

## **DEROGATION LETTER**

### **IN RESPECT OF INITIAL ENFORCEMENT ORDERS ISSUED PURSUANT TO SECTION 72(2) ENTERPRISE ACT 2002**

**Consent under section 72(3C) of the Enterprise Act 2002 to certain actions for the purposes of the Initial Enforcement Order made by the Competition and Markets Authority ('CMA') on 28 November 2023**

### **COMPLETED ACQUISITION BY PHARMACY2U LIMITED OF METABOLIC HEALTHCARE LTD**

We refer to your letters and accompanying annexes dated 10 November 2023, 20 November 2023 and 24 November 2023 requesting that the CMA consents to derogations from the Initial Enforcement Order of 28 November 2023 (the '**Initial Order**'). The terms defined in the Initial Order have the same meaning in this letter.

Under the Initial Order, save with the written consent of the CMA, the Acquirer Group and Lloyds Direct are required to hold separate the Lloyds Direct business from the Acquirer Group business and refrain from taking any action which might prejudice a reference under section 22 of the Act or impede the taking of any remedial action following such a reference.

After due consideration of your request for derogations from the Initial Order, based on the information received from you and in the particular circumstances of this case, the Acquirer Group and Lloyds Direct may carry out the following actions, in respect of the specific paragraphs:

#### **1. Paragraphs 4(a), 5(a) and 5(l) of the Initial Order**

P2U submits that when the transaction closed, Lloyds Direct lost access to the funding facilities which Aurelius Asset Management, Lloyds Direct's previous owner, had made available. This created an urgent need for Lloyds Direct to have access to new financing facilities, especially in light of the long NHS payment cycle (time from dispensing the medication to payment by the NHS). P2U submits that given Lloyds Direct's loss-making business, any financial institution would refuse granting independent financing to Lloyds Direct.

Accordingly, P2U submits that the only viable option to ensure Lloyds Direct has access to the finance it needs to pursue its pre-merger plan is to make P2U's Barclays invoicing facility available to Lloyds Direct.

P2U therefore requests a derogation from paragraphs 4(a), 5(a) and 5(l) to make the Barclays invoicing facility available to Lloyds Direct.

The CMA consents to P2U's request for a derogation strictly on the basis that:

- (a) the invoicing facility will be in the name of Lloyds Direct;
- (b) access to information relating to the invoicing financing facility will be managed directly by Lloyds Direct's Financial Director, [X];
- (c) [X] will share information regarding funding requests only with [X] (P2U's Chief Financial Officer, Company Secretary and Director) (the '**Authorised Individual**');
- (d) the identity of the Authorised Individual cannot be changed except through written consent by the CMA (which can be given via email);
- (e) the Authorised Individual will sign a Non-Disclosure Agreement in a form approved by the CMA;
- (f) the information [X] shares with the Authorised Individual will be limited to a brief description of the funding request and will exclude specific supplier / contractor names or exact contract terms;
- (g) should remedial action be required by the CMA in relation to the Lloyds Direct business, any records or copies (electronic or otherwise) of business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature, wherever they may be held, that were received from the Lloyds Direct business for the purposes of this derogation will be returned to the Lloyds Direct business and any copies destroyed, except to the extent that record retention is required by law or regulation;
- (h) P2U will make available funding to Lloyds Direct in line with its pre-merger business plans;
- (i) the amount of funding and terms available from P2U, including the conditions on which Lloyds Direct can access that funding, will be at least as favourable to Lloyds Direct as its pre-closing lenders;
- (j) P2U will inform the CMA of any instances in which a funding request from Lloyds Direct has been denied (and of the reasons why it has been denied);
- (k) P2U will provide the CMA with fortnightly summaries of any funding provided to Lloyds Direct, which will include a brief description of what the funds are

being used for; and

- (l) this derogation will not result in any pre-emptive action which might prejudice the outcome of a reference or impede the taking of any action which may be justified by the CMA's decision on a reference.

## **2. Paragraph 5(l) of the Initial Order**

P2U submits that it needs to maintain high-level financial oversight of the Lloyds Direct business in order to ensure that Lloyds Direct remains a going concern and that its competitive capability is preserved.

P2U therefore requests a derogation from paragraph 5(l) to allow the Lloyds Direct business to share the following financial information with P2U, being:

- (i) high-level weekly financial information reports to manage lenders and the group cash position; and
- (ii) high-level monthly KPI reporting and performance data to enable management reporting.

(together, the '**Financial Information**').

The CMA consents to P2U's request for a derogation strictly on the basis that:

- (a) the Financial Information is strictly necessary to enable P2U to monitor Lloyds Direct's financial viability and competitive capability;
- (b) the Financial Information is shared only using the templates submitted to the CMA on 10 November 2023;
- (c) the Financial Information is shared only with the Authorised Individual;
- (d) the identity of the Authorised Individual cannot be changed except through written consent by the CMA (which can be given via email);
- (e) the Authorised Individual will sign a Non-Disclosure Agreement in a form approved by the CMA;
- (f) should remedial action be required by the CMA in relation to the Lloyds Direct business, any records or copies (electronic or otherwise) of business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature, wherever they may be held, that were received from the Lloyds Direct business for the purposes of this derogation will be returned to the Lloyds Direct business and any copies

destroyed, except to the extent that record retention is required by law or regulation; and

- (g) this derogation will not result in any pre-emptive action which might prejudice the outcome of a reference or impede the taking of any action which may be justified by the CMA's decision on a reference.

### **3. Paragraph 5(c) of the Initial Order**

P2U submits that when the transaction closed, Lloyds Direct lost access to the intra-group procurement support that it used to receive from AAH Pharmaceuticals (which is part of the Aurelius Asset Management Group) for the sourcing of medicines from branded and generic medicines manufacturers. This created an urgent need for Lloyds Direct to replace the intra-group arrangement with AAH Pharmaceuticals and to recruit a new Supply Chain Lead/Procurement Manager to be able to continue sourcing medicines, especially in light of the anticipated increase in the demand for medicines in December and January. The search for a new Supply Chain Lead/Procurement Manager had already started pre-merger, in anticipation of losing access to AAH Pharmaceuticals' support once Lloyds Direct ceased to be part of the Aurelius Asset Management Group. P2U submits that, despite Lloyds Direct's reasonable efforts to find for a suitable candidate since June 2023, including through a specialised in-house talent recruiter and online job adverts, it has been unable to fill this role.

P2U therefore requests a derogation from paragraph 5(c) of the Initial Order to allow a Senior Buying and Commercial Manager, [REDACTED] (the '**Seconded**'), to be seconded temporarily to Lloyds Direct to allow the business to procure medicines from wholesalers and manufacturers, especially in light of the anticipated increase in the demand for medicines in December and January, while Lloyds Direct's reasonable searches for a new Supply Chain Lead/Procurement Manager continue.

The CMA consents to P2U's request for this derogation strictly on the basis that:

- (a) this appointment is strictly necessary to preserve the viability and competitive capability of the Lloyds Direct business;
- (b) the appointment is temporary and will end one month after a new permanent Supply Chain Lead/Procurement Manager begins their role or after the adoption of a CMA decision pursuant to section 22 Enterprise Act (if any), whichever is sooner (unless otherwise agreed with the CMA via email);
- (c) Lloyds Direct will continue its reasonable searches for a new permanent Supply Chain Lead/Procurement Manager actively and through all available recruitment channels, to be agreed with the CMA (via email);

- (d) Lloyds Direct will update the CMA on its progress with finding a new permanent Supply Chain Lead/Procurement Manager on a fortnightly basis (on the same cadence as its Initial Order compliance statements);
- (e) P2U will fully support Lloyds Direct in finding a new permanent Supply Chain Lead/Procurement Manager;
- (f) once the Seconded ceases their secondment (in line with condition (b) above) they will not return to their original role (or any other role) at the Acquirer Group until the end of a garden leave period. The length of the garden leave period will be agreed with the CMA via email, and will be no shorter than one month;
- (g) the Seconded has the necessary capability and experience to effectively take on the responsibilities of the vacant procurement role within Lloyds Direct;
- (h) for the entirety of their secondment, the Seconded will be solely allocated to the Lloyds Direct business and will not have any involvement with P2U's business (including, but not exclusively, in the procurement of medicines for P2U);
- (i) the Seconded will be dedicated to the Lloyds Direct business and, as such, will act in the best commercial interests of the Lloyds Direct business for the duration of her secondment.
- (j) the Seconded will have no lines of communication with P2U, except as permitted by other derogations, and as such the Seconded will not have access to any commercially sensitive information of P2U (except if expressly permitted by other derogations);
- (k) the Seconded is not a key staff member and has no customer-facing responsibilities within P2U;
- (l) the Seconded will sign a Non-Disclosure Agreement, in a form approved by the CMA, in respect of any commercially sensitive information of Lloyds Direct she receives during her secondment. This Non-Disclosure Agreement will contain a commitment to refrain from using Lloyds Direct information in any future role at P2U;
- (m) The Seconded will sign compliance statements, in a form approved by the CMA, to confirm that she has not accessed any commercially sensitive information of P2U and has not disclosed to P2U any commercially sensitive information of Lloyds Direct, every two weeks (unless otherwise required by the CMA in writing, including via email);
- (n) P2U will organise a smooth handover of the Seconded's responsibilities, with a view to ensuring that the secondment will not have any adverse impact on

P2U's and Lloyds Direct's activities and will not result in any disruption to either business, including through the provision to the Seconded of a Lloyds Direct's email address and a new laptop that is only connected to Lloyds Direct's IT environments and cannot access P2U's IT environments;

- (o) no other organisational or key staff changes will be made to the P2U or Lloyds Direct businesses as a result of the proposed secondment;
- (p) should remedial action be required by the CMA in relation to the Lloyds Direct business, any records or copies (electronic or otherwise) of business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature, wherever they may be held, that were received from the Lloyds Direct business for the purposes of this derogation will be returned to the Lloyds Direct business and any copies destroyed, except to the extent that record retention is required by law or regulation; and
- (q) this derogation will not result in any pre-emptive action which might prejudice the outcome of a reference or impede the taking of any action which may be justified by the CMA's decision on a reference.

#### **4. Paragraph 5(a) of the Initial Order**

P2U submits that, pre-merger, both Lloyds Direct and P2U had started planning for 'hub and spoke' dispensing in light of the up-coming legislative changes introduced by the Human Medicines (Exemptions for Pharmacists) (Amendment) Regulations, in line with industry's trend and the expectations and aspirations of Department of Health and Social Care ('DHSC'). In the short term, P2U's plan consists of taking purely administrative steps that would be necessary for a hub and spoke dispensing arrangement under the applicable legislation. The interruption of this planning activity would risk setting back P2U's and Lloyds Direct's ability to be ready for hub and spoke dispensing by several months. This would in turn not only risk harming the competitive capability of the Lloyds Direct business, but it would also run counter to the expectations and aspirations of DHSC to accelerate the industry's readiness for hub and spoke dispensing.

P2U therefore requests a derogation to paragraph 5(a) of the Initial Order to allow it to submit the required application to the NHS England and required notification to the General Pharmaceutical Council for obtaining the relevant regulatory approvals for the hive up of Lloyds Direct into P2U, pursuant to section 10(1)(b)(i) of the Medicines Act 1968, as part of the first phase of its hub and spoke readiness plan.

The CMA consents to P2U's derogation request strictly on the basis that this derogation will not:

- (a) affect Lloyds Direct's assets (tangible or intangible);
- (b) result in any changes to staff/management of Lloyds Direct;
- (c) lead to any integration between the Lloyds Direct and P2U businesses;
- (d) result in changes to customer and/or supplier contracts;
- (e) affect the viability of Lloyds Direct's business;
- (f) result in the sharing of confidential or commercially sensitive information between Lloyds Direct and P2U;
- (g) result in the implementation of any organisational changes within either organization; and
- (h) result in any pre-emptive action which might prejudice the outcome of a reference or impede the taking of any action which may be justified by the CMA's decision on a reference.

## **5. Paragraphs 5(a), 5(g) and 5(l) of the Initial Order**

P2U submits that, pre-merger, Lloyds Direct bought most of the medicines it needed from three major suppliers of generic medicines: [X]. It did so through AAH Pharmaceuticals, a wholesaler with the same parent company as Lloyds Direct. [X] are among the top suppliers of generic medicines and, together, are expected to account for the majority of the supply of generic medicines in the UK.

P2U further submits that, in response, P2U opened an account with [X] on behalf of Lloyds Direct and in Lloyds Direct's own name, with an invoice address/name of Lloyds Direct at Perivale, and delivery address for the medicines at Perivale. Since P2U established these accounts, Lloyds Direct has been using them to order medicines from [X].

P2U submits that if Lloyds Direct were forced to cease buying medicines from [X] through these accounts there is a significant risk that Lloyds Direct will be unable to secure the supplies it needs in order to meet customer demand during the immediate term (including over the Christmas period when demand is particularly high). This is due to the following reasons:

- AAH Pharmaceuticals – and any other wholesalers or manufacturers – must first honour guaranteed levels of supply with their existing customers, and will only supply third party/ad hoc customers trading with them on standard terms, if they have any supplies left.

- Suppliers of generic medicines, and their account managers in particular, have told P2U that they do not have the capacity to take on any new accounts (including a stand-alone account for Lloyds Direct, which has never had an account with either [REDACTED]).

P2U therefore requests a derogation from paragraphs 5(a), 5(g) and 5(l) of the Initial Order in order for Lloyds Direct to continue to have access to its P2U group account with [REDACTED] and to allow Lloyds Direct to place orders with these suppliers using the P2U group account, especially in light of the anticipated increase in the demand for medicines, including generic medicines, in December and January.

The CMA consents to this derogation strictly on the basis that:

- (a) the accounts with [REDACTED] would be in Lloyds Direct's name;
- (b) orders would be made directly by Lloyds Direct (through the Seconded);
- (c) orders would be made in Lloyds Direct's own name;
- (d) supplies would be made directly to, and received directly by, Lloyds Direct;
- (e) P2U would have no visibility of the orders placed and received by Lloyds Direct;
- (f) the terms made available to Lloyds Direct are equivalent or better than the supply terms that were available to Lloyds Direct pre-merger;
- (g) this derogation will cover only the agreements with [REDACTED];
- (h) the CMA's consent to this derogation will lapse once Lloyds Direct has succeeded in establishing direct supply agreements (ie with its own stand-alone accounts) and, in any event, by Monday 15 January;
- (i) only the Authorised Individual would be able to access the Financial Information relating to the orders placed by Lloyds Direct under the P2U group account, in aggregated form (and not on a product level) and for the sole purpose of legitimate financial oversight;
- (j) the Authorised Individual will sign a Non-Disclosure Agreement in a form approved by the CMA;
- (k) should remedial action be required by the CMA in relation to the Lloyds Direct business, any records or copies (electronic or otherwise) of business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature, wherever they may be held, that were received from the Lloyds Direct business for the purposes of



this derogation will be returned to the Lloyds Direct business and any copies destroyed, except to the extent that record retention is required by law or regulation; and

- (l) this derogation will not result in any pre-emptive action which might prejudice the outcome of a reference or impede the taking of any action which may be justified by the CMA's decision on a reference.

Yours sincerely,

Matteo Alchini

Assistant Director, Remedies Business and Financial Analysis

28 November 2023