</sup> Under paragraph 2(4) of Schedule 10 to the Act.

## Annex 1 – SLC areas, Divestment Pharmacies and Upfront Buyers

No.	SLC site	Divestment Pharmacies	Upfront Buyer
1	FJ202 – Blackheath – Lexon site	FG244 - Well Moreton - Pasture Road HC	Gorgemead Limited trading as Cohens Chemist
2	FMP31 – Stockton-on-Tees – Well site	FMP31 – Well Stockton-on-Tees	Pyramid Pharma 7 Ltd
3	FN907 – Seaham – Church Street – Well site	FN907 - Well Seaham - Church Street	Teesside LLP trading as Riverside Pharmacy
4	FEM40 - Eilbeck Deneside – Lexon site		
5	FKG29 - Eilbeck Harbour – Lexon site		
6	FNG81 – Hadrian – Lexon site	FNK57 - Well High Howdon - Windsor Drive	S K Pharmacare Limited
7	FMP20 - Pensby Road - Well site	FMP20 - Well Pensby - Pensby Road	Gorgemead Limited trading as Cohens Chemist
8	FCN12 – Irby – Lexon site		
9	FXF69 - Bishop Auckland – Newgate Centre – Well site	FXF69 - Well Bishop Auckland - Newgate Centre	HA Healthcare Ltd
10	FH490 - Newgate Street – Lexon site		
11	FHV08 - Escomb Road – Lexon site		
12	FVQ79 – Kenton – 29 Arlington Avenue – Well site	FVQ79 – Well Kenton – 29 Arlington Avenue	Alrahi & Singh Limited